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Title: Roshan Lal (deceased) through his LRs. Vs. Pritam Singh & others (D.B.)

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Code of Civil Procedure, 1908- Section 100- **Regular Second Appeal-** Appellant/plaintiff seeking recovery of Rs.2,43,088/- and the defendant on the other hand by way of a counter-claim seeking a sum of Rs. 86,483/- the Learned Trial Court dismissed the suit of the plaintiff- It, however, allowed the counter-claim of the defendant for the recovery of Rs. 86,483/- In appeal too the said findings affirmed by the Learned 1st Appellate Court- While deciding the Regular Second Appeal the Court **Held-** that promisee could not extract pure resin as per the stipulation of the contract due to heavy rain fall- Resultantly the defendant could not abide by the terms of the Contract and as per Section 56 of the Indian Contract Act it was permissible in law- the frustration of the contract, thus, was due to the supervening circumstances and beyond the control of the defendant – Hence, the conclusion arrived at by the learned trial Courts below was based upon a proper appreciation of evidence on record- Consequently, appeal dismissed.

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Title: Rajesh Kumar Vs. Ravinder Kumar & Ors. Page-145

Code of Civil Procedure, 1908- Section 100- Second Appeal- Held- Concurrent findings of fact cannot be interfered in second appeal, when these are not perverse.

Title: State of Himachal Pradesh and another Vs. Mohinder Singh and another Page-357

Code of Civil Procedure, 1908- Section 151- Suit for declaration challenging sale deed as null and void- Suit at stage of final arguments- Plaintiff moving an application under Section 151 for leave of Court for filing copy of charge sheet in evidence- Application allowed by Trial Court- Petition against- Held- Charge sheet not accompanied with report of any hand writing expert nor showing that signatures of executant on sale deed are forged – Order of trial court allowing application of plaintiff, is illegal - Petition allowed.

Title: Jagan Nath & others Vs. Maghi Ram & another Page-474

Code of Civil Procedure, 1908- Order 1 Rule 10- Order XXII Rules 3 to 5- Determination of legal representation thereunder- Plaintiffs including one 'K' (P-4) filed suit for declaration and injunction against defendants - 'K' died on 10.7.2016 – Other co-plaintiffs filed an application under Order 1 Rule 10 for deletion of her name on ground of deceased having executed Will on 31.5.2016 in favour of one of co-plaintiff - Application contested by defendants on ground that legal heirs of 'K' were not correctly mentioned in application- However, Senior Civil Judge allowed application of plaintiffs and ordered deletion of 'K'- Lateron, sons and grandsons of 'K' also filed an application for bringing them on record as her legal representatives - This application was also dismissed by Trial Court- Petition against- Held- Determination of legal representation of deceased party is only for bringing them on record, so that legal proceedings are conducted further – Any such determination does not operate as res-judicata inter se rival representatives – Dispute as to Succession inter se legal representatives of deceased, if any, is to be independently adjudicated upon by way of separate suit –Order of Senior Civil Judge dismissing application of sons and grandsons of 'K' for bringing them on record as her legal representatives, set aside with direction to re-hear parties.

Title: Randhir Singh and another Vs. Santosh Kumari and others Page-604

Code of Civil Procedure, 1908- Order 5- The process issued returned back with a report that the addressee not residing at the mentioned address, stated to be residing in Shimla – Oblivious of the report the respondent ordered to be served by way of proclamation and eventually proceeded against exparte- **Held –** that the authority concerned acted mechanically, without even perusing the report of the Process Server- In fact, the only course available to the authority was to have directed the applicants to file the correct address of the parties in issue and then effect the service accordingly- the order of service by way of proclamation held to be wrong- Consequently, order dated 16.5.2017 whereby the respondent proceeded exparte, quashed and set aside.

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Code of Civil Procedure, 1908- Order 6 Rule 17- An application under Order 6 Rule 17 CPC filed for the amendment in the reply after the commencement of trial- **Held-** that amendment after the commencement of trial are controlled by the proviso to Order 6 Rule 17 CPC- amendment in the pleading should, however, normally be allowed, even a prayer in this regard is made at some belated stage, in case the same is essential and required for just and effective decision of the pending lis as possibility of a bonafide omission to raise such plea at the relevant time and realization of such omission at a later stage cannot be ruled out as happened in the instant case, wherein issues were framed on 31.3.2014 and application for amendment was filed on 5.7.2014 before any evidence was recorded- application partly allowed and petition disposed of accordingly.

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Code of Civil procedure, 1908- Order 15 Rule 1 CPC**- Section 6 of the Specific Relief Act, 1963- Civil Revision-** Suit of the plaintiff-respondent decreed at the stage of framing of issues directing the defendant/petitioner to remove locks from the property rented to the plaintiff-respondent- **Held-** that Section 6 of the Specific Relief Act provides an instant remedy to the possessor of the premises for restoration of the possession in case he is dispossessed by anyone, including the owner of the property- the said proceedings are summary in nature.

Title: Devender Thakur and another Vs. Hardayal Khimta Page-106

Code of Civil procedure, 1908- Order 15 Rule 1 CPC**- Section 6 of the Specific Relief Act, 1963- Civil Revision-** Further held that keeping in view the nature and scope of the suit filed under Section 6 of the Specific Relief Act and the conjoint reading of Order 15 rule 1, Order 14 Rule 1, Order 10 Rule 1, 2 and 3, as there was no denial of the assertion and the facts pleaded by the respondent-plaintiff with respect to the possession of the premises in question and the locking of the same by the petitioner-defendant, without taking recourse to law, there was no issue in dispute and as such, the learned Trial Court could have passed the judgment and decree at that stage itself- no material illegality, irregularity, infirmity or error of jurisdiction found to have been exercised by the learned Trial Court- Consequently, revision dismissed.

Title: Devender Thakur and another Vs. Hardayal Khimta Page-106

Code of Civil Procedure, 1908- Order VI Rule 17- Proviso- as added vide **Amendment Act, 2002-** Amendment of pleadings after commencement of trial- Party is required to specifically plead that despite due diligence, amendment could not be made- Plaintiff filing application without making such averments in it- Held- Application for amendment of pleadings not maintainable.

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Code of Civil Procedure, 1908- Order VIII Rules 3 to 5 - Held - Denial of facts pleaded in plaint must be specific and unambiguous – Vague and evasive denial of fact in written statement is no

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Code of Civil Procedure, 1908- Order XVIII Rule 2**- Commencement of trial- Held-** Trial of suit commences when issues are settled and case is fixed for evidence of party having right to produce its evidence.

Title: Mohd. Latif (since deceased) through LRs. Vs. Gaffuri and others Page-546

Code of Civil Procedure, 1908- Order XXII Rule 6- Death of party after hearing arguments but before judgment- Held- Death of party in such circumstances is inconsequential – Judgment will have same effect as if it was passed before death.

Title: Bhupinder Singh Vs. Gola Devi & Ors. Page-278

Code of Civil Procedure, 1908- Order XXIX Rule 1- Suit by company- Board of Directors delegated powers to Managing Director to nominate person to institute suit- Suit instituted by person nominated by Managing Director- Plaint accompanied with authorization letter issued by Managing Director in favour of such person- Held- Suit duly instituted by company.

Title: H.P.S.I.D.C. Ltd. Vs. M/s Kanol Herbals (P) Ltd & Ors. Page-250

Code of Civil Procedure, 1908- Order XXVI Rule 9- Appointment of Local Commissioner- Plaintiff seeking removal of underground sewerage pipe from his land - Not leading any evidence whatsoever yet filing an application for appointment of Local Commissioner for ascertaining whether pipe stood laid under suit land- Trial Court dismissed application- Revision against- Held- Provisions of Order 26 Rule 9 cannot be permitted to be used by party to create evidence in its favour- Local Investigation can only be for elucidating any matter in dispute- Order of Trial Court upheld.

Title: Prem Dutt Vs. State of Himachal Pradesh and others Page-514

Code of Civil Procedure, 1908- Order XXVI Rule 9- Appointment of Local Commissioner- Necessity thereof- In partition suit instituted earlier, property was divided by metes and bounds- And possession of respective shares was also delivered to co-sharers- In subsequent suit, there is no necessity for appointment of Local Commissioner for identifying part of said property again – Subsequent dispute regarding possession over any such property being a question of fact, is to be decided by Court and not by Local Commissioner.

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Code of Civil Procedure, 1908- Order XXVI Rule 9- Appointment of Local Commissioner- In suit seeking decree of permanent prohibitory injunction on ground of unauthorized interference of defendant, plaintiff filing an application under Order 26 Rule 9 of C.P.C. for appointment of Local Commissioner for demarcation of suit land- His plea being that defendant had made encroachment over his land and that part required to be identified by way of demarcation – Defendant resisted application on ground that land was demarcated earlier also – Application dismissed by trial court- Petition against- Held- Suit land stood already demarcated and unless earlier demarcation is set aside by competent authority, fresh demarcation of land cannot be ordered- Petition dismissed.

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Title: Sashi Verma Vs. Tek Singh and another Page-500

Code of Civil Procedure, 1908- Order XXXIX Rules 1 and 2- Temporary Injunction – Plaintiff seeking right of way over part of land of defendant – Trial court declining temporary injunction but Appellate Court in appeal granting relief- Petition against- Held- Sale deed referred to and relied upon by District Judge for granting relief could be looked into only after leave to produce such documents is granted under Order 41 Rule 27 Code of Civil Procedure, 1908- Matter remanded to District Judge.

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Code of Civil Procedure, 1908- Order XXXIX Rules 1 and 2- Temporary Injunction- Plaintiff alleging that his predecessor 'H' being non-occupancy tenant had become owner of suit land under H.P. Tenancy and Land Reforms Act- Revenue entries showing defendant as owner and consequent sale of such land by him, if any, was void – Plaintiff seeking temporary injunction against interference of defendant and also for restraining him from creating charge over land – Trial court dismissed his application – Appeal also dismissed – Petition – Held- Revenue entries prior to 1976 consistently show 'H' as non-occupancy tenant in suit land – Presumption of truth attached with these entries is not rebutted simply because 'H' never assailed such sale deeds during his life time- Principle of estoppel has not applicability- Petition allowed- Parties directed to maintain status quo qua nature and possession with respect to suit land during pendency of suit.

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Code of Civil Procedure, 1908- Order XXXVII- Summary procedure - Defendants No.1 and 2 hired machinery of plaintiff from time to time to execute work allotted to them by NHPC – Different work orders were issued by defendants No.1 and 2 in favour of plaintiff qua different work – Suit is for ascertained sum based on written contract - Held- Suit is maintainable under Order XXXVII.

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Code of Criminal Procedure, 1973- Section 311- Accused sought recall of complainant for further cross-examination as to source of money allegedly lent and also qua her signature on ground that he could not properly conduct cross-examination earlier – Application dismissed by Trial Court- Petition against- Held- Object of powers emanating from Section 311 is to find out truth and render a just decision – On facts, counsel representing accused was found not to have cross-examined complainant on material facts- Petition allowed and order of Trial Court set aside.
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Code of Criminal Procedure, 1973- Section 311- **Re-summoning and re-examination of witnesses- Held-** To recall and re-examine witnesses and that too for the limited extent of identifying the case property cannot be termed to be an exercise for filling up a lacuna- It would in any case though depend upon the circumstances of each case- It has been further reiterated that a witness can be recalled and re-examined, if it is necessary for the proper adjudication of the case.
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Code of Criminal Procedure, 1973- Section 311- **Re-summoning and re-examination of witnesses- Further Held-** That the plausible explanation in the application moved under Section 311 Cr.P.C that the contraband was required to be identified by the prosecution witnesses and the re-examination was confined to that limited purpose, held to be justified- Further Held- that a lacuna in prosecution is not be equated with the fallout of an oversight committed by the prosecutor or Investigating Agency.
Title: Irshad Vs. State of Himachal Pradesh Page-39

Code Of Criminal Procedure, 1973- Section 374- Appeal against conviction- **Indian Penal Code, 1860-** Section 363- Appellant was convicted and sentenced for offence under Section 363 by trial court- Appeal against- Age of prosecutrix - On facts, variance in name of prosecutrix as recorded in birth certificate and Parivar Register vis-à-vis name of victim as mentioned in MLC- Discrepancy not explained – Radiological age of victim found to be 15- ½ - 16 years – Held - By adding two years to the radiological age, prosecutrix could well be 18 years on date of alleged offence- Offence under Section 363 Indian Penal Code not proved- Appeal allowed – Conviction set aside.
Title: Mast Ram Vs. State of H.P Page-389

Code of Criminal Procedure, 1973- Section 374- **Appeal Against Conviction- Sections 20 and 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985- Held-** that the contraband recovered from the bag concealed under the front seat of the car over which accused was sitting- Same cannot be construed as a recovery from the person of an accused and as such provisions of the Section 50 of the N.D.P.S. Act were not applicable- Further Held- that simply because accused were also searched after the recovery of the contraband, the fact would not vitiate the trial, for no prejudice stands shown by the accused in the search of their in person, in violation of the provisions of Section 50 of the NDPS Act- Section 50 of the Act not attracted- Consequently, appeal dismissed.
Title: Saleem Mohamad Vs. State of Himachal Pradesh (D.B.) Page-34

Code of Criminal Procedure, 1973- Section 374- **Appeal against Conviction- Section 302 of I.P.C- Circumstantial Evidence-** Appellant convicted under Section 302 of I.P.C to undergo life imprisonment and to pay a fine of Rs.20,000/- - conviction and sentence challenged- While dismissing the appeal **Held**- legal parameters to appreciate the circumstantial evidence reiterated, as were held in criminal Appeal No.242/2016 titled as **Hikmat Bahadur versus State of Himachal Pradesh** decided on 19th September, 2017- The principle laid down by the Supreme Court of India in **Sharad Birdhichand Sarda versus State of Maharashtra, (1984) 4 SCC 116** reiterated that the conclusion of guilt is to be barred or "must or should be", and not merely "may be" fully established- The facts so established should be consistent only with the hypothesis of the guilt of the accused- The circumstances should be of conclusive nature and should exclude every possible hypothesis except the one to be proved and the chain of evidence must be so complete as to leave no reasonable grounds for the conclusion consistent with the innocence of the accused- Based on the aforesaid, on facts the circumstances culled out by the Learned Trial Court held to be consistent with the chain of circumstances so complete, but to establish the hypothesis of the guilt of the accused alone and the chain of evidence was held to be so complete as to leave any reasonable ground to come to the conclusion consistent with the innocence of the accused- Consequently, the appeal dismissed.
Title: Rakesh Kumar Vs. State of Himachal Pradesh (D.B.) Page-85

Code Of Criminal Procedure, 1973- Section 374- **Indian Penal Code, 1860-** Section 307- Trial court convicted and sentenced accused for offence under Section 307– Trial Court held that accused had caused stab wounds on forehead and hip of victim – Appeal against- Accused was previously known to victim and eye witness- Both identified him in court as assailant – Statements of witnesses consistent with each other and also corroborated by medical evidence - Injuries relatable to period of offence – Accused produced dagger pursuant to his disclosure statement – Injuries possible with weapon used by accused- Weapon used as well as part of body where stab wounds were caused give sufficient inference that intention of accused was to commit murder – However further held that offence was under Section 307 Second Part, therefore, Trial Court went wrong in imposing sentence under first part – State not filing appeal against sentence- Appeal of accused dismissed.
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Code of Criminal Procedure, 1973- Section 374- **Indian Penal Code, 1860**- Sections 147, and 307, 323, 506/149 – Appellants/accused was convicted and sentenced for said offences by trial court- Appeal against- Plea of accused being that evidence has been misread by trial court- Investigation was faulty and no test identification parade was got conducted – Therefore, identification of accused in court not relevant – On facts, statements of victim and one eye witness were found consistent – Material clearly suggesting presence of accused on spot- Injuries corroborated by medical evidence- Brick used in inflicting injuries was got recovered by one of accused pursuant to disclosure statement- Held- Accused rightly convicted by trial court for said offences.
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Code of Criminal Procedure, 1973- Section 374- Modification of sentence- However, accused first offender and of young age - Sentence reduced.
Title: Ravinder Kumar & Ors Vs. State of H.P. Page-607

Code of Criminal Procedure, 1973- Section 374- **Sections 452, 364, 376(2)(f) and 302 of the IPC-** The accused convicted and sentenced under the aforesaid provisions- Appeal against the conviction and sentence- Appeal dismissed holding- that the Court must adopt a very cautious approach in appreciating the circumstantial evidence and such circumstances must be conclusive in nature, fully connecting the accused with the 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 the guilt of the accused- On facts the narration of the independent witnesses held to be trustworthy, true and inspiring confidence, which were duly corroborated by the documentary evidence including the medical evidence- The plea of false implication was also held to be not probable.

Title: Anil Chauhan alias Anu Vs. State of Himachal Pradesh (D.B.) Page-74

Code of Criminal Procedure, 1973- Section 374- **Sections 452, 364, 376(2)(f) and 302 of the IPC-** The version of the eye witnesses supporting the prosecution held to be ably corroborated by the circumstantial evidence being the disclosure statement, it even resulting in the recovery of the body of the deceased- the ocular version and the documentary evidence, thus, ably corroborated by the circumstantial evidence clearly establishing the complicity of the accused- consequently, the conviction upheld- Appeal dismissed.

Title: Anil Chauhan alias Anu Vs. State of Himachal Pradesh (D.B.) Page-74

Code of Criminal Procedure, 1973- Section 378- Appeal against acquittal- Accused charged and tried on allegations of committing house trespass and causing simple/grievous injuries after making preparations to cause hurt- And also of threatening complainant, 'M', her mother-in-law, 'T' and her sister-in-law, 'S' – Accused convicted by trial Court but acquitted in appeal by Sessions Judge- Appeal by State – Appellant contending that evidence was not appreciated correctly – On facts, Statements of M, T and S were found consistent and duly corroborated by 'RS' and 'RK', independent witnesses – No contradictions in their statements vis-à-vis site plan qua place of occurrence – Injuries on person of victims possible with dandas – Sticks were recovered from place of occurrence – Held – Seessions Judge misread evidence and went wrong in acquitting accused – Appeal allowed- Acquittal set aside.

Title: State of H.P. Vs. Roop Lal and others Page-502

Code of Criminal Procedure, 1973- Section 378- **Appeal against acquittal- Section 20 of the N.D.P.S. Act, 1985-** Respondent acquitted by the learned Trial Court- State challenged the acquittal while re-affirming the findings so recorded - **Held-** that the bag containing contraband held not to have been recovered from the conscious possession of the accused/respondent as it was alleged to have been in between the legs of the accused beneath the seat No.14- On facts, based on the testimony of PW-2 Satvir Singh, an independent witness- All four passengers sitting on Seat Nos.12, 13 and 14 had come out off the bus and were questioned by the police regarding ownership of the bag in question- The said fact coupled with the discrepancy in timings- held- did not prove that the contraband was recovered from the conscious possession of the accused – Consequently, acquittal of the accused-respondent upheld.

Title: State of Himachal Pradesh Vs. Om Parkash (D.B.) Page- 100

Code of Criminal Procedure, 1973- Section 378- **Indian Penal Code, 1860-** Sections 323, 325, 341, 504/34- Appeal against acquittal – Allegations against accused are that they gave beatings with dandas and stones to complainant and her sisters when they were working in field- Accused acquitted by trial court- Appeal against- State contending gross misappreciation of evidence by trial court – On facts, two separate FIRs in respect of same incident were filed by both parties – Complainant party also chargesheeted and tried for same incident on FIR of accused, but acquitted by trial court- Held- Genesis of case thus suppressed – Evidence of witnesses contradictory-Acquittal proper- Appeal dismissed.

Title: State of H.P. Vs. Dhani Ram & another Page-620

Code of Criminal Procedure, 1973- Section 378- **Indian Penal Code, 1860-** Sections 294, 354, 509/34- Accused allegedly used criminal force to outrage modesty of victim and also did obscene

activity to her annoyance- Accused acquitted by trial court- State in appeal – Incident happened on 10.4.2001, whereas FIR filed on 12.4.2001- No explanation for delay in filing FIR – Same could be result of pre- meditation – Name of one of co-accused 'L' missing in FIR- Eye-witnesses 'R' and 'I' not supporting stand of victim- Held- Findings of trial court are based on proper appreciation of evidence- No interference in appeal – Appeal dismissed. Title: State of H.P. Vs. Sher Singh & another Page-506

Code of Criminal Procedure, 1973- Section 389- **Appeal against Conviction- Narcotic Drugs and Psychotropic Substances Act, 1985-** Section 42 and 50- Independent Witnesses- One of the independent witnesses fully supporting the prosecution case and his version supported by official witnesses- conviction sustained- Further Held- That Section 42 of the N.D.P.S. Act not attracted, if there was no prior information with the police- Section 50 of the N.D.P.S. Act also held to be not applicable, in case of a chance recovery- Conviction upheld- Appeal dismissed.
Title: Harish Kumar Vs. The State of Himachal Pradesh Page-24

Code Of Criminal Procedure, 1973- Section 389- Suspension of sentence- Held- Appellate Court can suspend execution of sentence subject to deposit of fine or part thereof, which is just and conscionable within certain period.
Title: Pritpal Singh Vs. M/S Singla Medical Agencies Page-450

Code Of Criminal Procedure, 1973- Section 389(1)- **Negotiable Instruments Act, 1881-** Section 138- Suspension of Sentence- Held- Appellate Court while suspending sentence imposed by trial court, can direct appellant to deposit as condition precedent, fine or atleast part thereof which is just or conscionable within certain period.
Title: Harinder Kumar and others Vs. M/S S.S.V Traders Page-432

Code of Criminal Procedure, 1973- Section 397- Appellant was apprehended with 600 boxes of country made liquor of make "Sirmaur No.1"- he was sentenced to undergo simple imprisonment for one year and to pay fine of Rs. 5000/- under Section 61 (1) (a) of Punjab Excise Act by Learned Trial Court – only 6 pouches were sent for chemical analysis out of the allegedly recovered liquor – **Held-** that the recovery allegedly effected by the police stands vitiated as it is not proved that boxes were containing liquor except 6 pouches sent for chemical analysis- prosecution failed to prove that accused was carrying liquor beyond permissible limit- Judgments passed by the Courts below quashed and set aside- accused acquitted.
Title: Subhash Vs. State of HP Page-161

Code of Criminal Procedure, 1973- Section 397 read with Section 401- **Sections 22 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985-** The petitioner alongwith one Mr. Mathias apprehended with 165 grams of MDA including Indian and foreign currency while travelling in the Car- Driver Mathias on being signalled to stop was alleged to have thrown waist money bag, black in colour, towards the back seat of the car- the petitioner aggrieved by framing of the charges against her sought quashing of the same on the ground that the contraband was not recovered from her conscious possession nor there was any evidence that she abetted the commission of the crime- **Held-** that the petitioner was accompanying the accused for the last many days and there was prima facie evidence that they had purchased the contraband from Rishikesh, and, as such, it cannot be said that the petitioner did not have knowledge of the narcotic substances being carried by the co-accused for the last so many days- Thus, at this stage, there was sufficient material to proceed against the petitioner- consequently, framing of charge upheld.
Title: Maya Kalsi Vs. State of H.P. Page-111

Code of Criminal Procedure, 1973- Section 438- Grant of Pre-arrest Bail Principles – Applicant/accused was allegedly having illicit relationship with deceased, who was already married to complainant 'S'- Applicant and deceased were staying in hotel where latter consumed poison after some altercation with applicant/accused – Applicant joined investigation- Her custodial interrogation was not required- Pre-arrest bail granted subject to conditions.
Title: Jali Vs. State of Himachal Pradesh Page-476

Code of Criminal Procedure, 1973- Section 438- **Indian Penal Code, 1860-** Sections 420, 467, 468 and 471- **Pre-arrest Bail-** On facts, accused-applicant found to have joined investigation and his custodial interrogation was not required by Investigating Agency- Accused admitted on pre-arrest bail subject to conditions.
Title: Phula Singh Vs. State of Himachal Pradesh Page-635

Code of Criminal Procedure, 1973- Section 438- **Indian Penal Code, 1860-** Section 376(2)(n)- Prosecutrix alleged that accused had been sexually exploiting her on pretext of marrying her– Further on 10.4.2018 accused came to her shop and raped her- Pre-arrest bail sought on ground that relationship, if any, was consensual – Application contested by State on plea of seriousness of offence- Held- Prosecutrix and accused were known to each other for almost twelve years and had intimate relations- She remained silent during this period- Though correctness and otherwise of allegations yet to be decided by trial court- On facts, applicant/accused is held entitled to pre-arrest bail subject to conditions.
Title: Hoshiar Singh Vs. State of Himachal Pradesh Page-648

Code of Criminal Procedure, 1973- Section 438- **Indian Penal Code, 1860-** Sections 323, 324, 451/34- Anticipatory bail - Grant of – Accused duly joined investigation – No recovery to be effected from him - Investigation complete – Accused granted conditional pre-arrest bail.
Title: Yunus Vs. State of Himachal Pradesh Page-645

Code of Criminal Procedure, 1973- Section 438- Pre-arrest Bail - Grant of- Held- Freedom of an individual is of utmost importance and cannot be curtailed on mere suspicion of his involvement in an offence –Object of bail is to secure presence of accused during trial – On facts, accused was found cooperating with police in investigation – Enlarged on pre-arrest bail subject to suitable conditions.
Title: Jai Krishan Vs. State of Himachal Pradesh Page-331

Code Of Criminal Procedure, 1973- Section 439- **Protection of Children from Sexual Offences Act, 2012**- Sections 6 and 17- Bail- Accused allegedly enticed victim and took her away along with him - Both families were already known to each other - Also agreed for marriage of victim with accused, so no FIR was registered – Lateron, mother of accused brought victim to her parents house and left her there - No one thereafter came to took her back – Only then FIR was registered for said offences against accused and his mother - On facts, Victim allegedly remained in accused's house for three months, yet no attempt was made to register FIR by complainant- Initial report of medical officer and report of RFSL do not suggest commission of sexual intercourse with victim- Held- accused entitled for regular bail.
Title: Sanjeev Kumar Vs. State of Himachal Pradesh Page-423

Code Of Criminal Procedure, 1973- Section 439- Regular Bail grant of- Accused alleged of having committed offences under Sections 147 and 307, 325, 452 read with 149 Indian Penal Code- Investigation was complete and charge-sheet also filed in Court- No material on record that accused can tamper evidence – Other co-accused already on regular bail- Bail granted subject to conditions.
Title: Mohd. Arshad @ Kuki Vs. State of Himachal Pradesh Page-410

Code of Criminal Procedure, 1973- Section 439- **Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 as amended vide Act 1 of 2016-** Section 3(1)(r)(s)- On facts, involvement of only one of accused was found during investigation- Charge-sheet stood filed against him- Regular bail granted subject to conditions.

Title: Ravinder Chauhan Vs. State of Himachal Pradesh Page-581

Code of Criminal Procedure, 1973- Section 457- **Himachal Pradesh Excise Act, 2011**- Section 39 (1)a- Vehicle impounded by police for being used for transporting liquor without permit- Application of petitioner for its release on sapurdari dismissed 'in default' – Revision against- Plea of petitioner being that his application could not have been dismissed in default for want of prosecution- Held- Judicial Magistrate was competent to dismiss application for want of prosecution- Revision dismissed with liberty to petitioner to file another comprehensive application before Judicial Magistrate.

Title: Rati Ram Vs. State of Himachal Pradesh Page-572

Code Of Criminal Procedure, 1973- Section 482- **Protection of Women from Domestic Violence Act, 2005**- Section 12- **Hindu Marriage Act, 1955-** Section 13-B- Trial Court granting protection, residence and maintenance orders in favour of wife – Appeal of husband, dismissed by Additional Sessions Judge- Petition against – During proceedings before High Court, parties filing petition before District Judge for divorce by mutual consent- Parties residing separately since long- Marriage broken down beyond repair- Re-approachment not possible – Petition allowed and orders of lower courts set aside- District Judge directed to dispose of petition under Section 13-B of Hindu Marriage Act expeditiously without waiting cooling off period to expire.

Title: Dhale Ram Vs. Pushpa Devi Page-304

Code of Criminal Procedure, 1973- Section 482- **Quashing of FIR- Sections 341, 323, 307, 504, 506 read with Section 34 of I.P.C-** Cross FIR registered by both the parties- Investigation complete, though, challan had not been filed in the Court- parties sought quashing of the FIR- **Held-** that since the parties have decided not to prosecute the cases and since the evidence is yet to be led in the Court- there are minimal chances of the witnesses coming forward in support of the prosecution case in view of compromise arrived at between the parties- chances of conviction of the accused in both the case are bleak – Cases are at the initial stage and even report under Section 173 Cr.P.C has yet not been filed to allow the criminal proceedings to continue would be an abuse of the process of law- Consequently, FIR ordered to be quashed.

Title: Rajesh Kumar Chauhan & ors. Vs. State of Himachal Pradesh & anr. Page-56

Code of Criminal Procedure, 1973- Section 482- **Sections 23 & 25, read with Section 28 of Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (**PC and PNDT Act)- Sections120-B & 201 of **Indian Penal Code, 1860—**Petitioner-Doctor seeking quashing of the complaint filed under the aforesaid provision- **Held-** that from the statement of the victim it was clear that when she was three month pregnant her husband and mother-in-law had forcibly got conducted a sex determination test- Statement of the victim coupled with other evidence on record show that there is prima facie case against the petitioner- it cannot be also said that chances of ultimate conviction of the petitioner are bleak, thus, held that petitioner was prima facie culpable- Accordingly, petition dismissed- parties directed to appear before the learned Trial Court.

Title: R.D. Sharma Vs. V.K. Chaudhary and another Page-65

Code of Criminal Procedure, 1973- Sections 91 and 482- Narcotic Drugs and Psychotropic Substances Act, 1985- Section 20- Accused facing trial on allegations that he was apprehended by police at 'Dashalani' and 1.4 kg charas was recovered from him- He moved an application

under Section 91 of the Code for production of customer application forms, tower location and call detail records of police personnel said to be members of police party apprehending him at 'Dashalani'- Application rejected by Special Judge on ground that Court cannot create evidence in defence for accused- Petition against - Held- Documents which petitioner/accused cannot himself procure for proving his defence can certainly be requisitioned by invoking powers under Section 91 of Code provided Court is satisfied that these are necessary and desirable- On facts, accused simply wanted to show that he was not apprehended at 'Dashalani' by police party by causing call details and tower location of cell numbers of police officials, who alleged to have apprehended him- Production of such documents is necessary and desirable- Order of Special Judge set aside and petition allowed.

Title: Ishwar Dass Vs. The State of Himachal Pradesh Page-530

Code Of Criminal Procedure, 1973- Sections 256 and 378- De facto complainant/victim filing an appeal against judgment of acquittal- Died during pendency of appeal- Offence was committed with respect to de facto complainant alone- Held- Appeal cannot be continued by his legal representatives.

Title: Sarvinder Singh Vs. Sukhbir Singh Page-365

Code of Criminal Procedure, 1973- Sections 320 and 482**- Indian Penal Code, 1860-** Sections 279, 337 and 338 – Petitioner/accused seeking quashing of FIR and consequent criminal proceedings on ground of compromise with complainant- Petition contested by State on ground of offences being 'non-compoundable' – Held- Inherent powers of High Court have no statutory limitations including Section 320 of Cr.P.C. and can be exercised for quashing criminal proceedings to meet ends of justice with due regard to nature and gravity of offences involved.

Title: Sukhpreet Vs. State of Himachal Pradesh & others Page-528

Code of Criminal Procedure, 1973- Sections 320 and 482- **Indian Penal Code, 1860-** Sections 279, 337 and 338- Petition for quashing FIR and consequent criminal proceedings on ground of compromise- Held- In appropriate cases, High Court in exercise of its inherent jurisdiction may quash FIR and consequent criminal proceedings pursuant to compromise of parties, even if, offence is non-compoundable.

Title: Rohit Panwar Vs. State of Himachal Pradesh & anr. Page-562

Code of Criminal Procedure, 1973- Sections 320 and 482- Inherent powers of High Court- Quashing of FIR and consequent criminal proceedings- Held- Power under Section 482 is not circumscribed by provisions of Section 320 - However, nature and gravity of crime and its social impact are relevant factors for consideration- On facts, FIR was found having been registered for offences under Sections 279 and 337 of I.P.C.- Matter was compounded by parties and composition was bonafide – Petition allowed – FIR and consequent criminal proceedings pending before Judicial Magistrate quashed.

Title: Sameer Yadav Vs. State of Himachal Pradesh and others Page-464

Conduct of party- Suppression of Material Facts- With a view to get construction activity of 'K.K.' being carried by him on land alleged to be encroached stopped, letter petitioners concealed fact that their application seeking temporary injunction against 'K.K.' already stood dismissed by Civil Judge, Nadaun - Letter petitioners were found to have concealed material facts from Court, therefore, warned to be more cautious and responsible in future while dealing with court matters - Costs of Rs.1,000/- imposed on letter petitioners and directed to be deposited with State Legal Services Authority.

Title: Court on its own motion Vs. State of H.P. & Others CWPIL No.9 of 2017 (D.B.)
Page-245

Constitution of India, 1950- Basic structure- Free and fair elections are part of basic structure of Constitution- It is essential that best available persons are elected as people's representatives - This can best be achieved through persons of high moral and ethical values who win election on positive vote- Members Secretary, State Legal Services Authority directed to hold sensitization drive apprising people of area of significance of participating in electoral process.

Title: Court on its own motion Vs. State of H.P. & others CWPIL No. 301 of 2017 (D.B.)

Page-362

Constitution of India, 1950- Article 21- Right to life- Held- For residents of hilly areas, access to road is access to life itself- On facts, residents of village Bhotan of Tehsil Dalhousie Distt. Chamba were found lacking a road to their village from main highway- Agitated villagers also didn't cast votes during Vidhan Sabha Election as a matter of protest - About 14 k.ms. road from Katori Bangla on Pathankot-Bharmour National Highway to village Bhotan was required to be constructed- Directions issued to all stake-holders to ensure that residents of village Bhotan have proper access.

Title: Court on its own motion Vs. State of H.P. & others CWPIL No. 301 of 2017 (D.B.)

Page-362

Constitution of India, 1950- Article 226- **Code of Criminal Procedure, 1973-** Sections 154, 156 and 170- Registration of First Information Report- One 'G' went missing and a missing report was lodged with P.S. B.S.L. Sundernagar- However, his dead body was found near Beas Kund at Rohtang and cremated by police being unclaimed- Relatives identified from photographs as body being of 'G' and requested SHO, P.S. Manali for registration of FIR – Their request declined on ground that FIR was to be registered with P.S. BSL Sundernagar where missing report was initially filed- Petition filed in High Court against police inaction- Held- Police can register an FIR of cognizable offence and if on investigation, it is found that crime was not committed within jurisdiction of that police station, it can transfer same to police station concerned in terms of Section 170 of Cr.P.C.

Title: Court on its own motion Vs. The Chief Secretary to the Government of Himachal Pradesh and others (D.B.) Page-241

Constitution of India, 1950- Article 226- Deceased employee died in an accident while serving as accountant in the office of the respondent- Petitioner, wife applied for appointment on compassionate ground- the application was rejected- **Held** – that the order of rejecting application is non-speaking and uninformed order- It does not reveal that the scheme contained in the office memorandum dated 9th October, 1998 for determination and availability of vacancies for such decision was adhered to or not- non-speaking and uninformed decision smacks mala fide and arbitrariness- petition was allowed and the communication rejecting the claim of the petitioner quashed- respondents were directed to reconsider the claim of the petitioner in the light of the aforementioned office memorandum.

Title: Chinta Devi Vs. The Director of Estates (Regions) and another Page-52

Constitution of India, 1950- Article 226- Deceased/Sandhya Devi admitted in the district Hospital Solan as emergency case as she was bleeding and labour pain had started on 25.4.1996 - she died on 26.4.1996- it is alleged that death has taken place due to negligent behaviour of defendants No.4 and 5, medical officers as they did not attend upon her properly – **Held-** that complainant has to clearly make out a case of negligence whenever a medical practitioner is charged with or proceeded against criminally- the plaintiff has failed to bring any evidence establishing willful negligence on the part of the Doctors concerned – Medical Practitioner is not liable to be held negligent, simply because things went wrong from mischance or misadventure or

through an error of judgment in choosing one reasonable course of treatment in preference to another – there is no merit in the petition, hence, same is dismissed.
Title: State of H.P. and others Vs. Dinesh Chauhan and others Page-217

Constitution of India, 1950- Article 226- **Drugs and Cosmetics Act, 1940 (D & C Act)-** Public Interest Litigation- High Court taking suo moto cognizance on news item regarding filing of charge-sheets in just three out of two hundred cases registered under D & C Act in District Kangra - Police taking plea that after registration of cases, charge-sheet could be filed for offences under D & C Act by Drug Inspectors only – Only three Drug Inspectors were posted in district Kangra- Himachal Pradesh Drugs and Cosmetics Amendment Bill, 2016 conferring more powers to police to deal with cases under Act pending before Central Government for approval- Petition disposed of with directions to State Government to pursue follow up action with Government of India, so that amendments in the Act are carried at the earliest.
Title: Court on its own motion Vs. State of H.P. & Others (D.B) CWPIL No.65 of 2017
Page-294

Constitution of India, 1950- Article 226**- H.P. Land Revenue Act, 1954-** Section 163- Letter petitioners alleged of encroachment having been made over Government land by "K.K." and prayed for necessary direction to concerned department for resumption of land- 'K.K.' denied allegation of encroachment - Claimed that his grand-father was a non-occupancy tenant in land and long standing entries of 'gair marusi' were illegally and arbitrarily changed to 'Kabzan' - Qua change of revenue entries appeal of K.K. and his brothers, pending before ASO-Dharmshala- Meanwhile, eviction proceedings under Section 163 of Act were also initiated against 'K.K.' before A.C. 1st Grade, Nadaun – Held- Case involved disputed questions of facts and law- Petition disposed of with directions to ASO, Dharamshala/A.C. 1st Grade, Nadaun to expedite proceedings.
Title: Court on its own motion Vs. State of H.P. & Others CWPIL No.9 of 2017 (D.B.)
Page-245

Constitution of India, 1950- Article 226- **Himachal Pradesh Civil Services (Revised Pay 1st Amendment) Rules, 1998-** A public servant governed by the said Rules is entitled to benefit of Assured Career Progression Scheme (ACPS) after completion of 4, 9 and 14 years of service- Petitioner was inducted in the Himachal Pradesh Administrative Service on 4.10.1992 - Given benefits under the ACPS on completion of service of 4 & 9 years- He completed 14 years of service on 30.9.2006 but denied benefits of ACPS on completion of 14 years of service owing to 'administrative instructions/guidelines' issued by Finance Department on 23.6.2000 providing for giving of such benefits on and w.e.f. 1.1.2007 only – Petition against – Hon'ble Single Bench allowing writ of petitioner- Letter Patent Appeal - Held – Petitioner admittedly had completed 14 years of service before his superannuation – He could not have been arbitrarily denied benefits on basis of mere administrative 'instruction/guideline' – Letter Patent Appeal dismissed.
Title: State of Himachal Pradesh and another Vs. Chaman Singh (D.B.) Page-461

Constitution of India, 1950- Article 226- Pensionary benefits of the father of the petitioner were withheld- Petitioner sought release of the said benefits along with interest @ 15% per annum- pensionary benefits not released due to penalty of recovery of Rs. 2,51,914/- imposed by the Conservator of Forests- Penalty was, however, waived on representation of the father of the petitioner- Father of the petitioner had, however, died during the pendency of the representation- the amount due has already been released- **Held-** that petitioner would have been entitled for interest had his father being exonerated from charge levelled against him as per Rules 9 and 68 of the CCS (Pension) Rules but it is not so in the present case - Hence, no merits in the petition- petition dismissed.
Title: Pushpender Kumar Vs. State of H.P. and others Page-197

Constitution of India, 1950- Article 226- Petitioner appointed against the post of Khansama on temporary basis was given salary in the pay scale of Rs. Rs.750-1410/-, whereas, other Khansama appointed on the same post on temporary basis was allowed pay scale of Rs. 830-1600/-- **Held-** that there is no justification of giving pay on lower scale to the petitioner, when on perusal of the appointment letters of both the persons, there is no difference in the conditions of the two appointments- Further held that such discrimination is violative of Article 14 of the Constitution- Respondent/Board is directed to pay salary to the petitioner in the higher scale – further directed to pay the arrears inthree months- petition disposed of as allowed.
Title: Raj Kumar Vs. Bhakra Beas Management Board and others Page-206

Constitution of India, 1950- Article 226- **Service Matter- Appointment-** Appointment denied to the petitioner despite having secured highest marks on the ground that she was disqualified to be appointed as an Anganwadi worker, since, her husband was in Government service- **Held-** that if such a disqualification is not provided under the guidelines, a mere policy decision taken by the Government in this behalf, expressly not contained in the guidelines, will not be sufficient to oust the petitioner from appointment as an Anganwadi worker- The appointment of the respondent set aside- petition allowed.
Title: Santosh Kumari Vs. State of H.P. and others Page-49

Constitution of India, 1950- Article 227- **Code of Civil Procedure, 1908- Order 26 Rule 9 readwith 151-** The appointment of a Local Commissioner sought by the plaintiff before the Learned Trial Court on the basis that the dispute related to a boundary – As per the respondent, plaintiff was trying to create evidence in his favour- the Learned Trial Court had dismissed the application – **Held-** since the dispute related to the possession of "Khatti" (a source of drinking water), one each was alleged to have come into possession of each of the parties – **Further Held-** It was definitely a boundary dispute, though, filed late - The Learned Trial Court ought to have appointed a Local Commissioner – Petition disposed of in the aforesaid terms.
Title: Kangru Ram Vs. Sriram Page-165

Constitution of India, 1950- Articles 14 and 16- Appointment to post of PTI as Parents Teacher Association Appointee – Dispute interse petitioner and private respondent – On complaint of petitioner, Inquiry Committee set aside selection of private respondent and recommended appointment of petitioner - In appeal, Appellate Authority (Deputy Commissioner) upset recommendations of Inquiry Committee and found selection of private respondent in consonance with norms- Petition against - Private respondent was appointed as per prevalent norms fixed vide notification dated 29.6.2006 - Inquiry Committee didn't hold nor it is shown to High Court that this appointment was in contravention of notification dated 29.6.2006 – Held - Inquiry Committee could not have recommended appointment of petitioner without first holding either earlier norms as unreasonable or selection of private respondent in violation thereof – petition dismissed.
Title: Parun Chandel Vs. State of Himachal Pradesh and others Page-341

Constitution of India, 1950- Articles 14 and 16- Right to be considered for promotion to higher post subject to eligibility and being in zone of consideration, is a fundamental right of an employee under Article 16.
Title: Ajay Kumar Vs. Bhakra Beas Management Board (BBMB) and others Page-584

Constitution of India, 1950- Articles 19(1)(g) and 19(6)- Right to trade- Meaning and scope – Held- It is a right subject to reasonable restrictions in the interest of general public - There is no right of street vending at any particular place- Street hawking can be regulated by law.
Title: Hari Ram Vs. State of H.P. & others (D.B.) Page-456

Constitution of India, 1950- Articles 21 and 226- Letter Petitioners opposing construction of sewerage treatment plant inside their villages on health issue and nuisance- However, matter regarding its construction settled with intervention of amicus curiae and local administration- Thereafter, villagers demanding that water emerging after treatment be channelized for irrigation of their fields- Such water could be used by lift irrigation scheme only, cost thereof quite high – petition disposed of with directions.

Title: Court on its own motion Vs. State of H.P. and others CWPIL No.42 of 2017 (D.B.)
Page-338

Constitution of India, 1950- Articles 21 and 226- Letter petitioner highlighting grievances of residents of Salapar and adjoining villages of Tehsil Sundernagar District Mandi due to pollution caused by mining of lime stone and production of cement by ACC factory- Status report of Deputy Commissioners, Mandi and Bilaspur found contradictory to each other- D.C. Mandi reporting about adverse impact on flora and fauna due to pollution in said villages- Aerial distance of Salapar is just 4-500 meters from ACC factory- Matter regarding blasting and resultant sound pollution already pending before National Green Tribunal- Petition disposed of with direction to authorities to examine grievances of letter petitioner.

Title: Court on its own motion Vs. State of H.P. & others CWPIL No. 49 of 2018 (D.B.)
Page-336

Constitution of India, 1950- Articles 226 and 227- **Civil Writ Petition- Section 28-A of the Land Acquisition Act, 1894- Held-** The application for the re-determination of compensation does not necessarily mean from the "first award" made by the Court and, as such, the limitation to file the said application will run from the date of the award on the basis of which re-determination of compensation is sought.

Title: Union of India Vs. Krishan Lal & others Page-58

Constitution of India, 1950- Articles 226 and 227**- Civil Writ Petition- Section 28-A of the Land Acquisition Act, 1894- Further Held-** It is permissible for the collector to keep the application for re-determination in abeyance if the award in question is in an appeal before the higher Court- The Collector can keep the application under Section 28-A of the Land Acquisition Act pending till the matter is finally decided by the High Court or Supreme Court, as the case may be.

Title: Union of India Vs. Krishan Lal & others Page-58

Constitution of India, 1950- Articles 226 and 227- **Civil Writ Petition- Service Law-** Penalty of reduction to a lower stage for a period of two years without cumulative effect, without adversely affecting the pension of the petitioner ordered by the Disciplinary Authority- **Held-** That in case a statutory representations and submissions made to the Disciplinary Authority are rejected and the same is duly affirmed by the material placed on record, the courts cannot interfere with the findings recorded by the Disciplinary Authority, moreso, when the Disciplinary Authority has recorded the detailed reasons in forming a conclusion contrary to the one drawn by the Inquiry Officer.

Title: Beli Ram Sharma Vs. High Court of H.P. (D.B.) Page-1

Constitution of India, 1950- Articles 226 and 227- **Civil Writ Petition- Service Law-** Rule 15(4) of the CCS & CCA Rules does not enjoin upon the disciplinary authority to given an opportunity of personal hearing to the delinquent.

Title: Beli Ram Sharma Vs. High Court of H.P. (D.B.) Page-1

Constitution of India, 1950- Civil Writ Petition- Article 226- **Code of Civil Procedure, 1908-** Order 2 Rule 2- Res-judicata- If the reliefs claimed in the subsequent writ petition and the prayers made therein are in majority the same and if some of the prayers though available had not been claimed in the earlier writ petition- the subsequent writ petition would not be maintainable- It is a hit by the the principles of res-judicata and the principles embodied in Order 2 Rule 2 C.P.C., as, though the provisions of Code of Civil Procedure are not applicable in the writ jurisdiction but the principles enshrined therein are applicable- the principles of res-judicata discussed- further **Held-** that the doctroine is applied so that the lis attained finality- It is not opened and re-opened twice over, which is a fundamental doctroine of law and consequently, writ petition dismissed as not being maintainable since the majority of the reliefs claimed therein had already been decided in the earlier writ petition.

Title: Ravi Azta and others Vs. Union of India & others Page- 129

'H'

Himachal Pradesh Kutlehar Forest (Acquisition of Management) Act, 1992- Section 4- Plaintiff was appointed as Forest Officer under Section 2(2) of Indian Forest Act and given management of Kutlehar Forests with right to retain 3/4th share in gross income of forest produce – This arrangement existed prior to the Act which came into force on 11.3.1995 – Entitlement of plaintiff to have share in income of Forest produce accruing prior to that date – Held- Under Section 4 of the Act grant in favour of plaintiff stood extinguished only on and w.e.f. 11.3.1995 when the Act came into force- - Plaintiff entitled to share in income derived from forest produce prior to 11.3.1995 – Suit rightly decreed.

Title: Mahendra Pal (deceased) through his LRs Rani Lalita Kumari and others Vs. The State of Himachal Pradesh and others (D.B.) Page-518

Himachal Pradesh Land Revenue Act, 1954- Section 32- Record of rights- Entries are recorded in revenue papers for fiscal purposes- These are not conclusive proof of title.

Title: Madan Swaroop & Anr. Vs. Nand Lal & Ors. Page-663

Himachal Pradesh Tenancy and Land Reforms Act, 1972- Sections 104 & 112- Conferment of proprietary rights- Jurisdiction of Civil Courts- On facts, entries of non-occupancy tenant existing in favour of defendant were without any basis – Conferment of proprietary rights only on basis of such revenue entries held to be illegal- Declaratory suit- Maintainable as jurisdiction of civil Court is not barred – Exceptions laid down in ***Chuhniya Devi vs. Jindu Ram 1991(1) Sim. L.C. 223*** reiterated.

Title: Kanta Devi & Ors. Vs. Tripta Devi & Ors. Page-380

Himachal Pradesh Urban Rent Control Act, 1987- Sections 14(3)(d) and 14(6)- Petitioner seeking eviction of tenant from non-residential premises on ground of self use as her son, an architect wanted to open his office in it – Tenant filing an application for amendment of his reply and taking plea under Section 14(6) of Act that eviction petition not maintainable since landlady had acquired premises by way of gift and mutual settlement within five years of filing of petition- Application dismissed by Rent Controller- Petition against - Held- Eviction petition of petitioner is under Section 14(3)(d), whereas bar under Section 14(6) is applicable to eviction case filed under Section 14(3)(a)(i) only – Since, Section 14(6) is not attracted in petitioner's case, application for amendment was rightly dismissed- Order of rent controller upheld.

Title: Ram Kumar Chug Vs. Aruna Bansal & Anr. Page-399

Hindu Minority and Guardianship Act, 1956- Section 6- Vis-à-vis **Indian Penal Code, 1860**- Sections 363 and 366- Petitioner seeking directions to police to produce her daughter 'P' in Court and also for her custody – However, 'P' and one 'H' themselves appearing before High Court and

stated to have married each other – Also mentioning of their having filed petition in Punjab and Haryana High Court for police protection- Held - Custody of wife even if minor, should be with husband – Principles laid down in Shishu Pal vs. State of H.P., ILR 2017 (IV) 712 reiterated.

Title: Nand Kishore Vs. State of Himachal Pradesh & Others (D.B.) Page-448

Hindu Succession Act, 1956- Section 14(1) or 14(2)- Applicability - Land was given to widow 'J' for life in lieu of maintenance pursuant to compromise decree dated 14.8.1959- Later on, 'J' transferred property to one 'T' through gift - However, she and others filed a suit before Senior Sub Judge, Bilaspur on 26.10.1970 challenging gift deed purportedly executed by her in favour of 'T' on ground of her being limited owner of suit property - Suit decreed by Senior Sub Judge, Bilaspur vide decree dated 2.11.1972- And held 'J' as 'limited owner' of suit land- 'J' filed another suit on 1.9.1977 before Sub Judge, Ghumarwin seeking declaration that she had become full-fledged owner of suit land as it was given to her in lieu of maintenance - Suit was dismissed vide judgment dated 10.9.1979- Thereafter, 'J' executed a Will in favour of her son 'K' (D-1) and mutation of inheritance was also attested in favour of 'K' – 'K' executing a sale deed of part of said land in favour of defendant No.2- Plaintiff, another son of 'J' filed suit - Challenging Will of 'J' in favour of 'K' on ground that she was only limited owner of disputed land- Suit decreed by Trial Court - However, appeal of defendant was allowed by District Judge and suit was dismissed after setting aside judgment and decree of Trial Court- Regular Second Appeal- Held- Land in suit was given to 'J' under compromise decree dated 14.8.1959 in recognition of her right to maintenance and she had become its full-fledged owner under Section 14(1) of the Act notwithstanding contrary findings recorded in judgment dated 10.9.1979 by Sub Judge, Ghumarwin.

Title: Baldev Dass & Ors. Vs. Krishan Dayal & Ors Page-366

'I'

Indian Evidence Act, 1872 - Section 3- Appreciation of Evidence- Trial Court acquitted accused of offences punishable under Sections 323, 325, 504 and 506 of I.P.C. – Appeal against- On facts, statements of injured witnesses were found not being corroborated by independent witnesses qua alleged incident – Injuries were possible by fall- There was enmity between complainant and accused- FIR was also delayed- Held- Accused were rightly acquitted by Trial Court- Acquittal upheld.

Title: State of Himachal Pradesh Vs. Dilbag Singh alias Bagi & ors. Page-566

Indian Evidence Act, 1872- Sections 8 and 27- Recovery of knife from accused when he was being interrogated by police- Held- It not being a case of recovery at his instance from any place – Recording of his statement under Section 27 was not necessary – Factum of recovery of knife is admissible in evidence.

Title: Narain Dass & Anr. Vs. State of H.P. Page-488

Indian Evidence Act, 1872- Section 18- Admission- Effect of – Held – Admission of a party against its own interest is substantive evidence and cannot be ignored.

Title: Rupa alias Balia (since deceased) through is legal heirs Vs. Mansha Rama Page-612

Indian Evidence Act, 1872- Sections 61 and 62- Objection as to mode of proof of a document- Needs to be taken when document is sought to be tendered – Copies of sale deeds were exhibited in evidence without any objection as to mode of proof – Held- Objection as to mode and method of proof cannot be taken at appellate stage – R.V.E. Venkatachala Gounder vs. Arulmigu Viswesaraswami & V.P. Temple and another (2003) 8 SCC 752 relied upon.

Title: Madan Swaroop & Anr. Vs. Nand Lal & Ors. Page-663

Indian Penal Code, 1860- Sections 147, 447, 323 read with Section 149- Petitioner was allegedly assaulted by the respondent - challenged acquittal of the respondents by the 1st Appellate Court reversing the conviction recorded by the Learned Trial Court by way of revision- It transpired during hearing that revision was not maintainable – petition was filed for conversion of revision petition into an appeal- **Held-** that prayer of conversion is legal but same needs to be filed at the threshold – present application has been filed after nine years of filing of revision – Also, respondents have been suffering for last eighteen years in facing the criminal proceedings- no iota of evidence that they had constituted an unlawful assembly or used force or violence against the complainant- no interference is made out- revision petition as well as Cr.M.P (M)s dismissed.

Title: Shakuntla Devi Vs. Lalman & ors. Page-97

Indian Penal Code, 1860- Sections 294, 504 and 506**- Indian Evidence Act, 1872-** Section 3- **Appreciation of Evidence-** Held- Evidence in criminal cases needs to be evaluated on touch stone of consistency –Court should be conscious in dealing with situation where there are multiple testimonies and equally large number of witnesses testifying before it- On facts, statements of witnesses were found inconsistent and contradictory – No explanation given as why no attempt was made for filing an FIR with police – Acquittal recorded by Trial Court upheld.

Title: State of Himachal Pradesh Vs. Ashwani Kumar Page-345

Indian Penal Code, 1860- Section 307- Attempt to murder- On facts, accused found giving stab blow on stomach of victim – Injuries on his body were found corroborated by medical evidence – Accused got recovered knife - weapon of offence, pursuant to his disclosure statement – Accused was identified in Court by one of witnesses to whom he was previously known – Conviction proper – Appeal dismissed.

Title: Mahavir Vs. State of H.P. Page-601

Indian Penal Code, 1860- Sections 323, 324, 506/34- Complainant was allegedly caught hold by Nand Lal (A-2), and then stabbed by Narain Dass (A-1) on abdomen – Both were convicted of offences under Sections 323, 324 and 506/34 I.P.C. by Trial Court- Appeal dismissed by Additional Sessions Judge - Revision against- Held- Statement of complainant was corroborated from medical evidence as well as from his blood stained clothes- Weapon of offence was recovered from Narain Dass (A-1) during his interrogation - Other injured witness also testified allegations against accused- Conviction proper- Revision dismissed.

Title: Narain Dass & Anr. Vs. State of H.P. Page-488

Industrial Disputes Act, 1947- Section 25-H- Termination/retrenchment of services of petitioner- Department engaged one 'M' against that vacancy without offering an opportunity to petitioner to re-join his duties- However, reference to Labour Court simply involved issue as to termination of services of petitioner and not as to validity or otherwise of engagement of 'M' – Held- Labour Court could not have rendered findings beyond reference made to it on engagement of 'M' without offering opportunity to petitioner to re-join his duties - Petition dismissed with liberty to raise dispute afresh in accordance with law.

Title: Ravinder Kumar Vs. Union of India and others. Page-611

Interpretation of Contracts- Held- Business contracts must be interpreted in sense they are understood by business world in the usual course of dealings- Intent and objective sought to be sub-served by use of particular terminology in contracts, are relevant.

Title: Mahesh C. Puri Vs. State of Himachal Pradesh Page-631

Interpretation of Statutes- Non-obstante clause - Effect thereof- Held- Non-obstante clause is a legislative devise generally invoked to give an overriding effect to certain provision over contrary legislative stipulations contained either in same or other enactments.

Title: M/s SGI Power Limited Vs. M/s Himachal Wire Ind. Pvt. Ltd. Page-513

'L'

Land Acquisition Act, 1894- Section 30- Land in question acquired by Government for public purpose- Award pronounced by Land Acquisition Collector on 29.7.1972 and compensation paid to person recorded its owner in revenue papers – Agreement to sell in respect of same land, however, stood executed by owner in favour of predecessor-in-interest of plaintiff prior to award of Collector- Plaintiff filing suit and claiming ownership by way of adverse possession over said land – Held- After acquisition of land by Government, plaintiff was not its owner- Remedy for him, if any, is to initiate proceedings under Section 30 of Act.

Title: Mangat Rai Vs. State of H.P. & Ors. Page-386

Land Acquisition Act, 1894- Section 4- Petitioners filed reference petitions for enhancement of compensation- petition dismissed by the Trial Court- **Held**- that for determining the market value of the acquired land, purpose of acquisition is relevant and not nature and classification of the land- Hence, the rate awarded on the basis of classification is incorrect- Further, held that since these appeals have arisen from common award passed by the Collector, so owners are entitled to compensation of acquired land @ Rs. 4,69,955/- per bigha alongwith all consequential benefits – petition disposed of.

Title: Harnam Singh Vs. The Land Acquisition Collector Kol Dam and another Page-171

Limitation Act, 1963- Section 5**- Applicability of -** Policy Guidelines regarding 'Aganwari Worker' – No power is conferred in policy guidelines on Appellate Authority for condoning delay - Held- Appeal cannot be entertained by Appellate Authority filed after expiry of 15 days from date of appointment of a person as an Aganwari Worker – Section 5 of Act has no applicability.

Title: Rekha Devi Vs. State of H.P. and others Page-248

Limitation Act, 1963- Section 5- Condonation of delay- Applicant sought condonation of 2376 days delay in filing appeal against judgment and decree of District Judge – Plea being that whenever she visited her counsel, he told her that matter was pending in Court and only 6 months back from date of filing said application, Counsel informed her that case stood dismissed- Held- With efflux of time, rights accrue upon party and cannot be taken away arbitrarily –Plea of applicant is nothing but a routine excuse usually made in applications for condonation of delay- Application dismissed.

Title: Runa Devi Vs. Singhu Ram and another Page-307

Limitation Act, 1963- Section 5- Condonation of delay in filing appeal against Award dated 20.1.2007 of Claims Tribunal - Award directing insurer to pay and recover- Plea of applicant/insured being that he could not file appeal earlier due to wrong legal advice- On facts, it was found that applicant/insured was a party respondent in claim proceedings before Claims Tribunal as well as in First Original Appeal before High Court filed by Insurer – First Original Appeal was dismissed – Applicant/insured rushed to High Court by way of appeal only when execution was filed by claimant before Claims Tribunal- Held- Applicant was negligent in pursuing his cause- Delay of more than 9 years cannot be condoned- Application dismissed.

Title: Megh Raj Dogra Vs. Sunil Kumar and ors. Page-544

Limitation Act, 1963- Sections 18 and 19- Schedule - Article 18- Extension of period of limitation- Recovery suit can be filed within three years of part payment/date of acknowledgment, if same is made by party within limitation.

Title: M/s Dr. R.K. Puri(registered Firm) and others Vs. M/S Costal Project Pvt. Ltd. and others Page-434

'M'

Micro, Small and Medium Enterprises Development Act, 2006- Section 24- Scope and effect – By virtue of non-obstante clause incorporated in Section 24, provisions of Sections 15 to 23 of said Act shall have an overriding effect over provisions of Arbitration and Conciliation Act, 1996.

Title: M/s SGI Power Limited Vs. M/s Himachal Wire Ind. Pvt. Ltd. Page-513

Micro, Small and Medium Enterprises Development Act, 2006- Sections 18 and 19- **Arbitration and Conciliation Act, 1996 (A & C) Act-** Section 34- Award passed by Arbitrator on reference having been made under Section 18 of Act of 2006- Objections against award by way of Objection Petition under Section 34 of A & C Act– However, objector /petitioner not depositing 75% of award money in Court while filing objection petition in compliance of Section 19 of Act of 2006- Held- Section 24 of Act of 2006 gives Section 19 of said Act an overriding effect over provisions of A & C Act– For non-compliance of mandatory provisions of Section 19 of Act of 2006, Objection Petition is not maintainable.

Title: M/s SGI Power Limited Vs. M/s Himachal Wire Ind. Pvt. Ltd. Page-513

Motor Vehicles Act, 1988- Motor Accident Claims Tribunal- Insurance cover note executed by the company w.e.f. 14.6.2010 at 3:00 P.M. – The ill fated accident occurred on the same day at about 3:50 p.m. – Reiterating the ratio laid down in ***New India Assurance Co. Ltd. Versus Sita Bai (Smt.), (1999) 7 SCC 575***- **Held-** that since the insurance police itself reflected the recital relating to date/time of the commencement of the policy, which admittedly was 14.6.2010 after 3:00 p.m.- Insurance Company was liable to indemnify for the liability, as the accident had took place at 3:00 p.m.- consequently, appeal dismissed and award passed by the learned MACT upheld.

Title: United India Insurance Company Limited Vs. Shani & others Page-70

Motor Vehicles Act, 1988- Motor Accident Claims Tribunal- Insurance Company challenging the findings returned by the Learned MACT- the driver of the offending vehicle was not holding a valid driving licence at the time of the accident, on the ground that the Government of Nagaland who had issued the driving licence vide notification dated 1.8.2014 had directed to surrender all the driving licence(s) issued in booklet form after 30th October, 2009, for enabling the digitization of the data and, for the issuance of smart cards in its plea- **Held-** No- It was imperative for the insurer to have placed on record, the aforesaid notification before the learned Tribunal, moreover, when the same had been tendered into evidence as Ex.R-4 the counsel for the insurer had not even contested its validity or authenticity- The conclusions as arrived by the learned tribunal, thus, held to be correct - consequently, appeal dismissed.

Title: National Insurance Company Limited Vs. Onkar Singh & others Page-63

Motor Vehicles Act, 1988- Section 149 and 166- Insurance Company challenged its liability to indeminify the owner/insured when deceased/driver was not having valid driving licence- **Held-** that in view of judgment of Hon'ble Apex Court in **Mukund Dewangan** versus **Oriental Insurance Company Limited,** (2017) 14 Supreme Court Cases 663 if driver of the vehicle has effective driving licence to ply a light motor vehicle and uses such type of vehicle as transport vehicle, then he has no requirement to obtain separate endorsement to drive transport vehicle- There is no merit in the petition- petition dismissed.

Title: Oriental Insurance Company Ltd. Vs. Ram Kali & ors. Page-169

Motor Vehicles Act, 1988- Section 149(2)(a)(ii) and 166- Claims Tribunal fastening part liability on Insured/owner and absolving insurer on ground that driver was not holding a valid and effective driving licence – Appeal by Insured/owner- On facts, insured never took plea in his pleadings that he had authorized driver to ply vehicle only after examining his driver licence and found it valid – Insured also didn't examine himself in evidence- Driving licence was not produced and placed on record of Tribunal – Held- Onus to prove that driver of offending vehicle was not holding valid and effective driving licence shifts to insurer only when insured pleads and proves basic facts that driver of offending vehicle was authorized by him to drive only after perusing of his driving licence and found it valid at relevant time – Plea of insured declined - Pappu and Ors. v. Vinod Kumar Lamba and Anr", (2018) 3 SCC 208 relied upon.

Title: Suresh Kumar Chopra Vs. Jog Raj and Ors. Page-639

Motor Vehicles Act, 1988- Section 163-A- The learned Motor Accident Claims Tribunal declining relief to the claimants on the ground that the insurer had failed to have the vehicle registered after the expiry of the temporary registration number, which was an infraction of the terms and conditions of the insurance policy- Consequently, even the issues framed not answered by the Learned Tribunals- **Held-** that the insurer seeking permanent registration of the vehicle within one month of the issuance of the temporary registration number, a matter of evidence- adducing evidence in this behalf was imperative and the Learned Tribunals has failed answer the issues framed- The MACT accordingly directed to provide opportunity to the claimants lead evidence in this behalf- Consequently, appeal allowed and matter remanded to back to the Learned Tribunal with the aforesaid directions.

Title: Seema Gajta and others Vs. The National Insurance Company Ltd. Page-151

Motor Vehicles Act, 1988- Section 166- Claim for compensation for personal injuries suffered because of rash driving of tractor by respondent No.2- Application dismissed by Tribunal- Appeal against- On facts, FIR regarding accident was found belatedly filed – Further in criminal case arising out of same accident, claimant feigning ignorance as to cause of accident as well as regarding involvement of offending tractor in it - Held- Claim application rightly dismissed by Tribunal.

Title: Kashmiri Lal Vs. Jitu and another Page-385

Motor Vehicles Act, 1988- Section 166- **Code of Civil Procedure, 1908-** Section 151- Additional Evidence – Insurer filing an application for adducing additional evidence to prove that driving licence of driver was fake – Claims Tribunal dismissing application on ground that such evidence not relevant as insurer cannot avoid its liability qua third parties, even if licence is fake – Petition against- Held- Claims Tribunal pre-judged liability of insurer without adjudication- Effect of judgment of Apex Court, if any, in given case is to be seen at final stage- Application for additional evidence found not belated- Order of Claims Tribunal set aside and application of Insurer allowed.

Title: ICICI Lombard General Insurance Company Ltd. Vs. Pammi Devi and others Page-599

Motor Vehicles Act, 1988- Section 166- Compensation under conventional heads – Entitlement - Principles laid in National Insurance Company Limited v. Pranay Sethi and Ors., AIR 2017 SC 5157 relied upon – Since, compensation under conventional heads was on higher side vis-à-vis Prnay Sethi case- Award of Tribunal modified in appeal.

Title: Shriram General insurance Company Limited Vs. Anita Kumari and others Page-349

Motor Vehicles Act, 1988- Section 166- Contributory negligence- Deceased riding on motorcycle was found negligent in driving and also having contributed in occurrence of accident- Tribunal reducing compensation by 30% - In appeal, compensation further reduced by 50% by High Court.
Title: Suresh Kumar Chopra Vs. Jog Raj and Ors. Page-639

Motor Vehicles Act, 1988- Section 166- Grant of compensation- Tribunal awarded Rs.47,626/- as compensation for personal injuries suffered by claimant in motor accident- Appeal against for enhancement – Claimant claiming loss of income by alleging that she was running a tailoring shop at Chandigarh and earning Rs.20,000/- per month- No evidence adduced in that regard – Held – Tribunal was justified in not granting any compensation towards loss of income- However, compensation for pain and suffering enhanced to Rs.20,000/- in view of injuries sustained by her- Appeal partly allowed.
Title: Nidhi Vs. The Punjab Roadways "PUNBUS" Roop Nagar and others Page-552

Motor Vehicles Act, 1988- Section 166- Monthly income of the deceased was Rs. 18,141/- as per the cogent evidence on record- He was indisputably 38 years old at the time of accident- An addition of 50% in actual salary of the deceased towards the future prospect as he was below 40 years- multiplier of 15 shall be used- Thus, Learned Tribunal has rightly determined the compensation for dependency to the tune of Rs.36,73,440/- - The Learned Tribunal, however, fell in error while awarding compensation on account of loss of love and affection, also amounts awarded qua funeral expenses and loss of consortium need to be modified to Rs.15,000/- and Rs.40,000/- in spite of Rs.25,000/- and Rs.1 lacs as awarded by the Learned MACT below in view of judgment of Hon'ble Supreme Court in ***National Insurance Company Limited*** *v.* ***Pranay Sethi and Ors.***, **AIR 2017 Supreme Court 5157** – there is no thumb rule that interest cannot be granted @ 8% as awarded by the learned Tribunal, however, interest is reduced to 7.5% per annum from the date of filing of the petition till the realization of the whole amount in the circumstances of the present case- Claimants are, thus, entitled to Rs.37,68,440/- as compensation.
Title: United India Insurance Company Limited Vs. Sudarshana Devi and Ors.
Page-153

Motor Vehicles Act, 1988- Section 166- Tribunal saddling insurer with liability of Rs.46,77,000/- payable with interest- Insurer filing appeal and contending that compensation was wrongly assessed towards loss of future income and also, payment under conventional heads was on higher side- Held- On facts, Tribunal was right in giving 30% increase on established income towards loss of future income and in applying multiplier of 14 since deceased was 45 years old and in permanent employment.
Title: Shriram General insurance Company Limited Vs. Anita Kumari and others
Page-349

Motor Vehicles Act, 1988- Section 173- Motor Accident Claims Tribunal- Appeal filed by the insurer on the ground that deceased was a gratuitous passenger- **Held-** on facts nothing was proved on record as to how the deceased was a gratuitous passenger, he was not found to be the owner of the vehicle as alleged by the Insurance Company, on the contrary the evidence on record was that the deceased was travelling with his goods in the ill-fated vehicle – on quantum the award was held to be not excessive as deceased was only 16 years of age- Consequently, appeal dismissed.
Title: New India Assurance Company Vs. Seema Devi Page-81

'N'

N.D.P.S. Act, 1985- Section 20- Accused apprehended by the police party on the basis of suspicion of carrying contraband- His bag was searched without associating any independent witnesses- Charas weighing 800 grams was recovered- **Held-** that non-association of independent witness is not fatal in every case, evidence of the official witnesses can be believed- No honest effort was, however, made to find independent witness in the present case – the same is fatal for the prosecution case specially when there are contradictions in the versions of the official witnesses- non-production of seals by official witnesses with which contraband was sealed and re-sealed has also significant bearing on the fate of the prosecution case, especially in view of non-association of independent witnesses- Further held- that presumption of culpable mental state as contemplated in Section 35 of the N.D.P.S. Act shall come into effect only, once prosecution had successfully proved the recovery of contraband from the possession of the accused beyond reasonable doubt- no case for interference in the judgment of acquittal recorded by the Trial Court is made out- Appeal is accordingly dismissed.
Title: State of Himachal Pradesh Vs. Tharban Lal (D.B.) Page-200

N.D.P.S. Act, 1985- Section 20- Accused persons were convicted by the Learned Trial Court as they were found carrying 1.500 grams charas in the vehicle during the night in the routine checking of the vehicle- Independent witnesses were not associated by the prosecution- **Held-** that non-association of independent witness is not fatal to the prosecution case- obligation to take public witness is not absolute- it may not be possible to find independent witness at odd hours of night on highway in the chance recovery- the learned Trial Court properly appreciated the evidence and rightly convicted the accused persons- no merits in the appeal- appeal dismissed.
Title: Rahul Kumar Vs. The State of H.P. (D.B.) Page-197

N.D.P.S. Act, 1985- Section 50- Compliance thereof- Police party while on routine patrol spotting accused and searching his body- A packet containing 950 grams of 'charas' was found tucked inside his clothes- Held- Not being a case based on prior information, Section 50 of Act is not attracted.
Title: Nurdh Vs. State of Himachal Pradesh Page-416

N.D.P.S. Act, 1985- Sections 2(iii)(a) and 20- Recovery of 'charas'- Insignificant variation (14 grams) in weight of contraband as recorded by Investigating Officer in recovery memo vis-à-vis weight mentioned in FSL report – Held - not fatal – Variation may be because of difference in types of instruments used for weighment of contraband.
Title: Nurdh Vs. State of Himachal Pradesh Page-416

Negotiable Instruments Act, 1881- Section 138- **Code of Criminal Procedure, 1973-** Section 378(3)- Dismissal of complaint by trial Court- Leave to file appeal – Grant of – Complainant/financer alleging that cheque was issued by accused to discharge vehicle loan due till date of issuance – However, complaint was dismissed by trial court- On facts, complainant failed to show that amount in question was due on date of issuance of cheque – Accused also proving settlement deed between them and financer vide which various vehicle loans including loan in question, were settled – Held- complainant/financer failed in proving that cheque was issued in its favour to discharge loan- Complaint was rightly dismissed by trial Court- Leave declined.
Title: M/s. Mahindra & Mahindra Financial Services Limited Vs. Butta Singh & another
Page- 658

Negotiable Instruments Act, 1881- Sections 138 and 139- Accused got financed truck from complainant- Also issued cheques in favour of Financer - On dishonour of cheque, financer filing

complaint under Section 138 of Act - Trial court acquitted accused by holding that cheque was given as 'security'- Appeal against- On facts, vehicle found to have been repossessed by Financer and at that time, accused had demanded his cheques back- Financer not producing any record regarding amount due to it from accused despite claim of availability of such record with it- Held- Adverse inference is liable to drawn against financer - Cheque in question not proved to have been issued to discharge 'debt' or 'any other liability'- Acquittal upheld.

Title: New Jagdambay Finance Corporation Vs. Man Singh Page-492

'P'

Punjab Excise Act, 1914 as Applicable to State of H.P.- Section 61(i)(a)- Alleged recovery of 108 bottles of IMFL in nine cartons from vehicle occupied by accused without permit - Police took samples only from four bottles - Trial Court acquitted accused of said offence- Appeal against- On facts, statements of witnesses were contradictory to recitals made in recovery memo- Assuming recovery of four bottles to be from accused still they can be said to be possessing two bottles each, which is legally permissible to carry without permit – No charge is made out- Appeal dismissed.

Title: State of H.P. Vs. Sandeep Thakur & another Page-623

'R'

Registration Act, 1908- Sections 17 and 49- Plaintiff setting up title in abadi-deh land on basis of an unregistered exchange deed purported to have been executed in his favour in lieu of a share in ancestral house- Defendant denying exchange deed- Trial Court dismissed suit - In Appeal, District Judge decreed suit by setting aside judgment and decree of Trial Court – Regular Second Appeal - Held- An unregistered document which is mandatorily required to be registered under Section 17 of Act does not convey any title- Exchange deed purportedly created title in immovable property valuing more than Rs.100/- and required registration under Act- Being unregistered document, it could not have been looked in evidence by Appellate Court – Appeal allowed – Judgment and decree of District Judge reversed.

Title: Rattan Chand Vs. Piar Singh Page-284

'S'

Specific Relief Act, 1963- Section 34- Plaintiff filing suit for declaration that defendant 'B' was wife of 'G' and had one daughter 'K' from him – Thus, defendant not being widow of 'P', not entitled to succeed him – Also alleging that revenue entries showing 'B' as co-sharer in suit land as widow of 'P' are wrong- Further claiming that 'P' died issueless and his estate devolved upon his mother Sainu Devi ('S') – Plaintiff claiming succession to estate of 'S' on basis of Will dated 21.12.1987- Defendant however claiming succession as widow of 'P' – Suit decreed by Trial Court- Appeal of defendant, however, allowed by District Judge and suit dismissed- Regular Second Appeal- On facts, defendant clearly admitted her marriage with 'G' and birth of daughter 'K' from his loins in pleadings – But denying those very facts in evidence- In parivar register of 'G', 'B' is recorded as his wife and 'K' as daughter - In parivar register of 'P' no entry of wife found recorded – Mere fact that 'B' recorded as wife of 'P' in voter list does not prove her to be wife of 'P'- Appeal allowed – Judgment and decree of District Judge set aside and that of trial court restored.

Title: Besaru alias Balsaru Vs. Bhago Devi Page-308

Specific Relief Act, 1963- Section 34- Suit for declaration – **Himachal Pradesh Nautor Land Rules, 1968**- Rules 24 and 25- Land in suit granted to plaintiff by State as nautor on 21.5.1977 with rider that grantee was not competent to sell it for fifteen years- Plaintiff contending that on complaint of defendants No.2 and 3, Deputy Commissioner cancelled grant on 21.4.1994 after seventeen years without holding inquiry nor heard vendees, defendants No.4 and 5 – Plaintiff challenging order of cancellation of grant- Contesting defendants resisted suit on ground that period of fifteen years was enhanced to twenty years and grant was rightly cancelled- Vendees raised plea of bona fide purchasers – Suit dismissed by trial court- Plaintiff and vendees filing

appeal, which were also dismissed by Appellate Court- Regular Second Appeal – Appellant contending that DC not being 'commissioner' was not competent to cancel grant- Held - In view of Rules 24 and 25 of H.P. Nautor Land Rules Deputy Commissioner had jurisdiction to recall/cancel grant – Statutory provisions duly complied with before order of cancellation of grant- Suit rightly dismissed- Judgments and decrees of lower courts upheld.

Title: Arshad Ahmed (since deceased) through his legal heirs Vs. State of H.P. & others Page-590

Specific Relief Act, 1963- Section 34- Suit for declaration – Plaintiffs claiming that their father 'Nanku' was tenant qua share of 'Ugnu' in suit land and after death of 'Nanku' they inherited tenancy – Also alleging of their having become owner of share of 'Ugnu' by operation of law and in alternative claiming ownership by way of adverse possession qua share of 'Ugnu'- Plaintiffs further assailing partition orders dated 28.7.1974 and 8.1.1974 of A.C. 1st Grade obtained by defendants on basis of revenue entries existing in their favour - Defendants contested suit by pleading that Ugnu died issueless and her estate was inherited jointly by 'Nanku' and 'Devi Ram' their father- Trial court decreeing suit – Appellate court allowed appeal and as consequence dismissed suit- Regular Second Appeal – Held - Suit of plaintiffs basically for claim of ownership by way of adverse possession, which plea can be raised in defence only – Further Held- In absence of pleading, no declaration can be given that after death of Ugnu which took place in 1955-56, tenancy of 'Nanku' and thereafter of plaintiffs, is still continuing- Regular Second Appeal dismissed.

Title: Sant Ram & Ors Vs. Jangan Nath (deleted on 2.2.2013) & Ors. Page-616

Specific Relief Act, **1963**- Section 34- Suit for declaration and injunction- Grant of prohibitory Injunction – Plaintiff was found only having transitory abode in 'Kutiya' since 1971- Kuteshwar Mela Committee annually holding fair on Baishakhi on said land – And also performing 'puja' inside kutiya but on that day- Plaintiff's possession over 'Kutiya' established - Suit partly decreed restraining defendants from refusing plaintiff of maintaining his transitory abode in 'kutiya'.

Title: Swami Shayam Bharti Vs. General Public and others Page-402

Specific Relief Act, 1963- Section 34- Suit for declaration and injunction- Plaintiff claiming ownership and possession over disputed land- And also challenging gift deed purportedly executed by her on grounds of fraud and misrepresentation – Defendant denied allegations and claimed her own possession pursuant to gift deed- Suit as well as appeal of plaintiff dismissed by lower courts - Regular Second Appeal- On facts defendant was brought up since childhood by plaintiff and her husband, plaintiff got defendant married and she was residing with defendant of and on after death of her husband - Plaintiff also executing will of entire property in favour of defendant - No evidence on record qua allegations of fraud and misrepresentation- Held- Suit as well as appeal were rightly dismissed by lower courts- Regular Second Appeal also dismissed.

Title: Roshani Devi Vs. Kanta Devi Page-653

Specific Relief Act, 1963- Section 34- Suit for declaration and injunction- Plaintiff claiming suit land in joint ownership and possession with defendant and alleging revenue entries as wrong – Also seeking permanent injunction against dispossession from joint possession- Defendant denying plaintiff's case- Suit decreed by trial court- Appeal of defendant dismissed by First Appellate Court- Regular Second Appeal – On facts, plaintiff found to have admitted in writing that suit land was in exclusive possession of defendant and he (plaintiff) never cultivated it- Authenticity of this written admission not disputed – Held- Lower courts failed in appreciating this piece of evidence correctly- Plaintiff's joint possession not proved - Plaintiff not entitled for decree of declaration and injunction- Regular Second Appeal allowed- Judgments and decrees of lower courts set aside- Suit dismissed.

Title: Rupa alias Balia (since deceased) through is legal heirs Vs. Mansha Rama Page-612

Specific Relief Act, 1963- Section 34- Suit for declaration and injunction- Hindu Law- Ancestral Property- Plaintiff, son from first wife challenging alienation of land made by father (D1) by way of gift in favour of defendant No.2, second wife of D1 on ground of suit land being ancestral in hands of father qua him- Defendants taking plea that suit land was self acquired property of D1- Trial court dismissed suit- In appeal, First Appellate Court partly allowed appeal and decreed suit qua land recorded as abadi deh by holding it to be ancestral in hands of D1 – Regular Second Appeal by defendants- As well as cross-objections by plaintiff – On facts, D1 found to have acquired property except abadi deh by way of Will dated 25.9.1972 from his own father 'J' – No one ever challenged Will of 'J' on ground of property being ancestral in his hands – However, abadi deh land found to have come to 'J' from his grand-father, so held to be ancestral- Gift of suit land except abadi deh found valid – Appeal as well as cross-objections dismissed.

Title: Suraksha & another Vs. Adarsh Kumar Page-508

Specific Relief Act, **1963**- Section 34- Suit for declaration and injunction- Suit property owned by deceased under gift deed- Plaintiff claiming succession to his estate as his disciple (Shishaya) - Not pleading to which Hindu sect deceased belonged or what rituals were performed when plaintiff was made disciple by him- Held- No declaratory decree qua plaintiff's ownership with respect to suit property can be given.

Title: Swami Shayam Bharti Vs. General Public and others Page-402

Specific Relief Act, 1963- Section 34- Suit for declaration- In previous litigation, plaintiff 'P' and her daughter 'N' challenged Will dated 27.2.1980 executed by Dhari, husband of plaintiff in favour of defendants – Previous suit decreed by trial court and appeal of defendants also dismissed by First Appellate Court- In Regular Second Appeal filed by defendants, compromise decree passed by High Court on 6.11.1990 pursuant to compromise of parties - Thereafter, plaintiff filing fresh suit and challenging compromise decree dated 6.11.1990 of High Court on grounds of fraud and misrepresentation – Plea of plaintiff being that during pendency of second appeal before High Court, defendant No.1 brought her to Mandi and got executed certain papers on pretext of withdrawing second appeal then pending before High court – Further, she never instructed her counsel to compromise in appeal- Suit dismissed by trial court and her appeal by the First Appellate Court – Regular Second Appeal against - On facts, 'N' had accompanied 'P' to Mandi when requisite papers were prepared for compromise – Yet she didn't ask 'P' not to sign them – 'P' had also come to Shimla and met her counsel – Suit admittedly was filed by 'P' at instance of 'N'- Held – plea of fraud and misrepresentation while effecting compromise not established – Regular Second Appeal dismissed- Judgments and decrees of lower courts upheld.

Title: Parma Nand and Anr. Vs. Prem Chand & others Page-392

Specific Relief Act, 1963- Section 34- Suit for declaration- Plaintiff claiming ownership in land to extent of 1/3rd share on basis of Will dated 16.12.1976 executed by her husband in her favour as well as in favour of his two sons from first wife- Also disputing unregistered Will dated 17.11.1991 purportedly executed by her husband in favour of two sons only to her exclusion and mutations attested thereon- Trial Court setting aside both Wills – However, suit decreed granting ownership to plaintiff by way of natural succession – Plaintiff not filing any appeal against findings returned qua Will dated 16.12.1976 – Defendants appeal dismissed by District Judge- Regular Second Appeal by defendants before High Court- On facts, unregistered Will relied upon by defendants purportedly executed by testator just three days before death – Defendants not producing this unregistered Will before revenue authority for mutation – Rather, producing earlier registered Will dated 16.12.1976, which was in favour of plaintiff as well as defendants - No reason mentioned in unregistered Will dated 17.11.1991 for cancelling earlier registered Will- Plaintiff found residing with testator till his death and served him – No explanation in later Will as why she was excluded from inheritance- Held- Execution of later unregistered Will dated

17.11.1991 is surrounded by mystery- Appeal dismissed- Judgments and decrees of lower courts upheld.

Title: Bhupinder Singh Vs. Gola Devi & Ors. Page-278

Specific Relief Act, 1963- Section 34- Suit for declaration, possession and injunction- Plaintiff claiming succession to estate of deceased by inheritance - Also alleging that Will dated 2.4.1989 set up by defendant is forged and fabricated – Moreover, deceased was 'Bhatt Gaddi' and agriculturist by profession – She was governed by Kangra custom in matter of alienation of property, which prohibited bequeath of suit land – Defendant claiming succession to her estate on basis of Will as her adopted daughter- Also pleading that she continued to live with deceased, even after her marriage and cultivated suit land – Trial court dismissed suit – Appeal also dismissed by First Appellate Court- Regular Second Appeal – Thumb mark of testatrix on Will found smudged and not proved to be of testatrix – Report of expert, Questioned documents also not clear- Mere fact of registration of Will by Sub Registrar after death of testatrix at instance of legatee does not prove due execution of Will by deceased – Regular Second Appeal allowed – Judgments and decrees of lower courts set aside- Suit decreed.

Title: Roshan Lal (since deceased) through his legal representatives and others Vs. Salochana Devi Page-495

Specific Relief Act, 1963- Sections 6 and 37- Suit for injunction and possession- Plaintiff seeking decree of permanent prohibitory injunction on allegation of interference in his possession- Also praying for possession of part of suit land specifically shown in site plan allegedly encroached by defendants- However, defendants claiming adverse possession on such land, since time of ancestors – Trial court decreeing suit for injunction as well as possession by removal of superstructures – Additional District Judge dismissing appeal of defendants – Regular Second Appeal against – Defendants entries qua possession over part of land came to be recorded in revenue records for first time during settlement on orders of Naib Tehsildar (Settlement) – Settlement took place in 1988-89 – Suit filed in 1993- Copy of order of Naib Tehsildar (Settlement) not produced in evidence – Held- Plea of adverse possession not proved- Regular Second Appeal dismissed- Judgments and decrees of lower courts upheld.

Title: Jaswant Singh & Others Vs. Iqbal Singh Page-324

Specific Relief Act, 1963- Sections 34 and 38- Plaintiffs alleged that defendant No.2 in connivance with defendantNo.1 executed the sale deed of the land of the plaintiff playing fraud upon them by incorporating unauthorized term having power of executing sale in the power of attorney- **Held-** that in case of fraud, undue influence or coercion the pleadings must disclose full particulars of the same- general allegations are insufficient for making the Court to take notice of such averment in the pleadings- Further held that when there is concurrent findings of the fact and the law of the two courts below, such findings cannot be interfered with unless same are found to be perverse- no merit in the petition and same is dismissed.

Title: Kanta Devi and Ors. Vs. Manju and Ors. Page-190

State Financial Corporation Act, 1951- Section 29(4)- Plaintiff company taking over assets of M/s RKB Herbals and reselling them to defendant No.1 for Rs.96 lacs- Defendants No.2 to 4 stood guarantors of defendant No.1 – Defendants executed agreement with plaintiff and agreed to pay sale price with interest in installments – On failure of defendants, plaintiff-company filing suit for recovery in High Court - Defendants contending that assets of M/s RKB Herbals constituted 'immovable property' and could be sold to D-1 through registered instrument only - Being so, suit for recovery not maintainable- Held- In agreement executed interse parties, defendants specifically agreed that amount in question be treated as 'loan' and further agreed to pay it in installments – Defendants also agreed that their liability would be continuing one till payment- They also paid some installments towards agreed amount – Therefore, it was loan agreement and plaintiff entitled to recover amount by way of recovery suit.

Title: H.P.S.I.D.C. Ltd. Vs. M/s Kanol Herbals (P) Ltd & Ors. Page-250

Street Vendor (Protection of Livelihood and Regulation of Street Vending) Act, 2014- Section 3 and 22(2)- Street Vending Committees on basis of executive assessment are to categorize vendors and issue certificates for street vending in vending zones so determined by local authority – Not anyone and everyone has a right to hawk- Only licence holders can vend by hawking that too in vending zone subject to conditions stipulated in licence.

Title: Hari Ram Vs. State of H.P. & others (D.B.) Page-456

Suit for recovery- Plaintiff supplied plants and seeds on quotations called by defendants – In suit for recovery, one of defendant i.e. D-3 admitting calling of quotations and supply of goods by plaintiff- Remaining defendants (D-1 and D-2) however, contending that D-3 had no authority to call quotations – Suit decreed by trial court- Appeal of defendants dismissed by Additional District Judge- Second Appeal – Held- Findings of fact recorded by trial court are borne out from evidence on record – Defendants had released part amount to plaintiff – No explanation from side of defendants No.1 and 2 as how part money was released, if they had not asked for supply of goods- Regular Second Appeal dismissed.

Title: State of Himachal Pradesh and another Vs. Mohinder Singh and another

Page-357

'T'

Torts- Libel – Grant of damages – Defendant filing FIR with police that plaintiff was misusing government vehicle for personal use and transporting sand in it – Police investigated case and presented cancellation report- Defendant not shown to have filed any objection to final report of police- In written statement also, he pleaded that investigation was not properly conducted and complaint in fact, was true- Held- Investigation by police resulted in publicity of imputations made by defendant- Allegations being false and contrived, diminished esteem and reputation of plaintiff- District Judge was justified in allowing plaintiff's appeal and decreeing his suit for damages- Regular Second Appeal of defendant dismissed.

Title: Anant Ram Sharma Vs. Ramesh Singh Page-472

Transfer of Property Act, 1882- Section 106- Termination of tenancy- Plaintiff's suit for possession of a shop by ejectment of defendants decreed by Trial Court by holding that tenancy stood validly terminated – Appeal of defendants dismissed by Additional District Judge - Regular Second Appeal – On facts, disputed shop was found built over government land – Proceedings under Section 163 of H.P. Land Revenue Act were initiated and eviction order was passed against defendants – Held- Plaintiff not being owner of land over which disputed shop was built upon, not entitled for its possession- Appeal allowed and decrees of Lower Courts set aside.

Title: Sunil Kumar & Ors. Vs. Jhomphi Ram Page-626

'W'

Workmen Compensation Act, 1923- Section 4-A(3)- Commissioner awarding compensation with interest @ 12% per annum from 19.6.2004, i.e. from period after one month of accident – Insurer in appeal and challenging payment of interest – Held- Compensation payable to employee/his legal representatives from employer becomes 'due' on date of accident and not on date of determination of claim by Commissioner - Therefore, interest on compensation is payable from date of accident – Award of commissioner upheld as he granted interest on compensation from period after accident – Appeal dismissed- Principles laid down in Pratap Narain Singh Deo v. Shrinivas Sabata and Anr, AIR 1976 SC 222 relied upon. Title: Oriental Insurance Company Limited Vs. Shanti Devi and others Page-555

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

CWP No. 5445 of 2014 along
with CWP No.7955 of 2014.
Reserved on :03.01.2018.
Decided on: 1st March, 2018.

1. CWP No. 5445 of 2014
Beli Ram Sharma ....Petitioner.
Versus
High Court of H.P. ....Respondent.
2. CWP No. 7955 of 2014.
Tara Devi ....Petitioner.
Versus
High Court of H.P. ....Respondent.

Constitution of India, 1950- Article 226 and 227- Civil Writ Petition- Service Law- Penalty of reduction to a lower stage for a period of two years without cumulative effect, without adversely affecting the pension of the petitioner ordered by the Disciplinary Authority- **Held-** That in case a statutory representations and submissions made to the Disciplinary Authority are rejected and the same is duly affirmed by the material placed on record, the courts cannot interfere with the findings recorded by the Disciplinary Authority, moreso, when the Disciplinary Authority has recorded the detailed reasons in forming a conclusion contrary to the one drawn by the Inquiry Officer. (Para-5 to 8)

Constitution of India, 1950- Article 226 and 227- Civil Writ Petition- Service Law- Rule 15(4) of the CCS & CCA Rules does not enjoin upon the disciplinary authority to given an opportunity of personal hearing to the delinquent. (Para-9)

Cases referred:
Maharastra State Board of Secondary and Higher Secondary Education vs. K.S. Gandhi & Others, (1991)2 SCC 716
Lalit Popli vs. Canara Bank and others, (2003) 3 SCC 583

For the Petitioner(s): Mr. Subhash Sharma, Advocate, in both petitions.
For the Respondent(s): Ms. Jyotsana Rewal Dua, Sr. Advocate with Ms. Charu Bhatnagar, Advocate.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge.

Since, the incident in sequel whereto articles of charges were formulated against petitioners Beli Ram Sharma and Tara Devi, is common, to both the delinquents, hence, both the aforementioned writ petitions are enjoined to be disposed of, by a common verdict.

2. Through CWP No. 5445 of 2014, petitioner Beli Ram Sharma prays for affording to him, the hereinafter extracted reliefs:-

> **"(i) Ordering penalty of reduction to a lower stage in the time scale of Rs.10300-34800-3800 GP by one stage for a period of two years without cumulative effect without adversely affecting the pension of the petitioner may be quashed and set aside;**

(ii) Writ in the nature of mandamus may be issued, thereby directing the respondent High Court to grant full pay and allowances admissible to the petitioner during the period of his suspension.

(iii) Writ in the nature of mandamus may be issued, thereby directing the respondent High Court to post the petitioner his parent department, i.e. respondent High Court.

(iv) Writ in the nature of certiorari may kindly be issued thereby quashing and setting the rejection order dated 23.07.2013 on the review petition contained in Annexure P-19.

(v) Writ in the nature of mandamus may be issued, thereby directing the respondent High Court to release the incremental benefits due and admissible to the petitioner with consequential benefits with effect from the date of suspension dated 1.10.2011 Annexure P-12.

3. Through CWP No. 7955 of 2014, petitioner Tara Devi prays for affording to her, the hereinafter extracted reliefs:-

"(i) Ordering penalty of reduction to a lower stage in the time scale of Rs.4900-10680/- 1300 GP by one stage for a period of two years without cumulative effect without adversely affecting the pension of the petitioner may be quashed and set aside;

(ii) Writ in the nature of mandamus may be issued, thereby directing the respondent High Court to grant full pay and allowances admissible to the petitioner during the period of his suspension.

(iii) Writ in the nature of certiorari may kindly be issued thereby quashing and setting the rejection order dated 23.07.2013 on the review petition contained in Annexure P-15.

(iv) Writ in the nature of mandamus may be issued, thereby directing the respondent High Court to release the incremental benefits due and admissible to the petitioner with consequential benefits with effect from the date of suspension dated 1.10.2011.

4. In pursuance to a complaint received against the petitioners, a preliminary inquiry was held against them, in course whereof, on discernment of the material appended therewith, it was concluded that the writ petitioners were enjoined to be subjected to a regular inquiry.,whereafter, the following Article of Charges were framed against petitioner Tara Devi:-

"**ARCTICLE-I**

That on 13.09.2011 Smt. Tara Devi, Peon after marking her present in the attendance register in Rules & Inspection Branch went to the gate of the High Court. While she was standing near the gate at about 10.30/11 A.M., she saw a lady namely Smt. Kashmiri Devi (Complainant) accompanied with her brother Sh. Sanjay Kumar entering the High Court gage. Said Smt. Tara Devi immediately interrupted Smt. Kashmiri Devi and her brother and enquired about the purpose of their visit. Upon this, Smt. Kashmiri Devi disclosed about the case of her husband, who was lodged in the jail. Said Smt. Tara Devi assured them that the problem would be solved through Beli Ram Sharma, Judgment Writer, who according to Smt. Tara Devi, is most helpful of poor people. Said Smt. Tara Devi took Smt. Kashmiri Devi and her brother to the Canteen and asked them to sit there till lunch hours. During lunch ours Smt. Tara Devi alongwith Sh. Beli Ram Sharma, Judgement Writer (under suspension appeared in the canteen and had discussions with them. Sh. Beli Ram Sharma assured Smt. Kashmiri Devi and her brother that their work would be done and a fees of minimum of Rs.7000/- would be charged. Smt. Kashmiri Devi agreed to the proposal and handed over Rs.2000/- to Shri Beli Ram Sharma in the

presence of said Smt. Tara Devi, who told them that he (Beli Ram) would meet them in the evening, as he was busy and kept them sitting with Smt. Tara Devi till evening. In the evening Shri Beli Ram met them again and assured that their work would be done. Sh. Beli Ram Sharma asked them to pay the remaining amount by next Friday. Said Smt. Tara Devi, Peon (under suspension) neglected her duties and remained with Smt. Kashmiri Devi and her brother till evening. Thus, said Smt. Tara Devi committed an act of grave mis conduct, un-becoming of a public servant, thereby rendering herself liable for disciplinary action.

Thus, said Smt. Tara Devi has committed an act of grave misconduct as defined under Rule 3(1)(i) to (iii) of the CCS (conduct) Rules 1964.

ARTICLE-II

That on 16.09.2011, Shri Puppinder Kumar, the brother of the complainant came to Hon'ble High Court with Smt. Kashmiri Devi (complainant) to enquire about the status of the case. Smt. Tara Devi alongwith Beli Ram Sharma met Sh. Puppinder Kumar and Smt. Kashmiri Devi (complainant) in the morning of 16.09.2011 when Sh. Beli Ram Sharma again assured them that their problem would be solved and further told that he was busy at that time. At about 12.30 p.m. when said Sh. Puppinder Kumar etc. failed to find any clue of their case, he again contacted Smt. Tara Devi, Peon on phone and asked her to return her documents and Rs.2000/-. Upon this Smt. Tara Devi, Peon started threatening Sh. Puppinder Kumar. Thus, said Smt. Tara Devi committed an act of grave mis-conduct which amount to unbecoming of a public servant and thereby rendered herself liable for disciplinary action.

Thus, said Smt. Tara Devi has committed an act of misconduct as defined under Rule 3(1) (i) to (iii) of the CCS (Conduct) Rules, 1964.

ARTICLE-III

That as per call-details obtained from the mobile companies, it has been revealed that Smt. Tara Devi had made telephonic conversation with the complainant (Smt. Kashmiri Devi), her brother (Puppinder Kumar) on 13.09.2011. Said Smt. Tara Devi and Shri Beli Ram Sharma had also made frequent telephonic conversation with each other and also Sh. Rupinder Singh, Advocate not only on 13.09.2011 but even prior to that date and subsequently also, which suggests that Sh. Beli Ram Sharma and Smt. Tara Devi, Peon were in hand and glove in sponsoring the litigants to a particular Advocate and had indulged in such activities as are not becoming of a Court Servant.

Thus, said Smt. Tara Devi has committed an act of misconduct as defined under Rule 3(1) (I) to (iii) of the CCS (Conduct) Rules, 1964.

ARTCILE-IV

That on 21.09.2011 Smt. Tara Devi, Peon along with Shri Beli Ram Sharam tried to influence Smt. Kashmiri Devi (Complainant) and her brother Sh. Puppinder Kumar and made them to write a false application for withdrawal of complaint made by Smt. Kashmiri Devi. After writing such application Shri Beli Ram Sharma accompanied by Smt. Tara Devi took the complainant etc. to the chambers of Hon'ble the Chief Justice without obtaining any permission whatsoever to see His Lordship. Thus, said Smt. Tara Devi committed an act of grave mis-conduct, un-becoming of a public servant, thereby rendering herself liable for disciplinary action.

Thus, said Smt. Tara Devi has committed an act of misconduct as defined under Rule 3(1) (I) to (iii) of the CCS (Conduct) Rules, 1964."

The following Articles of charges were framed against petitioner Beli Ram Sharma:-

"**ARCTICLE-I**

That on 13.09.2011 Shri Beli Ram Sharma, while functioning as Judgmeent Writer in the High Court Registry met one Smt. Kashmiri Devi (complainant) who was accompanied by her brother Sh. Sanjay Kumar and had come to Hon'ble High Court in connection with some case of her husband. The complainant and her brother were, infact, introduced to said Shri Beli Ram Sharma by Smt. Tara Devi, Peon (under suspension). Said Shri Beli Ram Sharma met the complainant and her brother during lunch hours in the canteen when Smt. Tara Devi was also accompanying them. Said Shri Beli Ram told them that their problem would be solved and that a minimum fee of Rs.7000/- shall have to be paid by the complainant. The complainant agreed to the proposal and handed over Rs.2000/- to Sh. Beli Ram Sharma in the presence of Smt. Tara Devi, Peon (under suspension) and also gave certain papers relating to the said case. Said Shri Beli Ram Sharma asked the complainant that the balance amount be paid by the next Friday. Said Shri Beli Ram Sharma thereafter contacted Shri Rupinder Singh, Advocate. The petition on behalf of the complainant was prepared and typed in the evening of 13.9.2011 at the residence of Sh. Beli Ram Sharma at Tutu and filed on 14.09.2011 in the Hon'ble Court through Sh. Rupinder Singh, Advocate. Thus, said Sh. Beli Ram Sharma has committed an act of grave mis-conduct, which amount to un-becoming of a public servant, thereby rendered himself liable for disciplinary action.

Thus, said Sh. Beli Ram, Judgment Writer has committed an act of grave misconduct as defined under Rule 3(1)(i) to (iii) of the CCS (conduct) Rules 1964.

ARTICLE-II

That on 16.09.2011, Smt. Kashmiri Devi (Complainant) accompanied by her brother Sh. Puppinder Kumar came to High Court in order to know the status of the case of her husband. On that day, Sh. Beli Ram Sharma and Smt. Tara Devi met them and assured that their work would be done. However, Shri Beli Ram Sharma, told that he was busy. At about 12.30 p.m., when the complainant could not find any clue of her case, she contacted Smt. Tara Devi, Peon who told the complainant that she was unnecessarily making the things complicated. On the said date the complainant again contacted Smt. Tara Devi on telephone and asked to return the documents and Rs.2000/-, but Smt. Tara Devi stared threatening the complainant. In the evening, Sh. Puppinder Kumar gave a call to Sh. Beli Ram Sharma, who told that they have taken a wrong step and his brother-in-law would not be released from the jail.

Thus, said Sh. Beli Ram Sharma, Judgement Writer (under suspension)has committed an act of misconduct as defined under Rule 3(1) (i) to (iii) of the CCS (Conduct) Rules, 1964.

ARTICLE-III

That as per call-details obtained from the mobile companies, it has been revealed that said Shri Beli Ram Sharma had telephonic conversation with Smt. Kashmiri Dev (complainant) and her brother. Said Shri Beli Ram Sharma and Tara Devi had also made frequent telephonic conversation with each other and also with Sh. Rupinder Singh, Advocate. not only on 13.09.2011 but even prior to that date and subsequently also, which suggests that Sh. Beli Ram Sharma and Smt. Tara Devi, Peon were in hand and glove in sponsoring the litigants to a particular Advocate and had indulged in such activities as are not becoming of a court servant.

Thus, said Shri Beli Ram Sharma, Judgement Writer has committed an act of misconduct as defined under Rule 3(1) (I) to (iii) of the CCS (Conduct) Rules, 1964.

ARTCILE-IV

That on 21.09.2011 Shri Beli Ram Sharma alongwith Smt. Tara Devi, Peon tried to influence Smt. Kashmiri Devi (Complainant) and her brother Sh. Puppinder Kumar and made them to write a false application for withdrawal of complaint made by Smt. Kashmiri Devi. After writing such application Shri Beli Ram Sharma alongiwth Smt. Tara Devi took the complainant etc. to the chambers of Hon'ble the Chief Justice without obtaining any permission whatsoever to see His Lordship. Thus, said Shri Beli Ram Sharma committed an act of grave mis-conduct, un-becoming of a public servant, thereby rendering himself liable for disciplinary action.

Thus, said Shri Beli Ram Sharma, Judgement Writer has committed an act of misconduct as defined under Rule 3(1) (i) to (iii) of the CCS (Conduct) Rules, 1964."

5. The Inquiry Officer, on consideration of the evidence placed before him, made a conclusion, that excepting article of charge No. IV, qua other articles of charges standing not proven against the petitioners. Consequently, the matter was placed before Hon'ble the Chief Justice, given his donning the statutory capacity of Disciplinary Authority, whereupon, his Lordship disconcurred with the report of the Inquiry Officer AND ordered that before a verdict in disaffirmation, of, the report of the Inquiry Officer is rendered, representations and submissions, in consonance with sub rule (2) of Rule 15 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965, be elicited, from each of the writ petitioners, for theirs being placed before the disciplinary authority. The provisions of Rule 15 of the CCS & CCA Rules read as under:-

"15. ACTION ON INQUIRY REPORT:

(1) The disciplinary authority, if it is not itself the inquiring authority may, for reasons to be recorded by it in writing, remit the case to the inquiring authority for further inquiry and report and the inquiring authority shall thereupon proceed to hold the further inquiry according to the provisions of Rule 14, as far as may be.

(2) The disciplinary authority shall forward or cause to be forwarded a copy of the report of the inquiry, if any, held by the disciplinary authority or where the disciplinary authority is not the inquiring authority, a copy of the report of the inquiring authority together with its own tentative reasons for disagreement, if any, with the findings of inquiring authority on any article of charge to the Government servant who shall be required to submit, if he so desires, his written representation or submission to the disciplinary authority within fifteen days, irrespective of whether the report is favourable or not to the Government servant.

(2-A) The disciplinary authority shall consider the representation, if any, submitted by the Government servant and record its findings before proceeding further in the matter as specified in sub-rules (3) and (4).

(3) If the disciplinary authority having regard to its findings on all or any of the articles of charge is of the opinion that any of the penalties specified in clauses (i) to (iv) of rule 11 should be imposed on the Government servant, it shall, notwithstanding anything contained in rule 16, make an order imposing such penalty:

Provided that in every case where it is necessary to consult the Commission, the record of the inquiry shall be forwarded by the disciplinary authority to the Commission for its advice and such advice shall be taken into consideration before making any order imposing any penalty on the Government servant.

(4) ....."

A thorough rummaging, of, the record reveals (i) that the writ petitioners made statutory representations and submissions before the Disciplinary Authority, wherein they concerted to sustain the exculpatory findings recorded by the Inquiry Officer. However, the Disciplinary

Authority rejected the respective representations and submissions, made before it, by each of the writ petitioners, besides on a thorough and incisive scrutiny, of the evidence adduced before the Inquiry Officer, His Lordship, made a conclusion, that the exculpatory findings recorded vis-a-vis each of the writ petitioners, warrant theirs being reversed and upset.

6. The learned counsel appearing for the writ petitioners has contended with vigour, before this Court, that the essence and substance, of, the apposite sub rule (2) of Rule 15 of the CCS & CCA Rules, stands infringed, (i) whereupon severe prejudice has been caused to the writ petitioners, (ii) hence, he makes a submission that the findings rendered by the Disciplinary Authority in disaffirmation vis-a-vis the the one(s) recorded by the Inquiry Officer, warrant interference by this Court, in the exercise of its writ jurisdiction. However, the aforesaid submission is highly misplaced and is also not borne out, from, the material on record. The material on record makes a clear display (i) of the Disciplinary Authority, prior to His Lordship recording ad nauseam detailed findings, in disaffirmation vis-a-vis the exculpatory findings rendered qua each of the writ petitioners, by the Inquiry Officer, his Lordship proceeding to elicit written representation(s) and submission(s), from, each of the writ petitioners, (ii) also it is borne out, on a perusal of the record, of the each of the writ petitioner(s) in pursuance to the elicitation(s) sought from them, theirs making representations and submissions, before the Disciplinary Authority. In sequel with the spirit, of, the mandatory provisions of sub rule (2), of Rule 15 of the CCS & CCA Rules, hence, begetting the strictest compliance, (iii) thereupon, the submission aforesaid addressed before this Court by the learned counsel appearing for the petitioners, warrants rejection.

7. The learned counsel appearing for the petitioners has contended with vigour that the exculpatory findings recorded by the Inquiry Officer, stand anvilled upon (a) proper appreciation of the material on record and (b) findings in disaffirmation thereto, recorded by the Disciplinary Authority being surmisal and conjectural and (c) hence, he contended that the exculpatory findings recorded by the Inquiry Officer, upon the Articles of Charge concerned, framed respectively against the petitioners, warranting vindication, whereas, the findings in disaffirmation thereto, recorded by the Disciplinary Authority warranting reversal.

8. However, the aforesaid submission, is not sustainable, given a close reading of the order recorded, by the Disciplinary Authority, unveiling (a) of the Disciplinary Authority traversing, through, the entire evidence on record, (b) His Lordship also in making an order in disaffirmation, to the order recorded by the Inquiry Officer, rather proceeding to analyse the worth of the written submissions and representations, respectively submitted before him by each of the writ petitioners; (c) the Disciplinary Authority has recorded detailed reasons, in forming conclusions contrary, to the one(s), drawn by the Inquiry Officer; (d) the reasons afforded by the Disciplinary Authority being anvilled upon appreciation of evidence on record. The evidence attracted by the Disciplinary Authority against the writ petitioners AND in proof of the articles of charge, is both germane and relevant, to the relevant articles of charges, respectively framed against the writ petitioners. (e) The findings rendered by the Disciplinary Authority stand anvilled upon a proper appreciation of apposite thereto evidence besides the reasons supporting them are neither surmisal nor conjectural, rather are probably and possibly drawable, thereupon satiation is meted vis-a-vis the principles enshrined by the Hon'ble Apex Court in ***Maharastra State Board of Secondary and Higher Secondary Education vs. K.S. Gandhi & Others,*** reported in ***(1991)2 SCC 716,*** *(i)* qua the standard of proof in domestic/disciplinary proceedings, not, necessitating emanation of proof or eruption of evidence, for ensuring proof of articles of charge concerned, beyond reasonable doubt, (ii) rather the germane evidence, assuring qua, on, anvil of the principle of preponderance of probabilities, an inference being amenable to be probably drawn, of, findings harboured upon an adversarial analysis of evidence vis-a-vis the petitioners, by the Disciplinary Authority, being possibly as well as probably, hence, drawable. (g) Whereupon, with the Hon'ble Apex Court in caste titled as ***Lalit Popli vs. Canara Bank and others,*** reported in ***(2o03) 3 SCC 58***3, mandating, that, the scope of judicial review being impermissible, for, its being extended to reappreciation of evidence, especially for arriving at a conclusion other than the one formed by the Disciplinary Authority, (h) in sequel, with the legal

principle, for the reasons aforestated, mandated in (1991)2 SSC 716, begetting satiation, thereupon, it would be grossly impermissible for this Court, to, in exercise, of, its constitutional jurisdiction, of, judicial review, proceed, to supplant and substitute, the verdict recorded by the Disciplinary Authority. (I) More so, when the view propounded by the Disciplinary Authority is a reasonable and probable view.

9. The learned counsel appearing for the writ petitioners has with vigour contended that prior, to imposition, of, a penalty upon the writ petitioners by the Disciplinary Authority, it was enjoined upon the Disciplinary Authority, to give an opportunity of personal hearing, to the writ petitioners, whereas, with an apposite opportunity of personal hearing being not granted to the writ petitioners, espcially prior to the imposition of penalty vis-a-vis them, thereupon renders the orders impugned, to acquire a stain of vitiation. However, the aforesaid submission is in absolute disconcurrence with the provisions of sub rule (4) to Rule 15 of the CCS & CCA Rules, wherein an explicit mandate, occurs qua prior to the imposition of penalty(ies), upon, the delinquent(s), it being not necessary, for the Disciplinary Authority to give vis-a-vis them, any opportunity, to make representation qua the penalty proposed to be imposed upon them. In sequel, the aforesaid submission is rejected.

10. For the foregoing reasons, there is no merit in the instant petitions which are accordingly dismissed. All pending applications also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE, DHARAM CHAND CHAUDHARY, J.

Roshan Lal (deceased) through his LRs ... Appellants

Versus

Pritam Singh & others ...Respondents

RSA No. 258 of 2012-F and
Cross Objections No. 417 of 2012.
Judgment reserved on : 20.9.2017
Re-heard on : 26.2.2018
Date of Decision : March 1, 2018

Code of Civil Procedure, 1908- Section 100- Regular Second Appeal- Section 20 of the Hindu Succession Act, 1925- Whether the provisions of Hindu Succession Act apply to the agricultural land – **Held** – Yes –Succession Act falls under the scope of entry No.5 of list III i.e. the concurrent list and as such the provisions of Section 20 of the Hindu Succession Act shall apply even on agricultural land- The words 'property' as well as 'interest in Joint Family Property' held to be wide enough to cover agricultural land. (Para-44 to 56 and 61 to 63)

Cases referred:

Baldev Parkash & others vs. Dhian Singh & others, Latest HLJ 2008 (HP) 599
Vaijanath & others vs. Guramma & another, (1999) 1 SCC 292
Jaswant & others vs. Basanti Devi, 1970 P.L.J. 587
Madan Lal & another vs. Braham Dass alias Brahmu & another, 2008 (1) Shim. LC 427
Amar Singh vs. Baldev Singh, AIR 1960 Punj 666 (FB)
Laxmi Debi vs. Surendra Kumar Panda & others, AIR 1957 Orissa 1
Corpus Juris Secundum – Volume 83 (LXIII), Page 769
Munnalal vs. Rajkumar, AIR 1962 SC 1493
Bhuri Bai vs. Champi Bai & another, AIR 1968 Rajasthan 139

Dalip Chand & another vs. Chuhru Ram, AIR 1989 Himachal Pradesh 44
Hari Singh & others vs. Milap Chand, 2000 (1) Shim. L.C. 403
Madhu Kishwar & others vs. State of Bihar & others, (1996) 5 SCC 125
Union of India vs. Harbhajan Singh Dhillon, 1971 (2) SCC 779
Nirmala & others vs. Government of NCT of Delhi & others, 170 (2010) DLT 577 (DB)
Accountant and Secretarial Services Pvt. Ltd. another vs. Union of India & others, (1988) 4 SCC 324
Velamuri Venkata Sivaprasad (dead) by LRs vs. Kothuri Venkateshwarlu (dead) by LRs, AIR 2000 SC 434

For the appellant	:	Mr. Vivek Singh Thakur-II, Advocate, for the appellants/non-objector.
For the respondent	:	Mr. Ajay Sharma and Mr. Kishore Pundir, Advocates, for respondents No. 1 & 6 and also for the Objector.

The following judgment of the Court was delivered:

Justice Sanjay Karol, ACJ.

The difference of opinion between two learned Judges of this Court, sitting singly in separate proceedings, led the matter to be placed before us for answering the following question:

"Whether the provisions of Hindu Succession Act apply to agricultural lands?"

2. In *Baldev Parkash & others vs. Dhian Singh & others,* Latest HLJ 2008 (HP) 599, the view taken is that the provisions of the Hindu Succession Act, 1956 (hereinafter referred to as the 'Succession Act'), are not applicable to agricultural land, whereas, vide judgment dated 14th October, 2015, rendered in this very case (RSA No. 258 of 2012), by relying upon the decision of the apex Court in *Vaijanath & others vs. Guramma & another,* (1999) 1 SCC 292, a contrary view stands taken.

3. The question at best can be answered by examining the Constitutional provisions qua competence of the Central Government to enact the laws, pertaining to "succession" of agricultural land. In fact, legislative competence of the Central Government is the sole question, which arises for consideration in the present appeal.

4. The sale deed dated 14.3.2005 executed by defendant No. 2 in favour of defendant No. 1 is directly in attack by the plaintiff, claiming preferential rights by virtue of Section 22 of the Succession Act. Plaintiff filed a suit challenging the sale deed for the reason that he had a preferential right to acquire the interest transferred in terms of the instrument of sale. The suit came to be decreed, but in the appeal (RSA), defendant No. 1 by taking recourse to the decision already rendered by the learned Single Judge in *Baldev Parkash* (supra), pressed for setting aside the decree on the ground that the Succession Act, being a Central Legislation, would not and does not apply to agricultural land which falls purely within the domain of the State. Unable to persuade himself to agree with the view taken in *Baldev Parkash* (supra), after relying upon the decision rendered by the apex Court in *Vaijanath* (supra), the learned Single Judge referred the matter to the Division Bench by framing the aforesaid question, which we are called upon to answer.

5. We need not to go into the factual matrix of the case, for the issue is purely legal. The moot point is as to whether succession is a transfer or alienation and would include the expression "transfer of property" or not and as to whether succession with respect to agricultural land falls within item No. 5 of List III of the Constitution or not.

6. We now take note of relevant provisions of the Constitution of India (hereinafter referred to as the Constitution).

7. Part XI, Chapter I of the Constitution deals with the legislative relations i.e. distribution of legislative powers. By virtue of Article 245, territorial jurisdiction of the legislative powers of the Parliament and the State Legislatures is delimited and Article 246 distributes the legislative powers subject wise between the Parliament and State Legislatures. Of course, exceptions are carved out under Articles 247, 249, 250, 252 and 253. Articles 245, 246 and 254 read as under:-

> "245. Extent of laws made by Parliament and by the Legislatures of States. – (1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make law for the whole or any part of the State. (2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.
>
> 246. Subject-matter of laws made by Parliament and by the Legislatures of States – (1) Notwithstanding anything in Clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").
>
> (2) Notwithstanding anything in Clause (3), Parliament, and, subject to Clause (1), the Legislature of any State [* * *] also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").
>
> (3) Subject to Clauses (1) and (2), the Legislature of any State [* * *] has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").
>
> (4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included [in a State] notwithstanding that such matter is a matter enumerated in the State list.
>
> … …
>
> 254. Inconsistency between laws made by Parliament and laws made by the Legislatures of States – (1) If any provision of law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of Clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.
>
> (2) Where a law made by the Legislature of State [* * *] with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:
>
> Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State."

8. We may also advert to the historical background of the Constitutional provisions on the issue.

9. Prior to the enforcement of the Constitution, field of legislature of Federal Government and the State Government were governed under the Government of India Act, 1935

(hereinafter referred to as the "1935 Act"). Seventh Schedule, List 2 Provincial List contained subjects for the provincial legislature and List 3 Concurrent Legislative List contained subjects for both federal and provincial legislatures. The relevant entries, under the "1935 Act" are extracted as under:

> "Entry–21 Provincial Legislative List: Land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant, and the collection of rents; transfer, alienation and devolution of agricultural land; land improvement and agricultural loans; colonization; Court of wards; encumbered and attached estates; treasure trove.
>
> Entry–7 Concurrent Legislative List: Wills, intestacy and succession, save as regards agricultural land." [Emphasis supplied]

10. Entries relevant for answering the question, under the Constitution read as under:-

> Seventh Schedule.
>
> List II – State List.
>
> "18. Land, that is to say, right in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization." [Emphasis supplied]
>
> List III – Concurrent List.
>
> …
>
> "5. Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law." [Emphasis supplied]
>
> "6. Transfer of property other than agricultural land; registration of deeds and documents." [Emphasis supplied]
>
> "7.Contracts, including partnership, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land." [Emphasis supplied]

11. Noticeably the legislatures in their wisdom did not retain the expression "save as regards agricultural lands" so contained in Entry No. 21 of the Provincial Legislative List of "1935 Act" in the corresponding entry No. 5 of the Concurrent List under the Constitution.

12. At this juncture, it would be beneficial to take note of Section 22 of the Succession Act, which reads as under:

> "22. Preferential right to acquire property in certain cases. – (1) Where, after the commencement of this Act, an interest in any immoveable property of an intestate, or in any business carried on by him or her, whether solely or in conjunction with others, devolves upon two or more heirs specified in class I of the Schedule, and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred.
>
> (2) The consideration for which any interest in the property of the deceased may be transferred under this section shall, in the absence of any agreement between the parties, be determined by the Court on application being made to it in this behalf, and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of or incident to the application.

(3) If there are two or more heirs specified in class I of the Schedule proposing to acquire any interest under this Section, that heir who offers the highest consideration for the transfer shall be preferred."

[Emphasis supplied]

13. From the statement of object and reasons of the Succession Act, it is evidently clear that special provisions were included for "regulating succession to the property of intestate" of a Hindu.

14. Chapter II of the Succession Act deals with "intestate succession" whereas Chapter III deals with "testamentary succession".

15. Chapter II provides for the manner in which word "property" of an intestate would devolve upon and partitioned amongst the heirs of a person who dies as an intestate.

16. Noticeably though word "property" is not defined but "intestate" stands defined under Chapter I, Section 3(g), which reads as under:

"3. Definitions and interpretation. –

…

(g) "*intestate*" – a person is deemed to die intestate in respect of property of which he or she has not made a testamentary disposition capable of taking effect;

… …"

17. The word "succession" is also not defined under the Succession Act. But from the provisions of Chapter II, it is evidently clear that properties are to devolve upon the surviving heirs and distributed in accordance with the provisions contained therein.

18. We find that learned Single Judge in *Baldev Parkash* (supra), while holding that provisions of the Succession Act would not apply to agricultural land, independently, has not assigned any reason. Simply opinion rendered by the Hon'ble Judges of Punjab & Haryana High Court in *Jaswant & others vs. Basanti Devi,* 1970 P.L.J. 587 (para 8 of the report) stands reproduced.

19. At this point in time, we may observe that the very same learned Judge, while dealing with an identical issue and same provisions, in *Madan Lal & another vs. Braham Dass alias Brahmu & another,* 2008 (1) Shim. LC 427, took the following contradictory view:

"18. The trial Court has dealt with the aspect of the nature of the property as well as the point of legal necessity in detail vide judgment dated 25.8.1989. What has to be seen under Section 22 of the Hindu Succession Act, 1956, is that when an interest in any immovable property of an intestate, devolves upon two or more heirs specified in class 1 of the Schedule, and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred. The plaintiff and Haria are real brother and have inherited as class-1 heirs the suit land in equal shares after the demise of their father in January, 1975. The land in question was not partitioned. The trial Court as well as the appellate Court have correctly appreciated the oral as well as the documentary evidence brought on record by the parties."

20. At this point in time we may note that the learned Single Judge (in RSA No. 258 of 2012), while framing the question for adjudication, has taken note of several decisions rendered by various courts, both in support and against the point canvassed before us. In a tabulated form, the law of succession either applicable or not application to agricultural land is indicated as under:

Not applicable	**Applicable**
Jaswant & others vs. Basanti	*Basavant Gouda vs.*

Devi, 1970 P.L.J. 587	*Channabasawwa & another,* AIR 1971 Mysore 151.
Prema Devi vs. Joint Director of Consolidation, AIR 1970 Allahabad 238.	*Nahar Hirasingh vs. Mst. Dukalhin,* AIR 1974 Madhya Pradesh, 141.
Jeewanram vs. Lichmadevi, AIR 1981 Rajasthan 16.	*Nidhi Swain vs. Khati Dibya,* AIR 1974 Orissa 70.
Baldev Parkash & others vs. Dhian Singh & others, Latest HLJ 2008 (HP) 599	*Venkatalakshmamma vs. Lingamma,* 1984 (2) Kar. L. J. 296.
Subramaniya Gounder & others, vs. Easwara Gounder & others, 2011 (2) Mad. L.J. 467.	*Tukaram Genba Jadhav vs. Laxman Genba Jadhav,* AIR 1994 Bombay, 247.
Anjali Kaul & another vs. Narendra Krishna Zutshi, 2014 (9) RCR (Civil) 2794.	*Vaijanath & others vs. Guramma & another,* (1999) 1 SCC 292

21. Having analyzed the aforesaid decisions, learned Judge found that insofar as High Courts of Punjab and Haryana, Allahabad, Rajasthan, Madras and this Court in *Baldev Parkash* (supra) are concerned, it categorically held provisions of the Succession Act, more particularly Section 22 not applicable to agricultural land in the matter of succession, for being beyond the competence of Parliament to legislate over agricultural lands, which power, legislative in nature, is traced to Entry 5 of List III of Seventh Schedule of the Constitution, dealing only with devolution and not transfer.

22. Whereas, on the other hand, the High Courts of Mysore, Madhya Pradesh, Orissa and Karnataka while disagreeing with such proposition categorically held the provisions of Section 22 of the Act applicable to agricultural lands.

23. In fact, Bombay High Court found no conflict in the judgments rendered by the High Courts of Punjab, Mysore, Allahabad and Rajasthan, and also held the provisions of 1956 applicable to agricultural land, save and except to the extent provided in Section 4(2) of the Act.

24. In *Jaswant* (supra), while answering the question as to whether Section 22 of the Succession Act applies to agricultural land or not, the Court answered in the negative (para-7 of the report). While forming opinion, in para -8 of the report, Court observed that the words "immovable property" used in the said Section would include agricultural land and that "save and except for the purpose of devolution" which the said Section does not provide for otherwise, agricultural land would fall in entry No. 18 of List II.

25. One may only observe that here we are dealing with succession of an immoveable property of an intestate.

26. In our considered view, in the said decision what weighed with the Court, in forming its opinion, was also the decision of Federal Court in re: *Hindu Women's Right to Property Act,* AIR 1941 Federal Court 72, which incidentally was dealing with the provisions under the "1935 Act", wherein succession qua agricultural land was specifically exempted. Hence, law laid down in *Jaswant* (supra) was in a totally different context, not directly dealing with the issue in hand.

27. A two Judge Bench in *Prema Devi* (supra), has clearly held the provisions of the Succession Act not applicable to the agricultural properties governed by the U.P. Zamindari Abolition and Land Reforms Act. In our considered view, correctness of the decision cannot be doubted in view of the saving clause [sub–section (2) of Section 4 of the Succession Act], which

categorically exempted laws provided for the prevention of fragmentation; fixation of ceiling or devolution of tenancy rights in respect of agricultural holdings. The Court was dealing with a case where by virtue of a compromise decree, a lady was sought to be made a *Bhumidar* i.e. tenure holder of another class. It is in this background, Court observed provisions of sub-section 2 of Section 14 of the Succession Act, not to be applicable.

28. One notices that the view taken by the learned Single Judge in *Jeewanram* (supra) is based on a decision rendered in *Jaswant* (supra). Also Court did not account for statutory exceptions so contained under Section 4 of the Succession Act.

29. A Division Bench of High Court of Mysore in *Basavant Gouda* (supra), by applying the doctrine of "Pith and Substance" held the provisions of the Succession Act to be applicable to agricultural land in the following terms:

> "11. Mr. Savanur lastly contended that the Hindu Succession Act itself is not applicable to agricultural lands because entry 18 in List II of the Seventh Schedule of the Constitution, confers power on the State Legislature to make legislation in respect of agricultural lands. Hence Hindu Succession Act passed by the Parliament could not apply to succession to agricultural lands. This argument is merely to be stated for being rejected. Entry 5 of List III of the Seventh Schedule of the Constitution deals with the power to legislate in respect of marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of the Constitution subject to their personal law. It may be noticed here that the corresponding Entry 7 in the Government of India Act, 1935. List III read as follows:
>
> "Wills, intestacy; and succession, save as regards agricultural land."
>
> It is significant that in Entry 5 in the Constitution the words "save as regards agricultural land" have been omitted. The pith and substance of the Hindu Succession Act is to make a law relating to succession and not to deal with agricultural lands as such. That is the reason why the argument of Mr. Savanur requires no further consideration. The provisions of Section 14 of the Hindu Succession Act are matters which come within the ambit of Entry 5 in List III of the Seventh Schedule of the Constitution and their applicability to agricultural lands cannot be excluded. This view of ours finds support in the decision Amar Singh v. Baldev Singh, AIR 1960 Punj 666 (FB) and Shakuntala Devi v. Beni Madhav, AIR 1964 All 165."

30. At this point in time, it be only observed that the Court referred to and relied upon the decision rendered by a Full Bench of Punjab & Haryana High Court in *Amar Singh vs. Baldev Singh,* AIR 1960 Punj 666 (FB), which incidentally was never noticed by the Division Bench in *Jaswant* (supra).

31. A two Judge Bench in *Nidhi Swain* (supra), by relying upon *Basavant Gouda* (supra), held the provisions of the Succession Act applicable to agricultural land. The Court noticed that saving clause so contained in the entry under the "1935 Act" came to be deleted in the corresponding entry under the Constitution.

32. In *Laxmi Debi vs. Surendra Kumar Panda & others,* AIR 1957 Orissa 1, the Court held that:-

> "14. Mr. Jena further contended that the Act, even if applies retrospectively, will not apply to agricultural lands, and for this he relies upon the Federal Court decision reported in Hindu Women's Rights to Property Act, 1937, In the matter of, AIR 1941 PC 72 (K). That was a case which came up for decision by the Federal court on a reference made by His Excellency the Governor-General of India.

> Gwyer C. J., who delivered the judgment of the Court held that the Hindu women's Rights to Property Act of 1937, and the Hindu Women's Rights to property (Amendment) Act of 1938, do not operate to regulate succession to agricultural land in the Governors' Provinces; and do operate to regulate devolution by survivorship of property to other than agricultural lands.
>
> This decision, in view of the changed position in law, no longer holds good. The federal Court decision was based upon the law of legislative competency as it then stood, by the Government of India Act, 1935. In Schedule 7, Government of India Act, 1935, this subject appears in the Concurrent Legislative List (List 3) as item no. 7. Item 7 was in the following terms:
>
> "wills, Intestacy and Succession, save as regards agricultural lands."
>
> Now under the present Constitution of India, the same subject has been dealt with in the Concurrent List (List 3) in Sch.7 as item No. 5. Item No.5 runs as follows:
>
> "Marriage and divorce, infants and minors, Adoption, Wills, Intestacy and Succession, Joint Family and Partition, all matters in respect of which parties in judicial proceedings were, immediately before the commencement of this Constitution, subject to their personal law."
>
> It is clear that the Parliament had omitted the phrase "save as regards agricultural land" from item No. 5 of the Concurrent List in order to have a uniform personal law for Hindus throughout India, and accordingly, it necessitated the enlargement of Entry No. 5. We have no doubt, therefore, that in view of the change in law, the Act will apply to agricultural lands also, and the decision in AIR 1941 PC 72 (K) would no longer hold good."
>
> [Emphasis supplied]

33. A Full Bench of High Court of Madhya Pradesh in *Nahar Hirasingh* (supra) observed that where a tenancy or a land tenure legislation makes a special provision for devolution of the land, that provision would prevail in view of sub-section (2) of Section 4 of the Succession Act otherwise, elsewhere provisions of the Succession Act would prevail.

34. One finds that in *Tukaram Genba Jadhav* (supra), the learned Single Judge, after considering divergent views taken by various courts of the land and considering most of the aforesaid decisions, held that in fact there was no real conflict in view of the fact that decisions came to be rendered either on the basis of position as it existed prior to the enforcement of the Constitution or in view of the saving clause provided under Section 4(2) of the Succession Act.

35. In fact, view taken by the High Court of Bombay in the said decision is not contrary to the one so taken by the Full Bench of Punjab & Haryana High Court in *Amar Singh* (supra). Mere reading of the report reveals that insofar as subject matter of wills, intestacy and succession is concerned, it squarely falls within the exclusive competence of the Central Legislature. Definitely not the State Legislature. The alleged encroachment of entry No. 18 in the State List, if any, is incidental. By applying the doctrine of "Pith and Substance", if the subject legislated upon falls directly and substantially within the scope and ambit of entry in the Concurrent List, question of alleged encroachment in the State List would not arise.

36. The expression "property" of an intestate in Chapter II of the Succession Act, save and except the saving clause in Section 4(2), which also now stands repealed by virtue of the amendment carried out in the year 2005, necessarily has to include "immoveable property" be agricultural land or otherwise. Any tangible property is what is required to be seen.

37. We are in respectful agreement with the view of the matter taken by the learned Single Judge that the expression "property" would cover all kinds of properties, including agricultural land, which view finds support from the decision rendered by the Apex Court in *Vaijanath* (supra). Now, significantly the Apex Court was dealing with the provisions of the Hindu

Women's Rights to Property Act, 1937 which did not define the word 'property' which in fact, is similar to the position with the statute with which we are dealing. Noticeably, laws relating to women came to be enacted not only to mitigate hardship but also to confer certain rights upon women and widows. These are all beneficial legislations and hence have to be interpreted as such.

38. In *Vaijanath* (supra) the Court held that:

> "8. There is no exclusion of agricultural lands from Entry 5 which covers wills, intestacy and succession as also joint family and partition. Although Entry 6 of the Concurrent List refers to transfer of property other than agricultural land, agriculture as well as land including transfer and alienation of agricultural land are placed under Entries 14 and 18 of the State List. Therefore, it is quite apparent that the Legislature of the State of Hyderabad was competent to enact a Legislation which dealt with intestacy and succession relating to Joint Family Property including agricultural land. The language of the Hindu Women's Right to Property Act, 1937 as enacted in the State of Hyderabad is as general as the Original Act. The words 'property' as well as interest in Joint Family Property' are wide enough to cover agricultural lands also. Therefore, on an interpretation of the Hindu Women's Right to Property Act, 1937 as enacted by the State of Hyderabad, the Act covers agricultural lands. As the Federal Court has noted in the above judgment, the Hindu Women's Right to Property Act is a remedial Act seeking to mitigate hardships of a widow regarding inheritance under the Hindu Law prior to the enactment of the 1937 Act; and it ought to receive a beneficial interpretation. The beneficial interpretation in the present contest would clearly cover agricultural lands under the word 'property'. This Act also received the assent of the President under Article 254 (2) and, therefore, it will prevail.
>
> 9. The appellants, however, rely upon a subsequent Act passed by the State of Hyderabad, namely, Hyderabad Hindu Women's Rights to Property (Extension to Agricultural Land) Act, 1954. Section 2 of the said Act provides that "term property' in the Hindu Women's Rights to Property Act as in force in the State of Hyderabad shall include agricultural land." This act received the assent of the President on 15th October, 1954 and was published in the State Gazette dated 22nd of October, 1954. It was submitted that prior to the enactment of the Hyderabad Hindu Women's Right to Property (Extension to Agricultural Lands) Act, 1954, the Hindu Women's Right to Property Act as enacted in 1952 would not apply to agricultural land. The High Court has rightly negatived this contention. A subsequent Act cannot be used to interpret the provisions of an earlier enactment in this fashion. The language of the earlier Act is wide enough to cover agricultural land also. In the entire Hindu Women's Right to Property Act, 1937, there is nothing which would indicate that the Act does not apply to agricultural land. <u>The word 'property' is a general term which covers all kinds of property</u>, including agricultural land. A restricted interpretation was given to the original Hindu Women's Right to Property Act, 1937 enacted by the then Central Legislature, entirely because of the legislative entries in the Government of India Act, 1935, which excluded the legislative competence of the Central Legislature over agricultural lands. Such is not the case in respect of the Hindu Women's Right to Property Act, 1937, as enacted by the State Legislature of the State of Hyderabad. The ratio of the Federal Court judgment, therefore, would not apply. There is, therefore, no substance in the contention that the subsequent Act of 1954 restricted the application of the Hindu Women's Right to Property Act, 1937 brought into force by the earlier Hyderabad Act of 1952. As is pointed out by the High Court, the Act of 1954 was enacted by way of abundant caution, to make sure that the agricultural lands were not considered as excluded from the scope of the Hindu Women's Right to Property Act as enacted in 1952. The second Act is, therefore, clarificatory."

39. The term "succession" is defined as meaning the act of succeeding, or the state of being successive; a following of things consecutively; and, as applied to persons, a series of persons following one another. It is defined more specifically as the act or right of legal or official investment with a predecessor's office, dignity, possessions, or functions; also, the legal or actual order of so succeeding, or that which is or is to be vested or taken. The word "succession" is also applied to lineage or order of descendants, and may be employed to indicate the passing of property, and in a technical sense it denotes the devolution of title to property under the laws of descent and distribution. [Corpus Juris Secundum – Volume 83 (LXIII), Page 769]

40. Ordinary meaning of "succession" is transmission by law or will of man, to one or more persons of the property and the transmissible rights and obligations of the deceased person. That is the sense in which the word "succession" is used in the Lists in Schedule VII which is indicated by the collection of the words "wills, intestacy and succession" in Entry No. 5 of List III.

41. Going back to the issue of legislative intent of the Succession Act, it be only observed that under the Hindu Law only few females could claim inheritance and that too with a limited right. In the modern age of social emancipation and equality, more so to remove gender bias, based upon the principles enshrined in the fundamental Articles of the Constitution, there has been movement for amelioration of hardships faced by the females. It is in this backdrop that the Succession Act came to be codified. On this issue, observations made by the Apex Court in *Munnalal vs. Rajkumar,* AIR 1962 SC 1493, reproduced below are apt:-

> "The Act is a codifying enactment, and has made far-reaching changes in the structure of the Hindu Law of inheritance, and succession. The Act confers upon Hindu females full rights of inheritance, and sweeps away the traditional limitations on her powers of dispositions which were regarded under the Hindu law as inherent in her estate. She is under the Act regarded as a fresh stock of descent in respect of property possessed by her at the time of her death..... Manifestly, the Legislature intended to supersede the rules of Hindu law on all matters in respect of which there was an express provision made in the Act."

42. Although Hindu Law claims to have divine origin and further claims to be divinely ordained and divinely dictated body of rules and although theoretical claims are made that Hindu Law is eternal and immutable, yet in practice during the centuries preceding the promulgation of the Succession Act, Hindu Law and particularly the law relating to succession had ceased to be uniform and schemes of inheritance with radical differences came into existence in different parts of the country. Not only there were two differing systems of inheritance known as 'Mitakshara' and 'Dayabhaga' with different rules and orders of succession but under the 'Mitakshara' system of law, various schools with some differences in law had come into existence. Varying interpretation of texts in the smrities, dissimilar families and local customs and conflicting pronouncements contributed to the absence of uniformity and consistency. There was scant regard for the females in matter of inheritance and succession. Under Hindu Law, few females could claim inheritance and even if they inherited, such acquisition came only with limited rights. Whatever justification may have been for this position in the ancient and medieval conditions, the position could not be tolerated in the modern age of social emancipation and equality. Thus there has been a social struggle for changing the ancient Hindu Law for a more equitable, consistent and coherent system of jurisprudence.

43. In fact, on this issue we find the High Court of Rajasthan to have traced the customary and legislative law in *Bhuri Bai vs. Champi Bai & another*, AIR 1968 Rajasthan 139 (Paras 8 and 9).

44. Tracing the legislative history of succession to agricultural land, as already noticed supra, one would find that succession with regard to the agricultural land was always meant to be a provincial subject. It is in this backdrop, Federal Court, while interpreting the provisions of the Hindu Women's Rights to Property Act, 1937 in Re: *Hindu Women's Right to*

Property Act (supra), came to the conclusion that the Act did not extend to succession of agricultural land. Significantly, the provinces themselves took up the matter and carried out necessary amendments, extending the provisions of the said Act, also to agricultural lands in their respective provinces. For example Bombay Act 17 of 1942, the Bihar Act, 6 of 1942, and the United Provinces Act 11 of 1944 and the Madras Act 26 of 1947. But then the position changed later on.

45. As is evident from entry No. 5 of List–III, the words "save as regards agricultural land", as it stood in Entry No. 7 of the Government of India Act, 1935, stands deleted. Thus under the Constitution, Parliament intended to exercise full power in respect of matters of succession even with regard to the agricultural land, the only exception being so provided under the Act. On this issue, with profit, one may quote the views of famous author Mulla as expressed in Principles of Hindu Law (Vol. II, Page 299) as under:

> "It is sometimes said that the Act does not apply to agricultural lands but that would not be a correct proposition. Sub-section (2) relates only to certain specified matters and subject to that, the provisions of the Act must govern succession to agricultural lands too. Considerable legislation by various States, aimed at prevention of fragmentation of agricultural holdings and securing their consolidation and for the purpose of fixing ceilings and devolution of holdings, has found place on the statute-book in recent years and this section is not intended to override or disturb such legislation. Land policy in different States, though founded on the concept of a socialist welfare state, cannot be expected to be uniform and sub–Section (2), therefore, leaves such legislation relating to agricultural land undisturbed……. It may be said that this provision detracts from the fundamental objective of uniformity of legislation. However, the explanation is that what is aimed at is a uniform law for all Hindus and not necessary a uniform law for all forms of property."

46. The development of law did not stop with the codification of Hindu Law. Even in the year 2005, Act stands amended and the provisions of Section 4(2) of the Succession Act deleted. The whole object, purpose and intent being to offer right, absolute in nature, regardless of the nature of the property of a female.

47. Significantly, Item No. 18 of List –II does not use the expression "property". The expression used is "land". The field for exercising legislative competence by the State appears to be with regard to and in relation to the land – not property – of tenure and tenancy. Noticeably when it comes to agricultural land, the power is with reference to transfer and alienation. Significantly "transfer of property other than agricultural land" is specified as a subject in Entry No. 6 of concurrent list. Hence when it comes to transfer and alienation of agricultural land, Parliament is clear that competence would be only that of the State. However, when it comes to succession or so as to say inheritance, intestacy or testamentary, there is no restriction with regard to the legislative competence about the nature of the property, moveable or immovable, be it "land" or "agricultural land" as stipulated under Entry No. 18 of List II. "Land" necessarily would not mean and take in its sweep any other immoveable property.

48. Noticeably, learned Single Judge of this Court in *Dalip Chand & another vs. Chuhru Ram,* AIR 1989 Himachal Pradesh 44, while dealing with a case where the son, claiming absolute succession of the entire occupancy tenancy land under the provisions of the Punjab Tenancy Act, laid challenge to the gift so made by his mother in favour of a third party by virtue of her having succeeded to the estate of her husband alongwith her son, observed that:-

> "9. In case the rights acquired by Smt. Minhon are to be governed by sub-Section (1) of S. 14, she would be deemed to have been full owner of the aforesaid area of land and, thus competent to make a gift thereof. In that event the view taken by the courts below would have to be held to be erroneous and the suit of the plaintiff liable to dismissal. In the circumstances of the present case it is obvious that as a widow, Smt. Minhon had a right of maintenance which was a

charge on the property of her husband, Munshi Ram. In other words, her right to maintenance was a pre-existing right on the date of enforcement of the Hindu Succession Act. Such a right would bring the case within the ambit of sub-Section (1) of S. 14 of the Hindu Succession Act, 1956. Law in this respect is more than settled. If reference is needed to precedents, it may be made to Vaddeboyina Tulasamma vs. Sesha Reddi, AIR 1977 SC 1944; Bai Vajia vs. Thakorbhai Chelabhai, AIR 1979 SC 993; Nand Ram vs. Vidya, ILR (1985) Him Pra 852 (DB); Jagannathan Pillai vs. Kunnjithapadam Pillai, AIR 1987 SC 1492 and Smt. Gulwant Kaur vs. Mohinder Singh, AIR 1987 SC 2251."

49. To similar effect is the view expressed by another learned Single Judge of this Court in *Hari Singh & others vs. Milap Chand,* 2000 (1) Shim. L.C. 403.

50. The Apex Court in *Madhu Kishwar & others vs. State of Bihar & others,* (1996) 5 SCC 125 has observed that:-

"37. The public policy and constitutional philosophy envisaged under Articles 38, 39, 46, and 15(1) and (3) and 14 is to accord social and economic democracy to women as assured in the preamble of the economic empowerment and social justice to women for stability of political democracy. In other words, they frown upon gender discrimination and aim at elimination of obstacles to enjoy social, economic, political and cultural rights on equal footing. Law is a living organism and its utility depends on its vitality and ability to serve as sustaining pillar of society. Contours of law in an evolving society must constantly keep changing as civilization and culture advances. The customs and mores undergo change with march of time. Justice to the individual is one of the highest interest of the democratic State. Judiciary cannot protect the interests of the common man unless it would redefine the protections of the Constitution and the common law. If law is to adapt itself to the needs of the changing society, it must be flexible and adaptable.

38. Law is the manifestation of principles of justice, equity and good conscience. Rule of law should establish a uniform pattern for harmonious existence in a society where every individual would exercise his rights to his best advantage to achieve excellence, subject to protective discrimination. The best advantage of one person could be the worst disadvantage to another. Law steps into iron out such creases and ensures equality of protection to individuals as well as group liberties. Man's status is a creature of substantive as well as procedural law to which legal incidents would attach. Justice, equality and fraternity are trinity for social and economic equality. Therefore, law is the foundation on which the potential of the society stands." ...

...

"52. Sub-Section (2) of Section 4 of the Hindu Succession Act, to remove any doubts, has declared that the Act shall not be deemed to affect the provisions of any law in force providing for (i) prevention of fragmentation of agricultural holdings; (ii) for the fixation of ceiling; and (iii) for the devolution of tenancy rights in respect of such holdings."

51. The Apex Court in *Union of India vs. Harbhajan Singh Dhillon,* 1971 (2) SCC 779, while dealing with the Constitutional validity of the amendment carried in the Wealth Tax Act, 1957, including capital value of agricultural land for computing net wealth, held the Act not to be ultra vires of the Constitution, on the ground of lack of legislative competence. Repeatedly, the discussion by the Constitution Bench (Seven Judges) is referred to by the Apex Court. Hence, we deem it necessary to reproduce the following passages from the said report:-

"164. It will be noted that the Imperial Parliament was alive to the fact that there might be subject-matters of legislation not covered by any of the three Lists

of the Seventh Schedule but the same were not committed to the care of the Federal Legislature or even attempted to be divided between the Federal Legislature and the State Legislatures. It was the function of the governor-General to empower either the Federal Legislature or a Provincial Legislature by public notification to enact a law with respect to any law not enumerated in the Seventh Schedule including a tax not mentioned in any such list and in the discharge of this function, the governor-General was to act in his discretion. The Explanation for this is to be found in the speech of Sir Samuel Hoare recorded in the Parliamentary debates to the effect that :

> "Indian opinion was very definitely divided between the Hindus who wanted to keep the predominant powers in the Centre and the Moslems who wished to keep the predominant power in the Provinces. The extent of that feeling made each of these communities look with greatest suspicion at the residuary field the Hindu demanding it with the Centre and the Moslems demanding with the Provinces. "

165. It would appear from the same speech that all attempts to bridge the difference only resulted in making the Federal List, the Provincial List and the Concurrent List each as exhaustive as possible to leave little or nothing for the residuary field. The said speaker hoped that "all that was likely to go into the residuary field were perhaps some quite unknown spheres of activity" which could not be contemplated at the moment.

166. The matter had engaged the attention of the Constituent Assembly. The Second Report of the Union Powers Committee, dated 5/07/1947, to the President of the Constituent Assembly contains the following statement:

> "We think that residuary powers should remain with the Centre. In view however, of the exhaustive nature of the three lists drawn up by us the residuary subjects could only relate to matters which, while they may claim recognition in the future, are not at present identifiable and cannot therefore be included now in the Lists."

Moving the aforesaid report Shri Gopalaswami Aiyangar in his speech on 20th August, 1947 said inter alia as follows :-

> "We should make the Centre in this country as strong as possible consistent with leaving a fairly wide range of subjects to the Provinces in which they would have the utmost freedom to order things as they liked, In accordance with this view, a decision was taken that we should make three exhaustive Lists, one of the Federal subjects, another of the Provincial subjects and the third of the concurrent subjects and that, if there was any residue left at all, if in the future any subject cropped up which could not be accommodated in one of these three Lists then that subject should be deemed to remain with the Centre so far as the Provinces are concerned." (see the Constituent Assembly Debates Vol. V. p.38)

… …

"169. Scanning the lists and specially the entries mentioned above, there can be little doubt that the Constitution-makers took care to insert subject-matters of legislation regarding land and particularly agricultural land in the exclusive jurisdiction of State Legislature. Although Parliament is competent to legislate on transfers of property and contracts generally, the legislative power in this regard is not to be exercised over agricultural land but when evacuee property includes agricultural land Parliament is competent to legislate with respect to custody, management and disposal of the same under Entry 41 of List III. Similarly, when a question of acquisition or requisitioning of property including agricultural land

is concerned, both Parliament and the State Legislature are competent to exercise legislative powers."

52. As we have already observed, by virtue of the Amendment Act 39 of 2005, w.e.f. 9.9.2005 sub-Section (2) of Section 4 of the Succession Act stood deleted. Resultantly no local law pertaining to the prevention of fragmentation of agriculture holding for fixation of ceilings for devolution of tenancy rights, in respect to such holdings, with respect to succession is saved.

53. On similar issue, the Delhi High Court in *Nirmala & others vs. Government of NCT of Delhi & others,* 170 (2010) DLT 577 (DB), observed that "female have the right to succeed to the disputed agricultural land". It further observed that "For the aforesaid reasons, we hold that the provisions of the HAS would, after the amendment of 2005, have over-riding effect over the provisions of Section 50 of the DLR Act and the latter provisions would have to yield to the provisions of the HAS, in case of any inconsistency. The rule of succession provided in the HSA would apply as opposed to the rule prescribed under the DLR Act. The petitioners are, therefore, entitled to succeed to the disputed agricultural land in terms of the HSA. The respondents No. 1 and 2 are directed to mutate the disputed agricultural land, to the extent of late Shri Inder Singh's share, in favour of the petitioners and respondent Nos. 3, 4 and 5 as per the HSA."

54. To somewhat similar effect is another decision of the very same Court in W.P.(C) No. 8967/2014, titled as *Deepak Yadav vs. Government of NCT of Delhi,* decided on 25th February, 2015 and more recent one of Bombay High Court in *Shri Eknath Daval Thete vs. Ganpal Dagdu Thete (Decd.),* Second Appeal No. 450 of 1993, decided on 6.1.2016, where it is observed that "Section 22 of the Hindu Secession Act, 1956 clearly confers additional right of pre-emption in case of interest in any immovable property devolving upon two or more heirs specified in ppn 30 sa -450.93 (j).doc clause I of the Schedule and in case any one of such heirs proposing to transfer his or her own interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred. The plaintiff being a brother of the defendant No. 1 and was having joint interest in the suit property and rightly applied for pre-emption in the share of the share of the defendant No. 1 in the suit property by exercising right under Section 22 of the Hindu Succession Act, 1956, the learned trial Judge as well as the Lower Appellate Court have considered the said provision of Section 22 of the Hindu Succession Act, 1956 and have rendered a concurrent finding of fact that the plaintiff was entitled to apply for pre-emption and purchase the share of the defendant No. 1 in the suit property before the same was sold to the defendant No. 2. Learned counsel appearing for the defendant No. 2 is unable to demonstrate before this Court as to how the said concurrent finding of the fact rendered by both the Courts below is perverse and contrary to Section 22 of the Hindu Succession Act, 1956…".

55. In *Accountant and Secretarial Services Pvt. Ltd. another vs. Union of India & others,* (1988) 4 SCC 324, where eviction of a tenant was resisted with challenge being laid with regard to the legislative competence of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971, so enacted by the Parliament, the Apex Court interpreted the word "land" in entry No. 18 of List –II to read as under:-

> "27. In our opinion, the true import of the word 'land' can be gathered if we try to ascertain the proper interpretation and ambit of these three phrases, particularly, the first two among them, in the context of other entries in the Union List. Doing so, is it possible to interpret this entry as encompassing within its terms legislation on the relationship of landlord and tenant in regard to houses and buildings? That is the question. After careful consideration, we have reached the conclusion that the answer to this question has to be in the negative…"
>
> …
>
> "(5). While, on the one hand, the words in entry 18 have to be given the widest meaning possible, it has to be borne in mnd that the entries in the various lists have to be read together and construed in such a manner as to give a meaning and content to all of them. We need hardly say that the Constitution should be so

> interpreted as to reconcile all concerned and relevant entries (See: Hoechst Pharmaceuticals v. State, (1983) 4 SCC 45: (AIR 1983 SC 1019) and the Dhillon case (Union of India vs. H. S. Dhillon, (1971) 2 SCC 33: AIR 1972 SC 1061). If we give the word "land" a meaning so as to include buildings and also give the words "rights in or over land" a wide interpretation - as we have to, in view of the discussion and ratio in Megh Raj v. Allah Rakhia, AIR 1947 PC 72 - this entry will be seen to cover almost all kinds of not only transfer but also alienation and devolution of, or even succession to, lands and buildings. The interpretation thus placed will affect not merely leases and, therefore, a small part of the contents of the item regarding 'transfer of property'; it will apply equally to sales, mortgages, charges and all other forms of transfer of all kinds of interests in land and buildings and thus make such a substantial inroad into the scope of entry 6 in the concurrent list as to denude it of all application except to property other than land and buildings. The word "property" used in entry 6 will thus lose even its normal meaning not to speak of its being given the widest meaning possible appropriate to a legislative entry. It will mean that though transfer of property - other than agricultural land - is in the Concurrent List, the State will have exclusive power to legislate in respect of transfer of all property in the nature of land and buildings; in other words, for the words "transfer of property other than agricultural land", we will be substituting "transfer of property other than lands and buildings". It will mean that though wills, intestacy and succession are in item 5 of the Concurrent List, the State can legislate exclusively in respect of devolution of land and buildings of all description. It will render entry 35 of List II a surplusage in so far as it refers to "lands and buildings". We do not think that such an interpretation should be favoured. The more harmonious interpretation would be that any subject-matter that involves the element of transfer or alienation of any property (other than agricultural land) or of devolution (on testamentary or intestate succession) of any property or contract (other than one in relation to agricultural land) will fall in the Concurrent List and not in the State List even though it may relate to land or buildings."
>
> [Emphasis supplied]

56. Thus, "succession" falls within the scope of entry No. 5 of List –III and in case a narrow and pedantic or myopic view of interpretation is adopted by accepting succession to an agricultural land, bringing it within the scope of "rights in and over land", impliedly no meaning would be attached to entry No. 5 as each and every word of the list must be given effect to. If there is no local law on the subject, then the special law will prevail which in the instant case is the Succession Act. The scope, object and purpose of codifying Hindu Law is different. It is to achieve the Constitutional mandate. There is no provincial law dealing with the subject. As such, the Central Act must prevail.

57. We are in respectful agreement with the findings returned by the learned Single Judge in its judgment dated 14.10.2015 that the words 'property' as well as 'interest in Joint Family Property' are wide enough to cover agricultural land.

58. For all the aforesaid reasons we hold that the Provisions of the Hindu Succession Act would apply to Agricultural Lands.

Per Justice Dharam Chand Chaudhary, J

59. While, I wholly agree with the view of the matter taken by my esteemed brother Karol, the Acting Chief Justice, I prefer to support the same further by assigning additional reasons.

60. The Hindu Succession Act is a beneficial piece of social legislation enacted with sole object to provide a mechanism governing the law relating to succession among Hindus. The Act, being a codifying statute is a complete code and a comprehensive legislation in respect of the

matters dealt with thereunder. Regard must, therefore, be given to the clear language contained under the Act in the matter of interpretation of various provisions contained therein. Following observations of the Supreme Court in ***Velamuri Venkata Sivaprasad (dead) by LRs vs. Kothuri Venkateshwarlu (dead) by LRs, AIR 2000 SC 434,*** the relevant to the context, are reproduced herein below:

> "Undisputably, the Hindu Succession Act, 1956 in particular Section 14 has introduced far reaching changes having due regard to the role and place of womanhood in the country on the basis of the prevailing socio-economic perspective. It is now a well-settled principle of law that legislations having socio-economic perspective ought to be interpreted with widest possible connotation as otherwise, the intent of the legislature would stand frustrated. Recognition of Rights and protection thereof thus ought to be given its full play for which the particular legislation has been introduced in the Statute Book. ..... The endeavour of the law court should thus be to give due weightage to the requirement of the Constitution in the matter of interpretation of statutes..... The legislation of 1956 therefore, ought to receive an interpretation which would be in consonance with the wishes and desires of framers of our Constitution. We ourselves have given this Constitution to us and as such it is a bounden duty and an obligation to honour the mandate of the Constitution in every sphere and interpretation which would go in consonance therewith ought to be had without any departure therefrom."

61. The provisions contained under Section 22 of the Act have, therefore, to be construed and understood in the light of the above legal principles settled by the Supreme Court. Nothing is there in Section 22 of the Hindu Succession Act, 1956 to prohibit its applicability to "agricultural land" and for that matter even to any other kinds of land including "Banjar Kadim" and "Gair Mumkin", (the subject matter of dispute in the present lis). As a matter of fact, words "immovable property" in Section 22 of the Act covers all kinds of land including "agricultural land". It is worth mentioning that in the report of Joint Committee of both Houses of Parliament on the Bill called as "The Hindu Succession Bill" (13 of 1954), presented to the Rajya Sabha to amend and codify the law relating to intestate succession among Hindus, clause 24 was incorporated with a view to make additional provision to the effect that as and when an heir wish to dispose of his share in the immovable property or business, the intestate left behind, the other heirs shall have not only the right of preemption but also to enjoy such right by buying off his/her share and also that of a married daughter and thereby to dislodge the fears especially being entertained by the business community that a son-in-law and his family members getting hold of daughter's share may disturb their business.

62. Clause 24 of the Bill was enacted with a view to extend preferential right in favour of a co-sharer to buy off the share of another co-sharer in an immovable property or in any business carried on by an intestate in case the latter intends to sell his/her share therein. The Bill adopted by the Select Committee after taking into consideration various suggestions made from time to time was given short title called as "The Hindu Succession Act, 1956". The Act has intended to amend and codify the law relating to succession among Hindus. Section 22 of the Act is *para materia* to Clause 24 of the Bill.

63. The intention behind to give preferential right to a heir(s) as envisaged under Section 22 of the Act, to acquire property of other heirs in certain cases, therefore, is with the sole object to prevent the fragmentation of the estate and introduction of strangers in the family business and estate. After the commencement of the Hindu Succession Act, 1956, if the interest in any immovable property or business carried by an intestate devolves upon two or more heirs specified in class I of the Schedule and if anyone of such heirs proposes to transfer his/ her interest in the property or the business, the other heirs shall have a preferential right to acquire such interest proposed to be transferred. The consideration for acquisition of that interest either may be mutually agreed upon between those two heirs and in the absence of any such

agreement, the matter has to be decided by the Court on an application to be filed under Section 22 of the Act. If the applicability of Section 22 of the Act is excluded in the case of "agricultural land", the very purpose of such benevolent provisions therein shall be frustrated.

64. As noticed by brother Justice Karol in para supra, there are two divergent views qua the applicability of Section 22 of the Act to "agricultural land". Section 22(1) of the Act refers to the immovable properties and business alone. In our considered opinion, the expression "immovable property" is quite wide to include agricultural land(s) and for that matter any other land including *"Banjar Kadim"* and *"Gair Mumkin",* the subject matter of dispute in the present lis.

65. True it is that normally transfer and alienation of agricultural land falls squarely within the ambit of item 18 of the State List (List II) of Schedule VII of the Constitution of India. The transfer of immovable property contemplated under Section 22 of the Hindu Succession Act, 1956, however, has to be taken an exception to the general rule of transfer of agricultural land as envisaged under item No. 18 State List (List II) of Schedule VII of the Constitution of India. Such a transfer, to my mind, is covered under item No. 5 of Concurrent List (List III) of Schedule VII of the Constitution of India, as in a case of "intestacy" and "succession", the Parliament can also enact laws. As rightly pointed out by my esteemed brother Karol, the Acting Chief Justice, in the absence of any State enactment to extend preferential right to a co-sharer to buy off the share of another co-sharer, in the immovable property or business left behind by an intestate, Section 22 of the Act is applicable to such a transfer.

66. As already noticed, the object behind it is very noble i.e. to prevent the fragmentation of holdings, the entry of a stranger to the immovable property and business left behind by an intestate and on the top of it to give some solace to the intestate at his heavenly abode that after his/her death the successors do not allow any third person or stranger to enter upon the estate/business, he/she left behind. It is a hard fact that agriculturists are emotionally attached with the holdings came in their hands from their forefathers. No one wants to part therewith by way of its transfer to a stranger. In a case of inheritance by more than one heir, sometime a scrupulous and cunning heir sells off his share in the joint property to a stranger either to torture the other heirs or take revenge from them or teach a lesson to them for variety of reasons, including jealousy or inimical relations with them. Therefore, Section 22 of the Act not only protects the rights of other heirs in the estate left behind by an intestate but also save them from mental torture, harassment and also put fetters on such scrupulous heir from transferring his share in the joint property he inherited to a third person/stranger.

67. Such being the position, we feel that the provisions contained under Section 22 of the Act should also be made applicable to the property inherited by way of testamentary succession and also by survivorship and in addition to the immovable property or business left behind by an intestate. Anyhow, we leave it open to the Union of India to consider the desirability of incorporating the provisions in this regard either in the Hindu Succession Act or in any other legislation holding the field.

68. Therefore, for all the reasons recorded hereinabove and there being nothing in the Hindu Succession Act, 1956 which defines words "immovable property" used in Section 22 thereof, it is held that the provisions of the Section ibid are applicable to all kinds of lands, including "agricultural land" in the matter of sale of his/her share therein by one of the heirs in favour of other heir(s), of course for consideration, viz. either mutually agreed upon or settled by a Court of law in an application filed for the purpose by such co-sharer willing to exercise his/her preferential right, to buy the same. The point referred to us by learned Single Judge is accordingly answered. The appeal be now placed before a Bench having roster of board to hear and decide the same in accordance with law.

****

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

Harish Kumar .....Appellant.
Versus
The State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 304 of 2014
Reserved on: 10.01.2018
Decided on: 06.03.2018

Code of Criminal Procedure, 1973- Section 389- Appeal against Conviction- Narcotic Drugs and Psychotropic Substances Act, 1985- Section 42 and 50- Independent Witnesses- One of the independent witnesses fully supporting the prosecution case and his version supported by official witnesses- conviction sustained- Further Held- That Section 42 of the N.D.P.S. Act not attracted, if there was no prior information with the police- Section 50 of the N.D.P.S. Act also held to be not applicable, in case of a chance recovery- Conviction upheld- Appeal dismissed.

(Para- 17 to 23)

Cases referred:
Hem Raj and others vs. State of Haryana, AIR 2005 SC 2110
Vijaysinh Chandubha Jadeja vs. State of Gujarat, (2011) 1 SCC 609
Gyan Singh & others vs. State of U.P., 1995 Supp(4) SCC 658
State Represented by Inspector of Police vs. Saravanan & another, (2008) 17 SCC 587
State of Rajasthan vs. Om Prakash, (2007) 12 SCC 381

For the appellant: Mr. Suresh Kumar Thakur, Advocate.
For respondent: Mr. Virender K. Verma, Addl. AG, with Mr. Pushpinder Jaswal, Dy. AG and Mr. Rajat Chauhan, Law Officer.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal is maintained by the appellant/accused/convict (hereinafter referred to as "the accused"), laying challenge to judgment dated 02.08.2014, passed by learned Special Judge (II), (Additional Sessions Judge-II), Shimla, District Shimla, H.P., in Sessions Trial No. 16-S/7 of 2014, whereby the accused was convicted for the commission of the offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "ND&PS Act").

2. The background facts, as projected by the prosecution, can tersely be summarized as under:

On 25.10.2013, at about 07:30 p.m., police party was on routine patrol and traffic checking duty at Totu Chowk. The accused was coming from Power House Road towards Totu Chowk and on seeing police he started running. The accused was nabbed and he disclosed his name as Harish. His bag was checked by the police in presence of witnesses and during search inside the bag another black bag was found and the same contained a steel container. The said steel container was opened and some substance, which was black in colour and was in stick shapes, was recovered. The recovered substance on smelling and on the basis of experience was found to be *charas*. The recovered substance was weighed in the shop of one Shri Santosh Kumar on the electronic scale and was found to be 290 grams. The contraband alongwith container was also weighed and found to be 520 grams. Thereafter the police completed the sealing process and the contraband alongwith bags and container was taken into possession vide seizure memo. NCB forms were also filled in. The signatures of the accused and witnesses were

obtained on the seizure memo and sample seal. Seal impression, after its use, was handed over to Shri Kamal Verma. Police party sent *rukka* to Police Station Boileauganj, whereupon FIR was registered. All the incriminating articles were taken into possession vide seizure memo, seal impression was taken into separate piece of cloth and NCB form, in triplicate, was prepared. The case property was resealed with seal impression 'M' and facsimile seal was taken separately on a piece of cloth. The personal articles of the accused were also taken into possession vide separate seizure memo and sealed with seal impression 'J'. The case property was initially deposited in the *malkhana* and subsequently sent to chemical analysis. Police prepared the site plan of the place of occurrence. Special Report was sent to ASP Shimla, through HHC Gulat Ram, which was entered in diary register of Reader to ASP, Shimla. CIPA (common integrated police application certificate) was also prepared. Statements of the witnesses were recorded. Report from the Forensic Science Laboratory revealed that the sample contained presence of cannabinoids, including the presence of tetrahydrocannabinol in the presence of tetrahydracannabinol. The microscopic examination revealed the presence of characteristic cytolitihic haris in the sample. *Charas* is a resinous mass, the quantity of purified resin, as found in the sample as *charas* is 31.10% w/w. Thus the sample is extract of cannabis and sample of *charas.* After completion of all the formalities, final report was prepared and the *challan* was presented in the Court.

3. The prosecution, in order to prove its case, examined as many as eleven witnesses. Statement of the accused was recorded under Section 313 Cr.P.C., wherein he pleaded not guilty. The accused did not lead any evidence in his defence.

4. The learned Trial Court, vide impugned judgment dated 02.08.2014, convicted the accused to undergo rigorous imprisonment for four years and to pay fine of Rs.20,000/- and in default of payment of fine he was further ordered to undergo simple imprisonment for one year under Section 20 of the ND&PS Act, hence the accused (convict) preferred the present appeal.

5. The learned Counsel for the appellant (accused) has argued that the learned Trial Court has not appreciated the evidence in its right perspective and the judgment passed by the learned Trial Court is based on surmises and conjectures. He has further argued that the learned Trial Court has ignored the fact that the police did not comply with the mandatory provisions ingrained in the ND&PS Act. The statements of the official as well as independent witnesses are not confidence inspiring and the same have not been correctly appreciated. Conversely, learned Additional Advocate General has argued that the learned Trial Court has appreciated the evidence correctly and the accused has been rightly convicted. He has argued that the judgment rendered by the learned Trial Court is the result of proper appreciation of evidence and law. Lastly, he has prayed that the appeal is without merits and the same may be dismissed.

6. In rebuttal, the learned counsel for the appellant has argued that the appellant be acquitted and the judgment of conviction rendered by the learned Trial Court be set aside.

7. In order to appreciate the rival contentions of the parties I have gone through the record carefully.

8. PW-1, HC Manoj, deposed that on 25.10.2013, at about 07:30 p.m. he alongwith other police personnel was patrolling at Totu Chowk. They saw the accused coming towards Totu Chowk and he was carrying a bag on his back. As per this witness, after seeing the police party, the accused started running and was nabbed. Police inquired about his whereabouts and name. At that time Shri Anil Kumar and Shri Kamal Verma (PW-2) were also present there. Police searched the bag of the accused in front of the shop of one Shri Santosh Kumar (PW-9) in the light kept outside the shop. The bag contained one more bag, which was inscribed with word 'Royal' and the same contained a steel box whereon sticker having words 'Super cup tea' was found pasted. This steel box contained a black stick shaped material, which on smelling was found to be *charas.* The recovered contraband was weighed on the electronic scale kept inside the shop of Shri Santosh Kumar (PW-9) and it was found to be 290 grams. The *charas* was again kept inside the steel box and the box was weighed, which was found to be 520 grams. All the

articles were sealed with seal impression 'S' and facsimile seal was taken on a separate piece of cloth and on NCB form. The case property was taken into possession vide seizure memo, Ex. PW-1/A, which was signed by him, Shri Kamal Verma (PW-2) and Shri Anil Kumar. As per this witness, personal search of the accused was conducted and a mobile, electronic/digital scale, one belt, two lockets with black strings and currency notes of Rs. 15330/-, denomination whereof was Rs. 1000/-, Rs. 500/-, Rs. 100/- Rs. 20/- and Rs. 10/-, were found. All the personal articles were also taken into possession vide recovery memo, Ex. PW-1/C, and the same was signed by him and Shri Kamal Verma (PW-2) and Shri Anil. The seal 'S' was handed over to Anil and seal 'J' was kept by the I.O. This witness, in his cross-examination, has deposed that an entry was carried out in the *rapat roznamcha* qua the time of their arrival or departure. He has deposed that they had arrived on the spot at 07:30 p.m. and the accused was spotted by SI Harish. As per this witness, there had been visibility of approximately 100-150 meters from the spot to all the sides. The owner of the shop was present in the shop and police remained there till 11:00 p.m. The accused was apprehended by chance and the search was conducted by SI Harish Kumar (PW-11). He has further deposed that they prepared the parcels on the spot by stitching with needle and thread. Parcels, P-1 and P-7 were available in the I.O. kit, which were stitched with swing machine. Some polythene packets were taken from the shop.

9. PW-2, Shri Kamal Verma (independent witness), has deposed that he is taxi owner and used to park his taxi at Totu Taxi Union. On 23.10.2013, around 07:30 p.m., he alongwith Anil was standing at Totu Chowk. As per this witness, police had nabbed the accused and he was carrying a bag on his back. The accused disclosed his name as Harish, resident of Chamba. The accused was taken to City Café and he, Anil Kumar accompanied them. The bag of the accused was checked, which contained one more bag and that bag had a steel box. The steel box was opened and *charas,* which was black in colour, was found. The *charas* was sealed and personal search of the accused was conducted. During the personal search one mobile, currency notes in between Rs. 10,000/- to Rs. 15,000/- and other articles were found. All the articles were sealed and taken into possession, vide separate seizure memos, Ex. PW-1/A and Ex. PW-1/C. He signed the memos alongwith seal impression, Ex. PW-1/B and Ex. PW-1/D. He has deposed that he is 10+2 and after going through the contents of the memos he signed the same. This witness, in his cross-examination, has deposed that no one called him to the spot and the accused was caught in front of them, as they were standing nearby. As per this witness, he also stood as witness in another case of NDPS at Ghoond. He has good relations with the police. He has deposed that on the day of occurrence he went to Tara Devi and returned around 8-8:15 pm. He stayed on the spot for 5-10 minutes. The *charas* was weighed in the shop of Shri Santosh Kumar (PW-9) and the memos were prepared there to some extent and he signed the memos after returning from Tara Devi. He has deposed that sealing of the packets were not conducted before him.

10. PW-3, HHC Gulat Ram, deposed that he carried the *rukka* to Police Station, Boileauganj. He also also given a sealed parcel having seven seal impressions of 'S' alongwith NCB form, in triplicate, and sample seal. He handed over all the articles to Shri Gopal Verma, SHO, Boileauganj. After registration of the case, case file was handed over to him and he gave the same to S.I. Harish. SI Harish, Incharge, P.P. Jutogh handed over special report, in a sealed envelop, to S.O./ASP, Shimla, in his residence, as it was Sunday. This witness, in his cross-examination, has deposed that *rukka* was prepared about 07:30 p.m, outside the Cafe, Totu Chowk, by SI Harish Kumar. PW-4, HC Varun Singh, deposed that on 28.10.2013, a sealed parcel, containing 290 grams *charas* in a steel box, which was sealed with seal impression 'S' seven times and resealed with seal impression 'N' five times, NCB form, in triplicate, alongwith sample seals 'S' and 'M' alongwith the docket was handed over to him, vide RC No. 123/13, for being deposited in FSL, Junga. He after deposit of the same handed over the receipt to MHC Nikka Ram. As per this witness, all the articles remained intact under his custody. This witness, in his cross-examination, has deposed that he did not remember the time by when the case property was given to him.

11. PW-5, MHC Nika Ram, deposed that on 25.10.2013, SHO Gopal Verma (PW-10)

deposited with him a sealed parcel, which stated to have contained a steel box having 290 grams *charas,* sealed with seven seals of impression 'S' and resealed with five seals of impression 'M' alongwith sample seal, NCB form (in triplicate) and a black bag. He entered the case property at Sr. No. 954/103/13, dated 25.03.2013, which is Ex. PW-5/A. He has further deposed that he had also entered the articles recovered from the personal search of the accused. On 28.10.2013, he handed over the sealed parcel, containing *charas,* alongwith NCB form (in triplicate) and seal impression 'S' and 'M', vide RC No. 123/13 to constable Varun Kumar and he handed over the receipt to him on 28.10.2013. As per this witness, the case property remained intact under his custody. This witness, in his cross-examination, has deposed that he did not remember the time when the case property was entrusted under his custody by SHO Gopal Verma (PW-10). PW-6, HC Bhupender, deposed that he was working as Reader to ASP, Shimla, and on 27.10.2013, at about 03:30 p.m., HHC Gulat Ram, brought a special report under Section 57 of the ND&PS Act to ASP, Shimla, at her residence, as it was holiday. ASP, Shimla, made an endorsement over the report and handed over to him the same for make apt entries. Copy of special report is Ex. PW-6/A and the sane was entered in diary register at Sr. No. 24489. True copy of special report is Ex. PW-6/B.

12. PW-7, Constable Praveen Dutt, deposed that on 25.10.2013 he carried out entry, Ex. PW-7/A, in *rapat roznamcha* register and entered *rapat* No. 9, roznamcha dated 25.10.2013, about the departure report. PW-8, SI Jasvir Singh, deposed that on 25.10.2013, he alongwith SI Harish, HC Manoj Kumar, HC Susheel and HHC Gaulat were on routine patrol duty at Totu Chowk. They, at about 07:30 p.m., spotted the accused carrying a gunny bag on his shoulder and the accused, on seeing the police, started running. The accused was nabbed and he disclosed his name as Harish Kumar resident of Chamba. This witness has further deposed that search of the accused was conducted under the tube light of the shop of Shri Santosh Kumar (PW-9) and the accused was having a black bag, which was kept inside the gunny bag, which was brown and purple in colour. As per this witness, a steel container was recovered from the bag and the same contained stick shaped black substance, which was found to be *charas* sticks. While carrying out the search of the accused Anil Kumar and Kamal Verma were also present on the spot. The *charas* was weighed, in presence of the witnesses, on the electronic scale of Shri Santosh Kumar (PW-9) and was found to be 290 grams. The *charas* was also weighed alongwith the container and was found to be 520 grams. He has further deposed that the *charas* alongwith the steel container was put in a packet and sealed with seal having impression 'S' and facsimile seal was taken on a separate piece of cloth. NCB form, in triplicate, was prepared and the bags were taken into possession. Seizure memo, Ex. PW-1/A, was prepared qua the recovery of all the articles and Shri Anil Kumar, Shri Kamal Verma and HC Manoj stood as marginal witnesses to the seizure memo and accused also put his signatures on the memo. The personal search of the accused was conducted and he was found in possession of Rs. 15,330/-, a belt, two lockets and a pocket electronic machine. All the articles recovered during the personal search of the accused were taken into possession vide seizure memo Ex. PW-1/C and the same were sealed with seal impression 'J'. Memo, Ex. PW-1/C, was signed by Shri Anil Kumar, Shri Kamal Verma and HC Manoj and the accused also signed the same. Facsimile seal was also taken on a separate piece of cloth and the seal was handed over to Shri Anil Kumar. This witness, in his cross-examination, has deposed that the police did not check any vehicle or people during the patrol duty. He has further deposed that 20-25 people gathered on the spot. The *rukka* was prepared while sitting in the shop of Shri Santosh Kumar (PW-9). As per this witness, firstly the bag of the accused was searched and subsequently his personal search was conducted. His statement was recorded on the spot.

13. Shri Santosh Kumar (PW-9) has deposed that he has City Sweet and Café at Totu Chowk and nothing has happened before him, as he was out of the shop at that time. This witness has resiled from his statement given to the police, so he was cross-examined by the learned Public Prosecutor. In his cross-examination he has deposed that he used to sit in the cafe and it is incorrect that the shop remains open till 11:00 p.m. As per this witness it is incorrect that on 25.10.2013 the police came to his shop and weighed the *charas* and steel

container.

14. Shri Gopal Singh Verma, SHO, Police Station Boileauganj (PW-10) has deposed that on 25.10.2013, HHC Gulat Ram came with *rukka,* whereupon FIR, Ex. PW-10/A, was registered and endorsement, qua the *rukka,* was written on the back side of the *rukka,* which is Ex. PW-10/B, which bears his signatures encircled in 'A'. Subsequently, HHC Gulat Ram produced before him a sealed parcel having seal impressions 'S', a steel container having 290 grams of *charas,* which was packed in a poly pack alongwith sample seal 'A' and NCB forms, in triplicate. He resealed the sealed parcel with seal having impression 'M' and the sample seal was taken on a separate piece of cloth. All the articles alongwith the sample seals 'S', 'M' and NCB form were deposited with MHC Nikka Ram. He prepared certificate, Ex. PW-10/C, which was signed by him and MHC. He also filled the columns pertaining to him, as SHO. He, after completion of the investigation, prepared the *challan*, which bears his signatures. This witness, in his cross-examination, has deposed that columns No. 9 and 11 of the NCB form are blank. He has further deposed that he did not associate any independent witness during the resealing process.

15. PW-11, SI Harish Kumar, is the Investigating Officer in the case in hand. He has deposed that on 25.10.2013 he alongwith AsI Jasvir Singh, HC Manoj, HC Susheel and HHC Gulat Ram was on routine patrol duty. At about 07:30 p.m., when they were at Totu Chowk, a person carrying a bag came from Power House side towards Totu Chowk and on seeing the police he started running. On suspicion that he might be having some stolen articles, he was apprehended. The accused disclosed his name as Harish from Chamba. As per this witness, Shri Anil Kumar and Shri Kamal Verma were associated as independent witnesses and bag, which was being carried by the accused, was searched in their presence. The bag, which was brown and purple in colour had one more bag, which was black in colour. Inside the bag there was a steel container, whereon there was sticker having words *'super cup tea'* written. The said container had stick shaped substance and on smelling it was found to be *charas*. He has further deposed that the recovered *charas* was weighed on electronic scale, which was kept inside the shop of Shri Santosh Kumar (PW-9) and was found to be 290 grams. The shop was adjoining to the main road. As per this witness, the *charas* was again put inside the steel container and weighed with it, which was found to be 520 grams. He has deposed that the steel container and *charas* were packed and sealed with seal having impression 'S' and the seal impression was taken on a separate piece of cloth. All the articles were taken into possession vide seizure memo, Ex. PW-1/A, in presence of Shri Anil, Shri Kamal and HC Manoj. As per this witness signatures of the accused and witnesses were also obtained on the seizure memo and the sample seal was handed over to witness Kamal Verma. NCB form was filled in and *rukka*, Ex. PW-11/A, was sent to Police Station, Boileauganj, alongwith the case property. He has further deposed that personal search of the accused was also carried out and cash of Rs. 15,330/- and pocket electronic scale alongwith personal articles were recovered. The articles recovered from the accused were taken into possession vide seizure memo, Ex. PW-1/C, in presence of Shri Anil, Shri Kamal and HC Manoj. The accused also signed the said seizure memo. He prepared the site plan, Ex. PW-11/B and recorded the statement of Shri Santosh Kumar, which is Ex. PW-11/C. The accused was arrested. As per this witness, report from Forensic Science Laboratory, Junga, Ex. PW-11/D, was received and after completion of investigation he handed over the case file to Inspector Gopal Verma for preparing the *challan.* This witness, in his cross-examination, has deposed that on the day when the accused was apprehended the police party came to Totu bazaar and then went to Nalagarh bypass road and subsequently they came on the spot. He has further deposed that Nalagarh bypass road is on the opposite direction from the spot. He saw the accused from the distance of 15-20 meters from Totu Chowk. He has further deposed that there was sufficient light available on the spot, as street light and lights from the shops was lit. He did not know the witnesses prior to the occurrence. The witnesses met him after an interval of two minutes when the accused was apprehended. The shop of Shri Santosh Kumar (PW-9) is on the road side. He admitted that he did not show the street light on the site plan. As per this witness, witness Kamal left the spot during the investigation and his signatures were obtained before he left the

spot.

16. After thoroughly discussing the entire prosecution evidence, it can be safely held that the whole edifice of the prosecution story rests upon the statements of HC Manoj (PW-1), Shri Kamal Verma (PW-2), SI Jasvir Singh (PW-8) and SI Harish Kumar (PW-11). Out of the above mentioned witnesses, Shri Kamal Verma (PW-2) is independent witness and all others are official witnesses. PW-2, Shri Kamal Verma, categorically deposed that on 23.10.2013, around 07:30 p.m., he was standing at Totu Chowk and the police nabbed a person, who was carrying a bag on his back and he disclosed his name as Harish (accused). He has further deposed that the accused was taken to City Cafe and he alongwith Anil accompanied the police team. This witness has fully supported the recovery part of the prosecution story. This witness, in his cross-examination, has deposed that he stood as witness in another case of NDPS at Ghoond, but if an independent witness also sited as a witness in any other case, it does not give any plausible reason for the defence to take benefit of this fact.

17. As it was a chance recovery, there was no occasion for the police to associated independent witnesses, however, in the case in hand the police associated Shri Anil Kumar and Shri Kamal Verma (PW-2), as independent witnesses. One of the independent prosecution witness (Shri Kamal Verma, PW-2) has fully supported the prosecution case and his statement is further fortified by official prosecution witnesses. Therefore, the statement of PW-2 has to be read in conjunction with the statements of HC Manoj (PW-1), SI Jasvir Singh (PW-8) and SI Harish Kumar (PW-11). This Court is delving whether the conviction passed by the learned Trial Court is as per the law and based on the confidence inspiring statements of official prosecution witnesses or not.

18. After carefully scrutinizing the statements of PW-1, HC Manoj, PW-2, Shri Kamal Verma, PW-8, SI Jasvir Singh and PW-11, SI Harish Kumar, it is found that their statements are confidence inspiring. The statements of all these witnesses are convincing and there was no occasion for the official prosecution witnesses to have involved the accused falsely. In fact, the statements of these witnesses have been corroborated by the recovery of contraband from the possession of the accused, which was effected as per the law. The statements of these witnesses go unshattered and thus believable.

19. In the case in hand, the contraband was recovered from the steel container, Ex P-4, which was kept inside a black bag, Ex. P-3, which was further kept inside another bag, Ex. P-2, carried by the accused on his shoulder and this fact stands fully proved by the prosecution. As far as the prior information is concerned, there was no prior information available with the police and there is no material available on record which points towards the fact that the any prior information, qua the accused having the *charas,* was available with the police, thus the provisions of Section 42 of the ND&PS Act are not attracted at all.

20. The learned counsel for the appellant has argued that there are contradictions in the statements of the official prosecution witnesses and the benefit of these contradictions go to the accused. So far as the small contradictions qua distance, time etc. are concerned, such type of contradictions are natural, especially when the witnesses have deposed after lapse of long time, thus these minor contradictions are not fatal to the prosecution case and the accused cannot derive any benefit out of these minor contradictions. The overall reading of the statements of the official prosecution witnesses inspires confidence.

21. The statements of PW-1, HC Manoj, PW-2, Kamal Verma, PW-8, SI Jasvir Singh and PW-11, SI Harish Kumar, unflinchingly establish that a police party comprising of PW-11, SI Harish Kumar, PW-8, SI Jasvir Singh, PW-3, HHC Gulat Ram, and HC Susheel was present on the spot. The accused tried to escape, but he was nabbed and was found in exclusive and conscious possession of 290 grams of *charas,* which was kept inside a steel container. The accused was also found in possession of currency notes of Rs. 15,330/- and a pocket digital electronic scale. The defence endeavored hard while cross-examining PW-1, PW-2, PW-3, PW-8 and PW-11, but nothing favorable could be extracted from them. PW-10, SHO Gopal Singh

Verma carried out resealing process and he has fully corroborated the prosecution story to this effect. PW-3, HHC Gulat Ram, carried *rukka* from the spot, PW-4, HC Varun Singh, deposited the sample in Forensic Science Laboratory. The case property remained safe under the custody of MHC Nikka Ram (PW-5). Compliance qua Section 57 of the ND&PS Act, by making a special report, was proved by PW-6, HC Bhupender. Thus, the sequence of events stands fully proved. FSL report, Ex. PW-11/D, clearly establish that the cloth parcel, bearing seven seals of impression 'S' and five seal of impression 'M' were found intact and the same tallied with the specimen of seal impression on NCB form and the seal sample, which was sent alongwith the sealed parcel. The report further shows that the parcel was kept in safe custody of Assistant Chemical Examiner, till the time the report qua the same was signed and dispatched. NCB form, Ex. PW-10/B, road certificate, Ex. PW-5/B, abstract of *malkhana* register, Ex. PW-5/A, special report, Ex. PW-6/A and abstract of diary register, Ex. PW-6/A, further strengthens the prosecution case. PW-1, HC Manoj, PW-2, Shri Kamal Verma, PW-8, SI Jasvir Singh and PW-11, SI Harish Kumar, supported the prosecution case qua the recovery of *charas* from Ex. P-2 (bag), which contained another bag, Ex. P-3, wherein a steel container, Ex. PW-4, containing the *charas* was found. All the above enumerated witnesses were subjected to lengthy cross-examination, but nothing favourable to the accused came out. All the above witnesses have nothing against the accused and by no stretch of imagination they could have roped in the accused falsely, as nothing has come on record that these witnesses had enmity with the accused.

22. The learned counsel for the accused has argued that there are contradictions in the statements of the official witnesses, thus the testimony of only independent prosecution witness, i.e., PW-2, Shri Kamal Verma, cannot be made basis for convicting the accused. He has placed reliance upon a judgment of Hon'ble Supreme Court rendered in ***Hem Raj and others vs. State of Haryana, AIR 2005 SC 2110,*** wherein vide paras 9 and 10 it has been held as under:

> ***"9. The fact that no independent witness though available, was examined and not even an explanation was sought to be given for not examining such witness is a serious infirmity in the prosecution case having regard to the indisputable facts of this case. Amongst the independent witnesses, Kapur Singh was one, who was very much in the know of things from the beginning. Kapur singh is alleged to have been in the company of PW-5 at a sweet stall and both of them after hearing the cries joined PW-4 at Channi Chowk. He was one of those who kept the deceased on a cot and took the deceased to hospital. He was there in the hospital by the time the first I.O. PW-9 went to the hospital. The evidence of the first I.O. reveals that the place of occurrence was pointed out to him by Kapur Singh. His statement was also recorded, though not immediately but later. The I.O. admitted that Kapur Singh was the eye-witness to the occurrence. In the FIR, he is referred to as the eye-witness along with PW-5 Kapur Singh was present in the Court on 6-10-1997. The Addl. Public Prosecutor 'gave up' the examination of this witness stating that it was unnecessary. The trial Court commented that he was won over by the accused and, therefore, he was not examined. There is no factual basis for this comment. The approach of the High Court is different. The High Court commented that his examination would only amount to 'proliferation' of direct evidence. But, we are unable to endorse this view of the High Court. To put a seal of approval on the prosecution's omission to examine a material witness who is unrelated to the deceased and who is supposed to know every detail of the incident on the ground of 'proliferation' of direct evidence is not a correct approach. The corroboration of the testimony of the related witnesses PWs-4 and 5 by a known independent eye-witness could have strengthened the prosecution case, especially when the incident took place in a public place.***
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> ***10. Non-examination of independent witness by itself may not give rise***

to adverse inference against the prosecution. However, when the evidence of the alleged eye-witnesses raise serious doubts on the point of their presence at the time of actual occurrence, the unexplained omission of examine the independent witness Kapur Singh, would assume significance. This Court pointed out in Takhaji Hiraji v. Thakore Kubersing Chamansing and others ((2001) 6 SCC 145):-

> ***".....if already overwhelming evidence is available and examination of other witnesses would only a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case, the Court ought to scrutinize the worth of the evidence adduced. The Court of facts must ask itself – whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the Court. If the answer be positive then only a question of drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the Court can safely act upon it, uninfluenced by the factum of non-examination of other witnesses. In the present case we find that there ware at least 5 witnesses whose presence at the place of the incident and whose having seen the incident cannot be doubted at all. It is not even suggested by the defence that they were not present at the place of the incident and did not participate therein."***

It has come in the statements of PW-2, Shri Kamal Verma (independent witness) and I.O. PW-11, SI Harish Kumar, that Shri Anil Kumar was also associated as independent witness and Shri Anil Kumar was given up by the prosecution, being won over by the accused. In fact non-examination of Shri Anil Kumar is not fatal to the prosecution case, especially when PW-2, Shri Kamal Verma, fully supports the prosecution case. Therefore, the judgment (supra) is not applicable to the facts of the present case.

23. Learned counsel for the accused has also placed reliance on another judgment of Hon'ble Supreme Court rendered in ***Vijaysinh Chandubha Jadeja vs. State of Gujarat, (2011) 1 SCC 609,*** wherein it has been held as under:

> ***"24. Although the Constitution Bench in State of Punjab v. Baldev Singh, (1999) 6 SCC 172, did not decide in absolute terms the question whether or not Section 50 of the NDPS Act was directory or mandatory yet it was held that provisions of sub-section (1) of Section 50 make it imperative for the empowered officer to "inform" the person concerned (suspect) about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate; failure to "inform" the suspect about the existence of his said right would cause prejudice to him, and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from the person during a search conducted in violation of the provisions of Section 50 of the NDPS Act. The Court also noted that it was not necessary that the information required to be given under Section 50 should be in a prescribed form or in writing but it was mandatory that the suspect was made aware of the existence of his right to be searched before a gazetted officer or a Magistrate, if so required by him. We respectfully concur with***

these conclusions. Any other interpretation of the provision would make the valuable right conferred on the suspect illusory and a farce.

29. In view of the foregoing discussion, we are of the firm opinion that the object with which right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that in so far as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision."

However, in the case in hand the rigors of Section 50 of the ND&PS Act are not applicable, as it was a chance recovery and the contraband was recovered from the accused, who on seeing the police, tried to escape and was apprehended by the police and his bag was searched. Therefore, the judgment (supra) is not applicable to the facts of the present case and the accused cannot draw any help from it.

24. Lastly, the learned counsel for the accused relied upon another judgment of Hon'ble Supreme Court rendered in ***Gyan Singh & others vs. State of U.P., 1995 Supp(4) SCC 658,*** wherein it is held that conviction cannot be based upon uncorroborated testimonies of official witnesses. However, in the case in hand the testimonies of official police witnesses are fully corroborated with each other, thus it cannot be said that the statements of official police witnesses are uncorroborated.

25. The learned Additional Advocate General has also placed reliance on ***State Represented by Inspector of Police vs. Saravanan & another, (2008) 17 SCC 587,*** wherein vide para 18 of the judgment it has been held as under:

"18. The High Court also held that as there were some discrepancies and improvements in the statement of the witnesses, their evidence should not be relied upon. In State of U. P. v. M.K. Anthony, [(1985) 1 SCC 505] this Court has laid down the approach which should be followed by the Court in such cases:

"10. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper- technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives

> ***evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals. Cross- examination is an unequal duel between a rustic and refined lawyer."***
>
> ***Even otherwise, it has been said time and again by this Court that while appreciating the evidence of a witness, minor discrepancies on trivial matters without affecting the core of the prosecution case, ought not to prompt the court to reject evidence in its entirety. Further, on the general tenor of the evidence given by the witness, the trial court upon appreciation of evidence forms an opinion about the credibility thereof, in the normal circumstances the appellate court would not be justified to review it once again without justifiable reasons. It is the totality of the situation, which has to be taken note of. Difference in some minor detail, which does not otherwise affect the core of the prosecution case, even if present, that itself would not prompt the court to reject the evidence on minor variations and discrepancies."***

Indisputably, no person with precision can depose trivial details. An honest and truthfull witness may miss some trivial details, as the power of observation, retention and reproduction is variable individual to individual. In the case in hand only trivial contradictions are there and those contradictions have no force to overturn the conviction of the accused, therefore, the judgment (supra) is fully applicable to the facts of the present case.

26. The learned Additional Advocate General has also relied upon judgment rendered by the Hon'ble Supreme Court in ***State of Rajasthan vs. Om Prakash, (2007) 12 SCC 381,*** wherein vide para 12 it has been held as under:

> ***"12. At this juncture it is to be noted that though learned counsel for the respondent tried to highlight certain improvements in the version of the witness it is not of consequence. Irrelevant details which do not in any way corrode the credibility of a witness cannot be leveled as omissions or contradictions……..***

The judgment (supra) is fully applicable to the present case. In the case in hand minor contradictions, as have occurred, do not corrode the prosecution case and the benefit of the same cannot in any way be given to the accused.

27. A combined reading of facts and law only lead to a safest conclusion that the learned Trial Court has rightly appreciated the evidence and applied the law correctly. This Court finds that it will not be correct to reverse the findings of the learned Trial Court, as the same are based on sound reasons and are backed up by reliable evidence.

28. Now, coming to the sentence part, imposed by the learned Trial Court, upon the accused. The learned counsel for the accused has argued that the sentence imposed upon the accused is too harsh. In contrast, the learned Additional Advocate General has argued that four years rigorous imprisonment has only been imposed upon the accused and it could have been ten years. This Court, taking into consideration the quantity of the *charas* recovered, finds that the sentence of four years is not excessive, however, the learned Trial Court has imposed fine of Rs. 20,000/- (rupees twenty thousand) and in default of payment of fine ordered the accused to undergo one year's simple imprisonment. This Court finds that simple imprisonment of one year

in default of payment of fine of Rs. 20,000/- is too harsh and same is modified. Now, in default of payment of fine of Rs. 20,000/- the accused shall under simple imprisonment for six months.

29. The appeal, which sans merits, deserves dismissal and is accordingly dismissed. Pending application(s), if any, shall also stand disposed of.

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

Cr. Appeal No. 271 of 2016 a/w
Cr.Appeal No. 320 of 2016
Date of Decision: March 6, 2018

1. Cr.Appeal No. 271 of 2016
Saleem Mohamad ...Appellant.
Versus
State of Himachal Pradesh ...Respondent.
2. Cr.Appeal No.320 of 2016
Kishori Lal ...Appellant.
Versus
State of Himachal Pradesh ...Respondent.

Code of Criminal Procedure, 1973- Section 374- Appeal Against Conviction- Sections 20 and 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985- Held- that the contraband recovered from the bag concealed under the front seat of the car over which accused was sitting- Same cannot be construed as a recovery from the person of an accused and as such provisions of the Section 50 of the N.D.P.S. Act were not applicable- Further Held- that simply because accused were also searched after the recovery of the contraband, the fact would not vitiate the trial, for no prejudice stands shown by the accused in the search of their in person, in violation of the provisions of Section 50 of the NDPS Act- Section 50 of the Act not attracted- Consequently, appeal dismissed. (Para-8 to 12)

Cases referred:
Dalip and another vs. State of Madhya Pradesh, (2007) 1 SCC 450
Union of India vs. Shah Alam, (2009) 16 SCC 644
State of Rajasthan vs. Parmanand and another, (2014) 5 SCC 345
State of H.P. vs. Pawan Kumar, (2005) 4 SCC 350
State of Rajasthan vs. Ratan Lal, (2009) 11 SCC 464

For the Appellants: Mr. H.S.Rana, Advocate, for the appellant in Cr.Appeal No.271 of 2016.
Mr.Sandeep Dutta, Advocate, for the appellant in Cr.Appeal No.320 of 2016.
For the Respondent: Mr. Ashok Sharma, Advocate General, with Mr.J.K.Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

Sanjay Karol, ACJ.

In these appeals filed under Section 374 Cr.P.C., convicts Saleem Mohamad and Kishori Lal have assailed judgment dated 02.05.2016 / 05.05.2016, passed by Special Judge-(II), Shimla, H.P., in Sessions Trial No.16-S/7 of 2015, titled as *State of Himachal Pradesh Versus*

Saleem Mohamad & another, whereby they stand convicted for having committed an offence punishable under the provisions of Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act) and sentenced to serve rigorous imprisonment for a period of ten years each and pay fine of Rs.1,00,000/- each and in default thereof, further to undergo simple imprisonment for a period of one year

2. In short, it is the case of prosecution that on 08.02.2015, police party headed by ASI Raj Kumar (PW.13), recovered 1 kg 100 grams of charas from the conscious possession of accused Saleem Mohamad and Kishori Lal. The charas was recovered from a vehicle bearing registration No.CH-03D-7692, driven by accused Saleem Mohamad and the bag was kept under the front seat of the car over which accused Kishori Lal was sitting. The recovery was effected in the presence of independent witness Kuldeep Sharma (PW.1) and police officials H.C.Pyare Lal (PW.2) and HHC Babu Lal (PW.3). FIR No.8 of 2015, dated 08.02.2015 (Ex.PW.10/A) was registered by HC Kartar Singh (PW.10), for commission of offence punishable under the provisions of Section 20 of the NDPS Act at Police Station, Jubbal, District Shimla, H.P. With the completion of proceedings on the spot, including the accused being searched and the NCB form (Ex.PW.13/A) filled up, contraband substance was deposited in the malkhana by Kartar Singh (PW.10). Vinod Kumar (PW.5) carried the recovered stuff for chemical analysis and the report of the Chemical Analyst (Ex.PW.13/H) alongwith the contraband substance was brought by Jawahar Lal (PW.12). Special report (Ex.PW.11/A) so handed over by L.C. Anjana (PW.7) was received by Nanak Chand (PW.11) in the office of SDPO, Rohru. With the completion of proceedings, which *prima facie* revealed complicity of the accused in the alleged crime, SI Liaq Ram (PW.9) presented the challan in the Court for trial.

3. Both the accused were charged for having committed an offence punishable under the provisions of Section 20 of the NDPS Act, to which they did not plead guilty and claimed trial.

4. In order to establish its case, in all, prosecution examined as many as thirteen witnesses and statements of the accused under Section 313 of the Code of Criminal Procedure were also recorded, in which they took the plea of false implication. No evidence was led in defence.

5. Appreciating the evidence on record, Trial Court found the prosecution to have proven its case, beyond reasonable doubt, and as such, by convicting the accused sentenced them to serve imprisonment and pay fine.

6. Correctness of the findings returned by the Court below are subject matter in the present appeals, so filed by both the convicts.

7. We have heard M/s H.S.Rana and Sandeep Dutta, learned counsel, on behalf of the convicts-appellants as also Mr.Ashok Sharma, learned Advocate General, on behalf of the State. We have also minutely examined the testimonies of the witnesses and other documentary evidence so placed on record by the prosecution. Having done so, we are of the considered view that no case for interference is made out at all. We find the findings returned by the trial Court to be based on complete, correct and proper appreciation of evidence (documentary and ocular) so placed on record. There is neither any illegality/infirmity nor any perversity with the same, resulting into miscarriage of justice. Prosecution has been able to prove its case, beyond reasonable doubt against the convict.

8. Learned counsel appearing for the convicts have raised following submissions: (a) Prosecution story, being shrouded with suspicion is untrustworthy; (b) Contradictions in the testimonies of the witnesses have rendered the prosecution case to be doubtful; (c) Provisions of Section 50 of the NDPS Act stand impeached, entitling automatic acquittal of the accused (d) Similarly non compliance of provisions of Section 52(3) of the NDPS Act have rendered the

prosecution case to be fatal; (e) Also there is non compliance of Section 57 of the NDPS Act, thus entitling the accused for acquittal.

9. In the instant case, it is not disputed before us that contraband substance stands recovered not from the "person" of the accused, but from the bag concealed under the front seat of the car, over which accused Kishori Lal was sitting when accused Saleem Mohamad was on the wheels. ASI Raj Kumar (PW.13) does state that after recovery of the bag containing the contraband substance, which appeared to be charas, accused were also searched.

10. Allegedly proceedings of recovery and search of the person of the accused took place in the presence of witnesses be it police officials or independent witness Kuldeep Sharma (PW.1). Having minutely perused the testimonies of Kuldeep Sharma (PW.1), Pyare Lal (PW.2) and Babu Lal (PW.3), we find these witnesses to have corroborated the version of ASI Raj Kumar (PW.13), who states that only after the contraband substance was recovered, did he search the accused persons.

11. This Court in Cr.Appeal No.305 of 2014, titled as *Sohan Lal vs. State of Himachal Pradesh,* decided on 02.11.2016, with similar facts had an occasion to deal with the decisions rendered by the Apex Court in *Dalip and another vs. State of Madhya Pradesh,* (2007) 1 SCC 450; *Union of India vs. Shah Alam,* (2009) 16 SCC 644 and *State of Rajasthan vs. Parmanand and another,* (2014) 5 SCC 345, the judgments cited on behalf of the appellants.

12. After minute scrutiny, this Court found itself to be bound by the decisions rendered by the larger/earlier Benches of Apex Court in *State of H.P. vs. Pawan Kumar,* (2005) 4 SCC 350; *State of Rajasthan vs. Ratan Lal,* (2009) 11 SCC 464 and not *Shah Alam* (supra)*; Parmanand* (supra); and *Dalip* (supra). Hence, in our considered view, contention that search is illegal or there has been violation of mandatory provisions of Section 50 of the NDPS Act is untenable in law. Thus trial cannot be said to be vitiated. Simply because the accused were also searched after recovery of the contraband substance, that fact itself would not vitiate the trial, for no prejudice stands shown by the accused in the search of their person, in violation of the provisions of Section 50 of the NDPS Act.

13. From the testimony of ASI Raj Kumar (PW.13), we notice that regularly posted SHO was not on duty on the day of occurrence of the incident and in fact, in his place, it was the said witness, who was officiating as the SHO. Hence, there was no question of entrusting the property to the SHO or the same to be resealed specially when entire proceedings of depositing the case property in the malkhana had already taken place prior to the regular SHO returning to join his duty. Hence, we do not find any infraction of the said provisions of the NDPS Act.

14. In our considered view, also there is no infraction of provisions of Section 57 of the NDPS Act. From the conjoint reading of the testimonies of L.C.Anjana (PW.7) and Nanak Chand (PW.11), it is apparent that special report (Ex.PW.11/A) was immediately sent to the appropriate authorities. Much emphasis is laid on the fact that SI Liaq Ram (PW.9) does not state that special report was sent by him, but then how does it make any difference, for ASI Raj Kumar (PW.13) has testified to such effect. Yes, said witness does admit that there is overwriting and correction in the record with regard to the special report, but then, this in our considered view, does not render the prosecution case to be fatal. The doubt is not such so as to shake the genesis of the prosecution story to be true. In view of the clear testimony of PW.7 that she took the report and handed it over to Dy.S.P., Rohru on 10.02.2015.

15. From the conjoint reading of testimonies of Kuldeep Sharma (PW.1), Pyare Lal (PW.2), Babu Lal (PW.3) and ASI Raj Kumar (PW.13), it cannot be said that prosecution story is either shrouded with suspicion or that contradictions in the testimonies of the witnesses, in any manner, have rendered the creditworthiness of the witnesses to be doubtful.

16. ASI Raj Kumar (PW.13) categorically states that on 08.02.2015, he alongwith police officials Pyare Lal (PW.2) and Babu Lal (PW.3) was travelling towards Kharapathar on

routine patrolling duty. At about 12.15 pm, when they reached at a place known as Salwakara, they stopped a vehicle near the grocery shop of Kuldeep Sharma. At that time they noticed accused travelling in a vehicle bearing registration No.CH-03D-7692. Since the vehicle was from outside the State, on suspicion, the driver was asked to produce the documents. At that time, both the driver and the occupant appeared to be frightened. In the meanwhile, both independent witness Kuldeep Sharma (PW.1) and Hominder Sharma appeared on the spot. Both the papers and the vehicle were checked in their presence.

17. From the bag concealed under the front seat of the vehicle on which accused Kishori Lal was sitting, contraband substance was recovered. The recovered stuff was weighed with the scales brought from the shop of Kuldeep Sharma and found to be 1 kg. 100 grams. The recovered stuff was packed and sealed with five seals of seal having impression 'H' in the presence of the witnesses. The sample seal was handed over to Kuldeep Sharma after samples of the seal were taken on separate pieces of cloth (Ex.PW.1/A). NCB form (Ex.PW.13/A) was filled up in triplicate. Rukka (Ex.PW.3/A) was prepared and sent to the Police Station through Babu Lal (PW.3). Proceedings of recovery were photographed (Ex.PW.4/A1 to Ex.PW.4/A6). Thereafter, both the accused were searched and Fard jamatalashi (Ex.PW.1/C & Ex.PW.1/D) prepared. Accused were arrested and with the completion of proceedings on the spot, contraband substance was deposited with MHC Kartar Singh (PW.10). Special report (Ex.PW.11/A) was sent to SDPO Rohru through L.C. Anjana (PW.7). The witness has explained that driver of the vehicle in which police party was travelling has since expired. He has testified about the recovered stuff (Ex.P-5), carry bag (Ex.P-3), plastic bag (Ex.P-4). FSL report (Ex.PW.13/H) also stands exhibited by him.

18. Witness was cross-examined at length by both the accused, who were represented by the same learned counsel. We notice that presence of the accused on the spot, travelling in the vehicle in question, remains undisputed. Much emphasis is laid on false preparation of the documents, indicating false implication of the accused and the alleged recovery not having taken place in the presence of the independent witnesses.

19. Significantly, it has not come on record that anyone of the police officials were harbouring animosity against the accused, but then we may not be misunderstood to mean that accused has to prove his innocence, for it is a settled principle of law that prosecution has to stand on its own legs and in a case of such like nature, onus to prove is stricter and heavily, which undisputedly lies upon the prosecution. Statutory presumption would arise only with the prosecution establishing occurrence of crime.

20. When we peruse the cross-examination part of the testimonies of the witnesses, we notice that the credit of the witnesses remains un-impeached. Version of the witnesses with regard to: (a) presence of the police officials on the spot; (b) presence of the accused on the spot; (c) presence of the independent witnesses on the spot; and (d) recovery of the contraband substance from the conscious possession of the accused, stands duly corroborated by independent witness Kuldeep Sharma (PW.1), Pyare Lal (PW.2) and Babu Lal (PW.3) police officials, who in one voice have independently testified with regard to the events which took place on the spot, which we have discussed supra.

21. Contradictions as pointed out, in our considered view are absolutely minor. They are not material rendering the genesis of the prosecution case to be doubtful, much less false. Whether shop of Kuldeep Sharma (PW.1) was at a distance of 100 meters as pointed out by Babu Lal (PW.3) or 200-300 meters as pointed out by Pyare Lal (PW.2) or 60-70 meters as pointed out by Kuldeep Sharma pales into insignificance, for what stands conclusively established is the factum of Kuldeep Sharma having his shop in close proximity to the place of occurrence of the incident.

22. It is also argued that there are contradictions rendering the presence of another independent witness Hominder Sharma to be present on the spot. Whether he came of his own or he was called by the police officials, in our considered view, is not a contradiction material

enough, rendering the genesis of the prosecution case to be doubtful, for after all there is time gap between the date of occurrence of the incident and the recording of their statements in Court.

23. We also notice that the Trial Court has sufficiently dealt with the contradictions in paragraphs 32 and 33 of the judgment.

24. From the testimonies of spot witnesses, official witnesses as also independent witnesses, to our mind, it stands conclusively established that the prosecution has been able to establish its case, beyond reasonable doubt, that the contraband substance was in effect was recovered from the conscious possession of the accused. It is in this backdrop, statutory presumption would lie against the accused.

25. We also otherwise find the prosecution case to have been corroborated by other independent witnesses. Contraband substance came to be deposited with MHC Kartar Singh (PW.10), who has testified that till and so long the property remained with him, the same was not tampered with. It was sealed and the seals were kept intact. He handed over the same to C.Vinod Kumar (PW.5) for being deposited with the Forensic Science Laboratory, Junga. Such version also stands fortified by the latter**.**

26. Not only that, report of the expert of the Forensic Science Laboratory (Ex.PW.13/H) establishes that the case property was received in a proper and sealed manner and that the contraband substance analyzed was found to be charas. The case property was brought back from the Laboratory alongwith the certificate by C.Jawahar Lal (PW.12), who has also testified about the same.

27. We may also observe that accused do not dispute the factum of the vehicle with the registration of another State taken into possession by the police. Now these persons have not explained their presence on the spot.

28. 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**.**

29. From the material placed on record, it stands clearly established by the prosecution witnesses, beyond reasonable doubt, that the convicts are guilty of having committed the offences charged for. There is sufficient, clear, convincing, cogent and reliable piece of evidence on record to this effect. The circumstances stand conclusively proved by unbroken chain of unimpeachable testimony of the prosecution witnesses. The guilt of the convicts stands proved beyond reasonable doubt to the hilt. It cannot be said that convicts are innocent or not guilty or that they have been falsely implicated or that their defence is probable or that the evidence led by the prosecution is inconsistent, unreliable, untrustworthy and unbelievable. It cannot be said that the version narrated by the witnesses in Court is in a parrot-like manner and hence is to be disbelieved.

30. Thus, from the material placed on record, it stands established by the prosecution, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence, that convicts were found in conscious and exclusive possession of 1 kg 100 grams of charas.

31. 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 appeals are dismissed.

Records of the Court below be immediately sent back.

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

Irshad ...Petitioner

Versus

State of Himachal Pradesh ...Respondent

CrMMO No. 56 of 2018
Decided on: March 7, 2018

Code of Criminal Procedure, 1973- Section 311- Re-summoning and re-examination of witnesses- Held- To recall and re-examine witnesses and that too for the limited extent of identifying the case property cannot be termed to be an exercise for filling up a lacuna- It would in any case though depend upon the circumstances of each case- It has been further reiterated that a witness can be recalled and re-examined, if it is necessary for the proper adjudication of the case. (Para-10 and 11)

Code of Criminal Procedure, 1973- Section 311- Re-summoning and re-examination of witnesses- Further Held- That the plausible explanation in the application moved under Section 311 Cr.P.C that the contraband was required to be identified by the prosecution witnesses and the re-examination was confined to that limited purpose, held to be justified- Further Held- that a lacuna in prosecution is not be equated with the fallout of an oversight committed by the prosecutor or Investigating Agency. (Para-12 and 13)

Cases referred:

Sardar Singh vs. State of Himachal Pradesh, I L R 2017 (IV) HP

Rajendra Prasad vs Narcotic Cell, (1999) 6 SCC 110

For the petitioner: Mr. Nimish Gupta, Advocate.

For the respondent: Mr. Vikrant Chandel, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Being aggrieved and dissatisfied with order dated 17.1.2018 passed by learned Special Judge, Chamba, District Chamba, Himachal Pradesh, in Cr.MA No. 97/18 in Sessions Trial No. 8/17, whereby application having been filed by the respondent-State under Section 311 CrPC for re-summoning and re-examination of PW-1 Sanjay Kumar and PW-2 Hoshiar Singh came to be allowed, petitioner-accused (hereinafter referred to as 'petitioner') has approached this Court by way of instant petition praying therein for quashing of impugned order referred to herein above.

2. For having a bird's eye view of the matter, necessary facts as emerge from the record are that an application bearing Cr.MA No. 97/18 came to be filed under Section 311 CrPC on behalf of the State seeking therein permission of the court to re-summon and re-examine PW-1 and PW-2, names whereof have been referred herein above. Averments contained in the application i.e. annexure P-1 reveal that at the time of investigation, Investigating Officer had initiated process for pre-trial disposal of case property in terms of provisions contained under Section 52A of the Narcotic Drugs & Psychotropic Substances Act (hereinafter, 'Act'), but before said process could be completed, charge sheet came to be filed against the accused within stipulated period. Since process initiated for pre-trial

disposal of case property was pending, necessary disposal certificate could not be issued by competent authority and case property was also not destroyed.

3. On 27.5.2017, PW-1 Sanjay Kumar and PW-2 Hoshiar Singh were examined but on account of pending process of pre-trial disposal and also on account of bona fide belief that proceedings under Section 52A of the Act had been completed and further on account of non-availability of case property on that day, same could not be put to witnesses named above for identification. Factum with regard to aforesaid omission on the part of the prosecution came to the fore at the time of recording of examination of PW-6, whereafter, application for re-examination of PW-1 and PW-2 for limited purpose of identification of case property came to be instituted on behalf of the State.

4. Petitioner, while opposing aforesaid application disputed the averments contained in the same and stated before the Court that application has been moved solely with a view to fill up lacuna/omission on the part of prosecution in getting the case property identified from PW-1 and PW-2, who happened to be members of patrolling party, which had allegedly seized contraband from the conscious possession of the petitioner.

5. Learned trial Court taking note of aforesaid pleadings proceeded to allow the application filed under Section 311 CrPC vide order dated 17.1.2018 and allowed the re-examination of witnesses namely PW-1 Constable Sanjay Kumar and PW-2 Constable Hoshiar Singh. In the aforesaid background, petitioner has approached this Court, laying therein challenge to order dated 17.1.2018.

6. Mr. Nimish Gupta, learned counsel representing the petitioner, while inviting attention of this Court to the provisions contained in Section 311 CrPC, made a serious attempt to persuade this Court to agree with his contention that impugned order passed by learned Court below is not sustainable as the same is not in conformity with the provisions of law. While fairly conceding that in terms of Section 311 CrPC, court enjoys vast power to summon, re-examine or recall a witness at any stage of proceedings, learned counsel representing the petitioner contended that such power can not be exercised by a court to permit applicant to fill up lacuna in the prosecution case. Mr. Gupta further contended that the explanation rendered in the application for re-examination of PW-1 and PW-2 is not plausible because factum with regard to existence of case property was very much in the knowledge of prosecution and as such failure on its part to get the case property identified from PW-1 and PW-2 during their examination has definitely weakened the case of prosecution to the benefit of petitioner and as such, aforesaid omission which is/was not bona fide could not be allowed to be corrected/rectified by the learned Court below by ordering re-examination of aforesaid prosecution witnesses.

7. Mr. Vikrant Chandel, learned Deputy Advocate General, while refuting aforesaid contentions put forth by the learned counsel representing the petitioner, contended that provisions contained in Section 311 CrPC empower a Court to summon/recall a witness at any stage of proceedings, provided same is necessary for the proper adjudication of the case. While terming impugned order to be legal and in accordance with law, learned Deputy Advocate General contended that re-examination of PW-1 and PW-2, in whose presence, contraband was allegedly recovered from the conscious possession of the petitioner would facilitate proper adjudication of the case and no prejudice would be caused to the petitioner/accused, who will definitely be provided proper/adequate opportunity of cross-examination. Lastly, Mr. Vikrant Chandel, learned Deputy Advocate General contended that while exercising powers under Section 311 CrPC, paramount consideration of court is to do justice to the case and court can examine a witness at any stage, even if same results in filling up lacuna or loopholes. In that situation, it is a subsidiary factor. In this regard, he placed reliance upon judgment rendered by this Court

in CrMMO No. 209 of 2017, **Sardar Singh** vs. **State of Himachal Pradesh** decided on 1.8.2017.

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

9. Before adverting to the factual matrix of the case as well as arguments advanced by the learned counsel representing the parties, this Court deems it proper to refer to the judgment passed by this Court in CrMMO No. 209 of 2017, wherein scope and power of the Court while exercising power under Section 311 CrPC has been elaborately dealt with. Relevant paragraphs of the aforesaid judgment are reproduced herein below:

> "10. Before ascertaining the merits of the submissions having been made by learned counsel representing the respective parties vis-à-vis impugned order passed by the learned trial Court, it would be profitable to take note of Section 311 Cr.P.C., which reads as under:-
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> > "311. Power to summon material witness, or examine person present:-. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or. recall and re- examine any person already examined; and the Court shall summon and examine or recall and reexamine any such person if his evidence appears to it to be essential to the just decision of the case"
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> Bare perusal of aforesaid provision suggests that the Court may, at any time, summon any person as a witness, or recall and re-examine any witness provided that same is essentially required for just decision of the case, and judgments passed by Hon'ble Apex Court in Mannan SK and others vs. State of West Bengal and another AIR 2014 SC 2950, wherein the Hon'ble Court has held as under:-
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> > "10. The aim of every court is to discover truth. Section 311 of the Code is one of many such provisions of the Code which strengthen the arms of a court in its effort to ferret out the truth by procedure sanctioned by law. It is couched in very wide terms. It empowers the court at any stage of any inquiry, trial or other proceedings under the Code to summon any person as a witness or examine any person in attendance, though not summoned as witness or recall and re-examine already examined witness. The second part of the Section uses the word 'shall'. It says that the court shall summon and examine or recall or re-examine any such person if his evidence appears to it to be essential to the just decision of the case. The words 'essential to the just decision of the case' are the key words. The court must form an opinion that for the just decision of the case recall or reexamination of the witness is necessary. Since the power is wide it's exercise has to be done with circumspection. It is trite that wider the power greater is the responsibility on the courts which exercise it. The exercise of this power cannot be untrammeled and arbitrary but must be only guided by the object of arriving at a just decision of the case. It should not cause prejudice to the accused. It should not permit the prosecution to fill-up the lacuna. Whether recall of a witness is for filling-up of a lacuna or it is for just decision of a case depends on facts and circumstances of each case. In all cases it is likely to be argued that the prosecution is trying to fill-up a lacuna because the line of demarcation is thin. It is for the court to consider all the circumstances and decide whether the prayer for recall is genuine."
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> 11. Hon'ble Apex Court in Raja Ram Prasad Yadav vs. State of Bihar and another, (2013)14 SCC 461, has held that powers under Section 311 Cr.P.C. to summon any person or witness or examine any person already examined can be

exercised at any stage provided the same is required for just decision of the case. It may be profitable to take note of the following paras of the judgment:-

> "14. A conspicuous reading of Section 311 Cr.P.C. would show that widest of the powers have been invested with the Courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression "any" has been used as a pre-fix to "court", "inquiry", "trial", "other proceeding", "person as a witness", "person in attendance though not summoned as a witness", and "person already examined". By using the said expression "any" as a pre-fix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the Court was only in relation to such evidence that appears to the Court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the Court. Order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 Cr.P.C. and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 Cr.P.C. It is, therefore, imperative that the invocation of Section 311 Cr.P.C. and its application in a particular case can be ordered by the Court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any Court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined, the Court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the Court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the Court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution.
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> 15. In this context, we also wish to make a reference to certain decisions rendered by this Court on the interpretation of Section 311 Cr.P.C. where, this Court highlighted as to the basic principles which are to be borne in mind, while dealing with an application under Section 311 Cr.P.C.
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> 15.1 In the decision reported in Jamatraj Kewalji Govani vs. State of Maharashtra - AIR 1968 SC 178, this Court held as under in paragraph 14:-
>
> > "14. It would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of the trial to summon a witness or examine one present in court or to recall a witness already examined, and makes this the duty and obligation of the Court provided the just decision of the case demands it. In other words, where the court exercises the power under the second part, the inquiry cannot be whether the accused has brought anything suddenly or unexpectedly but whether the court is right in thinking that the new evidence is needed by it for a just decision of the case. If the court has acted without the requirements of a just decision, the action is open to criticism but if the court's action is supportable as being in aid of a

just decision the action cannot be regarded as exceeding the jurisdiction." (Emphasis added)

15.2 In the decision reported in Mohanlal Shamji Soni vs. Union of India and another - 1991 Suppl.(1) SCC 271, this Court again highlighted the importance of the power to be exercised under Section 311 Cr.P.C. as under in paragraph 10:-

"10....In order to enable the court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the new Code) are enacted whereunder any court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re- examine any person in attendance though not summoned as a witness or recall and reexamine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated."

15.3 In the decision in Raj Deo Sharma (II) vs. State of Bihar - 1999 (7) SCC 604, the proposition has been reiterated as under in paragraph 9:-

"9. We may observe that the power of the court as envisaged in Section 311 of the Code of Criminal Procedure has not been curtailed by this Court. Neither in the decision of the five-Judge Bench in A.R. Antulay case nor in Kartar Singh case such power has been restricted for achieving speedy trial. In other words, even if the prosecution evidence is closed in compliance with the directions contained in the main judgment it is still open to the prosecution to invoke the powers of the court under Section 311 of the Code. We make it clear that if evidence of any witness appears to the court to be essential to the just decision of the case it is the duty of the court to summon and examine or recall and re-examine any such person." (Emphasis added)

15.4 In U.T. of Dadra and Nagar Haveli and Anr. vs. Fatehsinh Mohansinh Chauhan - 2006 (7) SCC 529, the decision has been further elucidated as under in paragraph 15:-

"15. A conspectus of authorities referred to above would show that the principle is well settled that the exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof of such facts which lead to a just and correct decision of the case, this being the primary duty of a criminal court. Calling a witness or re-examining a witness already examined for the purpose of finding out the truth in order to enable the court to arrive at a just decision of the case cannot be dubbed as "filling in a lacuna in the 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." (Emphasis supplied)

15.5 In Iddar & Ors. vs. Aabida & Anr. - AIR 2007 SC 3029, the object underlying under Section 311 Cr.P.C., has been stated as under in paragraph 9:-

"9...27. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of

the accused, and it will not be an improper exercise of the powers of the court to summon a witness under the section merely because the evidence supports the case for the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is 'at any stage of inquiry or trial or other proceeding under this Code'. It is, however, to be borne in mind that whereas the section confers a very wide power on the court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind." (Emphasis added)

15.6 In P. Sanjeeva Rao vs. State of A.P.- AIR 2012 SC 2242, the scope of Section 311 Cr.P.C. has been highlighted by making reference to an earlier decision of this Court and also with particular reference to the case, which was dealt with in that decision in paragraphs 20 and 23, which are as under:-

"20. Grant of fairest opportunity to the accused to prove his innocence was the object of every fair trial, observed this Court in Hoffman Andreas v. Inspector of Customs, Amritsar (2000) 10 SCC 430. The following passage is in this regard apposite:

> "6. ...In such circumstances, if the new counsel thought to have the material witnesses further examined, the Court could adopt latitude and a liberal view in the interest of justice, particularly when the court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible."

23. We are conscious of the fact that recall of the witnesses is being directed nearly four years after they were examined-in-chief about an incident that is nearly seven years old. Delay takes a heavy toll on the human memory apart from breeding cynicism about the efficacy of the judicial system to decide cases within a reasonably foreseeable time period. To that extent the apprehension expressed by Mr. Rawal, that the prosecution may suffer prejudice on account of a belated recall, may not be wholly without any basis. Having said that, we are of the opinion that on a parity of reasoning and looking to the consequences of denial of opportunity to cross-examine the witnesses, we would prefer to err in favour of the appellant getting an opportunity rather than protecting the prosecution against a possible prejudice at his cost. Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself." (Emphasis in original)

15.7 In a recent decision of this Court in Sheikh Jumman vs. State of Maharashtra - (2012) 9 SCALE 18, the above referred to decisions were followed.

16. Again in an unreported decision rendered by this Court dated 08.05.2013 in Natasha Singh vs. CBI (State) – Criminal Appeal No.709 of 2013, where one of us was a party, various other decisions of this Court were referred to and the position has been stated as under in paragraphs 15 and 16:

> "15. The scope and object of the provision is to enable the Court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just

decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 Cr.P.C. must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal, however, must be given to the other party.

The power conferred 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 great caution and circumspection.

The very use of words such as 'any Court', 'at any stage', or 'or any enquiry', trial or other proceedings', 'any person' and 'any such person' clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the Court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should, therefore, be whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case.

16. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized. Adducing evidence in support of the defence is a valuable right. Denial of such right would amount to the denial of a fair trial. Thus, it is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court must be zealous in ensuring that there is no breach of the same. (Vide Talab Haji Hussain v. Madhukar Purshottam Mondkar & Anr., AIR 1958 SC 376; Zahira Habibulla H. Sheikh & Anr. v. State of Gujarat & Ors. AIR 2004 SC 3114; Zahira Habibullah Sheikh & Anr. v. State of Gujarat & Ors., AIR 2006 SC 1367; Kalyani Baskar (Mrs.) v. M.S. Sampoornam (Mrs.) (2007) 2 SCC 258; Vijay Kumar v. State of U.P. & Anr., (2011) 8 SCC 136; and Sudevanand v. State through C.B.I. (2012) 3 SCC 387.)"

17. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr.P.C. read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

a) 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?

b) 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 and speculative presentation of facts, as thereby the ends of justice would be defeated.

c) 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 reexamine any such person.

d) 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.

e) 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.

f) The wide discretionary power should be exercised judiciously and not arbitrarily.

g) 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.

h) 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.

i) 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.

j) 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.

k) 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.

l) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

m) 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.

n) 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."

12. Hon'ble Apex Court in **Zahira Habibullah Sheikh** (5) **and another** vs. **State of Gujarat and others** (2006)3 SCC 374 has held as under:-

> "27. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the Court to summon a witness under the Section merely because the evidence supports the case for the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the Court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind.
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> 28. As indicated above, the Section is wholly discretionary. The second part of it imposes upon the Magistrate an obligation: it is, that the Court shall summon and examine all persons whose evidence appears to be essential to the just decision of the case. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court. Sections 60, 64 and 91 of the Indian Evidence Act, 1872 (in short, 'Evidence Act') are based on this rule. The Court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the evidence, the Court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The Court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the Court has to act under the second part of the section. Sometimes the examination of witnesses as directed by the Court may result in what is thought to be "filling of loopholes". That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not must of course depend on the facts of each case, and has to be determined by the Presiding Judge.
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> 29. The object of the Section 311 is to bring on record evidence not only from the point of view of the accused and the prosecution but also from the point of view of the orderly society. If a witness called by Court gives evidence against the complainant he should be allowed an opportunity to cross- examine. The right to cross-examine a witness who is called by a Court arises not under the provision of Section 311, but under the Evidence Act which gives a party the right to cross- examine a witness who is not his own witness. Since a witness summoned by the Court could not be termed a witness of any particular party, the Court should give the right of cross- examination to the complainant. These aspects were highlighted in Jamat Raj Kewalji Govani v. State of Maharashtra, (AIR 1968 SC 178).
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> 30. Right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying existence of Courts of justice. The operative principles for a fair trial permeate the common law in both civil and criminal contexts. Application of these principles

involves a delicate judicial balancing of competing interests in a criminal trial, the interests of the accused and the public and to a great extent that of the victim have to be weighed not losing sight of the public interest involved in the prosecution of persons who commit offences.

13. In the judgments referred above, the Hon'ble Apex Court has specifically observed that the words "essential to the just decision of the case" are key words and in this regard, the court must form an opinion that for the just decision of the case, whether it is necessary to recall or examine the witness or not."

10. It is quite apparent from the aforesaid exposition of law rendered by this Court, which is squarely based upon the judgment passed by Hon'ble Apex Court, that court enjoys vast power of summoning or recalling any witness at any stage of proceedings, if his/her evidence appears to be essential for just decision of the case. No doubt, it has been cautioned by Hon'ble Apex Court repeatedly that the Courts below should be more careful and cautious while exercising power under Section 311 CrPC but it can always summon, recall or reexamine any witness at any stage, provided his/her statement is necessary for proper adjudication of the case. It is well settled that wider the power, greater the responsibility upon the Court which exercises such power and exercise of such power can not be untrammeled and arbitrary rather, same must be guided by the object of arriving at a just decision of case.

11. In the case at hand, stand has been taken by the learned counsel representing the petitioner that re-examination of PW-1 and PW-2 would amount to filling up of lacuna, but this Court, after having carefully perused averments contained in the application, which have not been seriously disputed by the accused, is not inclined to agree with the aforesaid contention of the learned counsel representing the petitioner. Hon'ble Apex Court in the judgment relied upon by this Court in the judgment of this court (supra), has categorically held that whether recall of a witness is for filling up a lacuna or for its just decision, depends upon the given circumstances of each case. Undisputedly, in the case at hand, factum with regard to existence of case property came to the notice of the prosecution during examination of PW-6 ASI Surinder Kumar, immediately whereafter, application under Section 311 CrPC came to be moved at the behest of prosecution. Prosecution sought re-examination of PW-1 Constable Sanjay Kumar and PW-2 Constable Hoshiar Singh for the limited purpose of getting the case property identified since both the above named witnesses were members of patrolling party, in whose presence, alleged contraband was recovered from the exclusive and conscious possession of the petitioner.

12. There appears to be plausible explanation rendered in the application by the prosecution qua the failure on its part to get the contraband identified at the time of examination of aforesaid witnesses. Explanation rendered on record by the prosecution, as has been taken note above, has been further corroborated with the version put forth by PW-10 ASI Ajit Singh. True it is that the case property was not shown to PW-1 and PW-2 during their examination before the Court, but taking note of the fact that the case property allegedly was recovered from the conscious possession of the petitioner in the presence of aforesaid witnesses, prayer for re-examination of these witnesses that too for limited purpose of identifying the case property, appears to be justified.

13. Hon'ble Apex Court in **Rajendra Prasad** vs **Narcotic Cell**, (1999) 6 SCC 110, which has also been taken note by learned Court below, has categorically held that a lacuna in prosecution is not to be equated with the fallout of an oversight committed by a public prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. Corollary of such lapses or mistakes during conducting the case can not be understood to be lacuna, which a court can not fill up. In the judgment referred herein above, it has been further held by Hon'ble Apex Court that lacuna in prosecution

must be understood as 'inherent weakness' or 'latent wedge' in the matrix of the prosecution. It has been further categorically held that if proper evidence was not adduced or relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.

14. In the case at hand, as has been rightly taken note of by learned Court below, names of witnesses were already known to both the parties and they were fully aware of the fact that evidence could not led to prove that case property was recovered from exclusive and conscious possession of petitioner in their presence as such, prayer made by prosecution for re-examination of PW-1 and PW-2 can not be said to be unreasonable.

15. Leaving everything aside, bare perusal of Section 311 CrPC suggests that Section 311 CrPC has two parts; first part reserves a right to the parties to move an appropriate application for recalling and re-examination of the witnesses at any stage but, definitely the second part is mandatory that casts a duty upon the Court to summon, re-examine or recall a witness at any stage, if his/her evidence appears to be essential for just decision of the case, because underlying object of Section 311 CrPC is to ensure that there is no failure of justice on account of mistake of either of the parties in bringing valuable piece of evidence on record or leaving ambiguity in the statements of witnesses examined from either of the sides.

16. Another argument advanced by the learned counsel representing the petitioner with regard to delay in moving the application also deserves outright rejection because application at hand came to be filed immediately after factum with regard to non-disposal of case property came to the notice of prosecution during examination of ASI Surinder Kumar, PW-6. Otherwise also, aforesaid argument can not be accepted in the teeth of wide powers conferred upon the courts under Section 311 CrPC, to summon a witness at any stage of inquiry, trial or other proceedings under CrPC. Moreover, in the case at hand, evidence of prosecution is not yet closed as emerges from the impugned order, rather, remaining witnesses have been ordered to be examined by the learned Court below alongwith PW-1 and PW-2, on the date fixed by it.

17. In the aforesaid background, this Court finds no reason to interfere with the well reasoned order recorded by the learned Court below, which otherwise appears to be in conformity with the provisions contained under Section 311 CrPC as well as law laid down by the Hon'ble Apex Court followed by this Hon'ble Court from time to time, and as such, same deserves to be upheld.

18. Consequently, in view of the detailed discussion above, present petition is dismissed. Impugned order passed by learned Court below is upheld. Pending applications, if any, are disposed of.

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

Smt. Santosh Kumari .....Petitioner.

Vs.

State of H.P. and others .....Respondents.

CWP(T) No.: 4903 of 2008
Date of Decision: 08.03.2018

Constitution of India, 1950- Article 226- Service Matter- Appointment- Appointment denied to the petitioner despite having secured highest marks on the ground that she was disqualified to be appointed as an Anganwadi worker, since, her husband was in Government service- **Held-** that if such a disqualification is not provided under the guidelines, a mere policy decision taken by the Government in this behalf, expressly not contained in the guidelines, will not be sufficient to oust the petitioner from appointment as an Anganwadi worker- The appointment of the respondent set aside- petition allowed. (Para-5 and 6)

For the petitioner: Mr. Pawan Gautam, Advocate.

For the respondents: Mr. Desh Raj Thakur, Additional Advocate General, with Mr. Kamal Kant Chandel, Deputy Advocate General, for respondents No. 1 and 2.
None for respondent No. 3.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral) :*

By way of this writ petition, the petitioner has challenged the appointment of respondent No. 3 as Anganwadi Worker at Anganwadi Centre, Churru, which appointment took place in the year 1997, on the ground that the candidature of the petitioner was wrongly rejected by the respondent-State, despite the fact that she was found to be more meritorious.

2. Though respondent No. 3 stands duly served and is duly represented by the learned counsel, whose name is duly reflected in the cause list, however, none has appeared for the said respondent, therefore, she is proceeded against *ex parte.* Reply filed by the said respondent is on record and the same has been perused by the Court alongwith the reply filed by the respondent-State as well as the supplementary affidavit subsequently filed by the State.

3. It is not in dispute that in the selection process which was undertaken by the respondent-State for appointing an Anganwadi Wroker for Anganwadi Centre at Churru, the present petitioner was found to be the more meritorious out of the candidates, who appeared in the interview. Details of the interview stand appended alongwith the reply filed by respondents No. 1 and 2, which are quoted hereinbelow:

"Details of interview for the post of Anganwadi Worker under ICDS Project, Amb

Gram Panchayat Churru Anganwadi Centre Churru

Sr. No.	Name of the candidate	D.O.B.	Edu Ql.	Whether any member of Family is in Govt./Semi Govt. service	Edu.	Exp.	GK	Total	Remarks
1.	2,	3.	4.	5.	6.	7.	8.	9	10
1.	Santosh Kumari, w/o Sh. Gian Singh VPO	12.2.71	10th	373/700 Yes	5.3	8	7	20.3	Experience for working in Shivalik Sewa Mandal Churru but the husband is working as Patwari.
2.	Shobha Devi w/o Dharam Pal VPO Churru	13.06.60	10th	447/900 No	4.9	-	5	9.9	IRDP, No family member in govt. service. Member of ward panch. If selected she will resign as per undertaking.

3. Saroj Devi D/o Nanak
Chand VPO Churru 11.4.78 10th356/700 No 5.0 - 4 9.0 Underage.

4. Rekha DhimanD/o
Jagdish Lal VPO Churru 26.8.77 10+2 Absent

5. Sona Devi D/o Paras
Ram V.P.O. Churru 23.4.72 10th Absent

Sd/- Sd/- Sd/-
C.D.P.O Amb T.W.O. Amb S.D.O. (c) Amb"

4. This document so filed by the State is self speaking that the total marks which were obtained by the present petitioner in the interview were 20.3, whereas the selected candidate only got 9.9. marks in the process. Despite this, respondent-State did not offer appointment to the petitioner on the ground that the petitioner was disqualified as her husband was in Government service. This is also evident from the reply so filed on the affidavit of Director, Social & Women's Welfare, H.P. dated 27th April, 1998.

5. Respondent-State had framed guidelines which governs the appointment/engagement of Anganwari Workers/Helpers. The Policy which was invogue at the time when the interviews took place and appointment was made, is on record. A perusal of the said guidelines demonstrates that there was no embargo in the same, which rendered a candidate ineligible to be considered for being appointed as Anganwadi Worker, if her husband was in Government service. Though in subsequent guidelines issued by the Government, a rider stood incorporated with regard to annual income of the applying candidate, but in the said guidelines in issue, there was no such embargo also. The contention of learned Additional Advocate General that though admittedly there was no such embargo in the guidelines which was invogue at the relevant time, but earlier in the year 1989 such a Policy decision stood taken by the Government, in my considered view does not help the cause of the State, because until and unless such a condition was expressly contained in the guidelines, it could not have been read into the guidelines so as to oust the candidate.

6. In view of above discussion, this writ petition is allowed. The act of respondent-authority of rejecting the candidature of the petitioner for being appointed as Anganwadi Worker at Anganwadi Centre, Churru, on the ground that her husband was a Government servant, is quashed and set aside. It goes without saying that in view of the findings so returned by this Court, the appointment offered by the respondent-State to the private respondent is also rendered bad in law. Accordingly, State is ordered to offer appointment to the petitioner forthwith. She shall be entitled for seniority as from the date, the respondent No. 3 was engaged as Anganwadi Worker, however, as far as back wages are concerned, in my considered view, interest of justice will be served in case the petitioner is monetarily compensated by the State by paying a lump sum amount of Rs.25000/-. Though this Court has held that the appointment offered to the private respondent is bad in law, in view of the decision so given by this Court, however, in case the respondent-State intends to protect the appointment offered to the private respondent, it can do so.

Petition stands disposed of in above terms, so also miscellaneous application(s), if any. No order as to costs.

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

Chinta Devi ...Petitioner.

Versus

The Director of Estates (Regions) and another ...Respondents.

CWP No. 10992 of 2011
Decided on: 09.03.2018

Constitution of India, 1950- Article 226- Deceased employee died in an accident while serving as accountant in the office of the respondent- Petitioner, wife applied for appointment on compassionate ground- the application was rejected- **Held** – that the order of rejecting application is non-speaking and uninformed order- It does not reveal that the scheme contained in the office memorandum dated 9th October, 1998 for determination and availability of vacancies for such decision was adhered to or not- non-speaking and uninformed decision smacks mala fide and arbitrariness- petition was allowed and the communication rejecting the claim of the petitioner quashed- respondents were directed to reconsider the claim of the petitioner in the light of the aforementioned office memorandum. (Para-8, 14 and 15)

For the petitioner: Mr. Kulbhushan Khajuria, Advocate, vice Mr. Jitender P. Ranote, Advocate.

For the respondents: Mr. Shashi Shirshoo, Central Government Standing Counsel.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge. *(Oral)*

It is undisputed that petitioner is wife of a deceased employee of respondents, who expired on 2nd July, 2006 in an accident while serving as Accountant in the office of respondent No. 2. After his death, petitioner, who is a matriculate, had applied for compassionate appointment with the respondents vide application, dated 14th August, 2006 (Annexure P-6) with request to consider her case for appointment at her native place, i.e. Shimla, being a single lady. Her request was rejected by the respondents and vide communication, dated 26th December, 2006 (Annexure P-8), it was conveyed that her application for appointment as Lower Division Clerk on compassionate grounds was considered but could not be acceded to. She had re-submitted request for compassionate appointment vide application, dated 11th December, 2008 (Annexure P-7).

2. A legal notice was also issued to the respondents through an Advocate requesting for compassionate appointment and also for assigning reasons for denying the appointment to the petitioner on compassionate grounds. Respondents never responded to the said notice whereupon the present petition stands filed.

3. It is evident from perusal of communication, dated 27th January, 2009 (Annexure P-9) sent by Assistant Estate Manager, Nagpur to Assistant Director of Estates (Regions), New Delhi, in continuation to representation of petitioner, dated 11th December, 2008, that it was recommended that petitioner could be accommodated against the post of LDC lying vacant in that office with effect from 21st April, 2008 and question of obtaining approval from Screening Committee did not arise if she was recommended against the above vacancy as per DoPT O.M. No. 14014/6/94-Estt (D), dated 9th October, 1998.

4. Petitioner has also placed on record office memorandum, dated 9th October, 1998 (Annexure P-11) issued by Ministry of Personnel, Public Grievances and Pension (Department of Personnel and Training), whereby revised 'Scheme' for compassionate appointment under the Central Government has been circulated. The object of this scheme is to grant appointment on compassionate grounds, to a dependent family member of a Government servant dying in harness

or retiring on medical grounds, thereby leaving his family in penury and without any means of livelihood, to relieve the family of the Government servant concerned from financial destitution and to help it get over the emergency.

5. As per clause 2 of the Scheme, spouse also falls in category of dependent family member of a Government servant who dies while in service. 'Determination/ Availability of Vacancies' for compassionate appointment has been provided under a separate Head, relevant portion of which reads as under:

> ***"(a) Appointment on compassionate grounds should be made only on regular basis and that too only if regular vacancies meant for that purpose are available.***
>
> ***xxx xxx xxx***
>
> ***(e) Employment under the scheme is not confined to the Ministry/Department/Office in which deceased/medically retired Government servant had been working. Such an appointment can be given anywhere under the Government of India depending on availability of a suitable vacancy meant for the pui .....ate appointment.***
>
> ***(f) If sufficient vacancies are not available in any particular office accommodate the persons in the waiting list for compassionate appointment, it is open to the administrative Ministry/Department/Office to take up the matter with other Ministries/Departments/ offices of the Government of India to provide at an early date appointment on compassionate grounds to those in the waiting list."*** *(Emphasis added)*

6. In reply to the petition, it has been averred that to assign the vacancy for compassionate appointment in small departments, like the respondent-department, direct vacancies in group C and D posts, arising each year for three or more preceding years, are to be taken into consideration and 5% of vacancies with reference to the grand total of vacancies of such years is to be allocated for compassionate appointment and it would be subject to condition that no compassionate appointment was/has been made by the department for three years or the number of years taken over and above three years for locating vacancy under 5% quota for compassionate appointment.

7. According to respondents, husband of petitioner had died on 2nd July, 2006 and though, the vacancy in the department had arisen on 21st April, 2008, but locating the same for compassionate appointment of the petitioner would have amounted to allocation of 100% vacancies to the compassionate appointment and, therefore claim of petitioner for compassionate appointment was not acceded to.

8. Office memorandum, dated 9th October, 2006, (Annexure - I) issued in continuation to circular, dated 9th October, 1998 has also been placed on record by respondents, which provides as under:

> ***"The undersigned is directed to invite attention to this Department's O.M. No. 14014//6/94-Estt. (D) dated the 9th October, 1998, as amended from time to time containing the Scheme for Compassionate Appointment. Para 7 (b) of this O.M. provides that compassionate appointment can be made upto a maximum of 5% of vacancies under Direct Recruitment quota in any Group 'C' or 'D' post.***
>
> ***2. Pursuant to a demand raised by the Staff Side in the Standing Committee of the National Council (JCM) for review of the compassionate appointment policy, instructions have been issued vide O.M. No. 14014/3/2005-Estt. (D) dated the 14th June, 2006 prescribing a certain method of calculation of vacancies under 5% quota for compassionate***

appointment. The provisions of the O.M. dated 14th June, 2006 have sought to enable the Ministries to locate vacancies under 5% quota, in order to absorb the most deserving cases.

3.The Scheme has been further examined, keeping in view the problem of non-availability of vacancies within the prescribed limit of 5% of Direct Recruitment vacancies within the prescribed limit of 5% of Direct Recruitment vacancies in Group 'C' and 'D' posts (excluding technical posts), persisting in the small Ministries/ Departments, even after issue of this Department's O.M. dated 14th June, 2006. It may happen that small Ministries/Departments may not be able to make a single compassionate appointment for a number of yeas due to non-availability of adequate direct recruitment vacancies in Group 'C' and 'D' posts arising in a year. Thus, this Department's O.M. dated 14th June, 2006 providing for a relaxed method for determination of vacancies under 5% quota, may not actually provide any relief to such small Ministries/Departments.

4. Accordingly, it has been decided that the small Ministries/Departments may apply a more liberalized method of calculation of vacancies under 5% quota for compassionate appointment. The small Ministries/Departments, for the purpose of these instructions, are defined as organization where no vacancy for compassionate appointment could be located under 5% quota for the last three years. Such small Ministries/ Departments may add up to the total of DR vacancies in Group 'C' and 'D' posts (excluding technical posts) arising in each year for 3 or more preceding years and calculate 5% of vacancies with reference to the grand total of vacancies of such years, for locating one vacancy for compassionate appointment. This is subject to the condition that no compassionate appointment was/has been made by the Ministries/ Departments during 3 years or number of years taken over and above 3 years for locating one vacancy under 5% quota.

5. The instructions contained in the O.M. No. 14014/6/94-Estt. (D) dated 9th October, 1998, as amended from time to time, stand modified to the extent mentioned above.

6. The above decision may be brought to the notice of all concerned for information, guidance and necessary action.

7. Hindi version will follow."

9. As clarified in memorandum, dated 9th October, 2006, this clarificatory office memorandum has been issued enabling the Ministries/Departments to extend the benefit of compassionate appointment in order to absorb the most deserving cases. It has been clarified in the said office memorandum that keeping in view the problem of non-availability of vacancies within the prescribed limit of 5% of Direct Recruitment vacancies in Group 'C' and 'D' posts persisting in small Ministries/ Departments, it may happen that such Ministries/ Departments may not be able to make a single compassionate appointment for number of years due to non-availability of adequate direct recruitment vacancies in Group 'C' and 'D' posts arising in a year and, therefore, method for determining vacancies under 5% quota, which was already relaxed vide office memorandum, dated 14th June, 2006, has further been liberalized by providing a method of calculation of vacancies under 5% quota for compassionate appointment by stating that the small Ministries/Departments, for the purpose of these instructions, are defined as organizations where no vacancy for compassionate appointment could be located under 5% quota for the last three years and such small Ministries/ Departments may add up the total of DR vacancies in Group 'C' and 'D' posts (excluding technical posts) arising each year for three or more preceding years for calculating 5% of vacancies with reference to the grand total of vacancies of such years for locating one vacancy for compassionate appointment.

10. The aforesaid clarification is also to be read with clause (e) of Determination/Availability of Vacancies contained in the Scheme for Compassionate Appointment (Annnexure P-11), which provides that employment under the scheme is not confined to the Ministry/Department/office in which deceased servant had been working, but, such an appointment can be given anywhere under the Government of India depending on availability of suitable vacancy meant for the purpose of compassionate appointment. Further clause (f) under the same Head of the Scheme provides that if the sufficient vacancies are not available in any particular office, then, to accommodate the persons in the waiting list for compassionate appointment, it is open to the administrative Ministry/Department/Office to take up the matter with other Ministries/Departments/ Offices of Government of India to provide, at any early date, appointment on compassionate grounds to those in the waiting list.

11. In instant case, communication, dated 26th December, 2006 (Annexure P-8), conveying the rejection of request of the petitioner, is subsequent to clarification/Office Memorandum, dated 9th October, 2006 (Annexure -I). The said communication is non-speaking and uninformed. It does not disclose as to whether provisions of the scheme providing for determination/availability of vacancies notified vide Office Memorandum, dated 9th October, 1998 (Annexure P-11) were adhered to or not and as to whether the liberalized method for calculating the vacancies circulated vide Office Memorandum, dated 9th October, 2006 (Annexure - I), was ever applied in case of the petitioner or not. Further, there was no response to the legal notice, dated 27th August, 2011.

12. So far as plea of the respondents taken in reply to the petition is concerned, it does not disclose that there was no vacancy available at the time of rejection of request of the petitioner in the entire Ministry/Department. There is nothing stated about taking up matter with other departments/Ministries, if ever taken up. The reply is also silent about the fate of the recommendations made by the Assistant Estate Manager on 27th January, 2009 (Annexure P-9) on arising of the vacancies in the office with effect from 21st April, 2008.

13. There is no record to reflect that case of the petitioner was ever considered in light of the provisions of Determination/Availability of Vacancies contained in Scheme for Compassionate Appointment.

14. Petitioner has a basic human and legal right to know the grounds and reasons for rejection of her claim. Non-speaking and uninformed decision smacks mala fide and arbitrariness. Arbitrariness, being anti thesis of 'Rule of Law', amounts to violation of Article 14 of the Constitution of India. Thus, impugned rejection of claim of petitioner warrants interference.

15. In view of above discussion, present petition is allowed, communication, dated 26th December, 2006 (Annexure P-8), conveying rejection of claim of the petitioner, is quashed and set aside with a direction to the respondents to consider the case of the petitioner afresh in light of Office Memorandum, dated 9th October, 1998 (Annexure P-11) and all clarificatory office memoranda issued subsequent thereto, including Office Memorandum, dated 9th October, 2006 (Annexure – I) and to decide the same, in accordance with law, within four months from today and offer her appointment in case she is found entitled to the same.

16. Needless to say that in case petitioner is not considered to be entitled for compassionate appointment, a speaking and reasoned order shall be passed in that regard, under intimation to the petitioner, after providing personal hearing to her, and obviously, petitioner shall have liberty to assail any decision adversely affecting her legal rights before competent Court/forum, in accordance with law, if so advised.

17. The writ petition is disposed of in aforesaid terms alongwith all pending applications, if any.

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

Cr.MMO No. 7 of 2018 with Cr.MMO No. 76 of 2018.
Date of decision: March 09, 2018.

1. Cr.MMO No. 7 of 2018

Rajesh Kumar Chauhan & ors. .....Petitioner.

Versus

State of Himachal Pradesh & anr. .....Respondents.

2. Cr.MMO No. 76 of 2018

Chaman Lal .....Petitioner.

Versus

State of Himachal Pradesh & anr. .....Respondents.

Code of Criminal Procedure, 1973- Section 482- Quashing of FIR- Sections 341, 323, 307, 504, 506 read with Section 34 of I.P.C- Cross FIR registered by both the parties- Investigation complete, though, challan had not been filed in the Court- parties sought quashing of the FIR- **Held-** that since the parties have decided not to prosecute the cases and since the evidence is yet to be led in the Court- there are minimal chances of the witnesses coming forward in support of the prosecution case in view of compromise arrived at between the parties- chances of conviction of the accused in both the case are bleak – Cases are at the initial stage and even report under Section 173 Cr.P.C has yet not been filed to allow the criminal proceedings to continue would be an abuse of the process of law- Consequently, FIR ordered to be quashed. (Para-7)

Cases referred:

Gian Singh Vs. State of Punjab and another, (2012) 10 Supreme Court Cases 30
Kulwinder Singh and others Vs. State of Punjab, 2007(3)RCR (Criminal) 1052
Narinder Singh and others vs. State of Punjab and another, (2014) 6 Supreme Court Cases 466

1. Cr.MMO No. 7 of 2018

For the petitioners Mr. Ashish Verma, Advocate.

For the respondents Mr. S.C. Sharma, Addl. AG with Mr. Kunal Thakur, Dy. AG, for respondent No. 1.
Mr. Mehar Chand, Advocate, for respondent No. 2.

2. Cr.MMO No. 76 of 2018

For the petitioner Mr. Mehar Chand, Advocate.

For the respondents Mr. S.C. Sharma, Addl. AG with Mr. Kunal Thakur, Dy. AG, for respondent No. 1.
Mr. Ashish Verma, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

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

This judgment shall dispose of both petitions filed with a prayer to quash the two FIRs registered in Police Station, Baijnath, District Kangra at the instance of the accused-petitioners and respondent No. 2 (complainant) against each other. The FIR bearing No. 0100 of 2017 against the accused-petitioners in petition No. 7 of 2018 though initially was registered under Sections 341, 323, 504, 506 read with Section 34 of the Indian penal Code, however, during the course of investigation the case converted into under Section 307 read with Section 34 IPC. One of the accused-petitioner in petition No. 7 of 2018, namely, Rajesh Kumar Chauhan has also registered a cross case against Chaman Lal-respondent No. 2 pertaining to the same occurrence in Police Station, Baijnath on the same day vide FIR No. 0101 of 2017 under Sections 341, 323, 504, 506 read with Section 34 IPC.

2. Learned Additional Advocate General has placed on record the status report. The perusal whereof reveals that the investigation is complete and the challan though has been prepared, however, not yet filed in the Court. Therefore, both cases are at its initial stage.

3. The parties on both sides in their statements recorded separately have stated that the occurrence was the result of misunderstanding. Accordingly, the cases against each other also came be to registered by them on account of such misunderstanding. They have now realized the same and decided not to prosecute the criminal cases, they registered against each other.

4. It is seen that an offence punishable under Section 307 read with Section 34 IPC is not compoundable under Section 320 of the Code of Criminal Procedure. The apex Court in ***Gian Singh*** Vs. ***State of Punjab and another, (2012) 10 Supreme Court Cases 30*** has however, held that the High Court in exercise of inherent powers vested in it under Section 482 of the Code of Criminal Procedure may quash FIR/criminal proceedings in a case where the offence allegedly committed by an accused though is not compoundable, however, in case the victim and accused have settled the differences amicably the inherent powers of the High Court can be pressed in service for quashing the proceedings. Such powers however can be exercised sparingly and only in appropriate cases, having arisen out of civil, mercantile, commercial, financial, partnership or such other transactions of like nature including matrimonial or the case relating to dowry etc. in which the wrong basically is done to the victim. This judgment further reveals that the compounding of offence in a case of serious nature like rape, dacoity and corruption etc. having serious impact in the society is not permissible.

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

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

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

registered with Police Station LOPOKE, District Amritsar Rural be quashed. We order accordingly."

7. Such being the legal position coupled with the factum of both parties have now decided not to prosecute the cases, they registered against each other as per their statements recorded separately, no useful purpose is likely to be served in case the FIRs are not quashed for the reasons that in view of the compromise now arrived at between the parties they are not likely to depose against each other. Therefore, chances of conviction of the accused in both cases are bleak. The cases registered at the instance of both parties against each other are yet at its initial stage because report under Section 173 Cr.P.C. is also not filed. Allowing the criminal proceedings to continue in these cases would, therefore, be nothing but merely an abuse of process of law.

8. In view of what has said hereinabove, both petitions are allowed. Consequently, both FIRs i.e. 0100 and 0101 of 2017 registered in Police Station, Baijnath, District Kangra are hereby quashed. The petitions stand disposed of.

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

Union of India .....Petitioner.
Versus
Krishan Lal & others .....Respondents.

CWP No.4737 of 2015.
Judgment reserved on: 06.03.2018.
Date of decision: 9th March,2018.

Constitution of India, 1950- Article 226 and 227- Civil Writ Petition- Section 28-A of the Land Acquisition Act, 1894- Held- The application for the re-determination of compensation does not necessarily mean from the "first award" made by the Court and, as such, the limitation to file the said application will run from the date of the award on the basis of which re-determination of compensation is sought. (Para-7 to 11)

Constitution of India, 1950- Article 226 and 227- Civil Writ Petition- Section 28-A of the Land Acquisition Act, 1894- Further Held- It is permissible for the collector to keep the application for re-determination in abeyance if the award in question is in an appeal before the higher Court- The Collector can keep the application under Section 28-A of the Land Acquisition Act pending till the matter is finally decided by the High Court or Supreme Court, as the case may be. (Para-12)

Cases referred:

Union of India and another versus Pradeep Kumari and others (1995) 2 SCC 736
Jose Antonio Cruz Dos R. Rodriguese and another versus Land Acquisition Collector and another AIR 1997 SC 1915
State of Tripura and another versus Roopchand Das and others (2003)1 SCC 421
State of Orissa and others versus Chitrasen Bhoi (2009) 17 SCC 74
Kendriya Karamchari Sehkari Grah Nirman Samiti Limited, Noida versus State of Uttar Pradesh and another (2009) 1 SCC 754

For the Petitioner : Mr.Shashi Shirshoo, Central Government Counsel.

For the Respondents: Mr.Susheel Gautam, Advocate, for respondents No.1 and 3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

This writ petition takes exception to the award passed by the Collector in exercise of his powers under Section 28-A of the Land Acquisition Act (for short 'Act').

2. The land of the respondents comprised in Khatauni No.1551/1762, Khasra No. 5984/5297, measuring 2 bighas, Khasra No. 6136/5985/5297, measuring 1 bigha and the land comprised in Khasra No.5950/5351, measuring 6-3 bighas, situated in Mauza Fatti Nirmand, District Kullu, H.P. was acquired by the petitioner for setting up an Army base for defence purposes at village Averi, Tehsil Nirmand, District Kullu, H.P. On 19.03.1998, the Collector announced the award in case No.1/98. Certain land owners whose land was covered under the same notification filed reference petition for enhancement of the award which eventually came to be decided by the learned District Judge, Kinnaur, on 21.02.2004 and the award was enhanced to Rs.60,000/- per bigha. Whereas, the respondents had been paid compensation of Rs.31,500/- per bigha for 'Bakhal Charand' and Rs.51,000/- per bigha for 'Bakhal Som'. Since the land of the respondents was acquired under the same notification and they had not sought reference, they filed applications under Section 28-A of the Act before the Land Acquisition Collector, Anni, on 19.04.2004, however, the Collector kept these applications in abeyance because the petitioner had preferred an appeal against the order of the learned District Judge.

3. Upon notice to the petitioners, they filed reply wherein they raised the question of limitation. The Land Acquisition Collector vide his award dated 16.03.2012 allowed the application filed by the respondents. It is this award that has been assailed by the petitioner mainly on the ground that the applications preferred by the respondents under Section 28-A were time barred and could not have been entertained, more especially when the reference pertaining to the same notification was decided by the learned District Judge on 22.02.2003 in Reference No.40-R/4 of 1999.

4. Respondents No.1 and 3 have filed their joint reply wherein they have supported the impugned award by claiming that the same is strictly in accordance with law and, therefore, needs to be upheld.

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

5. The only question that falls for consideration is whether an application under Section 28-A of the Act ought to have been dismissed on the ground that it was not filed within three months from the date of reference Court first award dated 22.02.2003. To answer this question, it would be apposite to refer to Section 28-A(1) of the Act which is extracted hereinbelow:-

> *"[**28A. Redetermination of the amount of compensation on the basis of the award of the court.** (1) Where in an award under this Part, the court allows to the applicant any amount of compensation in excess of the amount awarded by the Collector under section 11, the persons interested in all the other land covered by the same notification under section 4, sub-section(1) and who are also aggrieved by the award of the Collector, may, notwithstanding that they had not made an application to the Collector under section 18, by written application to the Collector within three months from the date of the award of the court require that the amount of compensation payable to them*

may be re-determined on the basis of the amount of compensation awarded by the court:

Provided that in computing the period of three months within which an application to the Collector shall be made under this sub-section, the day on which the award was pronounced and the time requisite for obtaining a copy of the award shall be excluded."

6. A perusal of above extracted portion reveals that an application under this Section has to be filed within three months from the date of the award of the reference Court.

7. The object underlying the enactment of this Section is to remove inequality in the payment of compensation for the same and similar quality of land arising on account of inarticulate and poor people not being able to take advantage of the right of reference to the Civil Court under Section 18 of the Act. This is sought to be achieved by providing an opportunity to all aggrieved parties whose land is covered by the same notification to seek redeteremination once any of them has obtained order for payment of higher compensation from the reference Court under Section 18. By construing the expression "wherein an award under this Part" in sub-section (1) of Section 28-A to mean "wherein the *first* award made by the Court under this Part", the word *first* which is not found in sub-section (1) of Section 28-A is being read therein and thereby the amplitude of the said provision would be curtailed so as to restrict the benefit conferred by it. In the matter of construction of a beneficent provision like the present one, it is not permissible by judicial interpretation to read words which are not there and thereby restrict the scope of the said provision. Therefore, the limitation for moving the application to the Collector under Section 28-A of the Act will begin to run only from the date of the award on the basis of which redetermination of compensation is sought and is three months from the date of the award.

8. At this stage, it shall be profitable to refer to the judgment of three Hon'ble Judges Bench of the Hon'ble Supreme Court in ***Union of India and another*** *versus* ***Pradeep Kumari and others (1995) 2 SCC 736*** wherein it was held that the limitation does not necessarily start from the date of the first award. The award "*first*" cannot be read into Section 28-A. The relevant observations of the said decision are extracted hereinbelow:-

10. It is possible to visualise a situation where in the first award that is made by the court after the coming into force of Section 28-A the enhancement b the amount of compensation by the said award is not very significant for the reason that the person who sought the reference was not able to produce adequate evidence in support of his claim and in another reference where the award was made by the court subsequently such evidence is produced before the court and a much higher amount is awarded as compensation in the said award. By restricting the benefit of Section 28-A to the first award that is made by the court after the coming into force of Section 28-A the benefit of higher amount of compensation on the basis of the subsequent award made by the court would be denied "to the persons invoking Section 28-A and the benefit of the said provision would be confined to re-determination of compensation on the basis of lesser amount of compensation awarded under the first award that is made after the coming into force of Section 28-A. There is nothing in the wordings of Section 28- A to indicate that the legislature intended to confer such a limited benefit under Section 28-A. Similarly, there may be a situation, as in the present case, where the notification under Section 4(1) of the Act covers lands falling in different villages and a number of references at the instance of persons having lands in different villages were

pending in the court on the date of coming into force of Section 28-A and awards in those references are made by the court on different dates. A person who is entitled to apply under Section 28-A belonging to a particular village may come to know of the first award that is made by the court after the coming into force of Section 28-A in a reference at the instance of a person belonging to another village, after the expiry of the period of three months from the date of the said award but he may come to know of the subsequent award that is made by the court in the reference at the instance of a person belonging to the same village before the expiry of the period of three months from the date of the said award. This is more likely to happen in the case of inarticulate and poor people who cannot be expected to keep track of all the references that were pending in court on the date of coming into force of Section 28-A and may not be in a position to know, in time, about the first award that is made by the court after the coming into force of Section 28-A. By holding that the award referred to in Section 28-A(l) is the first award made after the coming into force of Section 28-A, such persons would be deprived of the benefit extended by Section 28-A. Such a construction would thus result in perpetuating the inequality in the payment of compensation which the legislature wanted to remove by enacting Section 28-A. The object underlying Section 28-A would be better achieved by giving the expression "an award" in Section 28-A its natural meaning as meaning the award that is made by the court in Part III of the Act after the coming into force of Section 28-A. If the said expression in Section 28-A(l) is thus construed, a person would be able to seek re-determination of the amount of compensation payable to him provided the following conditions are satisfied :-

> *(i) An award has been made by the court under Part III after the coming in to force of Section 28-A;*
>
> *(ii) By the said award the amount of compensation in excess of the amount awarded by the Collector under Section 11 has been allowed to the applicant in that reference;*
>
> *(iii) The person moving the application under Section 28-A is interested in other land covered by the same notification under Section 4(1) to which the said award relates;*
>
> *(iv) The person moving the application did not make an application to the Collector under Section 18;*
>
> *(v) The application is moved within three months from the date of the award on the basis of which the re-determination of amount of compensation is sought; and*
>
> *(vi) Only one application can be moved under Section 28-A for re-determination of compensation by an applicant.*

11. Since the cause of action for moving the application for re- determination of compensation under Section 28-A arises from the award on the basis of which re-determination of compensation is sought, the principle that "once the limitation begins to run, it runs in its full course until its running is interdicted by an order of the court" can have no application because the limitation for moving the application under Section 28-A will begin to run only from the date of the award on the basis of which re-determination of compensation is sought.

12.We are, therefore, unable to agree with the view expressed in Babua Ram versus State of U.P. (1995) 2 SCC 689 and Union of India versus Karnail

> *Singh(1995) 2 SCC 728 that application under Section 28-A for re-determination of compensation can only be made on the basis of the first award that is made after the coming into force of Section 28-A. In our opinion, the benefit of re-determination of amount of compensation under Section 28-A can be availed of on the basis of any one of the awards that has been made by the court after the coming into force of Section 28-A provided the applicant seeking such benefit makes the application under Section 28-A within the prescribed period of three months from the making of the award on the basis of which re-determination is sought, The first contention urged by Shri Goswamy in support of the Review Petitions is, therefore, rejected."*

9. The ratio of the aforesaid decision was reiterated by the Hon'ble Supreme Court in ***Jose Antonio Cruz Dos R. Rodriguese and another*** *versus* ***Land Acquisition Collector and another AIR 1997 SC 1915*** by holding that the period of limitation has to be computed from the date of reference Court's award on the basis of which redetermination is sought.

10. Similar, reiteration of law can be found in the decision of the Hon'ble Supreme Court reported in ***State of Tripura and another*** *versus* ***Roopchand Das and others (2003)1 SCC 421*** and thereafter in ***State of Orissa and others*** *versus* ***Chitrasen Bhoi (2009) 17 SCC 74***.

11. In view of the aforesaid exposition of law and further bearing in mind the language employed in Section 28-A and the laudable interpretation put by the Hon'ble Supreme Court in the aforesaid cases, this Court has no hesitation in holding that Section 28-A of the Act provides for making an application within three months from the date of award on the basis of which the redetermination of the market value is sought.

12. In addition to the above, it would be noticed that the reference petition was answered by the learned District Judge on 22.02.2003 and the respondents filed the application under Section 28-A on 19.04.2004 which as observed above was kept in abeyance as the petitioner had preferred appeal against the reference order. Whether such a course was permissible for the Collector is not an issue which can be agitated by the petitioner as the same stands authoritatively decided by the Hon'ble Supreme Court in ***Kendriya Karamchari Sehkari Grah Nirman Samiti Limited, Noida*** *versus* ***State of Uttar Pradesh and another (2009) 1 SCC 754*** wherein it has been categorically held that when the award of the reference Court which is relied upon by the claimant for redetermination of the compensation is a subject matter of appeal before the High Court, the Collector would be well within his power to keep the application under Section 28-A of the Act pending till the matter is finally decided by the High Court or by the Hon'ble Supreme Court, as the case may be. The relevant observations are extracted below:-

> *"40. It is true that once the Reference Court decides the matter and enhances the compensation, a person who is otherwise eligible to similar relief and who has not sought reference, may apply under Section 28-A of the Act. If the conditions for application of the said provision have been complied with, such person would be entitled to the same relief which has been granted to other persons seeking reference and getting enhanced compensation. But, it is equally true that if the Reference Court decides the matter and the State or acquiring body challenges such enhanced amount of compensation and the matter is pending either before the High Court or before this Court (the Supreme Court), the Collector would be within his power or authority to keep the application under Section 28-A of the Act pending till the matter is finally decided by the High Court or the Supreme Court as the case may be. The*

reason being that the decision rendered by the Reference Court enhancing compensation has not attained "finality" and is sub judice before a superior Court. It is, in the light of the said circumstance that the State of U.P. issued two Government Orders on 14-1-1994 and 13-6-2001."

13. In view of the aforesaid discussion and for the reasons stated above, I find no merit in this petition and the same is dismissed, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

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

National Insurance Company Limited. .....Appellant.

Versus

Onkar Singh & others .....Respondents.

No. 376 of 2017
Reserved on : 5th March, 2018
Decided on : 12th March, 2018

Motor Vehicles Act, 1988- Motor Accident Claims Tribunal- Insurance Company challenging the findings returned by the Learned MACT- the driver of the offending vehicle was not holding a valid driving licence at the time of the accident, on the ground that the Government of Nagaland who had issued the driving licence vide notification dated 1.8.2014 had directed to surrender all the driving licence(s) issued in booklet form after 30th October, 2009, for enabling the digitization of the data and, for the issuance of smart cards in its plea- **Held-** No- It was imperative for the insurer to have placed on record, the aforesaid notification before the learned Tribunal, moreover, when the same had been tendered into evidence as Ex.R-4 the counsel for the insurer had not even contested its validity or authenticity- The conclusions as arrived by the learned tribunal, thus, held to be correct - consequently, appeal dismissed. (Para-4)

For the Appellant:	Mr. Anil Tomar, Advocate.
For Respondents No. 1 to 4 :	Ms. Ritika Kashav, Advocate vice Mr. H.S. Rana, Advocate.
For Respondents No.5 & 6:	Mr. L.S. Mehta, Advocate

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal stands directed against the award pronounced by the Learned Motor Accident Claim Tribunal (II), Solan camp at Nalagarh, whereby, the learned Tribunal adjudged compensation vis-a-vis, the LRs of deceased Laxmi Devi, who met her end, in an accident caused, by the rash negligent driving of the offending vehicle, by one Bhupinder Singh (respondent No.6 herein). The quantum, of, compensation amount adjudged thereunder vis-a-vis the legal heirs of deceased Laxmi

Devi, is, constituted in a sum of Rs.14,37,500/- and interest at the rate of 9% per annum, is, levied thereon, commencing, from, the date of petition uptill its deposit. Compensation amount has been apportioned, amongst the claimants in the hereafter extracted manner:-

"Petitioner No.1: Rs.5,37,500/-
Petitioner No.2: Rs.3,00,000/-
Petitioner No.3: Rs.3,00,000/-
Petitioner No.4: Rs.3,00,000/-"

Obviously indemnificatory liability thereof, has been fastened, upon the insurer/appellant herein. The Appellant/insurer is aggrieved therefrom, hence, has instituted the instant appeal before this Court.

2. Note-worthily the only contention raised by the learned counsel for the appellant/insurer, is only, for reversing the findings rendered by the learned Tribunal, vis-a-vis issue No.4, appertaining to the driver of the offending vehicle, holding a valid and effective driving licence, to, at the time contemporaneous to the accident, hence drive it, (I) given theirs rather wanting in force, besides substance nor being supported, by any tangible evidence, of, any creditworthiness, (ii) hence, he further contends, that the findings recorded upon issue No.4, by the learned tribunal, warrant interference by this Court.

3. To support his submission, the learned counsel appearing for the appellant has averred in paragraph No.2 of the grounds of appeal (i) that with the government of Nagaland, wherefrom whose jurisdiction the contentious driving licence, held, by the driver of the offending vehicle, stands issued, having issued a notification No. TC-23/MV/2007[PT-1] of 1.8.2014, (ii) whereby all driving licence(s), issued in booklet form, after 30th October, 2009, warranting holders thereof, to report to the office(s) concerned, wherefrom, they stood issued, for enabling digitization of the data, and, for their issuance in smart card form. (iii) AND with the date for completion of the aforesaid processes, being mandated therein, to be, before 1st December, 2014. (iv) Besides with the driving licence, held, by the driver of the offending vehicle, being issued after 30th October, 2009, hence, enjoined compliance, with the mandate, of, the afore-referred notification, (v) whereas, compliance thereof standing evidently, not meted, by the driver of the offending vehicle, thereupon, no reliance was imputable vis-a-vis Ex.R4.

4. For the aforesaid submission to carry weight and vigour, it was imperative for the counsel, for the insurer, to place on record, the aforesaid notification before the learned Tribunal concerned, (I) conspicuously given, upon its standing adduced, in evidence, therebefore, and, its nullificatory applicability upon Ex. R-4, yet being omitted to be discerned besides adjudicated upon, by the learned Tribunal, (ii) would thereupon, render enabled this Court, to conclude of their occurring palpable discardings, by the learned Tribunal concerned, vis-a-vis the impact of the aforestated notification, upon the validity of Ex. R-4, (iii) hence, the award under challenge before this Court, for apposite discardings of germane material, appertaining to the validity of Ex. R-4, when, hence rendered the latter exhibit to enjoy no force, (iv) thereon any imputation of any validity thereon, by the learned Tribunal rather vested jurisdiction in this Court, to reverse the findings recorded upon apposite issue No.4, by the learned

Tribunal. However, a close perusal of the record, as requisitioned from the learned Tribunal concerned, makes disclosures, of the counsel for the respondent No.6 herein, tendering into evidence Ex.R-4, and, at the time of Ex. R-4 being tendered into evidence, the counsel for the insurer, did not contest its validity or authenticity nor he subsequent thereto tendered into evidence, the aforestated notification, (v) for, espousing that given its mandate being visibly infracted, thereupon, Ex. R-4 not enjoying any force, (vi) the aforesaid omission is grave and obviously disables, the insurer/appellant, to urge before this Court through its counsel, that the aforesaid notification, despite, being tendered into evidence its import besides evdentiary worth remained unassessed nor also he is enabled, to urge, that there occurs any perversity or absurdity, in the impugned award, (vii) arising from gross mis-appreciation of evidence, impinging upon the creditworthiness, of, Ex. R-4. (viii) More so, when the validity of Ex. R-4, remained uncontested at the time of its standing tendered besides exhibition marks, being endorsed thereon. Consequently, any reliance herebefore by the Appellant, upon, the aforesaid notification, dehors, its non adduction into evidence before the learned tribunal, for assessing its impact upon the validity of Ex. R-4, is of no worth, rather given the lack of any contest by the counsel, for the insurance company, before, the learned tribunal vis-a-vis Ex. R4, conspicuously at the time of its tendering besides exhibition marks being endorsed thereon, contrarily, renders Ex. R-4 to enjoy legal force, of, the fullest legal vigour.

5. The above discussion unfolds the fact that the conclusions as arrived by the learned tribunal are based upon a proper and mature appreciation of the relevant evidence on record. While rendering the findings, the learned tribunal has not excluded germane and apposite material from consideration.

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

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

R.D. Sharma .....Petitioner

Versus

V.K. Chaudhary and another .....Respondents

Cr.MMO No. 265 of 2017
Reserved on: 08.03.2018
Decided on: 12.03.2018

Code of Criminal Procedure, 1973- Section 482- Sections 23 & 25, read with Section 28 of Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (PC and PNDT Act)- Sections120-B & 201 of **Indian Penal Code, 1860—**Petitioner-Doctor seeking quashing of the complaint filed under the aforesaid provision- **Held-** that from the statement of the victim it was clear that when she was three month pregnant her husband and mother-in-law had forcibly got conducted a sex determination test- Statement of the victim coupled with other

evidence on record show that there is prima facie case against the petitioner- it cannot be also said that chances of ultimate conviction of the petitioner are bleak, thus, held that petitioner was prima facie culpable- Accordingly, petition dismissed- parties directed to appear before the learned Trial Court. (Para-9 to 12)

Cases referred:
Bobbili Ramakrishna Raja Yadad and others vs. State of Andhra Pradesh, (2016) 3 SCC 309
Parbatbhai Aahir vs. State of Gujarat, (2017) 9 SCC 641

For the petitioner:	Mr. Ramakant Sharma, Sr. Advocate with Mr. Basant Thakur, Advocate.
For the respondents:	Mr. Ashwani Sharma, Additional Advocate General.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present petition, under Section 482 of the Code of Criminal Procedure, is maintained by the petitioner for quashing the complaint filed by the complainant, under Sections 23 & 25, read with Section 28 of Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (hereinafter to be called as "PC and PNDT Act, 1994) and Sections 120-B & 201 of Indian Penal Code, being complaint No. 34-3 of 2015, as well as order dated 05.05.2017, passed by learned Judicial Magistrate 1st Class, Court No. 2, Ghumarwin, District Bilaspur, H.P., whereby the charge, under Section 23 of the PC and PNDT Act, 1994, has been framed against the petitioner.

2. Briefly stating the facts giving rise to the present petition as per the prosecution are that on 30.05.2014, the petitioner had conducted Pre-natal Diagnostic Test on one Smt. Priyanka Kapoor (hereinafter to be called as "the victim") in connivance with her husband and mother-in-law and disclosed the sex of foetus to them as girl child. The further allegations against the petitioner are that he has violated Rule 9(4) and Rule 10(1A) of PC and PNDT Rule, 1996.

3. The complaint made by the victim to the Police Station, Barmana on 11.05.2014 is as under:

> ***" Respected Sir, Today I am going to Hospital but first I want to see what happened to me then I want to take action against them. Please its my request take care of my decision. Sir after compromise he didn't talk to me even didn't ask me for food not even my kids. Sir please take action against them if something with happened to me. They were very cruel persons. Please sir it's a request help me out from this problem & neglected that compromise which I have done yesterday. It was just because I had seen my two daughters future and my future too. So once again help me out from this matter. Today 11th May, 2014 at 11:30 p.m. I write now I want to go to hospital. I want legal protection M/s Chet Ram & Co. Sd. Priyanka 11/5/2014."***

On the basis of the complaint made by the victim, F.I.R. No. 70 of 2014, dated 16.05.2014, under Sections 314(2), 498-A, 325 and 34 of IPC was registered against the petitioner and on receipt of intimation from the Superintendent of Police Bilaspur, the then CMO-cum-DAA, Bilaspur, Dr. M.L. Kaushal alongwith Deputy Superintendent of Police, Ghumarwin and Tehsildar Ghumarwin searched the Leelavati Hospital, Indira Market Ghumarwin on 07.07.2014 and sealed the Ultrasound Machine of Make and Model Shimadzu, SDU 350XL in presence of the witnesses and the petitioner with 11 seals of "Himachal Pradesh Kashetrie Perished Jantav Janardan". The record, i.e. register, Form "F" register, ultrasound register, bill/receipt book and Form "F" (in duplicate) four in number were also seized. The seizure memo of ultrasonography machine was duly signed by Dr. M.L. Kaushal, the then CMO-cum-DAA, Bilaspur, Sh. Anjani Jaiswal, Deputy Superintendent of Police, Ghumarwin, Sh. Kuldeep Patial, Tehsildar, Ghumarwin and present petitioner. The separate seal of "Himachal Pradesh Kashetrie Perished Jantav Janardan" was also taken on piece of cloth. On 21.08.2014, the meeting of District Level Advisory Committee constituted under PC and PNDT Act, 1994 was conducted and the Committee resolved to cancel the registration of USG clinic of the petitioner, under the PC and PNDT Act, 1994, for further investigation in the matter. On 04.10.2014, on request of Dr. M.L. Kaushal, the then CMO-cum-DAA Bilaspur, another F.I.R. No. 206/14, under Section 23 of PC and PNDT Act, 1994 was registered against the petitioner. After registration of F.I.R. No. 206 of 2014, the case was investigated by SHO Mukesh, who visited the spot on 11.10.2014 and sealed USG Machine in presence of the witnesses alongwith the record seized by Dr. M.L. Kaushal, the then CMO-cum-DAA, Bilaspur for further investigation, vide separate seizure memo, dated 11.10.2014. The USG Machine of Make and Model Shimadzu, SDU 350XL was kept sealed by the CMO-cum-DAA, Bilaspur w.e.f. 07.07.2014 to 11.10.2014 in the premises of Leelavati Hospital, Ghumarwin, was kept by SHO Ghumarwin in the Police station, Ghumarwin for safe custody, which was later on, vide road certificate No. 195/14, dated 15.10.2014, was sent through Constable Amit No. 470 and Constable Ajit Kumar, No. 194 to State Forensic Science Laboratory, Junga. During the course of investigation statements of the witnesses were recorded and challan was presented before the learned trial Court and learned trial Court, vide order dated 05.05.2017, framed charge against the present petitioner. Hence the present petition.

4. Learned Senior Counsel appearing on behalf of the petitioner has argued that as per the record, the pregnancy of the victim was only three and half months and as per the evidence on record no sex determination test could be carried out before the foetus is 25 weeks old. He has further argued that there is no evidence against the petitioner except the mere statement of the victim. He has argued that the present case is based on the scientific evidence and there is no scientific evidence against the petitioner. He has further argued that the prosecution has otherwise failed to prove whether the foetus was male or female. Learned Senior Counsel in support of his arguments has placed reliance upon the decision of Hon'ble Supreme Court in ***Bobbili Ramakrishna Raja Yadad and others vs. State of Andhra Pradesh***, (2016) 3 SCC 309. The relevant extracts of the judgment are reproduced hereinbelow:

> ***"11. It is well settled that power under Section 482 Cr.PC should be sparingly exercised in rare cases. As has been laid down by this Court in Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre, that when a prosecution at the initial stage was asked to be quashed, the test to be applied by the Court was***

> ***as to whether the uncontroverted allegations as made in the complaint prime facie establish the offence. It was also for the Court to take into consideration any special feature which appears in a particular case to consider whether it was expedient and in the interest of justice to permit a prosecution to continue. This was so on the basis that the Court cannot be utilised for any oblique purpose and where in the opinion of the Court chances of an ultimate conviction are bleak and therefore, no useful purpose was likely to be served by allowing a criminal prosecution to continue, the Court may while taking into consideration the special facts of a case also quash the proceedings even though it may be at a preliminary stage."***

Learned Senior Counsel also placed reliance upon the decision of Hon'ble Supreme Court in ***Parbatbhai Aahir vs. State of Gujarat,*** (2017) 9 SCC 641. The relevant extracts of the judgment are reproduced hereinbelow:

> ***"11. Section 482 is prefaced with an overriding provision. The statute saves the inherent power of the High Court, as a superior court, to make such orders as are necessary (i) to prevent an abuse of the process of any court, or (ii) otherwise to secure the ends of justice."***

5. On the other hand, learned Additional Advocate General has argued that legislative intend behind the enactment of the Act is to curb the sex determination in the Country, as numerous cases of sex determination and thereafter abortion of female foetus are coming into existence. He has further argued that the statement of the victim is reliable and trustworthy and made during the course of investigation, further the complainant was not having any enmity with the petitioner. He has argued that as per of the FSL report, the Ultrasound Machine seized/recovered is capable to perform Sex Determination Test. Further the Machine was without storage disk, thus it cannot be said that prior to seize the Machine, how many Ultrasounds were already performed. Learned Additional Advocate General in support of his arguments has placed reliance upon Section 3(a) of PC and PNDT Act, 1994, which provides as under:

> "***3A. Prohibition of sex-selection – No person, including a specialist or a team of specialists in the field of infertility, shall conduct or cause to be conducted or aid in conducting by himself or by any other person, sex selection on a woman or a man or on both or on any tissue, embryo, conceptus, fluid or gametes derived from either or both of them."***

Learned Additional Advocate General has further argued that no record regarding conducting of ultrasonography on a pregnant woman was kept by the petitioner in his clinic, as provided, under Section 4(3) of PC and PNDT Act, 1994. Lastly, learned Additional Advocate General has argued that as *prime facie* case is against the petitioner, the present is not a fit case where inherent power, under Section 482 Cr.PC, is required to be exercised in his favour and the present petition deserves to be dismissed.

6. In rebuttal, learned Senior Counsel has argued that the inspection of the clinic of the petitioner was being conducted by the expert every month and further

record shows that no Sex Determination Test was carried out by the petitioner, so the present petition deserves to be allowed and the charge framed against the petitioner may be quashed and set aside.

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

8. At the very outset, it is seen that on 11.05.2014, the victim has made a complainant to the Police, on the basis of which, the case was registered against her husband and mother-in-law, thereafter the complainant made a statement before the learned Magistrate, under Section 164 Cr.PC, wherein she has stated that her marriage was solemnized with Susheel Kumar on 26.11.2004 and when she conceived first girl child, instantaneously thereafter, her mother-in-law started torturing her physically and mentally, even her husband started maltreating her. When second girl child was born to the victim, her husband and mother-in-law started pressurizing her to conceive pregnancy again, so that male child can born and when she was two and half months pregnant, they took her to a *"Daai",* who after giving massage to her disclosed that the foetus is male. Thereafter, when the victim was three months pregnant, her husband and mother-in-law took her to the clinic of Dr. R.D. Sharma/petitioner, who got conducted Sex Determination Test of her foetus and disclosed that the foetus is girl. When her mother-in-law came to know that the child is girl child, she forced her to abort the foetus. As per the victim, on 9th May, 2014, her husband and mother-in-law gave leg blows to her on her stomach, due to which she got unconscious and fell down on the floor. After regaining conscious, when she asked them to take her to the hospital, no person of her family took her to the hospital. Thereafter, she made a telephonic call to Barmana Police, who took her to the Government Hospital, where her ultrasound was conducted and it was opined that the foetus has died. It is further submitted by the victim in her statement that on 10th May, 2014, on assurance of the Police, she has entered into a compromise with her husband and in the morning of 12.05.2014, she went to private Hospital for ultrasound, whereby it was disclosed that the foetus has died due to beatings. Thereafter, her in laws took her to PGI, Chandigarh for abortion, wherefrom she was taken to Panchkula and her abortion was got conducted and after taking all reports with them, they left the victim to her mother's house.

9. From the above statement of the victim, it is clear that when she was three months pregnant, her husband and mother-in-law took her to the clinic of Dr. R.D. Sharma (petitioner) where they forcibly got conducted her Sex Determination Test and the Doctor disclosed them that the foetus is girl. This clear statement of the victim, coupled with the other evidence which has come on record that thereafter husband and mother-in-law of the victim gave beatings to her on the lower portion of the stomach, due to which foetus has died. To this aspect the report of Regional Hospital, Bilaspur is very clear. The above mentioned act shows that the husband and mother-in-law of the victim were not wanted third girl child and for this purpose they gave beatings to the victim, so that the third girl child cannot take birth and all that has happened after the petitioner got conducted the Sex Determination Test of the victim and opined the foetus to be girl child.

10. This Court has also seen the literature enclosed by the petitioner alongwith his petition and gone through the arguments of learned Senior Counsel *"that nothing can be said with 100% precision even after 25 weeks of pregnancy about the sex of foetus,"* but the arguments of the learned Senior Counsel are without any significance

when the petitioner after three months disclosed the husband and mother-in-law of the victim that the foetus is girl and that too after conducting sonography test. Figure (E) of the literature, **Annexure P-13**, enclosed with the petition, provides that *"the fetal scrotum and penis are noted at 18 weeks of gestation"*. Meaning thereby that after 18 weeks even penis of the foetus can be detected and there is nothing in the literature to show that after 13 weeks sex cannot be determined. So, this Court finds that the petitioner after determining the Sex Determination Test of the victim, informed her husband and mother-in-law about the foetus. Therefore, the petitioner has *prime facie* committed an offence, under Section he is charged with.

11. Now coming to the law as cited by the learned Senior Counsel, this Court finds that at this moment, there is *prime facie* case against the petitioner and it cannot be said that chances of ultimate conviction of the petitioner are bleak. So, the law laid down by the Hon'ble Supreme Court in ***Bobbili Ramakrishna Raja Yadad and others vs. State of Andhra Pradesh,*** (2016) 3 SCC 309, is not applicable to the facts of the present case. Further the proceedings against the petitioner are in order to secure the ends of justice, as the statement of the victim is unequivocal, therefore, it cannot be said that there is any abuse of the process of the Court. Thus, the law laid down of the Hon'ble Supreme Court in ***Parbatbhai Aahir vs. State of Gugarat***, (2017) 9 SCC 641, cited by the learned Senior Counsel (supra), is also not applicable to the facts of the present case.

12. In view of the aforesaid discussions, this Court finds that prime facie case at this moment is against the petitioner and the charge framed by the learned trial Court is in accordance with law and present case is not a fit case where powers under Section 482 of the Code of Criminal Procedure are required to be exercised in favour of the petitioner.

13. The net result of the above discussion is that the present petition is devoid of any merits, deserves dismissal and is accordingly dismissed. Registry is directed to send the records of the present case henceforth. Parties to appear before the learned trial Court on ***20th March, 2018***.

14. The petition is accordingly disposed of alongwith pending applications, if any.

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

United India Insurance Company Limited. .....Appellant.

Versus

Shani & others ....Respondents.

FAO No. 335 of 2015.
Reserved on : 6th March, 2018.
Decided on : 12th March, 2018.

Motor Vehicles Act, 1988- Motor Accident Claims Tribunal- Insurance cover note executed by the company w.e.f. 14.6.2010 at 3:00 P.M. – The ill fated accident occurred on the same day at about 3:50 p.m. – Reiterating the ratio laid down in ***New India Assurance Co. Ltd. Versus Sita Bai (Smt.), (1999) 7 SCC 575***- **Held-** that since the insurance police itself reflected the recital relating to date/time of the commencement of the policy, which admittedly was 14.6.2010 after 3:00 p.m.- Insurance Company was liable to indemnify for the liability, as the accident had took place at 3:00 p.m.- consequently, appeal dismissed and award passed by the learned MACT upheld.

(Para-2)

Cases referred:

Oriental Insurance Company ltd. vs. Dharam Chand and others, 2010, ACJ 2659

New India Assurance Co. Ltd. Versus Sita Bai (Smt.), (1999)7 SCC 575

For the Appellant:	Mr. Ashwani K. Sharma, Sr. Advocate with Mr. Jeewan Kumar, Advocate.
For Respondents No. 1 to 2 :	Mr. Naresh Kumar Sharma, Court Master, as court Guardian.
For Respondents No.3 to 6:	Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The Insurer of the offending vehicle is aggrieved, by the fastening, of, the apposite indemnificatory liability, upon it, by the learned Motor Accidents Claims Tribunal-III, Una, vis-a-vis the compensation amount, assessed, under impugned award, in favour of the claimants.

2. The ill fated accident, involving, the offending vehicle, occurred on 14.06.2010 at about 3.50 p.m. An insurance cover note executed qua it inter se the owner thereof, and, the insurance company concerned, is comprised in Ex. Rx, wherein, the date of execution thereof is recited, as 14.06.2010 and the time of its issuance is recited as 3.00 p.m. The learned Tribunal concerned relied, upon, a decision rendered by a coram of two Hon'ble Judges, of the Hon'ble Apex Court, reported in ***2010, ACJ 2659, titled as Oriental Insurance Company ltd. vs. Dharam Chand and others***, (i) wherein, it has been held that given the cheque for the premium amount being received by the company, at 4.00 p.m. on 7.5.1998, it rendered valid, the imposition of fastening of liability vis-a-vis the compensation amount, upon, the insurance company, (I) dehors recitals occurring, in column No.3 and 4 of the apt cover note qua the commencement of the policy, being recoknable from 8.5.1998, hence, a day subsequent to the accident. The learned counsel appearing for the insurance company, has contended, on strength of a verdict, rendered by Hon'ble three Judges Bench, of the Hon'ble Apex Court, reported in ***(1999)7 SCC 575, titled as New India Assurance Co. Ltd. Versus Sita Bai (Smt.)*** and others, relevant paragraphs No.4, 5, 6 and 7 whereof are extracted hereinafter:-

"4. The proposal for insuring the vehicle in question was made by the owner of the vehicle on 16.4.1987 at 2100 hours. The cover note was issued by the appellant in respect of that vehicle, being No.P/703802 on 16.4.1987 at 2100 hours. The Insurance Policy (Exh. P-5) was later on issued in which also the date of commencement of the insurance policy was recorded as 16.4.1987 (2100 hours). The accident, in question, in which Smt. Salta Bai received fatal injuries had admittedly occurred at 10.00 A.M. on 16.4.1987. i.e., much before the commencement of the insurance policy.

5. The High Court opined that the insurance policy dated 16.4.1987 covered the period of the accident also because the policy would be deemed to have commenced at midnight of 15.4.1987 and 16.4.1987. The High Court in taking this view relied upon the judgment in Ram Dayal's case, (1990)2 SCC 680.

6. The correctness and applicability of the judgment in Ram Dayal's Case (Supra) came up for consideration before this Court subsequently in a number of cases. In New India Assurance Co. Ltd. v. Bhagwati Devi and Ors., (1998)6 SCC 534, a three-Judge Bench of this Court relied upon the view taken in National Insurance Co. Ltd. v. Jukubhai Nathuji Dabhi, 1997 (1) SCC 66), wherein it had been held that if there is a special contract, mentioning in the policy the time when it was bought, the insurance policy would be operative from that time and not from the previous midnight as was the Case in Ram Dayal's case, where no time from which the insurance policy was to become effective had been mentioned. It was held that should there be no contract to the contrary, an insurance policy become operative from the previous midnight, when bought during the day following, but, in cases where there is a mention of the specific time for the purchase of the policy, then a special contract comes into being and the policy because effective from the time mentioned in the cover note the policy itself. The judgment in Jikubhai's case (supra) has been subse-quently followed in Oriental Insurance Co. Ltd. v. Sunita Rathi & Ors., (1998)1 SCC 365 by a three-Judge Bench of this Court also.

7. In the fact situation of this case since the commencement of the policy at 2100 hours on 16.4.1987 was after the accident which had occurred at 1000 hours on 16.4.1987, the Tribunal as well as the High Court were wrong in burdening the appellant-Insurance Company, with any liability under Section 92-A of the Motor Vehicles Act by applying the law laid down in Ram Dayal's case, which, on facts, had no application to this case. This case is squarely covered by the judgment in Jikhubhai's case and the other judgments following it as noticed above. The impugned order against the appellant cannot thus be sustained. The same is hereby set aside. The appeal consequently succeeds and is allowed in so far as the appellant is concerned. No costs."

(ii) wherein, it stands vividly pronounced, (a) that the date of commencement, of, the insurance policy, elucidated in the cover note issued vis-a-vis the vehicle concerned, rendered the policy concerned, to thereat acquire binding force, or the relevant policy coming into force, only, from the date of its commencement, as, mentioned in the cover note concerned. He further contends, that, with Ex. Rx, exhibit whereof comprises, the cover note in pursuance, whereof the policy of insurance, hence, was issued, elucidating therein, 15.06.2010, to be the date/time, of commencement of the policy, (iv) whereas, with the relevant accident, occurring, a day earlier vis-a-vis, the date of commencement of the cover note, borne in Ex. Rx, hence, the apposite risk(s) contractually agreed to be covered by the Insurance company vis-a-vis the offending vehicle, not, falling within the ambit of Ex. Rx nor the apposite indemnificatory liability being fastenable upon the insurance company. However, the aforesaid submission addressed before this court, by the counsel, for the insurance company is anvilled, upon, his fragmentarily reading, paragraph No.4 and 5, of, Sita Bai's case (supra), (v) and from his remaining unmindful to the exception thereof, being carved in paragraph No.6 and 7 thereof, (vi) exception whereof, is comprised in the factum, of, the aforesaid rule existing in paragraphs No.4 and 5, of Sita Bai's case (supra), rule whereof comprises the tenet qua the reckonable date for concluding qua the timing of coming into force, of the policy of insurance, being the recited date, of, commencement thereof, especially in the cover note. Exception whereto being (a) of an apposite special contract, to the contrary, marked, by a recited date qua its purchase, rather, dehors the date of commencement thereof depicted, in Ex. Rx, being, the relevant date, for gauging the applicability, and, acquisition of force, of the relevant contract of insurance. Nowat with RW2, in his deposition, making, a disclosure, that, the insurance policy was issued, in pursuance, to Ex. Rx, thereupon, it has to be guaged from, Ex. Rx, exhibit whereof, is the apposite cover note qua (a) it embodying recitals vis-a-vis the time, of its purchase, (b) wherefrom, it can further be guaged qua the time, of, its being bought or purchased, thereafter wherefrom, it would erupt qua it containing, the date other than the one, of commencement, of policy concerned also whether date, if any, of purchase of the policy, hence, being a date prior to the occurrence of the ill fated accident, (c) whereupon, it can be concomitantly guaged, that, with the date of its purchase, being evidently prior to the, occurrence of the ill fated accident, hence, immediately on its purchase, it would acquire force, (d) hence occurrence of the relevant accident subsequent thereof, falling within its ambit also rendering valid, the imposition of the indemnificatory liability upon the insurance company. In making the aforesaid effort, with at the end of Ex. Rx, the date of its issuance being 14.10.2010, and, time of its issuance being 3.00 p.m. Consequently, the aforesaid recitals, occurring therein subsume the effects, of prior thereto recitals occurring therein qua date/time of the commencement of the policy, also it comprises a special contract to the contrary vis-a-vis the earlier thereto date/time mentioned in Ex. Rx, hence, renders it to fall within the ambit, of, paragraphs No. 6 and 7 of the Sita Bai's case (supra), (e) whereupon it is reiteratedly construable, to be purchased on 14.6.2010 at 3.00 p.m., whereupon, it acquirea force, from the date of its purchase , and, is also construable to be valid thereat. Consequently, the submission aforesaid, of the learned counsel appearing for the insurer, has no force and it is rejected accordingly.

3. The above discussion unfolds the fact that the conclusions as arrived by the learned tribunal are based upon a proper and mature appreciation of the relevant

evidence on record. While rendering the findings, the learned tribunal has not excluded germane and apposite material from consideration.

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

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

Anil Chauhan alias Anu ...Appellant

Versus

State of Himachal Pradesh ...Respondent

Criminal Appeal No. 338 of 2016

Judgment reserved on: 2.1.2018

Date of Decision : March 13, 2018

Code of Criminal Procedure, 1973- Section 374- Sections 452, 364, 376(2)(f) and 302 of the IPC- The accused convicted and sentenced under the aforesaid provisions- Appeal against the conviction and sentence- Appeal dismissed **holding**- that the Court must adopt a very cautious approach in appreciating the circumstantial evidence and such circumstances must be conclusive in nature, fully connecting the accused with the 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 the guilt of the accused- On facts the narration of the independent witnesses held to be trustworthy, true and inspiring confidence, which were duly corroborated by the documentary evidence including the medical evidence- The plea of false implication was also held to be not probable. (Para-6 to 23)

Code of Criminal Procedure, 1973- Section 374- Sections 452, 364, 376(2)(f) and 302 of the IPC- The version of the eye witnesses supporting the prosecution held to be ably corroborated by the circumstantial evidence being the disclosure statement, it even resulting in the recovery of the body of the deceased- the ocular version and the documentary evidence, thus, ably corroborated by the circumstantial evidence clearly establishing the complicity of the accused- consequently, the conviction upheld- Appeal dismissed. (Para-24 to 30)

For the appellant	:	Mr. V.S. Rathour, Advocate, for the appellant.
For the respondent	:	Mr. Ashok Sharma, Advocate General with Mr. M.A. Khan, Addl. A.G. and Mr. J. K. Verma, Dy. A.G. for the respondent-State.

The following judgment of the Court was delivered:

Sanjay Karol, ACJ.

Assailing the judgment dated 31.5.2014, passed by learned Addl. Sessions Judge-I, Shimla, H.P., in Sessions Trial No. 2-R/7 of 2013, titled as *State of H.P. vs. Anil Chauhan alias Anu,* whereby the accused stands convicted of the offences punishable under the provisions of Section 452, 364, 376 (2)(f) and 302 of the Indian Penal Code (hereinafter referred to as the IPC) and sentenced to undergo rigorous imprisonment for a period of 5 years and pay fine of Rs.5,000/- and in default thereof, to further undergo imprisonment for a period of six months for offence under Section 452 of the IPC; rigorous imprisonment for a period of 6 years and pay fine of Rs.10,000/- and in default thereof, to further undergo imprisonment for a period of one year for offence under Section 364 of the IPC; life imprisonment and pay fine of Rs.10,000/- and in default thereof, to further undergo imprisonment for a period of one year for offence under Section 376(2)(f) of the IPC; and life imprisonment and pay fine of Rs.10,000/- and in default thereof, to further undergo imprisonment for a period of one year for offence under Section 302 of the IPC, he has filed the present appeal under the provisions of Section 374 of the Code of Criminal Procedure, 1973.

2. In crux it is the case of the prosecution that on 23.7.2012, accused Anil Chauhan, after committing house trespass with an intent of causing hurt, not only assaulted complainant Rajinder (PW-1) and his wife Anita (PW-2) but forcibly took away their minor daughter, aged two and a half years (name concealed) and after committing sexual assault, murdered her. As such, accused stands charged for having committed offences punishable under the provisions of Sections 452, 364, 376(2)(f) and 302 of the IPC, to which he did not plead guilty and claimed trial.

3. The accused stands convicted on all counts and directed to serve the requisite sentence of imprisonment as also pay fine. Correctness of findings returned by the learned trial Court is subject matter of the present appeal.

4. We have heard Mr. V.S. Rathour, learned counsel, on behalf of the appellant as also Mr. Ashok Sharma, learned Advocate General, on behalf of the respondent-State. We have also minutely examined the testimonies of the witnesses and other documentary evidence so placed on record by the prosecution. Having done so, we are of the considered view that no case for interference is made out at all. We find the findings returned by the trial Court to be based on complete, correct and proper appreciation of evidence (documentary and ocular) so placed on record. There is neither any illegality/infirmity nor any perversity with the same, resulting into miscarriage of justice. Prosecution has been able to prove its case, beyond reasonable doubt.

5. From the evidence emanating from the record, it is clear that none saw the accused commit rape and kill the deceased. Such fact is sought to be established by the prosecution by way of circumstantial evidence. With regard to the offence of house trespass and kidnapping/abduction of the minor, prosecution seeks to establish the charge both by way of direct and circumstantial evidence.

6. It is a settled principle of law that prosecution has to establish the guilt of the accused beyond reasonable doubt and more so in relation to the charged offence which is sought to be established by way of circumstantial evidence. It is also a settled

proposition of law that when there is no direct evidence of crime, the guilt of the accused can be proved by circumstantial evidence, but then the circumstances from which the 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 the 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, the Court must adopt a very cautious approach and great caution must be taken to evaluate the circumstantial evidence.

7. The charge of house trespass and abduction is sought to be established by direct evidence, through the testimonies of eye witnesses Rajinder (PW-1), Anita (PW-2), Meera Devi (PW-3) mother of the accused, who has not supported the prosecution and Hukam Singh (PW-4).

8. The charge of murder and rape is sought to be established by way of circumstantial evidence through the testimonies of Rajinder (PW-1), Anita (PW-2), Hukam Singh (PW-4), Biru (PW-5) and Suchitra Devi (PW-13) and documentary evidence i.e. disclosure statement, memo of recovery and scientific evidence. Significantly all these persons are independent witnesses.

9. By way of medical evidence through the testimonies of Dr. Piyush Kapila (PW-9) and Dr. Dalip Sharma (PW-14) as also Const. Kuldeep Singh (PW-6) and Const. Karun Kishore (PW-18), prosecution has tried to corroborate such ocular evidence.

10. Record reveals that with the recording of 19 prosecution witnesses, statement of the accused under Section 313 Cr.P.C. was also recorded. Significantly not only from the admission made by him in such statement but also from the line of cross examination of the prosecution witnesses and the defence sought to be established through the testimonies of two witnesses, his wife Babli (DW-1) and brother Sushil Kumar (DW-2), factum of the presence of the accused, on the fateful night i.e. 23.7.2012 at 9.30 p.m., in a drunken condition, at the house of the complainant, stands admitted. He has taken a defence that while he was crossing the house of the complainant, he was given beatings with a danda, as a result of which he sustained injuries. Hearing the cries, his mother (PW-3), wife (DW-1) and brother (DW-2) reached the spot and took him away to his house. What happened thereafter is only a concocted story, for in the middle of night (at about 1.30 a.m.), police came and took him to the police station.

11. It is in this backdrop we proceed to examine the evidence led by the prosecution.

12. From the testimony of J. D. Bhardwaj (PW-10) it is evident that complainant Rajinder (PW-1) was employed by him. On 23.7.2012 at about 9.30 p.m., complainant called him on phone informing that the accused was quarrelling. On his asking, Anita made him speak with Babli (DW-1) who was requested to ask the accused not to indulge in such acts. Same night at about 10.15 p.m., he telephonically lodged the complaint at Police Station Rohru vide Rapt No. 42(A) (Ext. PW-19/A), informing that the accused was giving beatings to the complainant and his family members. Later on, complainant also informed that his daughter was missing. Now significantly there is

no cross examination of the witness on this aspect. In fact, it would be fruitful to reproduce the exact cross examination part of his testimony which reads as under:

> "Anita informed me that Anil has consumed excessive liquor and due to that reason we are unable to control him. House of accused Anil is quite nearer to my house. Anita also informed me that they are trying to take Anil to her home".

13. Now this version stands corroborated by police officer SI Bhupender Pal (PW-19) who was posted as ASI Police Station, Rohru, who further states that alongwith other police officials, same night, he reached the house of the complainant where they found the accused to have been caught by three – four persons. Complainant (PW-1) got his statement under Section 154 Cr. P.C. (Ext. PW-1/A) recorded which led to the registration of F.I.R No. 73/2012, dated 24.7.2012 (Ext. PW-15/A) under the provisions of Section 364 IPC registered at Police Station Rohru, Distt. Shimla, H.P. Whereabouts of the missing girl were inquired from the accused who was detained under the supervision of HC Puran Chand (PW-16), but since accused did not disclose anything, police party went searching for the child. At about 4.30 a.m., police returned to the house of the complainant. The accused was sent for medical examination for the reason that there were stains of blood on his clothes. While in police custody, the following morning i.e. 24.7.2012, in the presence of independent witnesses Suchitra Devi (PW-13) – a Ward Member and Hukam Singh (PW-4), accused made a disclosure statement (Ext. PW-4/A) to the effect that after picking the deceased from the house of the complainant and after committing assault, threw her in the river at a place, of which only he had knowledge and could get identified. Resultantly accused took the police and the witnesses to the spot and got recovered dead body of the deceased.

14. What really transpired in the house of the complainant stands narrated by witnesses. We now proceed to examine their testimonies.

15. As already observed, Babli (DW-1) and Sushil Kumar (DW-2), in their testimonies have already admitted not only their presence but also that of accused at the spot. According to these witnesses, accused who was totally drunk, was beaten up by the complainant and his wife and after hearing cries, they reached the spot and took him away. Babli states that after reaching house accused had sex with her and went off to sleep and Sushil slept in another room with his mother. Well we are not inclined to accept the version of these witnesses to be true, believable or probable, for none of the witnesses reported the matter either to police officials who were present on the spot or to the neighbours/public representatives/ authorities concerned. In fact, such defence stands taken for the first time only in Court. It is not that complainant was an influential person. Equally it is not their case that his employer, J. D. Bhardwaj (PW-10), had exercised or exerted any undue influence. In fact, it is not the suggested case of the accused that investigation was misdirected for having been conducted under the influence of any person or out of motivation and malice. One cannot ignore the fact that the complainants are not local persons. They are Nepali nationals and labourers. They had come to serve their master just seven months prior to the occurrence of the incident. Neither the complainant, nor his wife, much less their master, was harboring any animosity with the accused or his family members. The plea of false implication, in our considered view, is not well founded, much less probable.

16. Here we may also observe what the Doctor who conducted the medical examination of the accused had to state about the injuries on the body of the accused. Dr. Dalip Sharma (PW-14) testifies that on medical examination accused was smelling of alcohol. On medical examination, he found certain injuries on the body of the accused and that being, abrasion on the right arm, multiple abrasion on right elbow, abrasion on front of neck, as also injury on the penis which could be caused as a result of sexual intercourse. MLC (Ext. PW-14/B) stands duly proved by him.

17. Now when we notice the testimony of Dr. Piyush Kapila (PW-9) who conducted the post mortem of the dead body of the deceased, we notice him to have testified the deceased to have sustained the following injuries:

> "Face:
>
> 1. Pressure abrasion in an area of 3 X 1 cm on left zygomatic area, Pale yellowish to brown just below Left eye on lateral aspect, post mortem in nature.
>
> 2. Brown yellowish parchmentised pressure abrasion on upper eye lid on medial aspect, transverse, 1 cm X 0.2 cm postmortem in nature.
>
> 3. A linear pressure abrasion, transversely placed on left Lower mandibular margin, measuring 3 X 0.2 cm, Pale, Postmortem in nature.
>
> 4. 0.2 X 0.2 cm brownish yellow abrasion, 1 cm below outer aspect of Lower right eye lid, Postmortem in nature.
>
> 5. 1 X 0.2 cm yellowish abrasion on medial aspect of right eye over nasal area, postmortem in nature.
>
> 6. 1 X 0.2 cm yellowish, brown abrasion on right side of roof of nose just medial to inner right canthus, postmortem in nature.
>
> Note: No injury was found on inner aspect of lips, frenulum or mucosa, however abrasion was present on upper lip (visible outside)."

Also following injuries were found on her private parts:

> "Perineal Area: Blood fluid still oozing out of vagina and blood stains present on medial aspects of thighs and perineal area.
>
> Gross abrasion reddish on inner aspect of Labia Minora alongwith reddish contusions as well as in Labia majora and adjoining vaginal opening.
>
> Hymen ruptured at 6 O'Clock position with 2nd degree perineal tear, comprising of rupture of subcutaneous tissue, mucosa and skin of forchette almost reaching to upper margin of anus. Laceration measures 3 cm X 2 cm X muscle deep. Vaginal swab was taken for DNA profiling. 1 cm X 0.2 cm laceration was present skin deep on 6 O'Clock Position on Midline posterior to anal opening. All injuries mention in perineal region are antemortem in nature."

The post mortem report is Ext. PW-9/D. Dr. Kapila has categorically opined {(Ext. PZ) on application (Ext. PW-19/M)} that before her death, deceased was subjected to sexual intercourse.

18. We now examine as to what the complainant has to say about the events which took place on the spot.

19. Complainant (PW-1), who is a labourer, states that on 23.7.2012 at about 9 p.m., accused came to his house and after entering the kitchen, started abusing his wife (PW-2). When she went out, accused slapped her. Immediately she called for the family members of the accused who came and took him away. However on their asking, both he and his wife hid in the orchard. At that time, their daughter was sleeping inside the house. Soon, accused freed himself from his family members and after entering the room of their house picked her and went towards the river side. All this, they watched from the orchard. Soon thereafter he alongwith Biru and Kagu went to trace the girl when they met the accused near the river. At that time, the girl was not with him. Since she was not traceable, he informed his employer, who in turn, informed the police and same day police reached his house, where he got his statement (Ext. PW-1/A) recorded which was thumb marked.

20. The testimony of this witness is inspiring in confidence. We see no reason to disbelieve the version so narrated by him. We do not find his credit to have been impeached in any manner. He is a reliable witness. As already observed he had no reason to falsely implicate the accused or depose as such, in Court. The cross examination part of his testimony is only in the line of what we have discussed earlier. But what further, rather unrebuttedly, stands deposed by this witness in his cross examination, is that the accused was under the influence of liquor and that even his brother had gone to trace the deceased.

21. Even Anita (PW-2), wife of the complainant, has corroborated such version and we do not find her to have deposed falsely. Her credit also cannot be said to have been impeached in any manner. Chili cheese

22. At least, to such extent, the charge of the prosecution, with regard to the accused having entered the house of the complainant; abused his wife; slapped her and taken away the minor child from the house stands established by the ocular version of the witnesses. We have already noticed that such fact stands corroborated by their employer.

23. We may also observe that Meera Devi (PW-3), mother of the accused, stepped into the witness box but did not support the prosecution. She was declared hostile and cross examined by the Public Prosecutor. But however, unrebuttedly even she admits that "*It is correct that we took with us Anil from the dera of Rejinder but Anil was reluctant to come with us*". ..... "*It is correct that after hearing noise of my son I along with my son and daughter in law reached near that septic tank*" and "*We took Anil with us as he was heavily drunken*". She states that only on the basis of suspicion, police and the complainant falsely implicated her son. In our considered view, this witness, does not shatter the prosecution case, in any manner. Her version that the complainant and his wife were giving beatings to the accused with danda and rod and that the accused fell down near the septic tank and sustained injuries, is not believable.

We discount such version, for the matter not having brought to the notice of anyone. It is an afterthought. She has not deposed truthfully. In fact, feigns ignorance about certain facts. Though she states that after taking the accused home, she bolted the room and went off to sleep, but, does not remember as to when the police came. Now this version is totally unbelievable, in fact, stands belied through the testimony of Sushil Kumar (DW-2), according to whom he was sleeping with his mother and when the police came, he opened the door and at that time they took the accused to the spot.

24. Version of such of the eye-witnesses who have supported the prosecution, stands corroborated by circumstantial evidence, that being the disclosure statement (Ext. PW-4/A) recorded by SI Bhupinder Pal (PW-19) in the presence of Hukam Singh (PW-4) and Suchitra Devi (PW-13). Both the independent witnesses are local residents and did not harbour any animosity against the accused. They have testified about the disclosure statement to the effect that after committing sexual assault on the minor, accused killed her and threw her dead body in the river. We can take notice of the fact that river is not adjacent to the house of the complainant. It is at a distance and the child could not have walked to the place where the dead body was recovered. The child did not die as a result of drowning but as a result of shock and hemorrhage. The accused took the police and the witnesses to the place of crime and got recovered the dead body, proceedings in relation thereto, were got prepared and proven as Ext. PW-4/B).

25. Statements of independent witnesses as also police officials with regard to such circumstance are totally believable and inspiring in confidence. Suchitra Devi is categorical that in the police station accused made disclosure statement (Ext. PW-4/A) and thereafter got the body recovered. None knew about the place where the dead body was lying. To similar effect is the statement of Hukam Singh.

26. The Investigating Officer SI Bhupender Pal (PW-19) states that for DNA profiling, opinion of the expert was obtained. As per opinion of the expert (Ext. PX) who conducted the DNA test, samples of blood of the deceased found on clothes (Exhibit-4a & Exhibit-4b), vaginal swab (Exhibit-5), belongings of the deceased (Exhibit-6), matched with the DNA profile of blood found on the clothes (Exhibit-12a, Exhibit-12b, Exhibit-12d) worn by the accused. Testimony of police officials on the issue of collection of incriminating articles and case property and after sealing having kept the same in safe custody and not tampered at all, till the time of deposit at the FSL Junga, stands duly established by the Investigating Officer (PW-19), HC Amrit Singh (PW-8) and Const. Karun Kishore (PW-18). We need not elaborately discuss their testimonies, for such fact is seriously not disputed before us.

27. Thus, the ocular version as also the documentary evidence clearly establishes complicity of the convict in the alleged crime. The prosecution witnesses are totally reliable and their depositions believable. There are no major contradictions rendering their version to be unbelievable**.**

28. From the material placed on record, it stands established by the prosecution witnesses that the accused is guilty of having committed the offences he stands charged for. There is sufficient, convincing, cogent and reliable evidence on record to this effect. The circumstances stand conclusively proved by unbroken chain of unimpeachable testimony of the prosecution witnesses. The guilt of the accused

stands proved beyond reasonable doubt to the hilt. It cannot be said that the accused is innocent or not guilty or that he stands falsely implicated or that his defence is probable or that the evidence led by the prosecution is inconsistent, unreliable, untrustworthy and unbelievable. It cannot be said that the version narrated by the witnesses in Court is in a parrot-like manner and hence is to be disbelieved.

29. Thus, from the material placed on record, it stands established by the prosecution, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence that accused Anil Chauhan after committing house trespass with an intent of causing hurt, not only assaulted complainant Rajinder and his wife Anita, but forcibly took away the deceased, a minor aged two and a half years and after committing sexual assault, murdered her.

30. For all the aforesaid reasons, we find no reason to interfere with the well reasoned 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/or in complete appreciation of the material so placed on record by the parties. Findings of conviction cannot be said to be erroneous or perverse. Hence, the appeal is dismissed.

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

Records of the Court below be immediately sent back.

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

New India Assurance Company ...Appellant.

Versus

Smt. Seema Devi ...Respondent.

FAO (MVA) No. 46 of 2016
Reserved on: 13.12.2017
Date of Decision : 14.3.2018

Motor Vehicles Act, 1988- Section 173- Motor Accident Claims Tribunal- Appeal filed by the insurer on the ground that deceased was a gratuitous passenger- **Held-** on facts nothing was proved on record as to how the deceased was a gratuitous passenger, he was not found to be the owner of the vehicle as alleged by the Insurance Company, on the contrary the evidence on record was that the deceased was travelling with his goods in the ill-fated vehicle – on quantum the award was held to be not excessive as deceased was only 16 years of age- Consequently, appeal dismissed. (Para-16 to 18)

For the Appellant: Mr. Praneet Gupta, Advocate.

For the Respondents: Ms Anu Tuli Azta, Advocate for respondents No.1 & 2.
Ms. Tim Saran, Advocate for respondent No.3.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal under Section 173 of the Motor Vehicles Act, 1988, is maintained by the appellant/Insurance Company (hereinafter referred to as 'the appellant'). Subject matter of the present appeal is award, dated 31.10.2015, made by the learned Motor Accident Claims Tribunal, Shimla, (for short 'the learned Tribunal') in M.A.C. case No.111-S/2 of 2013, titled as Smt. Seema Devi & another versus New India Assurance Company Ltd. & others, vide which the compensation to the tune of Rs.6,00,000/- (Rupees six lacs) was awarded with interest @ 7.5% per annum from the date of institution of the claim petition, i.e. 30.10.2013 till its realization and costs assessed at Rs.5,000/- came to be awarded in favour of the claimants.

2. As per the petitioners deceased Vikas Sharma was travelling in vehicle No.HP-51A-1145 and died in the road side accident, which took place on 13.7.2013 at 7.30 P.M at Jajhar Nalah on Dalash-Luhari road.

3. The claimants are the parents of deceased Vikas Sharma and the present appeal has been preferred against the Insurance Company being insurer, owner and legal heirs of the deceased Virender Kumar, driver of the vehicle No.HP-51A-1145.

4. The case of the claimants is that the accident took place due to the rash and negligent act of the driver, who unfortunately has also died in the accident in question.

5. The Insurance Company filed its reply, in which the preliminary objection qua the fact that the claim petition is not maintainable, the vehicle involved in the accident was being driven in violation to the provisions of Motor Vehicles Act, as well as, in contravention to the terms and conditions of the insurance policy have been taken. It has also been pleaded that the deceased was travelling in the vehicle, in question, as gratuitous passenger. It has also been pleaded that the driver was not having a valid and effective driving licence and there was collusion between the claimants and respondents No.2 and 3.

6. The owner of the vehicle was Maneesh Kumar (respondent No.2). He also filed his separate reply, in which, he denied the contents of the claim petition for want of knowledge. However, the factum of accident has been admitted and it has been admitted that the deceased was travelling in the vehicle with apples.

7. The L.Rs. of the deceased driver (Virender Kumar) has not chosen to file reply, as the driver has expired in the accident. So, the legal representatives were made party and they were proceeded against *ex-parte* before the learned Tribunal below.

8. The above mentioned claim petition was resisted by the respondents/claimants before the learned Tribunal and the following issues came to be framed by the learned Tribunal below on 05.8.2014/30.10.2015:

> **"1. Whether Sh. Virender Kumar was driving Bolero Camper bearing registration No.HP-51A-1145 on dated 13.07.2013 at place Jajhar Nala on Dalash-Luhari road in rash and negligent manner resulting in death of Vikas Sharma, as alleged? OPP.**

2. **If issue No.1 is proved in affirmative, whether the petitioners are entitled for compensation, if so, to what amount and from whom? OPP.**

3. **Whether vehicle was being driven in violation of terms and conditions of Insurance Policy, provisions of Motor Vehicles Act and Rules as alleged? OPR.**

4. **Whether deceased Vikas Sharma was traveling in the offending vehicle as unauthorized/gratuitous passenger as alleged ? OPR.**

5. **Whether deceased driver Virender Kumar was not holding valid and effective driving licence as alleged? OPR**

6. **Whether petition is not legally maintainable as alleged? OPR**

7. **Whether petition has been filed in collusion with respondents No.2 & 3 as alleged? OPR-1.**

8. **Relief."**

9. The learned 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 accident and caused accident.

10. After deciding Issue Nos.1 and 2 in affirmative and Issue Nos. 3 to 7 in negative, the learned Tribunal awarded this compensation amount. The Insurance Company assailed the present award on the following grounds:

(1). That the impugned award under Section 166 of the Motor Vehicles Act is against the law and contrary to the facts and documents placed on the record, hence, liable to be quashed and set aside;

(2) That the learned Motor Accident Claims Tribunal has fallen in grave error in awarding exaggerated/ exorbitant amount and passed an award by totally ignoring the well settled legal positions as lay down by the Hon'ble Supreme Court of India and the award is not perverse, fanciful unjustifiable, unfair, arbitrary but also unreasonable. It has been submitted that the application moved under Section 170 of the MVA by the appellant was allowed by the learned Tribunal on 29.10.2014;

(3) That the learned Tribunal below has wrongly fastened the liability on the appellant despite the fact that the appellant has categorically pleaded and proved on record that the vehicle was plied in violation of the terms and conditions of the insurance policy;

(4) That the findings of the learned Tribunal below on Issue No.4 is without any evidence and pleadings. The contemporaneous record produced on record clearly shows that two persons were travelling as gratuitous passengers. The petitioners nowhere pleaded that deceased was travelling as a owner of the goods.

(5) That the learned Tribunal below has acted upon wrong principle of law by awarding extremely high/exorbitant compensation. The learned Tribunal below has drawn inference about the deceased occupation and income without any cogent and reliable oral or documentary evidence on record. It has been submitted that the learned Tribunal below should have not allowed a misfortune to turn into windfall.

(6) That the learned Tribunal below has awarded highly excessive compensation without their being any documentary evidence on record. The claimants have failed to prove on record the earning of the deceased and the figure of earning taken by the learned Tribunal below was without any basis

11. Learned counsel for the appellant has argued that Insurance Company is not liable to pay the amount of compensation and further that amount as awarded is against the law as settled by the Hon'ble Supreme Court of India, in Special Leave Petition (Civil) No.25590 of 2014, decided on 31.10.2017, titled **National Insurance Company Limited** versus **Pranay Sethi and others**, and the amount is thus required to be reduced.

12. On the other hand, learned counsel appearing for the respondents have argued that the Insurance Company has no right to assail the award and the appeal be dismissed.

13. In rebuttal, the learned counsel for the appellant has argued that as per the decision of the Hon'ble Supreme Court in Special Leave Petition(Civil) No.25590 of 2014, titled **National Insurance Company Limited** versus **Pranay Sethi and others,** the award be modified.

14. To appreciate the arguments of the learned counsel appearing on behalf of the parties, I have gone through the record of the appeal carefully.

15. As far as the negligence of the driver of the vehicle is concerned, PW1, Pooja Devi by filing her affidavit Ex.PW-1/A in examination-in-chief shows that the same is based upon the contents of the claim petition. Allegations of rash and negligent driving against the driver have also been levelled. Further, the facts speaks for itself.

16. PW2, H.C. Anil Kumar, Police Station, Anni, District Kullu, proved the copy of the F.I.R. Ext. PW-2/A, registered at Police Station, Anni. He deposed that due to the death of the driver in the accident, in question, the proceedings in the F.I.R. have been dropped. However, the case of the Assurance Company is that in the F.I.R., there is nothing to show that the deceased was travelling as the owner of the vehicle. So far as the death is concerned, PW3, Dr. Manish Thakur, who conducted the postmortem examination of the dead body of the deceased and proved the copy of the postmortem report Ext.PW-3/A. This witness has specifically stated that the injuries found on the body of the deceased could be caused in a motor vehicular accident. Unfortunately the driver, against whom the allegations of rash and negligent driving have been levelled by the claimants, had also died in the accident in question. In this case, there is no eye witnesses to the accident in question as all the occupants as well as the driver died in the accident. Keeping in view the allegations, which have been mentioned in the F.I.R., according to which, the road was wide enough, this Court is of the view that the

accident had taken place due to the rash and negligent driving of the driver and the registration of FIR is prima facie proof for rash and negligent driving against the driver of the ill-fated vehicle.

17. Further, from the record, it is clear that it was the driver who was driving the vehicle in such a rash and negligent manner that he could not control the vehicle and resultantly, the accident took place and the deceased died. Further, the facts speaks of itself and so this Court is of the considered view that the accident in question, took place due to the rash and negligent driving of the vehicle in question, in which the deceased received fatal injuries.

18. The age of the deceased was 16 years and he was the only son of his parents and the Court below has awarded Rs.6,000,00/- (Rupees Six lacs) alongwith interest @ 7.5% per annum. So, this Court finds that the Award passed by the learned Tribunal below cannot be said to be excessive, as the deceased was 16 years of age and could have earned a lot in his life and might have served his parents. Therefore, this Court find no infirmity or illegality in the award passed by the learned Tribunal below and thus the award needs no interference. Hence, the appeal is dismissed.

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

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

Rakesh Kumar .....Appellant.

Versus

State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 149 of 2017
Reserved on : 19.12.2017
Decided on : 14.3.2018

Code of Criminal Procedure, 1973- Section 374- Appeal against Conviction- Section 302 of I.P.C- Circumstantial Evidence- Appellant convicted under Section 302 of I.P.C to undergo life imprisonment and to pay a fine of Rs.20,000/- - conviction and sentence challenged- While dismissing the appeal **Held**- legal parameters to appreciate the circumstantial evidence reiterated, as were held in criminal Appeal No.242/2016 titled as **Hikmat Bahadur versus State of Himachal Pradesh** decided on 19th September, 2017- The principle laid down by the Supreme Court of India in **Sharad Birdhichand Sarda versus State of Maharashtra, (1984) 4 SCC 116** reiterated that the conclusion of guilt is to be barred or "must or should be", and not merely "may be" fully established- The facts so established should be consistent only with the hypothesis of the guilt of the accused- The circumstances should be of conclusive nature and should exclude every possible hypothesis except the one to be proved and the chain of evidence must be so complete as to leave no reasonable grounds for the conclusion consistent with the innocence of the accused- Based on the aforesaid, on facts the circumstances culled out by the Learned Trial Court held to be consistent with the

chain of circumstances so complete, but to establish the hypothesis of the guilt of the accused alone and the chain of evidence was held to be so complete as to leave any reasonable ground to come to the conclusion consistent with the innocence of the accused- Consequently, the appeal dismissed. (Para-17 to 29)

Case referred:

Jagriti Devi versus State of Himachal Pradesh, AIR 2009 SC 2869

Sulender vs. State of H.P., Latest HLJ 2014 (HP) 550

State of Himachal Pradesh vs. Rayia Urav @ Ajay, ILR 2016 (5) (HP) 213

Devinder Singh v. State of H.P. 1990 (1) Shim. L.C. 82

For the appellant	Mr. N.K. Thakur, Senior Advocate with Mr. Divya Raj Singh, Advocate.
For the respondent	Mr. S.C. Sharma and Mr. Narinder Guleria, Addl. AGs.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J.

Appellant herein is convict (hereinafter to be referred as 'accused'). He has been tried for the commission of an offence punishable under Sections 364 and 302 of the Indian penal Code, however, convicted and sentenced to undergo life imprisonment and to pay a fine of Rs.20,000/- for the commission of an offence punishable under section 302 IPC alone vide judgment dated 27.1.2017 passed by learned Additional Sessions Judge, Sirmaur District at Nahan in Sessions trial No. 51-N/7 of 2015.

2. Aggrieved by his conviction and sentence the convict-appellant has preferred the present appeal for quashing and setting aside the impugned judgment on the grounds, inter alia, that the same is against the law and facts of the case. He had no intention to kill his son deceased Himanshu. He was not seen by anyone while throwing his son in Kulhal canal. The circumstantial evidence produced against him no where suggest that it is he who has thrown his son Himanshu in the canal. The chain of the evidence led against him is not complete so as to clinch that it is he alone and none else had eliminated deceased Himanshu. The trial Court was not justified to make basis the statement he made under Section 313 Cr.P.C. while recording his findings of conviction and sentence. His version in the statement does not absolve the prosecution from the onus upon it to prove him guilty beyond all reasonable doubts. The testimony of the prosecution witnesses, none else but closely related hence interested one, has been erroneously relied upon to record the findings of conviction against him. The person like PW15 Parvinder Singh is a liar because his statement that he noticed the accused driving the motor cycle with his child as pillion rider at a time while buying some articles from S.K. General Store and that when returned the child was not on the motor cycle is absolutely false. PW15 according to the accused is a stock witness, hence deposed falsely. Near Yamuna bridge, only dhabas and tea-stalls are situated and not any general store. PW16 Ram Dass admit that there exists path adjoining Kulhal canal being used by the people to have access to village Khara and Baba Bhure Shah Mandir. Therefore, in a broad day light i.e. around 11:30 A.M. or

12.00 noon how a grown up child could have been thrown in the canal. Otherwise also, a person thrown in canal would raise hue and cry, however, no such evidence has been produced. Therefore, PW16 has also made a false statement.

3. Complainant in this case is Reena Devi (PW1). She is wife of accused. They married each other on 7.5.2000. Two sons namely Deepak and Himanshu (deceased) were born to them out of this wedlock. Since the accused was suspecting extra marital relations of the complainant with someone else and was also of the belief that both sons were not born to her from his loins and rather from the loins of the person with whom she was having extra marital relations, he had no liking for both children. He also used to torture the complainant on this pretext. She was given merciless beating by him in the year 2010. She, therefore, left the matrimonial home with her sons and started living in the house of her parents. It is in the year 2013 the accused compromised all disputes with her and assured that he will not torture her any further. On the assurance so given by him she returned to the matrimonial home and they again started living together with children. After some time he again started torturing her at the same pretext. She had been managing her stay in the matrimonial home anyhow or other.

4. On 30th May 2015 the accused asked her to accompany him along with Himanshu to Paonta Sahib for preparing Adhaar cards. They went to Paonta Sahib with accused on motor cycle. There the accused filled-in her form and also form of Himanshu and handed over the same to the complainant. She was asked to stand in queue and deposit the forms in SDM office and himself went to market to purchase computer. Master Himanshu was also taken by him on motor cycle with him. When the accused and deceased Himanshu did not come back for one and half hours, she made a call on his cell phone through the cell phone of Kamla PW2 who was also standing in queue with her. The accused, however, did not pick up the call. When after one and half hours he returned alone she inquired about Himanshu as to where was he. The accused replied that Himanshu had alighted from the motor cycle at Nirmal Sweet shop. He asked the complainant to search Himanshu at the place of her parents. The missing report Ext.PW1/A lodged by the complainant reveals that she and her husband the accused both searched master Himanshu in the market near and around Paonta Sahib but of no avail. It is thereafter she decided to report the matter to the police.

5. The report Ext.PW1/A was lodged in the police station on 30.5.2015 itself. The police swung into action. Efforts were made with the assistance of the complainant and other relatives of Himanshu to search him out but of no avail. On the next day i.e. 31.5.2015 in the evening when statement of the complainant was recorded under Section 161 Cr.P.C. she disclosed about her strained relations with the accused at the pretext of the latter was suspecting her chastity and paternity of both sons. She also expressed her doubt that due to such suspicion it is he alone who either has done away with minor Himanshu or concealed him somewhere. Shri Fateh Singh (Former MLA) father of accused was also associated on that very day in the investigation of the case. He also disclosed about the strained relations of the complainant and the accused on account of the latter doubting the chastity of the former and her extra marital relations with someone else. He has further disclosed to the police that the accused was even of the impression that two sons have not been born to the complainant from his loins and rather from that of the person with home she was having extra marital relations. Therefore, Fateh Singh aforesaid has also suspected

that Master Himanshu was either eliminated by the accused or hided at some place. The statement of PW15 Parvinder Singh recorded by the police under Section 161 Cr.P.C. that while crossing through S.K. General Store near Yamuna bridge a child was sitting on the motor cycle being driven by the accused as pillion rider, however, when returned the child was not with him has also given a clue to the investigating agency that there is hand of the accused in the commission of some non-bailable offence connected with the incident of missing of Master Himanshu.

6. The accused was, therefore, taken in custody on 31.5.2015 itself. When interrogated in custody, the accused allegedly made the disclosure statement Ext.PW16/A in the presence of witnesses that he can show the place where he pushed Himanshu in canal. The statement so made was reduced into writing. Accordingly the police and witnesses had rushed to Kulhal barrier and identified the place where he pushed his son Himanshu into canal. The identification memo of that place Ext.PW16/B was accordingly prepared in the presence of witnesses. During further course of investigation the spot map etc. was also prepared. The motor cycle bearing No. HP-17B-4035 of the accused handed over to the police by his brother Sumer Chand was also taken into possession vide seizure memo Ext.PW11/A.

7. On 12.6.2015 in the morning PW4 Jagbir Singh a JCB Operator noticed the dead body of a child floating in Kulhal canal. He informed the official of CISF Unit deployed there on security duty. The intimation was further passed on by CISF official to Mirjapur police and police of Paonta Sahib. The police in turn had passed on such information to PW17 Surjeet Singh and Sumer Chand, the uncles of Himanshu. They accompanied by the police went to the spot near Khara project and identified the body of their nephew Himanshu. The autopsy was got conducted from the team of Doctors comprising PW10 Dr. Kamal Pasha. Since the dead body was in badly decomposed condition, therefore, referred to IGMC Shimla for conducting autopsy by the expert. In IGMC it is Dr. Sangeet Dhillon PW21 who has conducted the autopsy and the cause of death of deceased was found drowning and throwing him in water.

8. On collecting the post mortem reports and also the report from State Forensic Science Laboratory as well as completion of the investigation the police has found the involvement of the accused in the commission of the offence. Therefore, report under Section 173 Cr.P.C. was filed against him in the trial Court.

9. Learned trial Judge on having gone through the evidence collected by the police and hearing learned counsel and recording its satisfaction qua the existence of a prima-facie case against the accused proceeded to frame charge against him under Sections 364 and 302 of the Indian Penal Code. He, however, pleaded not guilty and claimed trial.

10. The prosecution has examined 21 witnesses in all to prove its case against the accused. As noticed at the outset, the present is a case of circumstantial evidence. Anyhow, the material prosecution witnesses who have been examined by the prosecution to prove the circumstances suggesting the guilty of the accused are PW1 Reena Devi the complainant, PW2 Kamla Devi, PW3 Fateh Singh father of the accused, PW6 Vishal brother of PW1, PW16 Ram Dass father of the complainant, PW17 Surjeet Singh elder brother of accused, PW18 Gurmeet Singh and PW15 Parvinder Singh also. The other witnesses including officials have also been examined to complete the chain of circumstances so relied upon against the accused.

11. The accused was also examined under Section 313 Cr.P.C. and all the incriminating circumstances appearing against him in prosecution evidence put to him during such examination. Interestingly enough, he has not denied his marriage with the complainant and two sons born to her. Though the prosecution evidence that he was suspecting her extra marital relations with someone else and also raising finger on the paternity of two sons were denied, however, admitted that on one occasion the complainant abandoned his company and left the matrimonial home also. She was brought back by him on the assurance that he will not torture her any further in future.

12. The accused also admit that on 30.5.2015 he had taken the complainant and deceased Himanshu to Paonta for preparing their Adhaar cards. He also admits that he went to the market for purchasing a computer and had taken HImanshu also with him. It was also put to him that when he returned Himanshu was not with him which fact he also admit as correct. However, when the disclosure statement Ext.PW16/A was put to him though he admit that he made the statement to the police, however, not to the effect that he pushed Himanshu into canal and explained that Himanshu rather slipped away into canal at his own. In reply to question No. 14 he admit that on being asked by PW1 as to where Himanshu was, he told that Himanshu alighted from the motor cycle at Nirmal Sweet shop. He also admitted that when returned on motor cycle PW15 noticed that Himanshu, a pillion rider was not with him at that time.

13. The accused was given an opportunity to produce evidence in his defence also, however, he opted for not to do so.

14. Learned trial Court on the completion of the record and hearing learned Public Prosecutor as well as defence Counsel and on appreciation of the evidence available on record has held the accused guilty of the commission of an offence punishable under Section 302 IPC. Consequently, he has been convicted to undergo rigorous imprisonment for life and also to pay Rs.20,000/- as fine. No case under Section 364 IPC, however, was found to be made out against him, hence acquitted of the charge so framed against him.

15. Mr. N.K. Thakur, learned Senior Advocate assisted by Mr. Divya Raj Singh, Advocate has argued that there is no iota of evidence to connect the accused with the commission of alleged offence. Again there is no tangible evidence to show that it is the accused who has pushed his own son Himanshu into Kulhal canal and thereby killed him. The circumstantial evidence as pressed in service according to learned defence Counsel is neither plausible nor reasonable. The findings of conviction under Section 302 IPC are stated to be recorded against the accused on the basis of surmises and conjectures.

16. On the other hand, learned Additional Advocate General while repelling the arguments addressed on behalf of the accused has contended that the circumstantial evidence available on record is cogent and reliable. The change of circumstances as appeared in the prosecution evidence against the accused is complete and leave no manner of doubt that it is the accused who has pushed deceased Himanshu into canal and due to which he died. Learned lower Court, therefore, has not committed any illegality or irregularity while convicting the accused for the commission of offence punishable under Section 302 of the Indian Penal Code.

17. On having gone through the entire material on record and also the given facts and circumstances coupled with the factum of the present is a case where no direct evidence is available and rather the prosecution case hinges upon the circumstantial evidence an onerous duty is casted upon this Court to find out the truth by separating grain from the chaff. However, before that it is desirable to take note of the necessary ingredients of an offence punishable under Section 302 IPC.

18. Reliance in this regard can be made to the provisions contained under Section 300 IPC. As a matter of fact, culpable homicide amounts to murder firstly if the accused is found to have acted with an intention to cause death or secondly to cause such bodily injury knowing fully well that the same is likely to cause death. Thirdly, intention of causing bodily injury to any person and such injury intended to be inflicted knowing fully well that the same in ordinary course of nature would be sufficient to cause death.

19. Culpable homicide has been defined under Section 299 IPC. Whoever causes death of someone by way of an act caused intentionally or with the knowledge that such act is likely to cause death can be said to have committed the offence of culpable homicide punishable under Section 302 of the Indian Penal Code. The Apex Court in ***Jagriti Devi*** versus ***State of Himachal Pradesh, AIR 2009 SC 2869*** has held that expression "intent" and "knowledge" postulate the existence of a positive mental attitude of different degree. 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 circumstantial evidence produced by the prosecution is sufficient to connect the accused with the commission of offence or not is a question to be determined later on, however, before that what are legal parameters to appreciate the circumstantial evidence as we detailed in a recent judgment in *Criminal Appeal No. 242 of 2016*, title ***Hikmat Bahadur*** versus ***State of Himachal Pradesh*** and its connected appeal rendered on September 19, 2017 need to be discussed. The same reads as follows:

> ".....Before the evidence produced by the prosecution in this case is elaborate, the present being a case of circumstantial evidence, the Court seized of the matter has to appreciate such evidence in the manner as legally required. We can draw support in this regard from a judgment of Division Bench of this Court in **Sulender vs. State of H.P., Latest HLJ 2014 (HP) 550**. The relevant extract of this judgment is re-produced here-as-under:-
>
> ***"21.*** *It is well settled that in a case, which hinges on circumstantial evidence, circumstances on record must establish the guilt of the accused alone and rule out the probabilities leading to presumption of his innocence. The law is no more res integra, because the Hon'ble Apex Court in Hanumant Govind Nargundkar vs. State of M.P., AIR 1952 SC 343, has laid down the following principles:*
>
> *"It is well remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature*

and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

22. *The five golden principles, discussed and laid down, again by Hon'ble Apex Court in Sharad Birdhichand Sarda vs. State of Maharashtra, (1984) 4 SCC 116, are as follows:*

(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."...

21. Similar case is the ratio of judgment rendered again by this Bench in **State of Himachal Pradesh vs. Rayia Urav @ Ajay, ILR 2016 (5) (HP) 213**. This judgment also reads as follows:-

"10. *As noticed supra, there is no eye-witness of the occurrence and as such, the present case hinges upon the circumstantial evidence. In such like cases, as per the settled proposition of law, the chain of circumstances appearing on record should be complete in all respects so as to lead to the only conclusion that it is accused alone who has committed the offence. The conditions necessary in order to enable the court to record the findings of conviction against an offender on the basis of circumstantial evidence have been detailed in a judgment of this Court in* ***Devinder Singh v. State of H.P. 1990 (1) Shim. L.C. 82*** *which reads as under:-*

"1. The circumstances from which the conclusion of guilt is to be drawn should be fully established.

2. 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 guilt.

3. The circumstances should be of a conclusive nature and tendency.

4. They should exclude every possible hypothesis except the one to be proved.

5. 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.

11. *It has also been held by the Hon'ble Apex Court in Akhilesh Halam v. State of Bihar 1995 Suppl.(3) S.C.C. 357 that the prosecution is not only required to prove each and every circumstance as relied upon against the accused, but also that the chain of evidence furnished by those circumstances must be so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. The relevant portion of this judgment is reproduced here-as-under:-*

".....It may be stated that the standard of proof required to convict a person on circumstantial evidence is now settled by a serious of pronouncements of this Court. According to the standard enunciated by this Court the circumstances relied upon by the prosecution in support of the case must not only by fully established but the chain of evidence furnished by those circumstances must be so complete as not to leave any reasonable ground for as conclusion consistent with the innocence of the accused. The circumstances from which the conclusion of the guilt of an accused is to be inferred, should be conclusive nature and consistent only with the hypothesis of the guilt of the accused and the same should not be capable of being explained by any other hypothesis, except the guilt of the accused and when all the circumstances cumulatively taken together lead to the only irresistible conclusion that the accused is the perpetrator of the crime."...

20. Learned trial Court in para-37 of the impugned judgment has taken into consideration the following circumstances and formed an opinion that the chain is complete:-

1) The accused suspected that complainant had extra marital relations with one person of the neighbourhood and both the children were born from those relations.

2) The accused used to torture the complainant and subject her to severe beatings on this issue and had given an axe blow on the head of the complainant in the year 2010.

3) The accused used to treat the children with cruelty and had no affection for them.

4) In the year 2010, when the complainant was dealt axe blow by the accused, she along with the children left the house and stayed with her father.

5) The accused thereafter, brought the complainant back alongwith children with the promise not to torture them anymore and kept nicely for about 6 months, where after maltreatment again begun.

6) The accused had made an attempt to eliminate the deceased child by putting him in a box as narrated by the complainant and others to the Investigating Officer, SHO Laiq Ram.

7) On the fateful day, the accused intentionally brought the complainant and the deceased child to the office of SDM Paonta Sahib, with a view to get their Adhaar card prepared as he had a design in his mind to eliminate the child.

8) The accused intentionally made the complainant to stand in the queue to wait for the turn and at that very moment impressed upon her that he shall take Himanshu to market so that a computer could be purchased for him; whereas, as a matter of fact presence of Himanshu was also required on the spot as his Adhaar card was also to be prepared. Computer could have been purchased later on.

9) The accused thus, intentionally isolated the child and made his mother bound to stay before the Authorities by making her to stand in the queue so that she would not come in his way.

10) The accused took the child on the motorcycle across the Yamuna river and pushed the child in the canal and on his return made a false excuse by deposing that the child has alighted at Nirmal Sweet shop.

11) The accused thereafter, misguided the complainant and made her to report the police about the missing of the child and took her to the houses of relatives to search the child, whereas he himself knew that he had pushed the child in the water canal.

12) The accused on the next day instead of joining the search campaign of the child started evading his presence and also did not pick up the phone calls and in this manner the complainant and her father expressed that they suspected that the accused had hand in the missing of the child.

13) The accused was seen with the child going across the Yamuna bridge by PW15 Shri Parwinder Singh. He also noticed that the accused had returned all alone.

14) The accused thereafter, made a confessional statement and showed the canal, in which he had thrown the child and subsequently, body was recovered from the same canal. The accused therefore, had a special knowledge as to from where the body of the child could be recovered and this evidence became admissible against him.

15) The accused while asked to explain the circumstances, he admitted the evidence to the effect that he had taken the child across the bridge and by the side of canal. He only tried to explain that child slipped in the water for no fault on his part.

16) Even if the child had slipped in the canal by accident, the conduct of the accused speaks volumes of his intentions and falsify the explanation given by him. The accused concealed all these facts and pretended as if the child had gone missing near the SDM office itself.

17) The medical evidence showed that the death of the child has been caused by drowning and death has taken place 10-15 days back and thus the possibility of murdering the child somewhere else and throwing the body in the canal are fully ruled out.

18) The accused thus, had a motive, had failed in his previous attempt and thus created an opportunity to execute his designs by bringing the child and the mother for preparation of their Adhaar card and by making the mother of the child to stand in the queue before the Authorities and executed his designs with utmost cleverness.

21. We are in full agreement with learned trial Court as the above sated circumstances appeared on record against the accused. The question for our consideration is, however, that the chain of circumstances so appeared on record is complete so as to establish the guilt of the accused in the commission of the offence. Our answer to this poser in all fairness and in the ends of justice would be in affirmative for the reason that on facts the prosecution and defence by and large is not at variance. As noticed hereinabove the accused admit the complainant to be his legally wedded wife. He also admits strained relations between them. Though he has disputed that the cause thereto was extra marital relations of his wife, the complainant, with someone else, however, has failed to assign any other and further reason thereto. We are convinced that the cause of strained relations between accused and complainant was the suspicion the former entertained against the latter that she had extra marital relations with someone else as had it been not so at least PW3 Fateh Singh his father and brother Surjeet Singh PW17 would have not stated so while in the witness box. They have not been cross-examined qua this aspect of their testimony having come on record in their examination-in-chief. There is thus admission on the part of the accused that he was suspecting her relations with someone else. His wife the complainant PW1, father-in-law Ram Dass PW16 and brother-in-law Vishal PW6 have also stated in own voice that the accused was suspecting the relations of PW1 with someone else. They have also not been cross-examined qua this aspect of the matter. In normal circumstances their testimony could have been suspected on account of interested in the success of prosecution evidence, however, their testimony in examination-in-chief is not discredited at all as they have not been cross-examined qua this aspect of the matter. It is thus safe to place reliance thereon also while arriving at a conclusion that the cause of strained relations between the accused and the complainant was the former suspecting the chastity of latter. The evidence as has come on record by way of the statement of PW3 Fateh Singh and PW17 Surjeet Singh cannot be ignored by any stretch of imagination as they were none else but the father and real brother respectively of the accused. Normally the father and brother will not implicate his own son/brother that too in a case of this nature. Both PWs 3 and 17 had shown the guts and told truth while in the witness box to substantiate the cause of justice. No suggestion was given to them that they deposed so on account of enmity or for some extraneous consideration. Therefore, from the circumstances appeared on record and relied upon against the accused it is proved satisfactorily that the accused had been

doubting the chastity of his wife, the complainant and was under the impression that the two sons including deceased were not born to the complainant from his loins and rather from that of the person with whom she allegedly was having extra marital relations.

22. Be it stated that in a case of circumstantial evidence the motive to commit the offence plays a vital role. In the present case the circumstances appeared against the accused on record establish that he had the motive to kill deceased Himanshu since he was belaboring under the belief that Himanshu is not born to complainant from his loins and rather from that of someone else, therefore, he had the cause to eliminate Himanshu. The testimony of the complainant PW1 that of her father-in-law PW3 Fateh Singh, brother-in-law PW17 Surjeet Singh reveal that the accused had no liking for the children. As per the testimony of PWs 1 and 3 the children used to remain in the company of their grandfather PW3 for all the time. According to PW3 deceased Himanshu was even sleeping also with him whereas as per that of PW1 the accused was not allowing the children to sleep with them (accused and complainant). Himanshu, therefore, had become an eyesore for the accused. It is for this reason he has planned to done away with the life of deceased Himanshu.

23. As per own admission of the accused his wife the complainant and Himanshu both accompanied him to Paonta Sahib for preparation of Adhaar cards. He also admits that while the complainant was asked to stand in queue and deposit the forms in the SDM office, he went to the market for buying a computer. He had also taken Himanshu with him. He also admits that he returned alone to SDM office. On query by his wife as to where Himanshu was, his reply was that he alighted from the motor cycle at Nirmal Sweet shop. Surprisingly enough, in his statement recorded under Section 313 Cr.P.C. his reply to question No. 26 was altogether different because when the disclosure statement Ext.PW16/A was put to him he replied that no doubt he had made the statement to the police, however, not that he pushed Himanshu into canal and rather that Himanshu slipped away and fell into canal at his own. Had it been so, why it was not disclosed to the complainant at the best available opportunity to him when on his return alone she inquired as to where Himanshu was. There was no occasion for him to have disclosed her at that time that Himanshu had alighted from the motor cycle at Nirmal Sweet shop. The different statement the accused made qua this vital part of the prosecution case speaks in plenty that Himanshu was thrown by the accused alone into the canal and he died due to that. The disclosure statement Ext.PW16/A is duly proved from the testimony of Ram Dass PW16, a witness thereto. Even the accused has also admitted the statement having been made by him to the police, however, qualified his version that he has made the statement qua deceased Himanshu having slipped into the canal at his own and not pushed by him into it, which for the reasons already recorded cannot be believed to be true. The testimony of PW15 may not be of much help to the prosecution case because even if it is believed that the said witness was buying articles in S.K. General Store situated near Yamuna bridge was not expected to have take note of the accused driving the motor cycle with a child as pillion rider and also the accused returning alone after one hour. The accused, however, has himself admitted that he returned alone from the market.

24. The remaining prosecution case i.e. the dead body of Himanshu was seen floating in Kulhal canal by PW4 Jagbir Singh in the morning is also satisfactorily proved on record as this part of the prosecution case is not only supported by PW4 Jagbir

Singh CISF personnel on duty at canal but also the another official Sh. Sham Singh PW5, PW7 Surjeet Singh the brother of accused as well as PW18 Gurmeet Singh who accompanied Surjeet Singh to Kulhal canal where the dead body was seen. The prosecution case qua taking in possession the dead body and forwarding the same to Civil Hospital, Paonta Sahib for post mortem also stand satisfactorily proved from the testimony of PW10 Dr. Kamal Pasha who on examination of the dead body and its condition alongwith Dr. Rajiv Chauhan concluded that the dead body being in decomposed condition its post mortem was required to be conducted by a forensic expert. The dead body, as such, was referred to IGMC, Shimla where the autopsy was conducted by PW21 Dr. Sangeet Dhillon. In his opinion, the cause of the death was throwing the deceased into water and consequently drowning.

25. The link evidence produced by the prosecution also substantiates the circumstances appearing against the accused in prosecution evidence. As already noticed PW4 Jagbir Singh was working as JCB Operator at the relevant time in A.P.E. company, Khara Hydro Electric Project. It is he who noticed the dead body of Himanshu in Kulhal canal on 12.6.2015 around 8:00 a.m. He informed the CISF official on duty at the project site. Consequently, PW4 Sham Singh who was posted as ASI in CISF Unit, Khara Hydro Electric project at that time informed Mirjapur and Paonta Sahib Police about the dead body lying in the canal. The canal leads to Haryana to Kulhal side is proved from the testimony of PW7 Ram Bhaj Sharma, Patwar, Patwari Circle, Ambari, Tehsil Vikas Nagar, District Dehradun. He has supplied the copy of revenue papers Ext.PW7/A and tatima Ext.PW7/B to the police. PW8 Pankaj Kumar, Lekh Pal, Patwari Circle, Tehsil Behat, District Saharanpur (UP) has supplied the jamabandi Ext.PW8/A and tatima Ext.PW8/B of the place from where the dead body was recovered. PW9 Sukhjit Singh at the relevant time was posted as Executive Engineer at Asan Barrage, Dhalipur (Uttrakhand). On an application Ext.PW9/A made to him by the police he had supplied the certificate Ext.PW9/B to the effect that canal leads to Haryana via Asan barrage, Kulhal, Mutak Majri etc.

26. The remaining witnesses are police officials. PW11 Constable Pradeep Kumar, Police Station, Paonta Sahib has proved the seizure memo Ext.PW11/A whereby the vehicle along with its key was taken in possession by the I.O. PW12 HHC D.R. Thakur has proved the memo Ext.PW12/A whereby the IO has taken in possession one nip of water from canal. PW13 HHC Rajinder Singh, Police Station, Paonta Sahib had taken the case property to the Forensic Science Laboratory vide RC No. 77/15 Ext.PW14/B and deposited the same there in safe custody. PW14 HHC Virender Singh was posted as Moharar Head Constable in police Station, Paonta Sahib at the relevant time. He has received the case property, made its entries Ext.PW14/A in the Malkhanna register and later on forwarded the same to Forensic Science Laboratory for testing through PW13 vide RC No. 77/15 Ext.PW14/B. PW19 at the relevant time was posted as SHO in Police Station, Paonta Sahib. He has recorded the FIR Ext.PW19/A on the basis of the report Ext.PW1/A lodged by the complainant. He had prepared spot map Ext.PW19/C and also issued hue and cry notice Ext.PW19/D. According to him when PW1 complainant and her father-in-law PW3 Fateh Singh was associated in the investigation of the case on the next day i.e. 31.5.2015 they both stated that the accused was suspecting her extra marital relations with someone else and that it is he who had either killed Master Himanshu or hidden him at some place. PW15 Parvinder Singh was also associated on the same day. In view of their

statements recorded under Section 161 Cr.P.C. the accused was arrested by PW19 and handed over the case file to PW20 ASI Mohar Singh for further investigation. It is PW20 who had recorded the disclosure statement Ext.PW16/A made by the accused while in custody and prepared the identification memo Ext.PW16/B of the place from where the dead body was recovered. He had also prepared the spot map Ext.PW20/B and inquest papers Ext.PW20/C and Ext.PW20/D. The application Ext.PW10/A was made to the Medical officer for conducting post mortem of the dead body. The dead body was sent through Constable Ram Kumar vide docket Ext.PW20/E to IGMC Shimla for expert opinion. PW20 had also taken the photographs Ext.PW20/G-1 to Ext.PW20/G-16. He had also collected the revenue record i.e. Ext.PW9/B, PW8/A and PW8/B. The reports from laboratory Ext.PA and PB were also taken on record.

27. The link evidence as has come on record by way of the testimony of the former/official witnesses discussed hereinabove also helps the prosecution to show that the chain of circumstances appearing against the accused in prosecution evidence is complete in all respect.

28. The present in view of the discussion hereinabove is a case where the circumstances pressed into service against the accused stand satisfactorily established on record. The circumstantial evidence produced by the prosecution being conclusive in nature is with the findings of guilt of the accused recorded by learned trial Court. The chain of circumstances is complete and leave no reasonable ground for arriving a conclusion inconsistent with the guilt of the accused and also satisfies the conscience of this Court that it is the accused alone who had thrown his son Himanshu in Kulhal canal and as a result thereof he died.

29. True it is that a criminal trial is not like a fairy tale and the prosecution must built its case on the edifice of evidence legally admissible. However, in this case, legally admissible evidence has been produced by the prosecution to prove the involvement of the accused in the commission of such a gruesome offence, hence he rendered himself liable to be convicted and sentenced for the commission of said offence. Learned trial Judge, therefore, has not committed any illegality or irregularity while recording the findings of conviction against the accused.

30. In view of what has said hereinabove, this appeal fails and the same is accordingly dismissed.

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

Shakuntla Devi. .....Petitioner.

Versus

Lalman & ors. .....Respondents.

Cr. Revision No. 89 of 2009.
Date of decision: March 14, 2018.

Indian Penal Code, 1860- Sections 147, 447, 323 read with Section 149- Petitioner was allegedly assaulted by the respondent - challenged acquittal of the respondents by the 1st Appellate Court reversing the conviction recorded by the Learned Trial Court by way of

revision- It transpired during hearing that revision was not maintainable – petition was filed for conversion of revision petition into an appeal- **Held-** that prayer of conversion is legal but same needs to be filed at the threshold – present application has been filed after nine years of filing of revision – Also, respondents have been suffering for last eighteen years in facing the criminal proceedings- no iota of evidence that they had constituted an unlawful assembly or used force or violence against the complainant- no interference is made out- revision petition as well as Cr.M.P (M)s dismissed. (Para-7 to 9)

For the petitioner	Mr. Dalip K. Sharma, Advocate.
For the respondents	Mr. Neeraj Gupta, Advocate, for respondents No. 1 to 4.
	Mr. S.C. Sharma and Mr. Narinder Guleria, Addl. AGs with Mr. Kunal Thakur, Dy. AG, for respondent No. 6.

The following judgment of the Court was delivered:

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

Cr.MP(M) No. 1276 of 2017, Cr.MP o. 1215 of 2017

and Cr. Revision No. 89 of 2009

Petitioner herein claims herself to be the victim of occurrence having taken place long back on 10.11.2001 around 1:30 P.M. at village Dhangu, Police Station Balh, Tehsil Sadar (now Tehsil Balh), District Mandi wherein she allegedly was assaulted by respondents No. 1 and 2, the accused persons at a time when was irrigating the field belonging to them along with her son Hitesh Kumar. Both accused accompanied by their co-accused Hem Raj, Jagdish Kumar and Puran Chand (since dead) all of a sudden appeared on the spot and started ploughing the said field with a tractor brought with them. While accused-respondent Lalman caught hold the complainant, his wife accused Radha Devi assaulted her with sickle and thereby she received injuries on her person. It was further alleged that all the accused gathered in the form of an unlawful assembly and conspired with each other to tress pass into the land of the complainant party and also administer beatings to them. The task they planned by conspiring with each other they completed by entering upon the field of complainant party and administered beating to the complainant and her son Hitesh Kumar.

2. The occurrence was reported to the police of Police Station, Balh, District Mandi where a case came to be registered against all the accused under Section 147, 447, 323 read with Section 149 IPC vide FIR No. 376 of 2001. The police on conducting investigation and collecting the evidence against the accused-petitioner prepared the final report under Section 173 Cr.P.C. and presented the same in the Court with a prayer to punish the accused persons. The report so filed came to be registered as Police Challan No. 53-I/2002 (46-II/2002) and tried by the Court of learned Judicial Magistrate Ist Class (II), Mandi, District Mandi. Learned trial Magistrate after holding full trial has convicted all the accused persons for the commission of offence punishable under Sections 323 and 447 read with Sections 149 and 147 of the Indian Penal Code. They were sentenced to undergo simple imprisonment for a period of three months and also to pay Rs.500/- as fine under Section 323 read with Section 149 of the Indian Penal Code and to undergo simple imprisonment for a period of two months and to pay Rs.200/- as fine under Section 447 read with Section 149 IPC and also to undergo three months simple imprisonment as well as to pay Rs.500/- as fine under Section 147 IPC.

3. All the accused have assailed the findings of conviction recorded against each of them by learned trial Court in an appeal registered as Criminal Appeal No. 15 of 2006. Learned Sessions Judge, Mandi on hearing the parties and appreciation of evidence has held that the prosecution has failed to prove its case beyond all reasonable doubt. All the accused, as such, were acquitted of the charge framed against each of them vide judgment under challenge in these proceedings before this Court.

4. It is worth mentioning that the State has not opted for filing an appeal against the judgment of acquittal passed by learned lower Appellate Court. It is the complainant claim herself to be the victim of the occurrence has preferred the revision petition challenging therein the judgment passed by learned lower Appellate Court on several grounds, however, mainly that the findings of the acquittal of the accused recorded by learned lower Appellate Court are not based upon the proper appreciation of the evidence available on record. As per her further grouse the well reasoned judgment passed by learned trial Court has erroneously been set aside.

5. The revision petition when heard for some time, it transpired that the same is not maintainable. Therefore, on the prayer made on behalf of the petitioner, the matter was adjourned enabling thereby the learned Counsel representing her to satisfy this Court as to how a revision petition is maintainable against the judgment of acquittal passed by learned lower Appellate Court. It is pursuant to the order so passed in this petition the applications registered as Cr.MP No. 1215 of 2017 with a prayer to order the conversion of the revision petition into an appeal and Cr.MP No 1276 of 2017 to grant leave to appeal came to be filed.

6. Both applications have been resisted and contested on behalf of the respondents-accused on the grounds, inter-alia, that at this belated stage neither the revision petition can be ordered to be converted into an appeal nor leave to appeal granted.

7. On hearing learned Counsel representing the parties and learned Additional Advocate General, it would not be improper to conclude that in normal circumstances there is nothing illegal in converting a revision petition into an appeal. The present, however, is a case where the application with a prayer to convert the revision petition into an appeal came to be filed after nine years of the institution of the revision petition in this Court. On the other hand against the judgment of acquittal passed by learned lower Appellate Court the remedy available was to file appeal in this Court and not revision petition. As noted at the outset the conversion of a revision petition into an appeal is legally permissible, however, in appropriate cases and that too at the very threshold and not at a belated stage because allowing the revision petition to be converted into an appeal at this stage would amount to take away a right accrued in favour of the accused on expiry of the period prescribed for filing the same. Above all allowing such conversion at this belated stage would amount further harassment of the respondents-accused who have been facing the present case since its registration with the police in the year 2001 i.e. for the last 18 years. The offence allegedly committed by the accused-respondents is also not very serious and heinous in nature as the only allegations against them are that they entered upon the field of the complainant party and caused hurt to the complainant and her son Hitesh Kumar. The offence they allegedly committed is thus punishable under Sections 447 and 323 of the Indian Penal Code because admittedly the so called injuries allegedly inflicted by the accused party on the person of the complainant were simple in nature. In a case punishable under Section 447 IPC the maximum sentence of imprisonment may extend up to three months with fine which may extended to Rs.500/-. Similarly, for the offence punishable under Section 323 IPC the sentence of imprisonment may extend to one month or with fine which may extended to Rs.1000/- or with both. A person held guilty under Section 147 IPC

may also undergo the sentence of imprisonment for a maximum period of two years or with fine or with both.

8. The accused persons who have been facing the present case for the last 18 years in the considered opinion of this Court had suffered a lot. Otherwise also, the record reveals that there is no iota of evidence suggesting that the accused formed an unlawful assembly and conspired with each other to enter upon the field of the complainant party and also administered beatings to them. There is no grain of truth in the prosecution story that the accused assembled in the form of an unlawful assembly, had used force against the complainant party and were violent also so that the commission of an offence punishable under Section 147 IPC could have been said to be committed by them. No doubt, learned trial Judge has convicted and sentenced the accused, however, learned lower Appellate Court on re-appreciation of the evidence while setting aside the findings of conviction recorded by the trial Court has acquitted them of the charge framed against each of them.

9. Therefore, not only the wrong remedy has been chosen by the petitioner-complainant but on merits also no case for interference is made out. The present is also not a case where at this belated stage, the prayer for conversion of the revision petition into an appeal and leave to appeal should be granted.

10. Being so, the applications are dismissed. Consequently, the revision petition also stand 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

Om Parkash ...Respondent.

Cr. Appeal No.166 of 2011
Reserved on: 09.01.2018
Decided on: 14.03.2018

Code of Criminal Procedure, 1973- Section 378- Appeal against acquittal- Section 20 of the N.D.P.S. Act, 1985- Respondent acquitted by the learned Trial Court- State challenged the acquittal while re-affirming the findings so recorded - **Held-** that the bag containing contraband held not to have been recovered from the conscious possession of the accused/respondent as it was alleged to have been in between the legs of the accused beneath the seat No.14- On facts, based on the testimony of PW-2 Satvir Singh, an independent witness- All four passengers sitting on Seat Nos.12, 13 and 14 had come out off the bus and were questioned by the police regarding ownership of the bag in question- The said fact coupled with the discrepancy in timings- held- did not prove that the contraband was recovered from the conscious possession of the accused – Consequently, acquittal of the accused-respondent upheld. (Para-19 to 33)

Cases referred:

Muddasani Venkata Narsaiah (Dead) through LRs versus Muddasani Sarojana, (2016) 12 SCC 288

Devraj versus State of Chhattisgarh, (2016) 13 SCC 366

Raja and others versus State of Karnataka, (2016) 10 SCC 506

Vinod Kumar versus State of Punjab, (2015) 3 SCC 220

Ritesh Chakarvarti versus State of M.P., (2006) 12 SCC 321
Paramjeet Singh alias Pamma versus State of Uttarakhand, (2010) 10 Supreme Court Cases 439
Sunil versus State of Himachal Pradesh, Latest HLJ 2010 (HP) 207
State of H.P. versus Mehboob Khan, 2013 (3) Him. L.R. (FB) 1834

For the appellant: Mr.D.S. Nainta & Mr. Virender Verma, Additional Advocate Generals.
For the respondent: Mr.Vipin Rajta, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge.

Instant appeal has been preferred by the State of Himachal Pradesh against acquittal of respondent-Om Parkash vide judgment, dated 14th January, 2011, passed by the learned Presiding Officer, Fast Track Court, Solan, in Case No. 11 FTC/7 of 2010 arising out of case FIR No. 98/2009 registered at Police Station Parwanoo, District Solan, under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'NDPS Act').

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

3. Prosecution case, in brief, is that on 28th November, 2009, after recording G.D. Entry No. 34 (a), Ex. PW-4/A, PW-12 ASI Ram Lal alongwith PW-1 HC Ashok Kumar, PW-7 HC Bhagirath, PW-11 Constable Rajesh Kumar and Constable Gurcharjit Singh (not examined) left the Police Station at about 11.10 p.m. in official vehicle Bolero Camper being driven by Constable Desh Raj (not examined) having search light, investigation kit and weights and scale for checking of vehicles and Nakkabandi in the area of Sector 3, Parwanoo etc. At about 12.35 a.m., police party stopped a HRTC bus plying from Rohru to Delhi near Shivalic Agro Factory, Sector 3, Parwanoo and conducted routine checking of luggage of passengers. During checking, a person sitting on seat No. 14 was found with a bag in his lap and one bag between his legs below the seat. On checking these bags, a mobile charger with lead and a t-shirt were found in the bag which was in his lap and in another bag, a brown pant, a woolen shawl and a polythene packet were found. In the polythene packet, charas in round and stick shape was recovered. Person alongwith bags was brought out of the bus from the front door and driver and conductor of the bus were also called outside the bus, who disclosed their names to be Vinod Kumar and Nagender, respectively. Name of owner of bag was also asked in presence of driver and conductor of the bus, who disclosed his name and identity as respondent.

4. Thereafter, identification slip of recovered contraband Ex. PW-1/A was prepared and on weighing, recovered charas was found to be 4 kg 400 grams. Recovered charas was put in the polythene bag and was again put in bag alongwith shawl and the bag was sealed in a packet of cloth by affixing seal 'A'. Another bag was also sealed in a separate piece of cloth with the same seal 'A'. Sample of seal was taken and it was handed over to PW-7 HC Bhagirath. Memo Ex. PW-1/C was prepared in this regard. Parcels were taken into possession vide property search and seizure form Ex. PW-1/D and Ex. PW-1/E. NCB form in triplicate was filled in. During the search and seizure process, PW-1 HC Ashok Kumar had also taken photographs of the proceedings with digital camera, which were downloaded by PW-10 ASI Chander Shekhar on the computer for taking prints Ex. P-10 to P-12 of the said photographs.

5. After seizure of the contraband, rukka Ex. PW-12/B was sent to Police Station at 2.10 a.m. through PW-11 Constable Rajesh Kumar, who handed over the same to PW-4 MHC Prem Singh, which was fed in the computer by the said MHC and FIR Ex. PW-4/B was registered, which was signed by PW-9 SHO Govind Ram. After registration of FIR, PW-11 Constable Rajesh Kumar brought the case file to the spot. PW-12 ASI Ram Lal completed the proceedings on the spot. During this process, respondent also produced bus tickets from Karsog to Shimla worth ₹ 90/- Ex. P-1 and from Shimla to Samlakha worth ₹ 200/- Ex. P-2, vide memo Ex. PW-1/F. Spot

map Ex PW-12/C was prepared. Statements of witnesses were recorded and respondent was arrested at 5.30 a.m. after giving information of his arrest to him and his father. Memo Ex. PW-12/D was prepared in this regard.

6. As per prosecution case, police party returned to Police Station at 7.40 a.m. and produced the case property before PW-9 SHO Govind Ram, who re-sealed the recovered contraband with seal 'G'. After taking sample of seal 'G' on the piece of cloth, filling up relevant column in NCB form and affixing facsimile of seal 'G' on the said form and recovered contraband, NCB form was handed over to PW-4 MHC Prem Singh for depositing the same in malkhana. Entry in daily station diary Ex. PW-9/F was made in this regard. PW-4 MHC Prem Singh entered the case property in malkhana register against entries No. 430 and 431 as black bag containing clothes of respondent was deposited by PW-12 ASI Ram Lal directly in the malkhana against entry No. 430 and recovered contraband, after re-sealing was deposited by PW-9 SHO Govind Ram against entry No. 431, as depicted in Ex. PW-4/C.

7. On 30th November, 2009, the recovered contraband alongwith forwarding letter Ex. PW-9/G was sent for chemical analysis vide RC Ex. PW-4/D by PW-4 MHC Prem Singh through PW-5 HHC Santosh Singh, who deposited the same in SFSL Junga on the very same day.

8. After receiving the recovered contraband alongwith report of Chemical Examiner, Ex. PW-12/E, challan was prepared and presented in the Court by PW-9 SHO Govind Ram.

9. On finding *prima facie* complicity of the respondent in commission of offence, charge under Section 20 of NDPS Act was framed against him. During trial, prosecution has examined twelve witnesses to prove its case. After recording his statement under Section 313 of the Code of Criminal Procedure (hereinafter referred to as 'CrPC'), respondent has chosen not to lead any evidence in his defence. On conclusion of trial, the respondent stands acquitted. Hence, the present appeal.

10. PW-1 HC Ashok Kumar, PW-7 HC Bhagirath, PW-11 Constable Rajesh kumar and PW-12 ASI Ram Lal are spot official witnesses. PW-2 Satvir Singh (passenger of the bus) and PW-3 Nagender Singh (conductor of the bus) are independent witnesses examined in support of prosecution case.

11. The spot official witnesses, by and large, have corroborated the prosecution case with respect to departure of police party from Police Station at 11.10 p.m., arrival of the police party on the spot at about 11.25 - 11.30 p.m., checking of certain vehicles prior to intercepting the bus in question and checking of no other vehicle thereafter. These witnesses have also stated in one voice that respondent was travelling on seat No. 14 having one bag in his lap (wherein no charas was recovered) and another bag in between his leg beneath the seat wherein 4 kg 400 grams charas was recovered by the police party.

12. Preparation of memo of identification of recovered contraband Ex. PW-1/A, memo of affixing sample seal on piece of cloth Ex. PW-1/B and handing over the seal to PW-7 HC Bhagirath Ex. PW-1/C, seizure memo Ex. PW-1/D, seizure form Ex. PW-1/E and signing of these memos and piece of cloth having sample seal by four persons, i.e. driver Vinod Kumar (not examined), PW-3 Nagender Singh (conductor), PW-1 HC Ashok Kumar and PW-7 HC Bhagirath has been deposed almost in similar fashion by these official witnesses. Preparation of rukka Ex. PW-12/B by Investigation Officer, PW-12 ASI Ram Lal at 2.10 a.m. and handing over the same to PW-11 Constable Rajesh Kumar for registration of FIR has also been corroborated by these witnesses. Receiving of rukka in Police Station, registration of FIR Ex. PW-4/B by PW-9 SHO Govind Ram after getting it typed in computer through PW-4 MHC Prem Singh and handing over the case file to PW-11 Constable Rajesh Kumar thereafter, have also been duly proved by PW-4 MHC Prem Singh, PW-9 SHO Govind Ram and PW-11 Constable Rajesh Kumar. Snapping of photographs on the spot with the help of official digital camera, by PW-1 HC Ashok Kumar, has also been proved by official witnesses. Downloading and development of these photographs has been proved by PW-10 ASI Chander Shekhar, Nodal Officer, Police Station Parwanoo, who has also proved photographs Ex. P-10 to P-12.

13. Handing over of tickets Ex. P-1 to P-9 by respondent to the Investigating Officer and taking possession thereof vide memo Ex. PW-1/F has been proved by PW-1 HC Ashok Kumar and PW-7 HC Bhagirath. Issuance of these tickets has been admitted by PW-3 Nagender Singh, conductor of the bus. All these facts have not been disputed during the cross-examination by the defence. Spot map Ex. PW-12/C, prepared by the Investigating Officer, has also not been questioned at any point of time.

14. It is well settled that no cross-examination of witness on a point, stated in examination-in-chief, amounts to admission of version of the said witness on the said count. *(See Muddasani Venkata Narsaiah (Dead) through LRs versus Muddasani Sarojana, (2016) 12 SCC 288)*

15. Independent witness PW-2 Satvir Singh has supported the prosecution case whereas PW-3 Nagender Singh (conductor of the bus) has desisted from lending support to the entire prosecution case, however, he has admitted certain facts during his cross-examination by the learned Public Prosecutor after getting him declared hostile for resiling from his earlier statement recorded by the police.

16. It is settled law that statement of a hostile witness cannot be brushed aside in toto and said to be inadmissible only for the reason that he has been declared hostile, rather, reliable portion of his statement, which finds due corroboration from the other evidence/material on record, can be considered in favour of either of the parties. *(See Devraj versus State of Chhattisgarh, (2016) 13 SCC 366; Raja and others versus State of Karnataka, (2016) 10 SCC 506 and Vinod Kumar versus State of Punjab, (2015) 3 SCC 220)*

17. PW-3 Nagender Singh has admitted that he was conductor in the bus plying from Rohru to Delhi on 28th November, 2009 and Vinod Kumar was driver of the said bus, which was checked by the police party during midnight near Parwanoo. Recovery of one bag from the bus, weighing of recovered charas in his presence and issuance of tickets Ex. P-1 to P-9 by him has also been admitted by him. He has also admitted signing the memos Ex. PW-1/A, Ex. PW-1/B, Ex. PW-1/C, Ex. PW-1/D and Ex. PW-1/E after going through contents of these documents.

18. From the entire evidence on record, interception of the bus, checking of the luggage by the police party and recovery of 4 kg 400 grams charas from the bag kept beneath the three seater bench of seats No. 12 to 14 stands duly proved on record.

19. Now, the moot question to determine the guilt of respondent is as to whether the bag containing charas was recovered from the conscious possession of respondent.

20. It is law of the land that stringent the punishment, stricter the degree of proof required, since higher degree of assurance is required to convict the accused. *(See Ritesh Chakarvarti versus State of M.P., (2006) 12 SCC 321; and Paramjeet Singh alias Pamma versus State of Uttarakhand, (2010) 10 SCC 439)* In present case, evidence connecting the respondent with the recovered charas is not only weak but dicey.

21. In examination-in-chief, PW-1 HC Ashok Kumar, PW-7 HC Bhagirath, PW-11 Constable Rajesh Kumar and PW-12 ASI Ram Lal have deposed that the bag was kept by respondent beneath his seat between his legs whereas PW-2 Satvir Singh has stated that passengers were sitting on the three seater bench having seats No. 12 to 14 and on inquiry by police about ownership of the bag found under these seats, respondent, sitting on seat No. 14, had claimed it as his bag. PW-2 Satvir Singh has also stated that Om Parkash (respondent) alongwith bag and also driver and conductor were alighted from the bus. He has further stated that he, who was sitting on seat No. 16, and two other persons sitting with Om Parkash (respondent) also came out of the bus. In cross-examination this witness has stated that respondent told the police outside the bus that bag belonged to him. Contrary to the prosecution case that bag was found in possession of the respondent in between his legs under seat No. 14, this witness has deposed that not only two passengers of the bus seating on seats No. 12 and 13 were enquired, but he (PW-2) was also asked regarding the bag by the police whereupon he had told that his bag was inside the bus.

22. Matter does not end here. PW-2 Satvir Singh has further deposed that police, after taking out the jean pant from the bag, was matching the pants worn by the persons sitting on seats No. 12, 13 & 14 and it took about 15-30 minutes to the respondent to confess that bag belonged to him.

23. What emerges from the evidence of PW-2 Satvir Singh, who is an independent prosecution witness, is that the bag, lying below the three seater bench bearing seats No. 12, 13 and 14 was recovered but it was not sure as to whom that bag belonged and the police was trying to ascertain the actual owner/possessor of the said bag. Not only passengers sitting on seats No. 12 and 13, but PW-2 Satvir Singh, who was travelling on seat No. 16, was also enquired by the police in this regard and for identifying the possessor of the bag, an exercise to match the jean pant found in the bag containing the recovered charas with the pants of persons sitting on seats No. 12, 13 and 14 was also undertaken.

24. According to PW-2 Satvir Singh, four passengers sitting on seats No. 12, 13, 14 and 16 came out of the bus and all of them were questioned by the police regarding ownership of the bag in question. The said fact also finds corroboration in the statement of PW-3 Nagender Singh, who has stated that four persons were interrogated on suspicion.

25. Though, passenger sitting on another two seater bench on seat No. 16 has been cited as a witness and examined as PW-2 by the prosecution, however, the fact that he was ever associated as a witness does not find mention either in any memo prepared during investigation or in rukka sent to Police Station and special report submitted to the Superintendent of Police.

26. There is no plausible reason on record for not having any reference or detail of passengers travelling on the same bench of seat (seats No. 12, 13 and 14) on which respondent was sitting and for not citing or examining those persons/passengers as a witness who would have the best persons to tell about the events of recovery of contraband and exact location of the bag better than the person travelling on seat No. 16.

27. Rukka was prepared at 2.10 a.m. Meaning thereby, search and seizure was complete prior to that. FIR was recorded at 2.30 a.m. and case file was handed over to PW-11 Constable Rajesh Kumar. As per prosecution witnesses, the distance between the spot and the police station was 1½ to 3 kilometers and the police party was having official vehicle with it. All memos except Ex. PW-1/F (seizure of tickets) were prepared prior to leaving of the bus for its destination as these memos bear signatures of driver and conductor of the bus.

28. According to PW-2 Satvir Singh, the bus was detained for about 1½ hour whereas according to PW-1 HC Ashok Kumar, it was detained approximately for about three-four hours. PW-11 Constable Rajesh Kumar stated that he did not remember exact time of detention of the bus on the spot whereas PW-12 ASI Ram Lal stated that bus was detained for about 1½ hour. It is case of the prosecution that bus was intercepted at about 12.30 a.m. If the statement of Investigating Officer, i.e. PW-12 ASI Ram Lal in corroboration with statement of PW-2 Satvir Singh is believed then bus was detained up to 2.00 a.m. Even if the bus is considered to have been detained for three-four hours, then the bus must have left for its destination by 4.00 a.m.

29. PW-1 HC Ashok Kumar and PW-7 HC Bhagirath have categorically stated that police party remained on the spot for 1½ hour after leaving of the bus. In case statement of PW-12 ASI Ram Lal is believed, the police party was supposed to reach Police Station at about 3.00 a.m. and in case statement of PW-1 HC Ashok Kumar is believed, then police party was supposed to reach by 5.00 a.m., whereas as per record, police party had reached in the Police Station at 7.40 a.m.

30. In case of other reliable evidence on record, the discrepancy in timings may have been immaterial, but, in present case, there is material contradiction with regard to identity of possessor of the bag in which contraband was recovered by the police and, therefore, the time gap of at least more than 2½ hours remained unexplained by the prosecution as, as per prosecution

case, no other vehicles were checked/intercepted after recovery of contraband in present case and after completing of proceedings on the spot, the police party returned to the Police Station. In case proceedings were completed by 5.00 a.m., what for the police party remained on the spot till 7.30 a.m. at a distance not more than three kilometers from the Police Station despite the fact that the police party was having the official vehicle with it and it might have taken hardly 5-10 minutes to reach the Police Station from the spot.

31. PW-11 Constable Rajesh Kumar and PW-12 ASI Ram Lal have categorically stated that after checking the bus, only respondent was taken out from the bus and no other passenger deboarded the bus, whereas PW-2 Satvir Singh, the independent witness, has deposed contrary to that.

32. It is the case of the prosecution that the entire proceedings were completed with the help of search light and street light. PW-12 ASI Ram Lal further added that besides taking help of search light and street light, help of light of the vehicle was also taken. It is also claimed that all shops/khokhas near by the spot were closed at that time. But, the photographs placed on record as Ex. P-10 to P-12 indicate something else. It is evident from photograph Ex. P-12 that police party is sitting on a bench inside some shop and behind it, door of the said shop/store is open and articles kept in shelf of the said store adjacent to the opened door are also clearly visible in this photograph. Further Ex. P-10 and P-11 clearly indicate that papers of the police are kept on a white table. These photographs appear to have been snapped and developed in such a manner so as to hide the complete visibility of location on the spot and only to reflect the situation suitable to the prosecution case.

33. In view of the aforesaid evidence on record, it cannot be held beyond reasonable doubt that it was only the respondent who was having the possession of the bag from which the contraband was recovered. Therefore, prosecution has failed to prove the recovery of contraband from the conscious possession of the respondent. So, presumption under Sections 35 and 54 of the NDPS Act is also not attracted in present case.

34. As it has been found that prosecution has failed to prove the recovery of charas from the conscious possession of the respondent, chemical examination report Ex. PW-12/E is of no help to the prosecution. However, it is clarified that judgment, dated 11th December, 2009, passed by a Division Bench of this Court in a batch of **Criminal Appeals No. 267 & 311 of 2007 and 45, 314, 363 & 500 of 2008, Sunil versus State of Himachal Pradesh,** reported in **Latest HLJ 2010 (HP) 207,** relied upon by the trial Court to discard chemical analysis report, stands overruled by Full Bench of this Court in case titled as **State of H.P. versus Mehboob Khan,** reported in **2013 (3) Him. L.R. (FB) 1834,** holding that finding in Sunil's case; that without there being no reference of the resin contents in the reports assigned by the Chemical Examiners, the contraband recovered was not proved to be charas; was erroneous and it has further been held that charas is a resinous mass and for presence of resin in the stuff analyzed, without there being any evidence qua the nature of neutral substance, the entire mass has to be taken as charas.

35. Respondent has advantage of being acquitted by the trial Court fortifying the presumption of innocence in his favour which stands unrebutted for want of pointing out any cogent, reliable, convincing and trustworthy evidence regarding recovery of contraband from his possession. Therefore, it cannot be said that acquittal of respondent has resulted into travesty of justice or has caused miscarriage of justice. Thus, no case for interference is made out.

36. Having glance of the above discussion, the appeal is dismissed. Bail bonds furnished by the respondent and his surety are discharged. Record be sent back.

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

Devender Thakur and another ...Petitioners.
Versus
Hardayal Khimta ...Respondent.

CMPMO No. 424 of 2016
Reserved on: 28.02.2018
Decided on: 15.03.2018

Code of Civil procedure, 1908- Order 15 Rule 1 CPC- Section 6 of the Specific Relief Act, 1963- Civil Revision- Suit of the plaintiff-respondent decreed at the stage of framing of issues directing the defendant/petitioner to remove locks from the property rented to the plaintiff-respondent- **Held-** that Section 6 of the Specific Relief Act provides an instant remedy to the possessor of the premises for restoration of the possession in case he is dispossessed by anyone, including the owner of the property- the said proceedings are summary in nature. (Para-4 to 16)

Code of Civil procedure, 1908- Order 15 Rule 1 CPC- Section 6 of the Specific Relief Act, 1963- Civil Revision- Further held that keeping in view the nature and scope of the suit filed under Section 6 of the Specific Relief Act and the conjoint reading of Order 15 rule 1, Order 14 Rule 1, Order 10 Rule 1, 2 and 3, as there was no denial of the assertion and the facts pleaded by the respondent-plaintiff with respect to the possession of the premises in question and the locking of the same by the petitioner-defendant, without taking recourse to law, there was no issue in dispute and as such, the learned Trial Court could have passed the judgment and decree at that stage itself- no material illegality, irregularity, infirmity or error of jurisdiction found to have been exercised by the learned Trial Court- Consequently, revision dismissed. (Para-16 to 25)

Cases referred:

Mohanlal and others versus The State of Punjab and others, 1970 Rent Control Journal 95

M.C. Chockalingam and others versus V. Manickavasagam and others, (1974) 1 Supreme Court Cases 48

Sanjay Kumar Pandey and others versus Gulbahar Sheikh and others, AIR 2004 Supreme Court 3354

Ved Prakash Wadhwa versus Vishwa Mohan, AIR 1982 C 816 = (1981) 3 SCC 667

Sham Lal (dead) by Lrs versus Atma Nand Jain Sabha (Regd.) Dal Bazar, AIR 1987 SC 197 = (1987) 1 SCC 222

Arjun Khiamal Makhijani versus Jamnadas C. Tuliani and others, (1989) 4 SCC 612

Siraj Ahmad Siddiqui versus Shri Prem Nath Kapoor, AIR 1993 SC 2525 = (1993) 4 SCC 406

Advaita Nand versus Judge, Small Cause Court, Meerut and others, (1995) 3 SCC 407

M/s. Mangat Singh Trilochan Singh thr. Mangat Singh (dead) by Lrs. & ors. Versus Satpal, AIR 2003 SC 4300 = (2003) 8 SCC 357

K. Seetharam versus B.U. Papamma & Anr., 2001 (2) Apex Court Journal 682 (SC)

For the petitioners: Mr. Virender Singh Chauhan, Advocate.
For the respondent: Mr. Arvind Sharma, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge.

This petition has been filed assailing judgment and order, dated 21st September, 2016, passed by learned Civil Judge (Junior Division), Chopal (Camp at Jubbal), District Shimla, in Case No. 45/1 of 2016, titled as Hardyal Khimta versus Devender Thakur (for short 'impugned

judgment') whereby suit of plaintiff-respondent has been decreed, at the stage of framing of issues, exercising powers under Order XV Rule 1 of the Code of Civil Procedure (for short 'CPC'), by adjudicating the suit under Section 6 of The Specific Relief Act, 1963 (for short 'the Act'), directing the defendants-petitioners to remove the locks from the property rented out to the plaintiff-respondent.

2. I have heard learned counsel for the parties and have also gone through the record and relevant provisions of law.

3. Section 6 of the Act reads as under:

> ***6. Suit by person dispossessed of immovable property.*** *- (1) If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit.*
>
> *(2) No suit under this section shall be brought -*
>
> *(a) after the expiry of six months from the date of dispossession; or*
>
> *(b) against the Government.*
>
> *(3) No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.*
>
> *(4) Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof.*

4. As evident from bare perusal of Section 6 of the Act, it provides instant remedy to the possessor of the premises for restoration of possession in case he is dispossessed by anyone, including the owner of the property, without adopting the due process of law. The public policy propagated under Section 6 of the Act is to discourage persons from taking the law in their own hands and entering, by force, upon the property in the possession of other persons.

5. The main object of this provision is to establish the rule of law by directing the person, interested to have the possession of a property in possession of another person, to approach the competent Court of law instead of allowing a person to be his own judge. The proper course for a party, out of possession, is to file a suit for ejectment and recover possession and if, instead of adopting due course of law, he forcibly dispossesses another person in possession, the law requires restoration of status quo ante and the fact that the dis-possessor, the lawful owner, who can successfully maintain an ejectment action, is immaterial for this purpose. As observed by the apex Court in case titled as **Mohanlal and others versus The State of Punjab and others,** reported in **1970 Rent Control Journal 95,** *"under our jurisprudence even an unauthorised occupant can be evicted only in the manner authorised by law. This is the essence of law."*

6. Suit proceedings under Section 6 of the Act are summary in nature and, thus, no appeal has been provided against the decree under Section 6 of the Act. A limited remedy to the unsuccessful party in a suit under Section 6 of the Act is a revision under Section 115 CPC, but, only by way of exception. Owner or the person, entitled for recovery of possession of the property, has an independent remedy to file a suit for recovery on the basis of his title or entitlement for possession, but he has no right to dispossess a person by taking law in his own hands.

7. In case titled as **M.C. Chockalingam and others versus V. Manickavasagam and others,** reported in **(1974) 1 Supreme Court Cases 48,** the apex Court has held as under:

> *"13. ..... All that Section 6 (new) of the Specific Relief Act provides is that a person, even if he is a landlord, cannot take the land into his own hands and forcibly evict a tenant after expiry of the lease. This Section has relevance only to the wrongful act of a person, even if it be by the landlord, in forcibly recovering possession of the property without recourse to law. Section 6 frowns upon forcible dispossession without recourse to law but does not at the same time declare that*

the possession of the evicted person is a lawful possession. The question of lawful possession does not enter the issue at that stage. All that the Court is then required to consider is whether an evicted person has been wrongfully dispossessed and he has come to the Court within six months of the dispossession. The various civil rights between the land-lord and the tenant will have to be adjudicated upon finally in a regular civil suit if filed. ....."

8. Dealing with the scope and nature of proceedings of suit under Section 6 of the Act, the apex Court in **Sanjay Kumar Pandey and others versus Gulbahar Sheikh and others,** reported in **AIR 2004 Supreme Court 3354,** has held as under:

"4. A suit under Section 6 of the Act is often called a summary suit inasmuch as the enquiry in the suit under Section 6 is confined to finding out the possession and dispossession within a period of six months from the date of the institution of the suit ignoring the question of title. Sub-section (3) of Section 6 provides that no appeal shall lie from any order or decree passed in any suit instituted under this Section. No review of any such order or decree is permitted. The remedy of a person unsuccessful in a suit under Section 6 of the Act is to file a regular suit establishing his title to the suit property and in the event of his succeeding he will be entitled to recover possession of the property notwithstanding the adverse decision under Section 6 of the Act. Thus, as against a decision under Section 6 of the Act, the remedy of unsuccessful party is to file a suit based on title. The remedy of filing a revision is available but that is only by way of an exception; for the High Court would not interfere with a decree or order under Section 6 of the Act except on a case for interference being made out within the well settled parameters of the exercise of revisional jurisdiction under Section 115 of the Code."

9. Order VII Rule 1 CPC provides the particulars to be contained in the plaint whereas Order VIII CPC deals with written statement, set-off and counter claim wherein Rule 2 provides that defendant must raise by his pleadings all matters which show the suit not to be maintainable and all such grounds of defence, if not raised, would be likely to take the opposite party by surprise. Rule 3 of Order VIII CPC provides that denial in the written statement must be specific and it shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff. Order X CPC empowers the Court examination of parties at the first hearing of the suit to ascertain as to whether allegations in pleadings are admitted or denied.

10. Relevant Rules 1, 2 and 3 of Order X CPC reads as under:

"ORDER X

EXAMINATION OF PARTIES BY THE COURT

1. Ascertainment whether allegations in pleadings are admitted or denied. *- At the first hearing of the suit the Court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite party, and as are not expressly or by the necessary implication admitted or denied by the party against whom they are made. The court shall record such admissions and denials.*

.....

2. Oral examination of party, or companion of party. *- (1) At the first hearing of the suit, the Court -*

(a) shall, with a view to elucidating matters in controversy in the suit, examine orally such of the parties to the suit appearing in person or present in Court, as it deems fit; and

(b) may orally examine any person, able to answer any material question relating to the suit, by whom any party appearing in person or present in Court or his pleader is accompanied.

(2) At any subsequent hearing, the Court may orally examine any party appearing in person or present in Court, or any person, able to answer any material question relating to the suit, by whom such party or his pleader is accompanied.

(3) The Court may, if it thinks fit, put in the course of an examination under this rule questions suggested by either party.

3. Substance of examination to be written. *- The substance of the examination shall be reduced to writing by the Judge, and shall form part of the record."*

11. Order XIV CPC deals with settlement of issues and determination of suit on issues of law or on issues agreed upon. Relevant Rule 1 of Order XIV CPC reads as under:

"ORDER XIV

SETTLEMENT OF ISSUES AND DETERMINATION OF SUIT ON ISSUES OF LAW OR ON ISSUES AGREED UPON

1. Framing of issues. *- (1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.*

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.

(4) Issues are of two kinds:

(a) issues of fact,

(b) issues of law.

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after examination under rule 2 of Order X and after hearing the parties or their pleaders, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence."

12. Order XV Rule 1 CPC empowers the Court to dispose of the suit at the first hearing by pronouncing judgment, which reads as under:

"ORDER XV

DISPOSAL OF THE SUIT AT THE FIRST HEARING

1. Parties not at issue. *- Where at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the court may at once pronounce judgment."*

13. It is not *res integra* that the term 'first hearing of a suit' in provisions of Order I Rule 10 CPC, Order XIV Rule 1 (v) CPC and Order XV Rule 1 CPC means the day fixed for hearing on which Court applies its mind to determine the point in controversy between the parties to the suit, which ordinarily would be at the time when either issues are determined or evidence is taken. *{See Ved Prakash Wadhwa versus Vishwa Mohan, AIR 1982 C 816 = (1981) 3 SCC 667; Sham Lal (dead) by Lrs versus Atma Nand Jain Sabha (Regd.) Dal Bazar, AIR 1987 SC 197 = (1987) 1 SCC 222; Arjun Khiamal Makhijani versus Jamnadas C. Tuliani and others, (1989) 4 SCC 612; Siraj Ahmad Siddiqui versus Shri Prem Nath Kapoor, AIR 1993 SC 2525 = (1993) 4 SCC 406;*

Advaita Nand versus Judge, Small Cause Court, Meerut and others, (1995) 3 SCC 407; and M/s. Mangat Singh Trilochan Singh thr. Mangat Singh (dead) by Lrs. & ors. Versus Satpal, AIR 2003 SC 4300 = (2003) 8 SCC 357}

14. In instant case, respondent-plaintiff had filed a suit under Section 6 of the Act for restoration of his peaceful possession as a tenant alleging his forcible dispossession by the landlord, i.e. petitioners-defendants, without adopting due course of law by locking the premises rented out to the respondent-plaintiff.

15. In the written statement, petitioners-defendants had admitted renting out premises in question to respondent-plaintiff and also putting locks thereupon with an explanation that the said premises was found without lock for two days and, thus, to protect the premises to be further being sublet to others alleging that rented premises had been sublet by respondent-plaintiff to someone else resulting into loss of possession by respondent-plaintiff and also that respondent-plaintiff had no right, title or interest in the premises for arrears of rent amounting to ₹ 42,500/- up to 31st March, 2016, as the respondent-plaintiff had not paid rent since 1st March, 2015 and also for non-payment of electricity bill amounting to ₹ 7,064/- since 9th February, 2012 till 31st August, 2016.

16. Keeping in view the nature and scope of a suit filed under Section 6 of the Act, material proposition of fact, in present case, is that as to whether respondent-plaintiff was in possession of the premises in question as a tenant of petitioners-defendants and he has been dispossessed without adopting the due process of law and material proposition of law is that as to whether the suit under Section 6 of the Act has been preferred within six months of forcible dispossession of the respondent-plaintiff.

17. In the plaint, respondent-plaintiff has specifically pleaded his possession as a tenant and putting locks by the landlord on 14th July, 2016 upon the premises rented to him resulting into his forcible dispossession from the said premises. In the written statement, petitioners-defendants have not disputed renting out of the premises to the respondent-plaintiff and his possession till 14th July, 2016, rather, they have admitted putting locks on the premises in question on 14th July, 2016 with explanation that the said premises was lying unlocked since 13th July, 2016 and, therefore, after informing the police and Gram Panchayat, the said premises was locked in presence of Up Pradhan of the Gram Panchayat and the said act was justified for arrears of rent, non-payment of electricity bill and subletting of one portion of the said premises.

18. It is evident from the material on record that for the purpose of adjudicating a suit under Section 6 of the Act, there was no denial of the assertion and the facts pleaded by respondent-plaintiff with respect to possession of the premises in question rented out by the petitioners-defendants and locking the said premises by the petitioners-defendants without taking recourse under law available to the petitioners-defendants.

19. Date of dispossession, i.e. 14th July, 2016, has also not been disputed by the petitioners-defendants. Suit was preferred within the period of six months prescribed under Section 6 of the Act as the same was filed on 14th October, 2016. Therefore, material proposition of fact or law, as affirmed by the respondent-plaintiff, has not been denied, rather, admitted by the petitioners-defendants in the suit. There was no issue in dispute of material proposition of fact or law and thus, parties were not at issue on any question of law or fact to be adjudicated upon under Section 6 of the Act.

20. So far as question of recovering the possession for arrears of rent or non-payment of electricity bill or subletting the portion of premises by the respondent-plaintiff is concerned, petitioners-defendants have an independent right to take recourse to appropriate proceedings in competent Court of law, which are definitely not to be adjudicated upon in a suit filed by respondent-plaintiff under Section 6 of the Act.

21. It may be noticed that learned Civil Judge has not reduced the substance of examination of party, as provided under Rule 3 of Rule X CPC read with Order XIV Rule 1 (5) CPC

and also from the impugned judgment, it does not appear that he opted for oral examination of party, as provided under Rule 2 of Order X CPC, but the purpose of these provisions is to ascertain as to whether there is any issue in dispute arising between the parties from a material proposition of fact or law affirmed by one party and denied by the other. But omission to carry out such exercise does not have any effect on merits of order as such exercise was necessary only if parties would have been at variance on material propositions of fact or of law and, as discussed hereinabove and hereinafter, there is no such variance in present case.

22. During hearing of the present petition, learned counsel for the petitioners-defendants has re-asserted that it is not disputed that premises in question was rented out to respondent-plaintiff by the petitioners-defendants and the said premises was locked by the petitioners-defendants on 14th July, 2016, as admitted in the written statement, but, has argued that the learned Civil Judge has committed an error by passing the impugned judgment and decree in favour of respondent-plaintiff ignoring the plea of the petitioners-defendant with regard to arrears of rent, non-payment of electricity bill and subletting of a portion of the premises in question.

23. Petitioners-defendants have also relied upon pronouncement of apex Court in case titled as **K. Seetharam versus B.U. Papamma & Anr.,** reported in **2001 (2) Apex Court Journal 682 (SC).** The facts of the said case were entirely different from the present case. As per submissions made on behalf of petitioners-defendants, referred to above, and also evident from the written statement and documents placed on record by petitioners-defendants, material proposition of fact with regard to possession of respondent-plaintiff upon premises in question as a tenant and putting locks thereon by the petitioners-defendants resulting into dispossession of respondent-plaintiff without adopting due process of law stands admitted by petitioners-defendants whereas in the judgment relied upon by the petitioners-defendants, the findings of the Courts below were clearly found to be contrary to the record and it was found that the Courts below had erred in construing that the defendant had admitted the pleadings of the plaintiff as there was a categorical denial of the defendant in the written statement with regard to assertion of the plaintiff made in the plaint. Therefore, this judgment is not applicable in the given facts and circumstances of present case.

24. Keeping in view the settled position of law with regard to nature and scope of suit under Section 6 of the Act, as discussed hereinabove, I am of the opinion that for all these issues related to arrears of rent, non-payment of electricity bills and subletting, petitioners-defendants should have approached the competent Court of law under the relevant provision of law applicable and available for redressal of his grievances.

25. For aforesaid reasons, I am of the considered view that the learned Civil Judge has not committed any error in decreeing the suit of respondent-plaintiff. There is no material illegality, irregularity, infirmity or error of jurisdiction exercising the powers by the learned Civil Judge in terms of the impugned judgment.

26. Viewed thus, there is no merit in the present petition, hence, the same is dismissed. No order as to costs.

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

Maya Kalsi .....Petitioner

Versus

State of H.P. .....Respondent

Cr. Revision No. 143 of 2016
Reserved on: 12.03.2018
Decided on: 15.03.2018

Code of Criminal Procedure, 1973- Section 397 read with Section 401- Sections 22 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985- The petitioner alongwith one Mr. Mathias apprehended with 165 grams of MDA including Indian and foreign currency while travelling in the Car- Driver Mathias on being signalled to stop was alleged to have thrown waist money bag, black in colour, towards the back seat of the car- the petitioner aggrieved by framing of the charges against her sought quashing of the same on the ground that the contraband was not recovered from her conscious possession nor there was any evidence that she abetted the commission of the crime- **Held-** that the petitioner was accompanying the accused for the last many days and there was prima facie evidence that they had purchased the contraband from Rishikesh, and, as such, it cannot be said that the petitioner did not have knowledge of the narcotic substances being carried by the co-accused for the last so many days- Thus, at this stage, there was sufficient material to proceed against the petitioner- consequently, framing of charge upheld. (Para-7 to 9)

Case referred:
Ismail Khan Aiyub Khan Pathan vs. State of Gujarat, (2000) 10 SCC 257

For the petitioner:	Ms. Shilpi Jain and Mr. Karan Singh Kanwar, Advocates.
For the respondent:	Mr. Ashwani Sharma, Additional Advocate General with Mr. Rajat Chauhan, Law Officer.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present petition, under Section 397, read with Section 401 of the Code of Criminal Procedure, is maintained by the petitioner, for setting aside the impugned order dated 03.12.2015, whereby learned Special Judge, Kullu, H.P., has framed charge against the petitioner, under Sections 22 & 29 of the Narcotic Drugs and Psychotropic Substances Act (hereafter to be called as "ND & PS Act").

2. The brief facts of the case, as per the prosecution are that on 10.05.2015, Head Constable Bhupender Singh alongwith Head Constable Ram Krishan, No. 62, Constable Chaman Lal, No. 357, Constable Vinay Singh, No. 674 and lady Constable Meena Kumari, No. 282, was on traffic checking duty. At about 6:30 p.m., one car bearing registration No. HP-34A-8000, coming from Kullu Side was signaled to be stopped. The said car was being driven by a foreigner and a foreigner woman was sitting with him on front seat. When documents of the car were demanded from the driver, both the foreigners were got perplexed and the driver thrown the waist money bag, black in colour, on the back seat of the car. At the same time, one car bearing registration No. HP-34D-0780 coming from Patlikuhal side was also signaled to stop by Head Constable Bhupender Singh, which was being driven by a local resident, namely Munna Lal. Thereafter, Head Constable Ram Krishan, No. 62 and Munna Lal were made witnesses and in their presence when names of the persons sitting in the car were asked, they told their names to be Mathias S/o Dietar, Nationality Deutsch and Maya D/o Onkar Nath Chand, Nationality British. When search of the above foreign citizens were made in front of the witnesses, no objectionable article was recovered, however when the waist money bag, which was thrown on the back seat of the car was searched, one transparent polythene tied with rubber band, in which, brown colour substance, stated to be MDA and currency notes, both Indian and foreign were recovered, which on weighment was found 165 gms. The recovered substance was sealed with eight seals of impression "T" and NCB form in triplicate was prepared and seal after use was handed over to the witness Munna Lal. After completing all necessary formalities, the petitioner alongwith co-accused was arrested and challan was presented before the learned trial Court and learned trial Court, vide order dated 03.12.2015, framed charge against the present petitioner. Hence the present petition.

3. Ms. Shilpi Jain, learned counsel appearing on behalf of the petitioner has argued that the petitioner was having no knowledge with respect to the alleged quantity of Narcotics recovered. She has further argued that the present petitioner has accompanied the co-accused from Goa to Manali only for the simple reason that she wanted to save her Flight fare from Goa to Kullu, which was unaffordable. She has argued that as far as abetment is concerned, no ingredients is there to prove the same, as there is nothing in the prosecution case to conclude that whether the petitioner had packed the material, kept the material or in any manner assisted the co-accused. She has further argued that as the petitioner is innocent, she may be discharged. Learned counsel for the petitioner, in support of her arguments placed reliance upon the decision of Hon'ble Supreme Court in ***Ismail Khan Aiyub Khan Pathan vs. State of Gujarat***, (2000) 10 SCC 257 and stated that no presumption can be taken against the person sitting as a passenger in a car.

4. On the other hand, learned Additional Advocate General has argued that the prior to Manali incident, the petitioner remained with the co-accused for many days at different places in Madhya Pradesh, Uttar Pradesh etc., which is evident from their call details collected by the Police. He has further argued that the petitioner is actively involved in the present incident and the prosecution has collected sufficient material and placed the same before the Court, to connect the petitioner with the alleged offence and order of framing charge needs no interference at this stage.

5. In rebuttal, learned counsel for the petitioner has argued that the petitioner is a young lady and cannot be expected to be involved in such offences, so the present petition may be allowed and the charge framed against the petitioner may be quashed.

6. The case of the prosecution is that the petitioner was accompanying the co-accused in the car and, therefore, she was having knowledge with regard to the Psychotropic substance and when their car was stopped for traffic checking, she becomes perplexed. The co-accused has also disclosed to the Police that he purchased the alleged substance from a person at Rishikesh for Rs.60,000/- and he was in Manali to sell the same. Further the petitioner accompanied the co-accused from Rishikesh and prior to that, they were together for many days at different places.

7. In these circumstances, at this stage, *prime facie* case is found to be made against the petitioner and the judgment cited by the learned counsel for the petitioner is of no use, being not applicable to the facts and circumstances of the present case, as in the said case, the Hon'ble Supreme Court has come to the conclusion that there is nothing on record that the accused were dealing with the Narcotic Drugs, nor they had admitted either through a confession or otherwise of any incriminating role, nor was there any evidence that the accused persons, who were found sitting in the room, had a connection with the article in question. However, in the present case, the petitioner was accompanying the accused for the last so many days and *prime facie* it seems that they purchased this material from Rishikesh, thus it cannot be said that the petitioner was not having knowledge with respect to the Narcotic substance, as she also got perplexed on seeing the Police and was with the co-accused from last many days.

8. Therefore, it is not possible to hold at this moment that the petitioner is not at all involved in the present case. There is sufficient material to proceed against the petitioner, so order dated 03.12.2015, whereby charge against the petitioner was framed, cannot said to be without any basis.

9. In view of the aforesaid discussions, this Court finds that *prime facie* case, at this moment, is against the petitioner and the charge framed by the learned trial Court is in accordance with law.

10. The net result of the above discussion is that the present petition is devoid of merits, deserves dismissal and is accordingly dismissed. However, taking into consideration the age of the present petitioner and the fact that trial is pending since, 2015, it is expected that learned trial Court will try to dispose of the matter at the earliest possible. Registry is directed to

send back the records forthwith. Parties through their counsel are directed to appear before the learned trial Court on ***28th March, 2018***.

11. The revision petition is accordingly disposed of alongwith pending applications, if any.

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

M/S Mahindra & Mahindra Financial Services Ltd. .....Petitioner.

Versus

Sh. Kana Singh & anr. .....Respondents.

CMPMO No. 390 of 2015.
Date of decision: March 15, 2018.

Arbitration and Conciliation Act, 1996- Section 36- The enforcement of award through execution can be filed anywhere in the Country where such decree can be executed – there is no requirement for obtaining an order of transfer of the decree or issue of a percept from the Court which would have jurisdiction over the arbitral proceedings. (Para-4)

Case referred:

Swastik Gases Private Limited versus Indian Oil Corporation Limited (2013) 9 Supreme Court cases 32

For the petitioner	Mr. Deepak Gupta, Advocate.
For the respondents	Nemo for respondent No. 1.
	Name of respondent No. 2 stands deleted.

The following judgment of the Court was delivered:

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

Heard.

2. Order dated 21.2.2015 passed by learned District Judge, Shimla in execution proceedings registered as Arbitration Case No. 40-S/X of 2014 is under challenge in this petition. The petitioner herein is the decree holder as learned Arbitrator has made the award in its favour and against the respondents-judgment debtors. Respondent No.1-judgment debtor though is duly served, however, no one has put in appearance on his behalf on the previous date and even before that also. Today also, there is no appearance on his behalf. Respondent No.2, however, has already been ordered to be deleted.

3. The petitioner-decree holder has initiated proceedings in the Court below for execution of the award passed in its favour in terms of Section 36 of the Arbitration and Conciliation Act. In the matter of the execution of the award the same has to be executed in the same manner as the decree passed by the Court. Learned District Judge has placed reliance on the judgment of the Hon'ble Apex Court in ***Swastik Gases Private Limited*** versus ***Indian Oil Corporation Limited (2013) 9 Supreme Court cases 32*** and arrived at a conclusion that for want of jurisdiction, the award cannot be executed. The execution petition, as such, has been ordered to be returned to the petitioner-decree holder for presentation before the competent Court having the territorial jurisdiction to entertain and

try the same. The view of the matter so taken by learned District Judge is not legally sustainable as at this stage it is well settled that the arbitral proceedings stands terminated on the announcement of the award. Although in the matter of execution of the award the same procedure as in the case of the execution of a decree passed by the Court had to be followed yet the award cannot be treated to be a decree within the meaning of Section 38 of the Code of Civil Procedure.

4. Being so, the execution of the award can be sought by initiating the execution proceedings at any place in the country where the same can be executed. Neither the execution proceedings need to be transferred nor any percept obtained as is required in the matter of execution of the decree passed by a civil Court. Support in this regard can be drawn from a recent judgment of the Apex Court in Civil Appeal No 1650 of 2018, titled ***Sundaram Finance Limited*** versus ***Abdul Samad & anr.,*** decided on 15th February, 2018. The relevant portion of this judgment reads as follows:

> "*19. The aforesaid provision provides for arbitral proceedings to be terminated by the final arbitral award. Thus, when an award is already made, of which execution is sought, the arbitral proceedings already stand terminated on the making of the final award. Thus, it is not appreciated how Section 42 of the said Act, which deals with the jurisdiction issue in respect of arbitral proceedings, would have any relevance. It does appear that the provisions of the said Code and the said Act have been mixed up.*
>
> *20. It is in the aforesaid context that the view adopted by the Delhi High Court in* ***Daelim Industrial Co. Ltd. v. Numaligarh Refinery Ltd.*** *records that Section 42 of the Act would not supra apply to an execution application, which is not an arbitral proceeding and that Section 38 of the Code would apply to a decree passed by the Court, while in the case of an award no court has passed the decree.*
>
> *21. The Madras High Court in* ***Kotak Mahindra Bank Ltd. v. Sivakama Sundari & Ors.*** *referred to Section 46 of the said Code, which spoke of precepts but stopped at that. In the context of the Code, thus, the view adopted is that the decree of a civil court is liable to be executed primarily by the Court, which passes the decree where an execution application has to be filed at the first instance. An award under Section 36 of the said Act, is equated to a decree of the Court for the purposes of execution and only for that purpose.*
>
> *Thus, it was rightly observed that while an award passed by the arbitral tribunal is deemed to be a decree under Section 36 of the said Act, there was no deeming fiction anywhere to hold that the Court within whose jurisdiction the arbitral award was passed should be taken to be the Court, which passed the decree. The said Act actually transcends all territorial barriers.*
>
> ***Conclusion:***
>
> *13 supra.*
>
> *22. We are, thus, unhesitatingly of the view that the enforcement of an award through its execution can be filed anywhere in the country where such decree can be executed and there is no requirement for obtaining a transfer of the decree from the Court, which would have jurisdiction over the arbitral proceedings."*

5. Such being the position of law, the impugned order being not legally sustainable is quashed and set aside. The present petition is allowed. The Court below is directed to proceed further in the pending execution proceedings in accordance with law.

6. The petition is accordingly disposed of. Pending application(s), if any, shall also stand disposed of.

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

Shri Surinder Mohan. .....Petitioner.

Versus

Shri Raj Kumar Mehra & anr. .....Respondents.

CR No. 17 of 2017.
Date of decision: March 15, 2018.

Code of Civil Procedure, 1908- Order 6 Rule 17- An application under Order 6 Rule 17 CPC filed for the amendment in the reply after the commencement of trial- **Held-** that amendment after the commencement of trial are controlled by the proviso to Order 6 Rule 17 CPC- amendment in the pleading should, however, normally be allowed, even a prayer in this regard is made at some belated stage, in case the same is essential and required for just and effective decision of the pending lis as possibility of a bonafide omission to raise such plea at the relevant time and realization of such omission at a later stage cannot be ruled out as happened in the instant case, wherein issues were framed on 31.3.2014 and application for amendment was filed on 5.7.2014 before any evidence was recorded- application partly allowed and petition disposed of accordingly. (Para-9, 12 and 19)

Cases referred:

Vidyabai and others versus Padmalatha and another, (2009) 2 Supreme Court Cases 409

Ajendraprasadji N. Pandey versus Swami Keshavprakeshdasji N. & Others, (2006) 12 SCC 1

Surender Kumar Sharma versus Makhan Singh, (2009) 10 Supreme Court Cases 626

State of Madhya Pradesh Versus Union of India and another, (2011) 12 Supreme Court Cases 268

Rameshkumar Agarwal versus Rajmala Exports Private Limited and others, (2012) 5 Supreme Court Cases 337

Abdul Rehman and another versus Mohd. Ruldu and others, (2012) 11 Supreme Court Cases 341

For the petitioner	Mr. R.K Bawa, Senior Advocate with Mr. Ajay K. Sharma, Advocate.
For the respondents	Mr. Bhupender Gupta, Senior Advocate with Mr. Naresh Sharma, Advocate.

The following judgment of the Court was delivered:

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

Order Annexure P-1 passed by learned Rent Controller, Court No. III, Shimla in an application under Order 6 Rule 17 CPC registered as CMA No. 75-6 of 14 is under challenge in the present petition. Learned Rent Controller below has dismissed the application and

declined the amendment sought to be made by the petitioner (hereinafter referred to as the respondent-tenant) in reply to the rent petition initially filed.

2. The respondents herein are the owners of a shop in building No. 84, the Mall Shimla. The building is non-residential. The shop was rented out to one Trilok Chand, father of respondent-tenant Surinder Mohan for doing tailoring business. The respondent-tenant is presently doing the tailoring business in the shop under the name and style M/S Bhagat sons. The demised premises allegedly is bonafidely required by the petitioners-landlords for expansion of their business. They are running cloth business in this very building under the name and style M/S Nathu Ram and Sons. Adjoining thereto is another shop occupied by Shri Raman Jain. The petitioners-landlords are also running business of readymade garments under the name and style "M/S John Raymond Bright" in a part of the floor situated immediately below Mall Road level. The demised premises and another shop adjoining thereto being situated in the heart of town are stated to be most appropriate and convenient to the petitioners-landlords for expansion of their existing business. The petitioners-landlords allegedly are not occupying any other premises owned by them in the Urban Area of Shimla nor vacated any such premises in the Urban area without sufficient cause within five years of the institution of the petition. The floor above the demised premises allegedly is being used by them for residential purposes. Their requirement, as such, is stated to be bonafide. Besides the respondent-tenant is claimed to be in arrears of rent, therefore, his eviction from the demised premises has been sought on the ground of personal bonafide requirement and also he being in the arrears of rent.

3. In reply the respondent-tenant has raised the question of maintainability of the petition and also that all legal heirs of deceased tenant Trilok Chand have not been impleaded as respondents in the petition. On merits, while denying the contentions in the rent petition qua the demised premises bonafidely required by the petitioners-landlords, it has been submitted that not the petitioners but it was late S/Shri Roshan Lal and Raj Kumar were running business under the name and style of M/S Nathu Ram and Sons and also M/S John Raymond Bright in the shop at Mall Road level. Late Shri Roshan Lal later on shifted to Delhi. Recently they occupied two offices behind the shop and another shop after removing the partition. They also took the second shop adjoining to the first shop and removed the partition between the two and then merged the office at the back of the second shop by removing its partition. In this way a big huge shop wherein business of cloth and readymade garments is being carried out by them under the name and style of Nathu Ram and Sons and M/S John Raymond Bright. It is also denied that the demised premises are situated in the heart of town, hence more appropriate and convenient to the petitioners-landlords for running the business. It is also denied that one shop has been divided into three parts by them out of one is with them, another with respondent-tenant and the third one with Raman Jain. The petitioners-landlords have nothing to do with the shops in the occupation of the respondent-tenant and Raman Jain. The tenants in the demised premises were late Shri Trilok Chand and late Shri Devi Chand. The petition without impleading all the legal heirs of said Shri Trolok Chand and Shri Devi Chand is stated to be not maintainable. It is also denied that the petitioners-landlords were not occupying any other premises owned by them in urban area. One big hall below entire building No. 84, the Mall Shimla in their possession is stated to be lying vacant. Besides, the shops on Mall road level and top floor of the said building including an attic is also with them. They have concealed such facts from the Court. It is also pointed that they have not vacated any such premises in the urban area without sufficient cause within five years of the institution of the petition. They rather have recently merged the two shops, two offices and mezzanine floor into one big shop within five years of the institution of the petition. This fact has also been concealed from the Court. It is also denied that first floor is being used by the petitioner for

their residential purposes and partly for running their business. It is also submitted that they are residing in the top floor of Shop No. 36, the Mall Shimla belonging to one Chander Giri and also in a kothi known as Harkar, Lower Jakhoo, Shimla. The petition, as such, has been sought to be dismissed.

4. The petitioners-landlords have also filed the rejoinder. Issues were framed in the petition on 31.3.2014. However, evidence could not be recorded as yet. In view of the respondent-tenant having filed the application hereinabove registered as CMA No. 75-6 of 2014 under Order 6 Rule 17 CPC for seeking permission to amend the reply to the rent petition initially filed. By way of amendment, following preliminary objections have been sought to be incorporated:

> "4. That the petition is malafide. As per the alleged receipt regarding handling over the possession with regard to 36 The Mall Shimla placed on file by the petitioners, after the institution of the eviction petition against the respondent, the petitioner Raj Kumar Mehra is stated to have vacated the spacious flat on the Mall in Building No. 36, the Mall Shimla without any rhyme or reason and without there having any sort of litigation and is allegedly showing his residence, in the five storeyed Non-residential building (bearing No. 84, the Mall Shimla, the building in question). Had there been any need for the alleged expansion of the business, the petitioner would have never allegedly shifted in that. Further he has got another spacious residential set at Harkar Jakhoo, Shimla, which depicts that his alleged need for the expansion of the business is malafide with the only motive, to enhance the rent exorbitantly, from Rs. 2071/- per annum (i.e. about Rs. 173/- per month) to Rs. 10,000/- per month and to which the respondent showed his inability to pay and the petitioner refused to accept rent, when tendered number of times, in cash, by cheque, by money orders, by pay orders, much prior to the filing of the eviction petition dated May, 2012 in the Hon'ble Court.
>
> 5. That the petitioners/non-applicants have concealed material facts from the Hon'ble Court and have not come to the Hon'ble Court with clean hands. The petition deserves dismissal on this ground alone, at the very outset, with exemplary costs.
>
> i. The petitioners failed to mention regarding merging of two shops (by partition between the two shops), merging of two offices behind the said shops) in their eviction petition.
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> ii. The petitioner further failed to mention regarding the removal of mezzanine floor over the said two offices, which depicts that they had got surplus accommodation and that is why they had taken this step.
>
> ii. That the petitioner concealed the facts that they are having residential accommodation at No. 36, The Mall Shimla and at 'Harkar' Jakhoo, Shimla. Further, the accommodation got vacated for their personal requirement for business purpose was never utilized for the said purpose and the same is lying vacant.
>
> iv. That the petitioners have concealed material facts regarding their family members. The family members have since reduced. Sh. Roshan Lal (father of Sh. Raj Kumar) had sine expired, as according to the respondent, the Landlords of the premises are M/s Roshan Lal, Raj Kumar. Further, Raj Kumar had almost retired from his business due

to his old age (who is aged about 82 years), suffering from various heart ailments, diabetes keeping indifferent health and undergoing treatment in Delhi. As such, the business of both the Firs M/s Nathu Ram & sons and M/s John Raymond Bright are suffering.

v. That the entire five storeyed non residential building bearing no. 84, The Mall Shimla is lying vacant, except the shops, on The Mall road level. The petitioners have got even surplus accommodation, on the Mall Road level (for carrying on their business) which bears no. 84/1, The Mall Shimla, H.P.

6. That the eviction petition has been filed against the respondent with an oblique motive.

Respondent's father Late Sh. Trilok Chand was a witness in an earlier eviction case against petitioner tenant Sh. R.L. Seth, which he lost. Further there is a clash of business, as the petitioners are carrying on readymade business, in the name of M/S John Raymond Bright and the respondent is carrying on tailoring business in the name of M/s Bhagat Sons Tailors in that every building."

5. In order to explain as to why the preliminary objections sought to be incorporated by way of seeking amendment were not initially incorporated, it has been submitted that new facts having came into existence and to the notice of the respondent-tenant after institution of the petition has necessitated the same after the reply was initially filed.

6. The petitioners-landlords in reply filed to the application have contested and resisted the same on grounds, inter-alia, that the same is not maintainable and rather filed with malafide intention to delay the proceedings in the rent petition. The facts now sought to be incorporated by way of amendment were already in the knowledge and notice of the respondent-tenant. The same otherwise are also not necessary for the decision of the rent petition.

7. It is interesting to note that the application initially was decided by learned Rent Controller below vide order dated 24.11.2014, Annexure A1 to CMP No. 2843 of 2017. This order was challenged in this Court in Civil Revision No. 3 of 2015 which was disposed of vide judgment dated 23.4.2015 Annexure A2 to the above application CMP No. 2843 of 2017. The application was remanded to learned Controller below for fresh disposal by assigning reasons. Consequently, the application was decided afresh by learned Rent Controller on 7.10.2015 vide order Annexure A3 to this application. The matter was again agitated in this Court in Civil Revision No. 4 of 2016 which was disposed of vide judgment Annexure A4 and the application again remanded to learned Rent Controller with a direction to decide the same afresh by recording reasons. Consequently, learned Rent Controller has decided the application afresh vide Annexure P1 to this petition. Again the order Annexure P1 has been assailed in this petition.

8. Mr. R.K. Bawa, learned Senior Advocate assisted by Mr. Ajay K. Sharma, Advocate, representing the respondent-tenant has drawn the attention of this Court to various judgment of the Apex Court in which it is held that while considering an application under Order 6 Rule 17 CPC the approach should be liberal and the amendment if necessary for just decision of the *lis* should be allowed even if sought to be made at some belated stage. On the other hand, Mr. Bhupender Gupta, learned Senior Advocate assisted by Mr. Naresh Sharma, Advocate while inviting the attention of this Court to the provisions contained

under Section 14(3) of H.P. Urban Rent Control Act has contended that the petitioners-landlords are not in occupation of any other residential/non-residential building owned by them in Shimla town nor they vacated any such building within five years from the institution of the present petition. The contentions sought to be raised by way of having preliminary objection No. 4 are, therefore, of no help to the case of the respondent-tenant. On merits, it is submitted that what he now intend to incorporate in reply by way of preliminary objection No. 5 is already there in the reply he originally filed. As regard preliminary objection No. 6, the facts he averred therein were in his knowledge and notice when the reply was originally filed. Therefore, according to Mr. Gupta the amendment now sought is neither essential nor required for just decision of the rent petition.

9. Before coming to the point in issue, it is desirable to note at the outset that in terms of the provisions contained under Order 6 Rule 17 CPC amendment in the pleadings if required for just decision of the *lis* can be allowed at any stage of the proceedings. The proviso to Order 6 Rule 17 CPC take away the power of the Court to allow an application for amendment when the trial already commenced unless satisfied that inspite of due diligence the party seeking amendment in the pleadings has failed to do so before commencement of trial. The support in this regard can be taken from the judgment of the Hon'ble Apex Court in ***Vidyabai and others*** versus ***Padmalatha and another,*** (2009) 2 Supreme Court Cases 409. The relevant portion of this judgment reads as follow:

> "10. By reason of the Civil Procedure Code (Amendment) Act, 2002 (Act 22 of 2002), the Parliament inter alia inserted a proviso to Order VI Rule 17 of the Code, which reads as under:
>
> > "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."
>
> It is couched in a mandatory form. The court's jurisdiction to allow such an application is taken away unless the conditions precedent therefor are satisfied, viz., it must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of the trial."

10. Similar is the view of the matter again taken by the Hon'ble Apex Court in ***Ajendraprasadji N. Pandey*** versus ***Swami Keshavprakeshdasji N. and Others***, (2006) 12 SCC 1. This judgment also reads as follow:

> "41. We have carefully considered the submissions made by the respective senior counsel appearing for the respective parties. We have also carefully perused the pleadings, annexures, various orders passed by the courts below, the High Court and of this Court. In the counter affidavit filed by respondent No.1, various dates of hearing and with reference to the proceedings taken before the Court has been elaborately spelt out which in our opinion, would show that the appellant is precluded by the proviso to rule in question from seeking relief by asking for amendment of his pleadings.
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> 42. It is to be noted that the provisions of Order VI Rule 17 CPC have been substantially amended by the CPC (Amendment) Act, 2002.
>
> 43. Under the proviso no application for amendment shall be allowed after the trial has commenced, unless inspite of due diligence, the matter could not be raised before the commencement of trial. It is submitted, that

> after the trial of the case has commenced, no application of pleading shall be allowed unless the above requirement is satisfied. The amended Order VI Rule 17 was due to the recommendation of the Law Commission since Order 17 as it existed prior to the amendment was invoked by parties interested in delaying the trial. That to shorten the litigation and speed up disposal of suits, amendment was made by the Amending Act, 1999, deleting Rule 17 from the Code. This evoked much controversy/hesitation all over the country and also leading to boycott of Courts and, therefore, by Civil Procedure Code (Amendment) Act, 2002, provision has been restored by recognizing the power of the Court to grant amendment, however, with certain limitation which is contained in the new proviso added to the Rule. The details furnished below will go to show as to how the facts of the present case show that the matters which are sought to be raised by way of amendment by the appellants were well within their knowledge on their Court case, and manifests the absence of due diligence on the part of the appellants disentitling them to relief."

11. The legal principles settled in these judgments supra, therefore, are that the power of the Court to allow amendment in the pleadings at any stage of the proceedings are controlled by the proviso to Order 6 Rule 17 CPC. Under the proviso no application for amendment can be allowed after the trial has commenced unless the Court is satisfied that the party seeking amendment despite due diligence could not raise the contention sought to be incorporated by way of amendment ordinarily at the time of drafting and filing the pleadings.

12. It is also well settled that amendment in the pleadings should normally be allowed even a prayer in that regard made at some belated stage in case the same is essential and required for just and effective decision of the pending *lis*. It has also been emphasized that approach of the Court ceased of the matter should be liberal and not technical while considering an application for amendment. The Apex Court in ***Surender Kumar Sharma*** versus ***Makhan Singh***, (2009) 10 Supreme Court Cases 626 has held that the application for amendment merely belated should not be dismissed if the Court finds that allowing the same would facilitate to resolve the real controversy between the parties. The relevant portion of this judgment is reproduced hereunder:

> "5. As noted hereinearlier, the prayer for amendment was refused by the High Court on two grounds. So far as the first ground is concerned i.e. the prayer for amendment was a belated one, we are of the view that even if it was belated, then also, the question that needs to be decided is to see whether by allowing the amendment, the real controversy between the parties may be resolved. It is well settled that under Order 6 Rule 17 of the Code of Civil Procedure, wide powers and unfettered discretion have been conferred on the Court to allow amendment of the pleadings to a party in such a manner and on such terms as it appears to the Court just and proper. Even if, such an application for amendment of the plaint was filed belatedly, such belated amendment cannot be refused if it is found that for deciding the real controversy between the parties, it can be allowed on payment of costs. Therefore, in our view, mere delay and latches in making the application for amendment cannot be a ground to refuse amendment.
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> 6. It is also well settled that even if the amendment prayed for is belated, while considering such belated amendment, the Court must bear in favour of doing full and complete justice in the case where the party against

whom the amendment is to be allowed, can be compensated by cost or otherwise. [See B.K. N. Pillai Vs. P. Pillai and another [AIR 2000 SC 614 at Page 616]. Accordingly, we do not find any reason to hold that only because there was some delay in filing the application for amendment of the plaint, such prayer for amendment cannot be allowed.

7. So far as the second ground is concerned i.e. the prayer for amendment of plaint, if allowed, shall change the nature and character of the suit, we are unable to accept this view of the High Court. We have carefully examined the amendment prayed for and after going through the application for amendment of the plaint, we are of the view that the question of changing the nature and character of the suit, if amendment is allowed, cannot arise at all. The suit has been filed for eviction inter alia on the ground of arrears of rent. It cannot be disputed that even after the amendment, the suit would remain a suit for eviction. Therefore, we are unable to agree that if the amendment of the plaint is allowed, the nature and character of the suit shall be changed. Accordingly, the High Court was not justified in holding that the nature and character of the suit shall be changed, if such prayer for amendment is allowed.

8. For the reasons aforesaid, the orders of the High Court as well as of the trial Court are set aside. The application for amendment of the plaint filed by the appellant stands allowed, subject to the payment of costs of Rs.10,000/- to the opposite party, which shall be deposited/paid within a period of six weeks from the date of supply of a copy of this order. In default of deposit/payment of such costs, the application for amendment of the plaint shall stand rejected."

13. The Apex Court has again held in ***State of Madhya Pradesh*** Versus ***Union of India and another***, (2011) 12 Supreme Court Cases 268 that while considering an application for amendment the liberal approach should be general rule and to adjust the equity, the other side can be compensated with costs. It has also been settled in this judgment that the amendment which would render the suit infructuous, introduce a totally different, new and inconsistent case or challenges fundamental character of the suit, hence sought after unusual delay should not be allowed. This judgment also reads as follow:

"6. In order to consider the claim of the plaintiff and the opposition of the defendants, it is desirable to refer the relevant provisions. Order VI Rule 17 of the Code of Civil Procedure, 1908 (in short 'the Code') enables the parties to make amendment of the plaint which reads as under;

"17. Amendment of pleadings - The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

7. The above provision deals with amendment of pleadings. By Amendment Act 46 of 1999, this provision was deleted. It has again been restored by Amendment Act 22 of 2002 but with an added proviso to prevent application for amendment being allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. The proviso, to some extent, curtails absolute

discretion to allow amendment at any stage. Now, if application is filed after commencement of trial, it must be shown that in spite of due diligence, such amendment could not have been sought earlier.

8. The purpose and object of Order VI Rule 17 of the Code is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. Amendment cannot be claimed as a matter of right and under all circumstances, but the Courts while deciding such prayers should not adopt a hyper-technical approach. Liberal approach should be the general rule particularly, in cases where the other side can be compensated with costs. Normally, amendments are allowed in the pleadings to avoid multiplicity of litigations.

9. Inasmuch as the plaintiff-State of Madhya Pradesh has approached this Court invoking the original jurisdiction under Article 131 of the Constitution of India, the Rules framed by this Court, i.e., The Supreme Court Rules, 1966 (in short 'the Rules) have to be applied to the case on hand. Order XXVI speaks about "Pleadings Generally". Among various rules, we are concerned about Rule 8 which reads as under:

"8.The Court may, at any stage of the proceedings, allow either party to amend his pleading in such manner and on such terms as may be just, but only such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties."

The above provision, which is similar to Order VI Rule 17 of the Code prescribes that at any stage of the proceedings, the Court may allow either party to amend his pleadings. However, it must be established that the proposed amendment is necessary for the purpose of determining the real question in controversy between the parties.

10. This Court, while considering Order VI Rule 17 of the Code, in several judgments has laid down the principles to be applicable in the case of amendment of plaint which are as follows:

(i) Surender Kumar Sharma v. Makhan Singh, (2009) 10 SCC 626, at para 5:

"5. As noted hereinearlier, the prayer for amendment was refused by the High Court on two grounds. So far as the first ground is concerned i.e. the prayer for amendment was a belated one, we are of the view that even if it was belated, then also, the question that needs to be decided is to see whether by allowing the amendment, the real controversy between the parties may be resolved. It is well settled that under Order 6 Rule 17 of the Code of Civil Procedure, wide powers and unfettered discretion have been conferred on the court to allow amendment of the pleadings to a party in such a manner and on such terms as it appears to the court just and proper. Even if, such an application for amendment of the plaint was filed belatedly, such belated amendment cannot be refused if it is found that for deciding the real controversy between the parties, it can be allowed on payment of costs. Therefore, in our view, mere delay and laches in making the application for amendment cannot be a ground to refuse the amendment."

(ii) North Eastern Railway Administration, Gorakhpur v.

Bhagwan Das (dead) by LRS, (2008) 8 SCC 511, at para16:

"16. Insofar as the principles which govern the question of granting or disallowing amendments under Order 6 Rule 17 CPC (as it stood at the relevant time) are concerned, these are also well settled. Order 6 Rule 17 CPC postulates amendment of pleadings at any stage of the proceedings. In Pirgonda Hongonda Patil v. Kalgonda

Shidgonda Patil which still holds the field, it was held that all amendments ought to be allowed which satisfy the two conditions: (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties. Amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs."

(iii) Usha Devi v. Rijwan Ahamd and Others, (2008) 3 SCC 717, at para 13:

"13. Mr Bharuka, on the other hand, invited our attention to another decision of this Court in Baldev Singh v. Manohar Singh. In para 17 of the decision, it was held and observed as follows: (SCC pp. 504-05)

'17. Before we part with this order, we may also notice that proviso to Order 6 Rule 17 CPC provides that amendment of pleadings shall not be allowed when the trial of the suit has already commenced. For this reason, we have examined the records and find that, in fact, the trial has not yet commenced. It appears from the records that the parties have yet to file their documentary evidence in the suit. From the record, it also appears that the suit was not on the verge of conclusion as found by the High Court and the trial court. That apart, commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. As noted hereinbefore, parties are yet to file their documents, we do not find any reason to reject the application for amendment of the written statement in view of proviso to Order 6 Rule 17 CPC which confers wide power and unfettered discretion on the court to allow an amendment of the written statement at any stage of the proceedings."

(iv) Rajesh Kumar Aggarwal and Others v. K.K. Modi and Others, (2006) 4 SCC 385, at paras 15 & 16:

"15. The object of the rule is that the courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side.

16. Order 6 Rule 17 consists of two parts. Whereas the first part is discretionary (may) and leaves it to the court to order amendment of pleading. The second part is imperative (shall) and enjoins the court to allow all amendments which are necessary for the purpose of determining the real question in controversy between the parties."

(v) Revajeetu Builders and Developers v. Narayanaswamy and Sons and Others, (2009) 10 SCC 84, at para 63:

"63. On critically analysing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

(1) whether the amendment sought is imperative for proper and effective adjudication of the case;

(2) whether the application for amendment is bona fide or mala fide;

(3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and

(6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive."

The above principles make it clear that Courts have ample power to allow the application for amendment of the plaint. However, it must be satisfied that the same is required in the interest of justice and for the purpose of determination of real question in controversy between the parties."

14. Similar is the view of the mater taken by the Hon'ble Apex Court in ***Rameshkumar Agarwal*** versus ***Rajmala Exports Private Limited and others,*** (2012) 5 Supreme Court Cases 337. The relevant para is reproduced as under:

"It is clear that while deciding the application for amendment ordinarily the Court must not refuse bona fide, legitimate, honest and necessary amendments and should never permit mala fide and dishonest amendments. The purpose and object of Order VI Rule 17 of the Code is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. Amendment cannot be claimed as a matter of right and under all circumstances, but the Courts while deciding such prayers should not adopt a hyper-technical approach. Liberal approach should be the general rule particularly, in cases where the other side can be compensated with costs. Normally, amendments are allowed in the pleadings to avoid multiplicity of litigations."

15. It is worth mentioning that the application for amendment in the case ibid was filed immediately after filing of the suit i.e. before commencement of the trial which certainly is not the situation in the case in hand because here on framing of issues the trial has already commenced. However, on legal principles governing the field the ratio of this judgment is also attracted in the case in hand. The support can also be drawn from the judgment again that of the Hon'ble Apex Court in ***Abdul Rehman and another*** versus ***Mohd. Ruldu and others***, (2012) 11 Supreme Court Cases 341.

16. Now if examining the claims and counter claims in the light of the legal principles discussed hereinabove, prima-facie, the petitioners-landlords have vacated the premises, building No. 36, The Mall Shimla and Harker building, lower Jhakoo Shimla which were being used by them for residential purposes. In the reply originally filed the respondent-tenant has averred in para-19 thereof that the petitioners were residing in top floor of shop No. 36, The Mall Shimla owned by Shri Chander Giri and in Kothi known as 'Harker' lower Jhakoo. In rejoinder, the stand of the petitioners is that the accommodation i.e. 36, The Mall Shimla is irrelevant for the purpose of the present controversy as the same was not owned by them. The same according to them was vacated on 10.8.2010. In reply to the application they, however, have came forward the version that for want of the date of vacation of such residential premises by them allowing the respondent-tenant to incorporate preliminary objection No. 4 in his reply by way of amendment should be a futile exercise. Anyhow, in the considered opinion of this Court no prejudice is likely to be caused to the petitioners-landlords in case preliminary objection No. 4 is permitted to be incorporated to the reply for the reasons that prima facie they seems to have vacated top floor of building No. 36 and kothi known as 'Harker' which were being used by them for residential purpose. Although as per their version in rejoinder such premises were vacated by them in 2010, however, it is a fact to be gone into and proved during the course of trial

of the rent petition. Since the vacation of the respondent-tenant has been sought on the ground of the demised premises required by the petitioners for expansion of their business, therefore, the averments in preliminary objection No. 4 are relevant and necessary for deciding the controversy as to whether they are really in need of additional accommodation to expand their business or not. Therefore, the amendment sought to be incorporated in reply by way of preliminary objection No. 4 should have been allowed. Learned Rent Controller, however, has not appreciated this part of the controversy in its right perspective. Being so, the findings to the contrary recorded by learned Rent controller are quashed and set aside.

17. Similarly, no prejudice is likely to be caused to the petitioners-landlords in case preliminary objection No. 6 is also allowed to be incorporated in the reply for the reasons that the respondent-tenant is running a tailoring shop whereas the petitioners-landlords a shop of readymade garments. Therefore, the requirement of the petitioners-landlords is bonafide alone and not malafide to oust the respondent-tenant due to business rivalry also need to be gone into to arrive at a just decision in the petition.

18. However, the averments sought to be incorporated in the reply by way of preliminary objection No. 5 have already been raised in the reply filed originally, therefore, this part of the amendment is not required to be made, hence, the prayer to this effect being not legally and factually sustainable is rejected.

19. True it is that the application for amendment has been filed at a stage when the trial has already commenced. The record reveals that issues were framed in the writ petition on 31.3.2014. The application for amendment was filed on 5.7.2014 at a stage when the rent petition was fixed for recording of petitioners' evidence. No witness is yet recorded. Although, there is delay in filing the application and the prayer for amendment as such falls under the mischief of the proviso to order 6 Rule 17 CPC. The present, however, is a case where the petitioners-landlords have vacated the residential accommodation i.e. top floor of building No. 36, The Mall, Shimla and 'Harker' lower Jhakoo after filing the reply to the writ petition. Had it been not so the respondent-tenant would have raised such plea in the reply filed originally. True it is that the factum of the respondent-tenant is running tailoring business, whereas the petitioners-landlords cloth shop as well as business of readymade garments can reasonably be believed to be in the knowledge and notice of the respondent-tenant at the time of filing the reply to the rent petition. The possibility of he bonafidely omitted to raise such plea at the relevant time and realized the same at a later stage cannot be ruled out. Therefore, when the delay is not inordinate because the application was filed within four months of the commencement of trial cannot be said to be belated. On the other hand, this Court is of the view that the proposed amendment is essentially required to decide the rent petition judiciously and more effectively if allowed to be incorporated.

20. For all the reasons hereinabove the application for amendment filed by the respondent-tenant to the extent of incorporating preliminary objections No. 4 and 6 is allowed. The prayer to allow him to incorporate preliminary objection No. 5 also in the reply is however, declined. The application as such is partly allowed. Let him to file the amended reply accordingly before learned Rent Controller on 6.4.2018 the date fixed for appearance of the parties before learned Rent Controller below. The rent petition being old one, learned Rent Controller is directed to expedite the disposal thereof as early as possible of course subject to rendering effective assistance by the parties on both sides.

21. The parties through learned Counsel representing them are directed to appear before learned Rent Controller on the date already fixed.

22. The record be sent immediately so as to reach in the Court of learned Rent Controller well before the date fixed.

23. Before parting, it is made clear that the observations hereinabove shall remain confined to the disposal of this petition and have no bearing on the merits of the case.

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

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

Ajay Sharma ....Petitioner.

Versus

Assistant Collector 1st Grade, Ghanari, Tehsil Ghanari District Una and others ... Respondents.

CMPMO No. 290 of 2017
Reserved on 7.3.2018
Decided on: 16.3.2018

Code of Civil Procedure, 1908- Order 5- The process issued returned back with a report that the addressee not residing at the mentioned address, stated to be residing in Shimla – Oblivious of the report the respondent ordered to be served by way of proclamation and eventually proceeded against exparte- **Held –** that the authority concerned acted mechanically, without even perusing the report of the Process Server- In fact, the only course available to the authority was to have directed the applicants to file the correct address of the parties in issue and then effect the service accordingly- the order of service by way of proclamation held to be wrong- Consequently, order dated 16.5.2017 whereby the respondent proceeded exparte, quashed and set aside. (Para-7)

For the petitioner.	Mr. Bhupender Gupta, Sr. Advocate with Ms. Poonam Gehlot, Advocate.
For respondents	Mr. Desh Raj Thakur, Addl. Advocate General with Mr. Kamal Kant Chandel Dy. AG for respondent No.1. Remaining respondents ex parte.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.

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

"It is, therefore, most humbly and respectfully prayed that this petition may kindly be allowed and the impugned orders dated 16.5.2017 passed by Assistant Collector, 1st Grade, Ghanari, Tehsil Ghanari, District Una, HP whereby petitioner has been proceeded against ex parte and matter has been ordered to be posted for reply etc on 5.7.2017, may very kindly be set aside, with directions to the respondent No.1 to proceed in the matter afresh in accordance with law, in the interest of law and justice."

2. Brief facts necessary for adjudication of the present case are as under:-

Respondents No.2 and 3 have filed an application for partition of land measuring 1-01-20 hectares comprised in Khewat No. 395, Khatoni No. 449 (Khasra No. 134) as per Jamabandi for the year 2010-2011 situated in village Bhaderkali Tehsil Amb, District Una, H.P., in the Court of Learned Assistant Collector 1st Grade, Ghanari, Tehsil Ghanari District Una, Himachal Pradesh. Present petitioner has been impleaded as respondent No.6 in the said application. Notice to the petitioner was issued by the Court of Assistant Collector 1st Grade returnable for 16.2.2017, which was returned back with the report that Ajay Sharma was not residing at the address mentioned in the notice, who was residing at Shimla. This is evident from the report of the Process-Server dated 29.1.2017 (Annexure P-2 page 21 of the paper book). Zimni orders passed by the Court of Assistant Collector 1st Grade Ghanari, Tehsil Ghanari District Una demonstrate that on 16.2.2017 said authority recorded that out of all the respondents, on behalf of respondent No.2 Mr. Prince Sood submitted his memo, whereas rest of the respondents were not present. Said authority then ordered that the remaining respondents be served through proclamation for 17.4.2017. While passing this order, the report of the Process Server was perhaps both ignored and overlooked. On 17.4.2017 said authority again passed the similar order as was passed on 16.2.2017 and listed the case for 16.5.2017. Thereafter on 16.5.2017 said authority passed an order that as none of the respondents except respondent No.2 were present, hence they were ordered to be proceeded against ex parte and the case was ordered to be listed for 5.7.2017.

3. Feeling aggrieved by this order, the petitioner has preferred this petition.

4. As respondents No.2, 3 and 5 did not appear despite service, they were ordered to be proceeded against ex parte.

5. I have heard learned Senior Counsel for the petitioner as well as learned Addl. Advocate General for the State and have also gone through the records of the case appended with the petition.

6. Mr. Gupta learned Senior Counsel has strenuously argued that impugned order vide which the petitioner was ordered to be proceeded against ex parte is, prima facie, bad in law as while passing the said order, the authority concerned erred in not appreciating that as said report of the Process Server dated 29.1.2017 mentioned Ajay Sharma was residing Shimla, the petitioner could not have been proceeded against ex parte in the mode and manner in which it was done by the authority concerned. Mr. Gupta submitted that it is apparent that orders dated 16.2.2017, 17.4.2017 and 16.5.2017 were passed by the authority concerned without even caring to peruse the report of the Process Server.

7. In my considered view, there is force in the contention of Mr. Gupta. When it stood reported by the Process Server in his report dated 29.1.2017 that the present petitioner, who was respondent No.6 in the partition proceedings was residing in Shimla, then the proper course for the authority concerned was to have had directed the applicants therein to file the correct address of party in issue and then effect the service of the petition on the said correct address. Of course, thereafter if said party was found to be evading service, then the Authority could have resorted to other means of effecting service. Rather than doing so, the authority concerned apparently in a mechanical manner passed orders dated 16.2.2017, 17.4.2017 and thereafter order dated 16.5.2017, vide which the present petitioner was ordered to be proceeded against ex parte. This Court is satisfied that all these orders were passed by the authority concerned by ignoring and overlooking the report of the Process Server dated 29.1.2017. In other words, when the authority concerned passed orders referred to above, it did not even care to peruse the file including the report of the Process Server. This Court expresses its displeasure over the mode and manner in which the authority concerned has conducted itself. The authority has erred in not appreciating that it was performing quasi judicial function and was conferred with the duty of adjudicating upon the rights of the parties and in this background, it was not to act in a callous manner, in which it actually has acted which has indeed caused grave prejudice to the present petitioner. The order of service by way of proclamation has been passed in a

mechanical manner without any satisfaction being mentioned in the orders by the authority that respondents like the present petitioner were in fact evading the service.

In view of above, this petition is allowed and order dated 16.5.2017, vide which the present petitioner has been ordered to be proceeded against ex parte by learned Assistant Collector, 1st Grade, Ghanari, Tehsil Ghanari, District Una, H.P. in partition proceedings initiated against him is quashed and set aside with the direction to the authority to proceed with the case strictly in accordance with law.

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

Ravi Azta and others ...Petitioners

Vs.

Union of India & others ...Respondents.

CWP No. 4652 of 2015
Reserved on 13.3.2018
Decided on: 17.3.2018

Constitution of India, 1950- Civil Writ Petition- Article 226- Code of Civil Procedure, 1908- Order 2 Rule 2- Res-judicata- If the reliefs claimed in the subsequent writ petition and the prayers made therein are in majority the same and if some of the prayers though available had not been claimed in the earlier writ petition- the subsequent writ petition would not be maintainable- It is a hit by the the principles of res-judicata and the principles embodied in Order 2 Rule 2 C.P.C., as, though the provisions of Code of Civil Procedure are not applicable in the writ jurisdiction but the principles enshrined therein are applicable- the principles of res-judicata discussed- further **Held-** that the doctroine is applied so that the lis attained finality- It is not opened and re-opened twice over, which is a fundamental doctroine of law and consequently, writ petition dismissed as not being maintainable since the majority of the reliefs claimed therein had already been decided in the earlier writ petition. (Para-7 to 19)

Cases referred:

Gulabchand Chhotalal Parikh vs. State of Gujarat, AIR 1965 SC 1153
Babubhai Muljibhai Patel vs. Nandlal Khodidas Barot, AIR 1974 SC 2105
Sarguja Transport Service vs. STATE, AIR 1987 SC 88
Kundlu Devi and another vs. State of H.P. and others Latest HLJ 2011 (HP) 579
T. Arivandandam vs. T.V. Satyapal and another (1977) 4 SCC 467

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

For the Respondents: Mr. Shashi Shirshoo, Central Government Counsel, for respondent No.1.
Mr. Vinod Thakur and Mr. Sudhir Bhatnagar, Additional Advocate Generals with Mr. Bhupinder Thakur, Dy. Advocate General, for respondents No. 2 to 5.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge:

This Court vide its order dated 18.12.2017 had asked the petitioners to justify the maintainability of the instant writ petition, more particularly, in light of the fact that the

earlier writ petition being CWP No. 5269 of 2014 filed by the predecessor-in-interest Sh. Mangat Ram Azta had already been dismissed by a learned Division Bench of this Court on 29.8.2014 and even the SLP filed against the same had been withdrawn to enable him to approach this Court with the plea to extend the period for complying with the order passed by further four months.

2. It is not in dispute that Sh. Mangat Ram Azta had earlier approached this Court by way of CWP No. 5269 of 2014, wherein he had sought the following reliefs:

> *(a) The proceedings initiated against the petitioner under Section 447 IPC and Section 33 of the Forest Act through FIR No. 42/2011 may kindly be quashed and set-aside being void, illegal and unconstitutional and total infringement of the fundamental rights of the petitioner.*
>
> *(b) The notifications attached as Annexure P-6, P-7 and P-8 may kindly be quashed and set-aside being illegal and unconstitutional.*
>
> *(c) A writ of mandamus may also be issued directing the State Government to make entries regarding the proprietary rights of the petitioner and other persons of the same community in column No.5 of the jamabandi as per their legal rights.*
>
> *(d) Any appropriate order or direction against the State Government for acting illegally and malafidely and under the colourable exercise of legislation infringing the valuable rights of the petitioner."*

3. Even though the reliefs claimed above are self-speaking, however, it needs to be clarified that Annexures P-6, P-7 and P-8, were the copies of the notifications issued by the State Government, from time to time. Annexure P-6 is the notification FFE-B-A(II)1/2006-11 dated 31.5.2011, whereas Annexure P-7 is the copy of notification dated 25th February, 1952 and Annexure P-8 is a copy of notification issued by the respondents under Section 33 of the Indian Forest Act.

4. It is not in dispute that the writ petition filed by Sh. Mangat Ram Azta had been dismissed on merits and all the contentions raised therein were rejected by a learned Division Bench by concluding as under:

> *"10. The State Government cannot issue direction for regularization of any forest land. However, before parting with the judgment, all the courts in the State of Himachal Pradesh are directed to take into consideration notification dated 24.4.1997 issued by the Financial Commissioner-cum-Secretary (Revenue), Government of Himachal Pradesh for demarcation of private lands touching Government lands or boundaries of another State as well as notification dated 13.9.2012 on the issue of demarcation of land while deciding the cases. The Judicial Magistrate 1st Class, Chopal is directed to decide the case within a period of six months since the FIR was registered in the year 2011. All the courts in Himachal Pradesh are also directed to decide the cases pertaining to encroachment on the forest land within a period of one year.*
>
> *11. Accordingly, in view of the analysis and discussion made hereinabove, there is no merit in the petition and the same is dismissed. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs."*

5. It is further not in dispute that Sh. Mangat Ram Azta aggrieved by the foresaid judgment, approached the Hon'ble Supreme Court by filing appeal, however, the same was withdrawn so as to enable the petitioner to approach this Court with the plea to extend the period by further four months as would be clearly evident from the order dated 6.7.2015, which reads thus:

> *"At the threshold Learned Senior Counsel appearing for the petitioner seeks leave to withdraw the Special Leave Petition so as to enable the petitioner to approach*

the High Court with the plea to extend the period by further four months. The Special Leave Petition is dismissed as withdrawn."

6. As regards the instant writ petition, the same was filed by Sh. Mangat Ram Azta, however, during the pendency of the writ petition, he died and his legal representatives i.e. the present petitioners were ordered to be brought on record. This writ petition has been filed for the following reliefs:

(a) Appropriate orders or direction to the respondents to either notify the respondents to declare the petitioner and its co-habitants as legal occupants of the land situated at Shantha and in possession of the Badhan community.

(b) In the alternative direction to the respondents for adopting appropriate procedure for transfer and occupying of the land as per law applicable from the Badhan community to the State Government with adequate compensation as per market value.

(c) A declaration to the effect that the occupation of the land under the heading of birt bartandaran since times immemorial was justiciable and legal with no infirmity.

(d) Exemplary costs and damages against the respondents for diminishing the reputation of the badhan community classifying them as encroachers who are esteemed estate land owners and not liable for disobeyance of law of the land.

(e) Quashing of the notification dated 25.2.1952 being unjust, illegal, void and improper.

7. A bare perusal of the aforesaid reliefs would clearly establish beyond any doubt that the majority of the prayers as made therein had already been sought for in the earlier writ petition (CWP No. 5269 of 2014) and some of the prayer though available, had not been claimed while filing the earlier writ petition.

8. As regards the notification dated 25.2.1952, the same was subject matter of the previous writ petition and had in fact been annexed as Annexure P-1 therewith and a specific prayer for quashing the same had been made. However, the said prayer was rejected by a learned Division Bench of this Court by holding as under:

"8. It is settled law that no limitation has been prescribed to the writ proceedings, but the delay has to be explained satisfactorily. Petitioner cannot be permitted to challenge Annexures P-7 and P-8 dated 25.2.1952, respectively by way of present petition. He cannot be conferred with proprietary rights once the State of Himachal Pradesh, in fact, is owner of the land as per revenue record."

9. As observed above, the reliefs as sought for in this writ petition, have already been rejected by this Court while adjudicating upon CWP No. 5269 of 2014, while the additional relief claimed therein are only the result of clever drafting and were otherwise available to the petitioners while filing the earlier writ petition and, therefore, the moot question is whether the petitioners can file and maintain the writ petition in view of the dismissal of the earlier writ petition.

10. The complete answer to the proposition is contained in the principles of res judicata as also in the principles embodied in Order 2 Rule 2 CPC.

11. However, the learned counsel for the petitioners would vehemently argue that the provisions of the Code of Civil Procedure, do not apply to the writ petition and have rather been excluded by making a specific provision in the Code by itself incorporating Section 141 CPC, which reads thus:

***"141. Miscellaneous proceedings**. – The procedure provided in this Code in regard to suits shall be followed as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.*

Explanation. – In this section, the expression "proceedings" includes proceedings under Order IX, but does not include any proceeding under Article 226 of the Constitution."

12. Undoubtedly, the provisions of the CPC are not applicable in the writ jurisdiction by virtue of provision of Section 141 but the principles enshrined therein are applicable. (vide ***Gulabchand Chhotalal Parikh*** vs. ***State of Gujarat, AIR 1965 SC 1153, Babubhai Muljibhai Patel*** vs. ***Nandlal Khodidas Barot, AIR 1974 SC 2105 and Sarguja Transport Service*** vs. ***STATE, AIR 1987 SC 88***.)

13. The doctrine of *res judicata* is applied to give finality to 'lis' and in substance means that an issue or a point decided and attaining finality should not be allowed to be reopened and re-agitated twice over. The literal meaning of res is 'everything that may form an object of rights and includes an object, subject-matter or status; and res judicata literally means 'a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment. Even otherwise, the provision of CPC, more particularly, those contained in Section 11 are not exhaustive and contain only the general principles of res judicata.

14. The principle of res judicata is a fundamental doctrine of law, that there must be an end to litigation. The same is based on the rule of the conclusiveness of the judgment based upon the maxim of Roman jurisprudence '*Interest reipublicae ut sit finis litium'*(it concerns the state that there be an end to law suits*);* and, partly on the maxim '*Nemo debet bis vexari pro una at eadam causa'* (no man should be vexed twice over for the same cause).

15. Whereas, Order 2 of CPC deals with the frame of the suit and each party is supposed to include the whole of the claim which he is entitled to make in respect of the cause of action. The principles laid down therein confers certain privileges in favour of the party, who brings the suit, but simultaneously it imposes an embargo or restriction in claiming/bringing another suit for any of the reliefs which he could have prayed in the earlier suit. The underlying principle of this provision is based on the principle that defendant may not be and should not be vexed twice for one of the same cause of action.

16. Even otherwise, it is settled law that in every proceeding whole of the claim which party entitled to should be made and when a party omitted to sue in respect of any portion of the claim, he cannot afterward sue for the portion so omitted and this is based upon the principle of constructive res judicata.

17. At this stage, it shall be apposite to refer to a Division Bench judgment of this Court in ***Kundlu Devi and another vs. State of H.P. and others Latest HLJ 2011 (HP) 579*** wherein the aforesaid principles of law was lucidly dealt with and it was observed as follows:

"3. It is seen that the Petitioners were not satisfied with the award dated 9.8.1995 and hence they had pursued their grievance before the Reference Court leading to Annexure P-1, order. The Civil Court, as per Annexure P-1 order, granted certain reliefs. Still not satisfied, the matter was pursued in RFA No. 155 of 1998 before this Court. The appeal was disposed of vide judgment dated 28.6.2007.

4. The contention of the learned Counsel for the Petitioners is that though the grievance with regard to quantum was dealt with, the grievance with regard to the claim for rent and occupation charges during the period the property was in possession of the Government has not been dealt with. According to the Petitioners, they are entitled to the same in view of the decision of the Apex Court in R.L. Jain v. DDA, 2004 4 SCC 79. We do not think that it will be proper for this Court at this stage in proceeding under Article 226 of the Constitution of India to go into the question as to whether the Petitioners are entitled to that component of compensation. That grievance the Petitioners have pursued in accordance with the procedure prescribed under the Land Acquisition Act, 1894 initially before the Collector, thereafter before the Civil Court and finally in appeal before the High Court. According to the Petitioners, though this grievance was raised, the same has

not been adverted to. If that be so, a civil writ petition or for that matter any other collateral proceeding is not the remedy. All contentions, which a party might and ought to have taken, should be taken in the original proceedings and not thereafter. That is the well settled principle under Order II Rule 2 CPC. Order II Rule 2 reads as follows:

*"**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 relief's. - A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such relief's; but if he omits, except with the leave of the Court, to sue for all such relief's, he shall not afterwards sue for any relief so omitted."

5. This Rule is based on the principle that the Defendant shall not be vexed twice for one and the same cause. The Rule also seeks to prevent two evils, one the splitting of claims and the other splitting of remedies. If a Plaintiff omits any portion of the claim or omits any of the remedies in respect of the cause, he shall not be permitted to pursue the omitted claim or the omitted remedy. The requirement of the Rule is that every suit should include the whole of the claim which the Plaintiff is entitled to make in respect of a cause of action. Cause of action is a cause which gives occasion for and forms foundation of the suit. If that cause of action enables a person to ask for a larger and broader relief than to which he had limited his claim, he cannot thereafter seek the recovery of the balance of the cause of action by independent proceedings. This principle has been also settled by the Apex Court in Sidramappa v. Rajashetty, AIR 1970 SC 1059.

6. Order II Rule 2 applies also to writ proceedings. The left out portion of a cause of action cannot be pursued in a subsequent writ proceedings. All claims which a Petitioner might and ought to have taken, should be taken in one proceedings and only in one proceedings.(See the decision of the Supreme Court in Commissioner of Income-tax v. T.P. Kumaran, 1996 (1) SCC 561.)

7. Equally, a person who has filed the suit seeking certain relief in respect of a cause of action is precluded from instituting another suit for seeking other relief's in respect of the same cause of action. He shall not be entitled to invoke the writ jurisdiction of the High Court for obtaining the very same relief. In other words, if a second suit is barred, a writ petition would also be barred. What is directly prohibited cannot be indirectly permitted. That is the principle underlying under Order II Rule 2 CPC."

18. Similar issue came up before a Division Bench of this Court in ***CWP No.1228 of 2014*** titled ***Ajay Kumar Sharma and another*** vs**. *State of H.P. and another,*** decided on 31.08.2017, wherein it was held as under:

*"7. Even though the petitioners would vehemently argue that the bar of Order 2 Rule 2 of the CPC does not apply to the petition filed under Article 226 of the Constitution and would rely upon the Constitutional Bench decision of the Hon'ble Supreme Court in **Devender Pratap Narain Rai Sharma, v. State of Uttar Pradesh and others, AIR 1962 1334** and **Gulabchand Chhotalal Parikh v. State of Gujarat, AIR 1965 1153**.*

However, we find no merit in the said contention as this legal proposition has already been considered by us in detail in ***Review Petition No. 108 of 2016, in case titled as Ex-Petty Officers No.114294-K Hari Pal Singh vs. State of H.P.****, wherein it was held as under:-*

> *"2. The review is primarily sought on the ground that this Court while denying relief to the appellant had wrongly invoked the principles contained in order 2 rule 2 of the Code of Civil Procedure (CPC) as the same were not applicable to the proceedings under Article 226 of the Constitution of India.*
>
> *3. In support of his submission, strong reliance was placed by the petitioner on the judgment of the Hon'ble Constitution Bench of the Supreme Court in* ***Devendra Pratap Narain Rai Sharma*** *vs.* ***State of Uttar Pradesh and others****,* ***AIR 1962 SC 1334****, particularly observations contained in para 12, which read thus:*
>
> > *"[12] The High Court has disallowed to the appellant his salary prior to the date of the suit. The bar of O. 2 R. 2 of the Civil Procedure Code on which the, High Court apparently relied may not apply to a petition for a high prerogative writ under Art. 226 of the Constitution, but the High Court having disallowed the claim of the appellant for salary prior to the date of the suit, we do not think that we would be justified in interfering with the exercise of its discretion by the High Court."*
>
> *4. Undoubtedly, the aforesaid observations support the contention of the petitioner, but this Court has nowhere in the judgment under review held the provisions of order 2 rule 2 CPC to be applicable but has only made the principles contained therein applicable to the facts of the case.*
>
> *5. It is more than settled that avoiding the multiplicity of legal proceedings should be the aim of all courts and, therefore, a litigant cannot be allowed to split up his claim and file writ petition in piecemeal fashion. If the litigant could have, but did not without any legal justification claim a relief which was available to him at the time of filing earlier writ petition, the same claim cannot be allowed to be subsequently agitated by filing another writ petition.*
>
> *6. In this context, it shall be apt to refer to the judgment of the Hon'ble Supreme Court in* ***M/s. D. Cawasji and Co.****,* ***etc*** *vs.* ***State of Mysore and another****,* ***AIR 1975 SC 813*** *wherein it was held as under:*
>
> > *"[18] But, that however, is not the end of the matter. In the earlier writ petitions which culminated in the decision in* ***(1968) 2 Mys LJ 78*** *=* ***(AIR 1969 Mys 23)*** *the appellants did pray for refund of the amounts paid by them under the Act and the High Court considered the prayer for refund in each of the writ petitions and allowed the prayer in some petitions and rejected it in the others on the ground of delay. The Court observed that those writ petitioners whose prayers had been rejected would be at liberty to institute suits or other proceedings. We are not sure that, in the context, the High Court, meant by 'other proceedings', applications in the nature of proceedings under Article 226, when it is seen that the Court refused to entertain the relief for refund on the ground of delay in the proceedings under Article 226 and that in some cases the Court directed the parties to file representations before Government. Be that as it may, in the earlier writ petitions, the appellants did not pray for refund of the amounts paid by way of cess for the years 1951-52 to 1965-66 and they gave no reasons before the High Court in these writ petitions why they did not make the prayer for refund of the amounts paid during the years in question. Avoiding multiplicity of unnecessary legal proceedings should be an aim of all courts. Therefore, the appellants could not be allowed to split*

up their claim for refund and file writ petitions on this piecemeal fashion. If the appellants could have, but did not, without any legal justification, claim refund of the amounts paid during the years in question, in the earlier writ petitions, we see no reason why the appellants should be allowed to claim the amounts by filing writ petitions again. In the circumstances of this case, having regard to the conduct of the appellants in not claiming these amounts in the earlier writ petitions without any justification, we do not think we would be justified in interfering with the discretion exercised by the High Court in dismissing the writ petitions which were filed only for the purpose of obtaining the refund and directing them to resort to the remedy of suits."

7. *In* ***Commissioner of Income Tax, Bombay*** *vs.* ***T.P. Kumaran****,* ***(1996) 10 SCC 561****, the Hon'ble Supreme Court observed as under:*

"[4] The tribunal has committed a gross error of law in directing the payment. The claim is barred by constructive res judicata under Section 11, Explanation IV, Civil Procedure Code which envisages that any matter which might and ought to have been made ground of defence or attack in a former suit, shall be deemed to have been a matter directly and substantially in issue in a subsequent suit. Hence when the claim was made on earlier occasion, he should have or might have sought and secured decree for interest. He did not seek so and, therefore, it operates as res judicata. Even otherwise, when he filed a suit and specifically did not claim the same, Order 2 Rule 2 Civil Procedure Code prohibits the petitioner to seek the remedy separately. In either event, the OA is not sustainable."

19. Before parting, it needs to be mentioned that it is only on account of clever drafting that an illusionary cause of action has been carved out. Whereas, it is more than settled proposition that clever drafting creating the illusion of a cause of action are not permitted in law and a clear right to sue has to be shown in the petition (Refer: ***T. Arivandandam vs. T.V. Satyapal and another (1977) 4 SCC 467***).

20. On the basis of the aforesaid exposition of law, it can conveniently be concluded that the petition has been instituted by the predecessors-in-interest of the petitioners Sh. Mangat Ram Azta was not maintainable and is barred by principles of not only constructive res judicata but also res judicata as the majority of the reliefs as claimed therein, have already been decided against the petitioner and the other reliefs which even if assumed to have not been raised in the earlier writ petition, but definitely available to him at the time of filing of the earlier writ petition and, therefore, cannot be permitted to be raised in the instant petition.

21. In view of the aforesaid discussion, this Court has no difficulty to conclude that the instant petition is not maintainable and the same is accordingly dismissed, so also the pending application(s), if any, leaving the parties to bear their own costs.

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

Ashish Dass Gupta .....Petitioner.

Versus

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

Criminal Revision No. 102 of 2013.
Reserved on : 8th March, 2018.
Decided on : 19th March, 2018.

Code of Criminal Procedure, 1973- FIR- Section 173 Cr.P.C.- Indian Penal Code, 1860- Sections 420, 467, 468 and 120-B- Cancellation report submitted by the Investigating Officer accepted by the Learned Magistrate based on the findings recorded by the Company Law Board vis-à-vis share holdings of the parties- High Court, however, **held-** that the findings recorded by the Company Law Board pertained only to half share of 2000 share holdings held by Ashish Das Gupta and one Satvinder Singh, but did not pertain to the transfer of 2000 shares individually held by Ashish Das Gupta in the Company – the findings arrived at by the Company Law Board were, thus, not conclusive at least qua the share individually held by Ashish Das Gupta – the continuation of criminal proceedings against the accused vis-à-vis the individual share of Ashish Das Gupta, thus, were permissible- Consequently, orders passed by the Learned Trial Court set aside. (Para-4)

Cases referred:

Life Insurance Corporation of India versus Escorts Ltd. And others, (1986)1 SCC 264
Chandran Ratnaswami vs. K.C. Palanisamy and others, (2013)6 SCC 740

For the Petitioner:	Mr. Raman Sethi, Advocate.
For Respondents No. 1:	Mr. Hemant Vaid, Addl. Advocate General
For Respondents No.4:	Mr. B.C. Negi, Senior Advocate with Mr. Sanjay Bhardwaj, Advocate.
For Respondents No.2, 3, 5 & 6:	Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The petitioner is aggrieved by the orders recorded by the learned Judicial Magistrate 1st Class, Kasauli, whereby, he accepted the proposal of the Investigating Officer concerned, for closure of FIR No.41 of 1999, lodged on 19.04.1999, with Police Station, Parwanoo, wherein, offences constituted under section 420, 467, 468 and 120B of IPC, stood embodied. The substratum of the allegations encapsulated in the apposite FIR are (a) of the respondents herein with inter se collusions besides with theirs inter se holding criminal conspiracy, hence producing forged documents before the Sub Registrar of Companies, Jallandhar, (b) whereupon, there occur(s) reduction(s) of the share holdings, in, M/s Parwanoo Enterprises Private Limited, of, the petitioner, from majority to minority, (c) AND, with the handwriting expert concerned, rather attributing, the relevant tamperings and forgery(ies) vis-a-vis accused Satvinder Singh, and, other co-accused, namely, Sarvshri M. Kamal Mahajan and Vijay Kumar Bansal, besides also with the latter swearing affidavits before the Investigating Officer, wherein, they admitted their signature(s) and handwritings, borne, on the purportedly forged and fabricated documents, hence the aforesaid prima facie, establishing the contents of the FIR, and, it being untenable for the learned Magistrate, to accept the proposal(s), made, by the Investigating Officer concerned

2. The entire dispute, especially, vis-a-vis the allegations constituted in the FIR aforesaid, came to be adjudicated upon, under a verdict recorded by the Company Law Board, Principal Bench, New Delhi, (hereinafter referred to as the Company Law Board). The verdict pronounced, by the Company Law Board, stood rendered, on 31.01.2000. Obviously, hence its emanation occurred prior to the recording of the impugned order. The verdict recorded by the Company Law Board, appertains to a subject matter holding absolute analogity, with, the allegations constituted in the FIR. The verdict recorded by the Company Law Board, is borne in Annexure OC/2, annexure whereof is appended, with, the record of the trial Court, and, was affirmed by the Division Bench of this Court, in a verdict rendered on 19.10.2009, upon, Co. Appeal No.2 of 2000. Consequently, it has to be determined, whether, in view of finality besides conclusivity, hence, acquired by the verdict pronounced by the Company Law Board, and, its appertaining to a subject matter, which also stands encapsulated in FIR No.41/99, qua whether

the continuation, of criminal proceedings against the respondents herein, is hence construable to legally befitting. In making the aforesaid fathoming(s), extraction(s) of paragraphs No.33 to 40, of the verdict rendered by the Company Law Board, is imperative. Paragraphs No.33 to 40 whereof, read as under:-

> "33. Then in the Annual return made upto 30.09.97, it is indicated that on 31.3.97, he has acquired by transfer 100 shares each from Ashish Das Gupta and from Ashish Das Gupt jointly with Sh. Satvinder Singh, details given earlier. In that even in his own showing he should be holding entire 4000 shares (2000 acquired on 7.10.95 and 2000 acquired on 31.3.97 by transfer), whereas, the shareholding pattern in the Annual Return upto 30.9.97-Annexure-2, the share holding pattern is shown as :-
>
> | **Sr. No.** | **Shareholder** | **Shares** |
> |---|---|---|
> | 1 | Sh. Ashish Das Gupta | 1000 |
> | 2. | Sh. Ashish Das Gupta jointly with Satvinder Singh | 1000 |
> | 3. | Sh. Satvinder Singh | 2000 |
> | | | 4000 |
>
> 34. The two positions claimed by him as on 30.9.96 and 30.9.97 are, therefore, contradictory. The respondent has not produced any transfer deeds duly executed by Sh. Ashish Das Gupta and Sh. Ashish Das Gupta jointly with Sh. Satvinder Singh in support of the alleged transfers on 31.3.97 in his favour. Under the circumstances reliance placed by him on Annual Return made upto 30.9.97 cannot be accepted. Further in regard to Respondent's contentions that he is the owner of 2000 shares earlier held by Sh. Praveen Kant and Sh. R.K. Gard, he has admitted that the shares from these persons were first acquired by him jointly with petitioner on 6.10.95 and thereafter on 7.10.95, he has purchased the interest of Sh. Ashish Das Gupta. The shares stands transferred on 6.10.95 in their joint names in the records of the company, the transfer deeds dated 7.10.95 executed by these two persons cannot be acted upon by the company without the mandatory compliance of the provisions of section 108 of the Act.
>
> 35. Another point of dispute is regarding the appointment of Sh. Bhushan Ahuja as Additional Director of the company on 31.3.97 the petitioner has emphatically denied of having attended any Board meeting in which Sh. Bhushan Ahuja was appointed as Additional Director as he has travelling and in his absence the appointment could not have been made in any Board meetings for want of quorum, there being only two directors of the company at that point of time. No minutes of the Board of Directors meeting wherein he was allegedly appointed as Additional Director have also been filed. We also note that his appointed as Additional Director has been notified in Form. 32 to Registrar of Companies on 22.2.99 almost after two years from the date of his appointment on 31.3.97 gives support to petitioners assertion that no Board Meeting was held and he was never appointed as Additional Director. Further Sh. Bhushan Ahuja whose appointment is under challenge and who has been made on of th parties in the proceeding u/s397/398 of the Act has not taken part in these proceedings by filing the submission or appearing before this Board. Under the circumstances we hold that Sh. Bhushan Ahuja was never appointed as an Additional Director of the company.
>
> 37. Another point of dispute relates to holding of Annual General Meeting on 30.9.97. As there are only two share holder and Sh. Ashish Das Gupta's categorical denial of his having attended any alleged Annual General Meeting of the shareholders held on 30.9.97, wherein the accounts for the year 1996-97 were laid and adopted and Sh. Bhushan Ahuja was allegedly appointed as regular director of

the company could not have been held for want of quorums. No minutes of the said alleged Annual Meeting were filed. Under the circumstances, we hold that no Annual Meeting of the Company was held on 30.9.97. Consequently, appointment of Sh. Bhushan Ahuja as regular Director of the company and as also adoption of the account or the year 1996-97 has not taken place.

38. In the 397/398 petitions, respondent has also claimed that the petitioner has ceased to be the Director of the company w.e.f. 28.8.98 pursuant to the pursuance of section 283(1)(g) of the Act for having not attended three consecutive Board meetings, the required Form No.32 for his cessation has also been filed almost after 6 months. However, in the reply to the section 186 petition, he has stated that petitioner was removed for siphoning funds of the company. Further since there are only two directors, the question of any Board Meeting being held does not arise unless both te directors attend the meeting as no proper Board meeting could have been held for want of proper quorum, the question of petitioner ceasing to be Director of the company pursuant to section 283(1)(g) of the Act does not arise. We therefore, hold that Sh. Ashish Das Gupta continues to be a Director of the company and the present Board of Director consists of Sh. Ashish Das Gupta and Sh. Satvinder Singh.

39. The petitioner has also alleged that the accounts prepared for the year 1996-97 do not reflect the correct position of assets and bank balance of the company. We have gone through these account and note that there is only one transaction in the Profit and Loss A/c i.e. Audit fee of Rs.2500/- on expenses side and the loss for the year has been shown equivalent to that amount. Further in the Balance Sheet, this fee has been shown as payable and correspondingly Accumulated losses have been increased. There is no other change n the figures in the Balance Sheet. The petitioner in support of his contention has filed Bank certificates of State Bank of India showing balance tot he credit of the company as on 31.3.97 at Rs.1008/- and Punjab National Bank of Rs.1659/- (Annexure A-26 & 27), page 39 &40 attached to the petitioner's reply to Sur Rejoinder which do not tally with the figures of Bank Balance shown for these two Banks in the Balance Sheet as at 31.3.97 filed by the Respondent with Registrar of Companies. Further the number of shares held by the company in M/s Sirmour Sudberg Auto Ltd. Are also not correctly reflected. Therefore, the contention that the Balance Sheet as at 31.3.97 does not reflect true and correct position appears to be correct.

40. Having held that 2000 shares are hled in the name of Sh. Ashish Das Gupta in his individual name and that another 2000 shares are jointly held in the name of Sh. Ashish Das Gupta and Sh. Satvinder Singh and that they are the only validly appointed directors, the question is the nature of relief to be granted. There are two petitions before us. One is under Section 186 of the Act and another under Section 397/398 of the Act. As far as the 1st petition is concerned, the relief sought is for directions to convene a General Body Meeting with the stipulation that even the presence of a single shareholder would constitute a valid quorum for the meeting. As far as the 2nd petition is concerned, we having already given our findings on the prayer relating to the shareholding in the company as well as the appointment of 3rd respondent as and additional director. There is another prayer in the 2nd petition that we should order removal of the 2nd respondent from the directorship of the company The company consists of only 2 shareholder and the proceedings before us already brought that the difference between the parties such that they cannot carry on together. The petitioner is admittedly the majority shareholder having 50% shares in the company in the individual capacity and another 50% shares jointly with 2nd respondent. Therefore, we given an option to the 2nd respondent either to continue as joint shareholder in the company or to transfer his interest in the joint holding to the petitioner or his nominee for a fair consideration to be determined by

> an independent valuer. He should indicate to the petitioner and to this Bench within 15 days from the date of his order choosing either of the option that we have given to him. In case the respondent likes to continue as joint shareholder in the company then, the petitioner is at liberty to convene a General Board Meeting within 45 days thereafter in which meeting the presence of a single shareholder would constitute a valid quorum....."

3. An incisive reading of the aforesaid paragraphs, makes apparent upsurgings, of apart from compliance with section 108 of the Companies Act, being not meted, there rather occurring evidence on record, of, under validly executed transfer deed(s), of hence the respondent concerned, acquiring shareholdings, of the petitioner, in the company concerned. The apt sequel therefrom, is, all the purported accretions in the shareholdings, of one Satvinder Singh, in the company concerned, besides diminutions, of the petitioner's shareholdings in the company concerned, being not, as contended by the counsel for the petitioner, (i) being an aftermath of any purported tamperings or alterations, occurring in the apposite record(s) of the company, (ii) rather occurrence in the orders impugned before this Court, of, receipt(s) in respect thereto being issued by the petitioner vis-a-vis the respondent concerned, does erode, the substratum of some of the allegations constituted in the FIR concerned. However, for the reasons to be ascribed hereinafter, a substantial part, of the allegations constituted in the FIR, do not hence suffer any effacement.

4. Nowat, the effect(s) of the requisite transfer deeds, standing echoed in the aforesaid extracted paragraph, of the verdict rendered by the company law board, to yet not beget any satiation with the mandatory provisions of Section 108, of the Companies Act, is, to be delved into besides adjudicated upon by this Court. In a verdict rendered by the Hon'ble Apex Court, in case titled as ***Life Insurance Corporation of India*** versus ***Escorts Ltd. And others***, reported in ***(1986)1 SCC 264***, the Hon'ble Apex Court, in, paragraph No.79, has held as under:-

> "In Mathalone and Ors. v. Bombay Life Assurance Company Ltd., AIR 1953 SC 385, (supra), the question of relationship between the transferor and transferee of shares before registration of the transfer in the books of the company came to be considered in connection with the right of the transferee to the 'right-shares' issued by the company. On the transfer of shares transferee became the owner of the beneficial interest though the legal title was with the transferor the relationship of trustee and 'cestui que trust' was established and the transferor was bound to comply with all the reasonable directions that the transferee might give and that he became a trustee of dividends as also a trustee of the right to vote. The relationship of trustee and cestui que trust arose by reason of the circumstance that till the name of the transferee was brought on the register of shareholders in order to bring about a fair dealing between the transferor and the transferee equity clothed the transferor with the status of a constructive trustee and this obliged him to transfer all the benefits of property rights annexed to the sold shares of the cestui que trust. The principle of equity could not be extended to cases where the transferee had not taken active steps to get his name registered as a member on the register of the company with due diligence and in the meantime, certain other privileges or opportunities arose for purchase of new shares in consequences of the ownership of the shares already acquired. The benefit obtained by a transferor as a constructive trustee in respect of the share sold by him cannot be retained by him and must go to the beneficiary, but that cannot compel him to make himself liable for the obligations attaching to the new issues of shares and to make an application for the new issue by making the necessary payments, unless specially instructed to do so by the beneficiary."
>
> (p.323)

also therein the Hon'ble Apex Court, after, considering the effects, of non compliance(s) vis-a-vis the mandatory statutory provisions, borne in the Companies Act, and, their consequential effect(s)m upon the rights of the transferees', has drawn conclusion(s), (i) that the transferee of

shares, even before without registration, of the apposite transfer(s), in the books of company, (ii) yet becoming owners of all beneficial interest(s) thereof, despite the legal title thereof, continuing to vest in the transferor, especially when hence the relationship of trustee, and, *cestui que* trust, stands established, and, the transferor hence is obliged, to comply with all the directions, meted by the transferee. However, the aforesaid submission, holds good, only with respect to 2000 shares jointly held by Ashish Das Gupta alongwith one Satvinder Singh, and, it does not, in view of reflections occurring in paragraph No.35, of the verdict recorded by the Company Law Board, (iii) the least effect the share holdings, of one Ashish Das Gupta vis-a-vis 2000 shares exclusively held therein by him, (iv) the reason being the propagation, of, one Satvinder Singh, of his, in his individual capacity holding 2000 shares in the company concerned, standing negatived, under a conclusive verdict recorded by Company Law Board. Further, the effects thereof, are, (v) that any purported accretions or diminutions, manifested in the apposite annual return, furnished by the accused before the Registrar concerned, vis-a-vis share(s), held respectively by one Satvinder Singh, and, the petitioner in the company concerned, rather being a sequel of purported tamperings or forgery(ies) being made, in the relevant documents by the accused concerned. (vi) Predominantly, for re-emphasis rather with the aforesaid assertion, of one Satvinder Singh, of, his individually holding 2000 shares, in the company concerned, being repelled besides negatived, under, a conclusive verdict recorded by the Company Law Board. Since, the aforesaid Satvinder Singh, was, aggrieved by the findings recorded by the Company Law Board, hence, came to institute company appeal bearing No. 2 of 2000, before the Division Bench of this Court, appeal whereof, was admitted, on the hereinafter extracted substantial question of law:-

> "(a) Whether respondent No.3 has authority to decide the fact regarding title of a person regarding shares in the company?
>
> (b) Whether respondent No.3 has authority to challenge the Balance Sheet submitted and signed by the statutory auditors and registered with the Registrar of Companies?
>
> (c) Whether the consistent entries in the records registered with the Registrar of the Companies regarding Share holding can be ignored in comparison to the belated records submitted by one of the Directors under his sole signatures, which position is highly disputed?
>
> (d) Whether the Respondent Board can direct particular share holder to transfer his share so as to transfer the entire share holding in favour of one person?"

therein, in respect of the substantial questions of law, occurring at serial No. (a) to (c), apposite answers stood not meted vis-a-vis them, hence, ipso facto, and, impliedly (i) the determination(s), of, share holding patterns, of one Ashish Das Gupta and, of, Satvinder Singh, in the company concerned, conspicuously by the Company Law Board, hence, remain intact besides undisturbed, (ii) thereupon, consequential effects thereof, are, of, the purported tamperings and forgery(ies), allegedly committed in the relevant documents, by the concerned, and theirs sequelly hence begetting all purported accretions, and, diminutions, in the share holdings, of Ashish Das Gupta, and, of, one Satvinder Singh, in the company concerned, are, obvious prima facie, inferences, generated therefrom. The learned Judicial Magistrate concerned has ignored, all the aforesaid facets, and, merely upon anvill of receipts issued by one Ashish Das Gupta vis-a-vis Satvinder Singh, qua transfer of some shares, thereupon, omnibusly concluded that all controversies in respect thereof, hence, coming to be rested, without, his considering, qua the aforesaid transfers, appertaining only vis-a-vis one Satvinder Singh, acquiring only 2000 shares jointly alongwith Ashish Das Gupta, (iii) whereas, the apposite FIR, contains allegations, of ,Satvinder Singh, while his holding criminal conspiracy with other co-accused, his purportedly committing forgery(ies) and tamperings, with the apposite record, for his untenably increasing his shareholdings in the company concerned, besides his untenably reducing the shareholdings therein, of one Ashish Kumar Gupta. Since, for reasons aforestated, inferences, of, accrual of all untenable reductions, and, accretions respectively, of Ashish Das Gupta and of Satvinder Singh, in their respective shareholding(s) in the company concerned, rather hence, emerge (iv) also when factum thereof, is

established, under, by a conclusive verdict recorded by the Company Law Board, verdict whereof stood affirmed by the Division Bench, of this Court, (v) reiteratedly, the verdict pronounced, by the Company Law Board is applicable only vis-a-vis acquisition by one Satvinder Singh, from, one Ashish Das Gupta of ½ shares from amongst 2000 shareholdings, hitherto held by Ashish Das Gupta, and, its not appertaining to any transfer , of 2000 shares individually, held, by Ashish Das Gupta, in the company concerned.

5. Since, the Hon'ble Apex Court, has, in its judgment, pronounced, in a case titled as ***Chandran Ratnaswami vs. K.C. Palanisamy and others,*** reported in ***(2013)6 SCC 740***, the relevant paragraph No.59, whereof extracted hereinafter;-

> "59. Neither the High Court nor the Magisterial Court have ever applied their mind and considered the conduct of the respondent and continuance of criminal proceedings in respect of the dispute, which are civil in nature and finally adjudicated by the competent authority i.e. the Company Law Board and the High in appeal." ...(p.769)

held that when the apposite FIR, contains, a subject matter in respect whereof, conclusive findings are rendered by the Company Law Board concerned, and, by the High Court, thereupon, the conclusive verdict recorded by the Company Law Board, rather prevailing. Consequently, with the Company Law Board, conclusively establishing the share holding patterns, in the company concerned, respectively of the petitioner, and, of one Satvinder Singh, besides its negativing the assertion(s) aforesaid reared therebefore, by one Satvinder Singh, hence, the ascriptions of guilt vis-a-vis the accused, prima facie hold vigour and veracity, and, the continuation of criminal proceedings, against, the accused vis-a-vis the allegations borne in the FIR , are, also permissible.

6. For the foregoing reasons, the instant petition is allowed and the order impugned before this Court, is quashed and set aside. The learned trial Court is directed to, in accordance with law, proceed in the matter. However, it is made clear that the observations made hereinabove shall have no bearings, on the merits of the case. All pending applications also stand disposed of. Records be sent back forthwith.

****

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

H.P. State Forest Corporation .....Appellant/Plaintiff.

Versus

Sh. Kahan Singh (since deceased) through his legal heirs.

....Respondent/defendant.

RSA No. 425 of 2007
Reserved on : 8th March, 2018
Decided on : 19th March, 2018

Code of Civil Procedure, 1908- Section 100- Regular Second Appeal- Appellant/plaintiff seeking recovery of Rs.2,43,088/- and the defendant on the other hand by way of a counter-claim seeking a sum of Rs. 86,483/- the Learned Trial Court dismissed the suit of the plaintiff- It, however, allowed the counter-claim of the defendant for the recovery of Rs. 86,483/- In appeal too the said findings affirmed by the Learned 1st Appellate Court- **While deciding the Regular Second Appeal the Court Held-** that promisee could not extract pure resin as per the stipulation of the contract due to heavy rain fall- Resultantly the defendant could not abide by the terms of the Contract and as per Section 56 of the Indian Contract Act it was permissible in law- the frustration of the contract, thus, was due to the supervening circumstances and beyond the

control of the defendant – Hence, the conclusion arrived at by the learned trial Courts below was based upon a proper appreciation of evidence on record- Consequently, appeal dismissed.

(Para-9 and 10)

For the Appellant: Mr. Bhupender Pathania, Advocate.
For the Respondent(s): Mr. G.R. Palsra, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant Regular Second Appeal stands directed by the plaintiff/appellant, against, the impugned rendition of the learned Additional District Judge, Mandi whereby he dismissed the first appeal, of the plaintiff/appellant herein, and, affirmed the judgment and decree rendered by the learned Civil Judge (Senior Division), Mandi, District Mandi, H.P., whereby, the latter Court dismissed, the plaintiff's suit for recovery of Rs.2,43,088, whereas, it decreed the counterclaim of the defendant, for recovery of a sum of Rs.86,483/- along with interest @ 6% per annum, from, the date of filing of the counter claim, till, realization of the decretal amount. The plaintiff/appellant herein, stands, aggrieved by the judgment and decree of the learned Additional District Judge, Mandi. Its standing aggrieved, hence it has therefrom preferred the instant appeal before this Court, for seeking from this Court reversal(s), of, the findings recorded therein.

2. Briefly stated the facts of the case are that the plaintiff is independent wing of Forest Department of Himachal Pradesh, which deals in timber, charcoal, resin and fuel wood. The plaintiff invited tenders from labour supply mates for setting up crop extraction of resin and carriage of the same upto road side Depot, for forest lot No.32/1997, Jogindernagar for the year 1997. The tender filled in by the defendant was accepted and the resin extraction work was allotted to the defendant vide agreement of 20.03.1997 which was signed by both the parties. As per agreement a target of 280.500 Qtls, pure resin, was fixed to be extracted from 7185 blazes and carriage of the same upto road side Depot at the rate of 620/- per Qtls. The defendant deposited earnest money of Rs.10,000/- by way of FDR of Himachal Gramin Bank and pledged the same in favour of the plaintiff. As per agreement all the necessary articles were provided to the defendant and trees were also handed over to him well in time on 29.3.1997. But the defendant during the entire period extracted only 180.620 Qtls. pure resin as against the target of 280.500 Qtls. as agreed between the parties. Thus the defendant extracted 99.87 Qtls. less resin than the target and the defendant caused loss of Rs.3,29,571/-. Thus, the plaintiff is entitled to recover the amount of Rs.2,44,088/- after deducting the amount of Rs.86,483/-, which is with the plaintiff. Hence the suit.

3. The defendant contested the suit and he also filed counter claim against the plaintiff for the recovery of Rs.86,483/-. In the written statement, the defendant has taken preliminary objections qua maintainability, limitation and estoppel. On merits, he averred that the agreement was in the form of Cyclostyled already prepared by the plaintiff and only signatures of the defendant were obtained on the same which was not readover and explained to him. Thus, the terms and conditions of the agreement are not binding upon him. He further averred that the target of extraction of resin could not be achieved due to heavy rain fall. However, the defendant supplied 180.630 Qtls. Pure resin worth of Rs.1,11,990/- to the plaintiff out of which a sum of Rs.38,952/- was paid to the defendant and the remaining amount of Rs.73,038/- is still due to the defendant from the plaintiff. Besides this the defendant is also entitled to recover the earnest money of Rs.13,455/- which was deposited with the plaintiff by way of F.D.R. Thus, the defendant is entitled to recovery Rs.86,483/- from the plaintiff. The defendant prayed for dismissal of the suit and for a decree of Rs.86,483/- in his favour.

4. The plaintiff/appellant herein filed replication to the written statement of the defendant/respondent as well as written statement to the counter claim instituted by the defendant, wherein, he denied the contents of the written statement as well as of counter claim besides 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 agreement dated 20.03.1997 for lot No.32/1997, Jogindernagar is signed by the parties? OPP.

2. Whether the above stated agreement is genuine and legal one? OPP.

3. Whether the defendant is failed to achieve the target of 280.500 Qtls. Pure resin as prayed in the agreement? OPP.

4. Whether the plaintiff is entitled for the recovery of Rs.2,43,088/- from the defendant? OPP.

5. Whether the suit is not legally instituted and constituted? OPD

6. Whether the plaintiff has no enforceable cause of action and right to sue against the replying defendant?OPD

7. Whether the suit of the plaintiff is time barred?OPD

8. Whether the plaintiff is estopped by his own act, conduct ad deed to file the present suit?OPD

9. Whether the defendant is entitled to recover the amount of Rs.86,483/- by way of counter claim alongwith interest from the plaintiff?OPD

10. Relief.

6. On an appraisal of the evidence, adduced before the learned trial Court, the learned trial Court, dismissed, the plaintiff's suit, whereas, it decreed the counter claim instituted by the defendant against the plaintiff/appellant herein. In a first appeal, preferred therefrom by the plaintiff/appellant herein, the learned first Appellate Court dismissed its appeal.

7. Now the plaintiff/appellant has instituted the instant Regular Second Appeal before this Court, wherein, it assails the findings recorded by the learned First Appellate Court, in its impugned judgment and decree. When the appeal came up for admission on 18.09.2007, this Court, admitted the appeal instituted by the plaintiff/appellant against the judgment and decree, rendered by the learned First Appellate Court, on the hereinafter extracted substantial question of law:-

a) Whether the Courts below have erred in law in concluding that the agreement Ex. PW2/A had become impossible and become void when it became impossible. Have not the Courts below wrongly construed the provisions of Section 56 of the Indian Contract Act and have thereby wrongly applied the same in favour of the respondent/defendant. Had the agreement Ex.PW2/A becoming impossible and whether there was sufficient evidence to prove that the agreement had become impossible?

Substantial question of Law No.1:

8. Uncontrovertedly, the defendant/respondent herein omitted, to abide by the terms of allotment of the apposite work, made, in his favour by the plaintiff/appellant. The apposite breach occurred in the defendant/respondent herein not meteing the requisite target enjoined to be accomplished by him under the relevant contract, (i) breach whereof, is contended to stand occasioned, by occurrence, of, heavy rain fall, in the area whereat the relevant work stood allotted to him. (ii) Ex.DW2/A, makes an evident display, of, occurrence of heavy rain fall, in the area whereat the relevant work stood allotted, to the defendant/respondent herein, by the plaintiff/appellant herein. Recitals qua the facet aforesaid, occurring in Ex.DW2/A stand corroborated by PW-2, PW-5 and PW-6. Given the evident occurrence of heavy rainfall, in the area

whereat the relevant work stood allotted by the plaintiff, for its execution, by the defendant, obviously hence deterred him to mete the relevant target imposed upon him, under agreement borne in Ex.PW2/A. Also with PW-4 admitting, of, on his visiting the relevant site, his noticing of the defendant, in consonance with the terms and conditions, of agreement Ex.PW2/A, hence employing sufficient manpower, does give leverage, to an inference of the defendant, not, dereliciing in achieving the target imposed upon him, under agreement Ex.PW2/A, rather the evident fact of occurrence of heavy rainfall, in the relevant area, rather hence deterring him to achieve the target imposed upon him, under Ex.PW2/A.

9. Be that as it may, even if, in Ex.PW2/A, there occurs no recital of occurrence of heavy rainfall, whereupon , the accomplishment by the defendant of the relevant contractual target, stood, rendered impossible, hence rendering tenable the imposition, of, mandatory pecuniary liability(ies) upon the defendant, (I) nonetheless, the evident fact, of occurrence of heavy rainfall in the relevant area, factum whereof is a *vis major,* occurrence whereof supervenes, the execution of Ex.PW2/A, rather imminently hence frustrated the accomplishment, of the relevant contractual target, by the defendant. (ii) Even if, the factum aforesaid remained unembodied in Ex.PW2/A, nonetheless, with the provisions of Section 56 of the Indian Contract Act, 1872 (hereinafter referred to the "Act"), provisions whereof, stands extracted hereinafter, enshrining the doctrine of frustration of contracts, frustration whereof arises, from occurrence of events supervening the recording of the relevant contract, enjoin or warrant their workability hereat:-

> "56. **Agreement to do impossible act**.- An agreement to do an act impossible in itself is void. Contract to do act afterwards becoming impossible or unlawful- A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. Compensation for loss through non-performance of act known to be impossible or unlawful- Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise."

(iii) Imperatively, when hereat the frustrating supervening event, since, the execution of Ex.PW 2/A, is the aforereferred *vis major,* occurrence whereof evidently frustrated, the defendant to achieve the relevant contractual target, hence enjoined to be accomplished by him, rather hence renders its attraction hereat, (iv) dehors recitals inconsonance therewith standing un-enunciated, in Ex.PW2/A, (v) preeminently when statutory postulations, even when remain unrecited in the relevant agreement, their workability when, on evident material, as exists hereat, in display qua their awakening hence stands enlivened, (vi) thereupon their apposite invocation hereat, is not amenable, to face the ill fortune, of theirs being rather blunted and benumbed. Consequently, while galvanizing the provisions of Section 56 of the Act, the inevitable sequel, is of, with evident material in satiation thereof existing hereat, obviously, hence constrain this Court to conclude of the apposite supervening *vis major,* rather frustrating, the execution, to the fullest, by the defendant, of, all the obligations cast upon him, under Ex.PW2/A.

10. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court as well as by the learned trial Court stand based upon a proper and mature appreciation of the evidence on record. While rendering the findings, both the learned Courts below have not excluded germane and apposite material from consideration. Accordingly, the substantial question of law stands answered in favour of the defendant/respondent and against the plaintiff/appellant.

11. Since, no appeal stands preferred hereat by the plaintiff/appellant against the concurrently recorded judgments and decrees, of, both the learned Courts below whereby they

decreed the counterclaim instituted thereat, by the defendant/respondent herein nor any substantial question of law in consonance therewith stands either framed nor obviously, thereupon, the appeal of the plaintiff/appellant herein stands admitted, hence renders the renditions of both the learned courts below, whereby they decreed the counterclaim instituted by the defendant/respondent herein, and, against the plaintiff/appellant herein, to not warrant any interference by this Court.

12. In view of above discussion, the present Regular Second Appeal is dismissed. In sequel, the judgements and decrees rendered by both the learned Courts below are maintained and affirmed. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

Rajesh Kumar ..Appellant/defendant.

Versus

Ravinder Kumar & Ors. ..Respondents/Plaintiffs.

RSA No. 245 of 2006.
Reserved on : 9th March, 2018.
Decided on : 19th March, 2018.

Code of Civil Procedure, 1908- Section 100- Regular Second Appeal- Indian Succession Act, 1925- Section 63- Ingredients necessarily enjoined to be proven are as provided in Section 63 of the Indian Succession Act- The registered will duly proved by marginal witness DW-2 Vijay Paul held to be in consonance with the provision of Section 63- The Will Ex.DW-2/A bearing an endorsement Ex.DW-2/B, which was duly proved by the witnesses- Will held to be valid and duly executed. (Para-9)

Code of Civil Procedure, 1908- Section 100- Regular Second Appeal- Indian Succession Act, 1925- Section 63- The marginal witness DW-2 proving the endorsement made by the Sub Registrar concerned occurring in Ex.DW-2/A - **Held-** that the endorsement, thus made enjoys the presumption of truth, more particularly as no evidence was led to disapprove the said fact- The sub Registrar concerned summoned by the plaintiff but was omitted to be examined- the presumption of truth, thus, enjoined by the endorsement Ex.DW-2/B borne in Ex.DW-2/A. Will thus duly held to be proved. (Para-10)

Code of Civil Procedure, 1908- Section 100- Regular Second Appeal- Indian Succession Act, 1925- Section 63- Suspicious Circumstances- Beneficiary of the testamentary disposition actively participated, in the preparation and execution of the Will - **Held** not to be suspicious circumstances- the marginal witness being a P.A. in the office of the District Collector also held not be a suspicious circumstance- **Further held-** that the testator going to the Hospital for some medical tests from the Sub Registrar's Office - Also held not to be a suspicious circumstance. (Para-12 to 14)

Cases referred:

Pentakota Satyanarayana and others vs. Pentakota Seetharatnam and others, (2005)8 SCC 67
Deep Ram and others vs. Laxmi Chand and others, 2000(1) Shim.L.C. 240

For the Appellant: Mr. Bhupender Gupta, Sr. Advocate with Ms. Rinki Kashmiri, Advocate.
For Respondents: Mr. R.K. Sharma, Sr. Advocate with Ms. Anita Parmar, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal is directed, against, the concurrently recorded verdicts by both the learned Courts below, whereby, the plaintiff's suit for rendition, of, a decree for declaration, as well as for, rendition of a decree for permanent prohibitory injunction besides for rendition in the alternative of a decree for possession qua the suit khasra number(s), was, hence partly decreed.

2. Briefly stated the facts of the case are that the suit was filed by one deceased Duni Chand and is being contested on his behalf by his next friends/heirs. The claim of the plaintiff is that the land comprised in Khata No.24, Khatauni No.50, Khasra Nos. 1111, 1112, 1113 and 1114, plot 4, area measuring 0-04-12 hectares, situated at Mohal Mant Khas, Mauza Mant, Teh. Dharamshala, District Kangra is owned and possessed by the plaintiff. The plaintiff has also sought declaration that he is owner in possession and the will dated 24.11.19888 allegedly executed in favour of defendant Rajesh by deceased Kirpa Ram, father of the plaintiff is not a genuine Will but is the outcome of fraud, mis-representation since Kirpa Ram was not in fit state of mind to execute a Will nor it was ever executed by him. The mutation attested on the basis of Will is also claimed to be invalid having provided not rights to the defendant. It has also been prayed that the decree for injunction be also issued against the defendant from interfering over the suit land in any manner. In the alternative prayer for decree of possession has been made. Kirpa Ram is stated to be the last male holder of the property and after his death, it is claimed to have been devolved upon the plaintiff to the exclusion of all. It is claimed that the defendant has got mutation attested on the basis of forged Will.

3. The defendant contested the suit and filed written statement, wherein, he has taken preliminary objections inter alia limitation, estoppel, cause of action, locus standi, maintainability, valuation, non joinder etc. On merits, it has been submitted that the suit land was owned and possessed by Kirpa Ram and the plaintiff to the extent of half share each. The allegations made by the plaintiff are absolutely wrong. After the death of Kirpa Ram, there is a testamentary disposition of his estate by way of Will dated 24.11.1988 which was duly registered and as such the defendant has become owner in possession and no rights are left with the plaintiff qua the share of Kirpa Ram. It has also been submitted that deceased Kirpa Ram had conducted two marriages and one of his wife was Achhari, who gave birth to the plaintiff. The second wife was named Smt. Suni Devi, who provided a daughter and son, Daya Parkash and Ranjba Devi. Defendant No.1 is the son of Daya Parkash one of the sons of deceased Kirpa Ram, i.e. grand son of deceased Kirpa Ram. The information has been withheld by the plaintiff from the court since the defendant was rendering services to deceased Kirpa Ram, who was aged about 80 years at the time of his death. He out of love and affection executed the Will in favour of the defendant. The plaintiff never looked after the deceased Kirpa Ram, during his life time when he was not well. It is stated that Kirpa Ram was never confined to bed nor Will has been executed under mis-representation or fraud and the mutation has rightly been attested The property having devolved upon the defendant by way of Will, the plaintiff has got no cause of action and locus standi to file the suit.

4. The plaintiffs filed replication to the written statement of the defendant(s), wherein, they denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the plaintiff is owner in possession of the suit land, as alleged?OPP.

2. Whether Kirpa Ram did execute any valid Will in favour of the defendant? OPD

3. If issue No.2, is proved against the defendant, whether the Will dated 24.11.1988 is the result of mis- representation and fraud, as alleged? OPP

4. Whether the suit is time barred? OPD.

5. Whether the suit is bad for non joinder of necessary parties, as alleged?OPD.

6. Whether the plaintiff is estopped from filing this suit by his act and conduct? OPD.

7. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court partly decreed the suit of the plaintiffs/respondents herein. In an appeal, preferred therefrom by the defendant/appellant herein before the learned First Appellate Court, the latter Court dismissed the appeal and affirmed the findings recorded by the learned trial Court.

7. Now the defendant/appellant herein, has instituted the instant Regular Second Appeal, before, this Court, wherein he assails the findings, recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, this Court, on 9.5.2007, 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:-

1. Whether there has been misreading of evidence by the Courts below in regard to the validity of the Will?

2. Whether the Courts below have committed gross error of law and jurisdiction in not dismissing the suit which was bad for non joinder of necessary parties i.e. natural heirs of the executant?

Substantial questions of Law No.1 to 2:

8. The defendant, relied upon a registered Will executed vis-a-vis him by the deceased testator, for his hence staking an exclusive claim to the suit property. The registered testamentary disposition of the deceased, testator, is borne in EX.DW2/A. For establishing the trite factum, of Ex.PW2/A being proven to be validly and duly executed by the deceased testator, all the ingredients occurring, in the provisions of Section 63 of the Indian Succession Act, were, necessarily enjoined to proven. The provisions of Section 63 of the Indian Succession Act, read as under:-

"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."

Succinctly, for Ex.DW2/A being formidably proven, to be validly and duly executed by its author, evidence was enjoined to upsurge qua (a) of the deceased testator scribing his signatures thereon, (b) the appending of his signatures thereon, occurring in the presence of the marginal witnesses thereto, latter whereof subsequent, to the appending of the signatures by the deceased testator, upon Ex.DW2/A, also proceeding to, in the presence of the deceased testator also scribe their thumb marks or signatures thereon.

9. In proof of the aforesaid statutory tenets, one of the marginal witness to Ex.DW2/A, namely, Vijay Paul stepped into the witness box as DW-2, and, testified of one Beni Prasad, at the behest of, and, at the instance of the deceased testator, drafting the apposite Will, (a)whereafter, on its, contents being readover and explained, to deceased testator Kirpa Ram, and, on his accepting them to be truthful, Kirpa Ram proceeding to, in the presence of both the witnesses thereto, append his signatures thereon, (b) whereafter, he and the other witness thereto also appending their signatures thereon, conspicuously in the presence of the deceased testator. He has, in his examination-in-chief, continued to testify, of Will borne in Ex.DW2/A, being thereafter presented, for registration before the Sub Registrar concerned, whereat also all the contents thereof, were, readover and explained to him, by the Sub Registrar concerned, (c) and, upon the deceased testator thereat admitting the correctness, of, recitals borne therein (d), of hence, the Sub Registrar, making, his endorsement comprised in Ex.DW2/B. Lastly, he has in his testification, occurring in his examination-in-chief, also echoed, qua at the relevant time of execution of the Will, of, the deceased testator, being in a sound disposing state of mind. The afore rendered testification of one, of, the marginal witness, to Ex.DW2/A, brings forth cogent evidence, in satisfaction, of the trite principle of (a) the deceased testator appending his signatures, in the, presence of the marginal witnesses thereto, (b) marginal witnesses, to Ex.DW2/A thereafter proceeding, to, in the presence of the deceased testator, appending their signatures thereon, obviously, hence Ex.DW2/A is construable to be proven to be validly and duly executed.

10. Furthermore, with DW-2 also proving the making, of an endorsement, comprised in Ex.DW2/B, occurring in Ex.DW2/A, by the Sub Registrar concerned, (a) endorsement whereof is testified to be made therein only subsequent to all contents thereof being readover, and, explained to the deceased testator, (b) and, also his ensuring, of all, recitals borne in Ex.DW2/A being comprehended by the deceased testator, (c) conspicuously also when DW-2 testifies, of, in his presence besides in presence of other marginal witness, to Ex.DW2/A, the deceased testator admitting the truthfulness of all the recitals borne therein, (d) thereupon, with the potent proof standing adduced, with respect to the authenticity of endorsement, comprised in Ex.DW2/B, occurring, in Ex.DW2/A, (e) thereupon the aforesaid endorsement enjoys a presumption of truth. However, the presumption of truth, enjoyed by Ex.DW2/B occurring in Ex.DW2/A, was displaceable, by cogent evidence, yet for dislodging the presumption, of truth, hence acquired by an endorsement, borne in Ex.DW2/B, occurring on Ex.DW2/A, no cogent evidence stood adduced, hence it acquires conclusivity. (f) Even though, the plaintiffs, could by striving, to ensure the stepping into witness box, of Sub Registrar concerned, and, by putting apposite suggestions to him, could shred, the efficacy of the aforesaid presumption, (g) also in case, the Sub Registrar concerned, even though summoned, as plaintiff's witness, yet omitted to in his examination-in-chief support the plaintiffs' version, the plaintiffs' counsel could yet make an endeavour, to ensure his being declared hostile, whereafter, the plaintiff's counsel could, put apposite suggestion(s), to him, for hence eroding the tenacity, of the endorsement borne in Ex.DW2/B, occurring in Ex.DW2/A. However, the plaintiff omitted to make the aforesaid endeavour, wherefrom, an inevitable inference ensues, of the presumption of truth enjoyed by the endorsement borne in Ex.DW2/B, (h) especially for want of cogent evidence in rebuttal thereto being adduced, by the plaintiff, hence acquiring an aura of conclusivity. In sequel, it has to be

concluded that the testamentary disposition borne in Ex.DW2/A, being proven to be validly and duly executed also it is to be concluded, that the testification of DW-2, qua the deceased testator, at the time of execution, of Ex.DW2/A being in a sound disposing state of mind also acquiring immense vigour. More so, reinforcingly, with a valid endorsement borne in Ex.DW2/B, being per se personificatory, of the deceased testator being hence in possession, of enlivened cognitive faculties, especially, when for want thereof, the Sub Registrar concerned, would omit to record an endorsement in Ex.DW2/B, occurring in Ex. Ex.DW2/A.

11. Be that as it may, even if, compelling proof, is adduced by the propounder of Ex.DW2/A, in proof of its valid and due execution, yet certain suspicious circumstances, surrounding the execution of the Will, were hence espoused by the plaintiff. Consequently, it was also incumbent upon the defendant, to dehors, his adducing cogent proof qua valid and due execution, of Ex.DW2/A, to, also remove the taints of suspicion, surrounding the execution of Ex. DW2/A. Both the learned Courts below had dwelt, upon, the exclusion, of all legal heirs, from inheritance by the deceased testator, to be rather constituting a potent suspicious circumstance. However, the aforesaid omissions, existing, in the testamentary disposition of deceased, was not construable to be a suspicious circumstance, as it is settled in a catena of decisions rendered by the Hon'ble Apex Court, that, the exclusion from inheritance, of all the natural heirs, by the deceased testator, being not construable, to be a suspicious circumstance, (a)emphatically, when the purpose of making a testamentary disposition, is for making the apposite exclusion(s).

12. Furthermore, even if, assumingly the beneficiary(ies), of the testamentary disposition actively participated, in the preparation of, and, in the execution, of the apposite Will, yet the aforesaid factum also does not constitute, any suspicious circumstance, hence, surrounding its execution, given, the Hon'ble Apex Court, in a case titled as ***Pentakota Satyanarayana and others vs. Pentakota Seetharatnam and others***, reported in ***(2005)8 SCC 67***, the relevant paragraph No.25 whereof stands extracted hereinafter:-

> **"25. It is settled by a catena of decisions that any and every circumstance is not a suspicious circumstance. Even in a case where active participation and execution of the Will by the propounders/beneficiaries was there, it has been held that that by itself is not sufficient to create any doubt either about the testamentary capacity or the genuineness of the Will. It has been held that the mere presence of the beneficiary at the time of execution would not prove that the beneficiary had taken prominent part in the execution of the Will. This is the view taken by this Court in Sridevi & Ors vs. Jayaraja Shetty & Ors, (2005) 2 SCC 784. In the said case, it has been held that the onus to prove 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 proof of signature of the testator as required by law not be sufficient to discharge the onus. In case, the person attesting the Will alleges undue influence, fraud or coercion, the onus will be on him to prove the same and that as to what suspicious circumstances which have to be judged in the facts and circumstances of each particular case." (p.84-85)**

(a) dispelling the effect(s) of the active participation, of the beneficiary, in preparation of, and, in the execution of Will, and also, recording a firm mandate that per se thereupon, it being not permissible to be inferable of, hence, any undue influence being exercised by them, upon, the volition of the deceased testator. (b) Even otherwise, any purported aura(s) of fictitiousness or forgery(ies) rather imbuing the execution, of Ex.DW2/A by its author, were required to proven by the plaintiffs, by theirs firmly establishing, by adducing apposite cogent evidence of Ex.DW2/A not carrying the authentic signatures, of the deceased testator besides were enjoined to establish, of the endorsement, borne in Ex.DW2/B occurring in Ex.DW2/A, being not free from any suspicion, (c) whereas, for reasons aforestated, with the plaintiff omitting, to dislodge the presumption of truth enjoyed by Ex.DW2/B, occurring in Ex.DW2/A, (d) whereupon, when hence with Ex.DW2/A, rather acquiring, an aura of conclusivity, thereupon, it is grossly impermissible

to rear any inference of Ex.DW2/A, being a sequel of undue influence or coercion being exerted by the beneficiary upon the deceased testator, (d) even, if, he played any active participation in the preparation or execution thereof. Apart from the above, the learned Courts below, had, on anvil of non occurrence of the name, of one of the legal heirs of the deceased testator, in the apposite testamentary disposition, borne in Ex.DW2/A, especially of one Duni Chand, made conclusion, of execution of Ex.DW2/A being surrounded by suspicious circumstance, hence, merely thereupon, discountenanced the probative vigour, of the testification of DW-2, a marginal witness to Ex.DW2/A also overlooked, the probative sanctity, of endorsement borne in Ex.DW2/B, occurring in Ex.DW2/A. The aforesaid discarding(s) of the testification of DW-2, in proof of valid and due execution, of Ex.DW2/A, and overlooking(s) by both the learned Courts below, of the probative worth, of endorsement, borne in Ex.DW2/B occurring in Ex.DW2/A, was highly inappropriate, (e) more so, when in a verdict recorded by the Court in a case titled as ***Deep Ram and others vs. Laxmi Chand and others***, reported in ***2000(1) Shim.L.C. 240*** , it has been firmly concluded, of, it not being an essential sine qua non, for hence the testamentary disposition, acquiring a mantle of sanctity, of its imperatively, containing the details of all legal heirs. Both the learned Courts below had concluded that with Ex.DW-2 rendering service, as PA in the office of Deputy Commissioner concerned, hence, his appending his signatures thereon, as a marginal witness, rather sparking a suspicious circumstance. However, the ascription, of a suspicious circumstance vis-a-vis appending of signatures by Vijay Paul, upon Ex.DW2/A, is grossly untenable, given his firmly deposing, of the apposite Will being executed, within, the precincts, of, Office of District Collector, and, his also deposing that his taking a short leave of two hours, for ensuring the execution, and, registration of Ex.DW2/A. The aforesaid testification of DW-2, remains uneroded, of, its tenacity, especially for want of any rebuttal evidence, thereto, being adduced. Since DW-2's testification, is not concerted to be imbued with any taint of his colluding or conniving with the beneficiaries thereof, thereupon, the mere factum of his serving as a PA, in the Office of District Collector concerned, can never be construable to be a suspicious circumstance, surrounding the execution of Ex.DW2/A.

13. As aforestated, with this Court, ascribing, the utmost legal sanctity, to endorsement borne in Ex.DW2/B occurring in Ex.DW2/A, occurrence whereof, was a sequel of the Sub Registrar, ensuring, of the deceased testator, being possessed of enlivened cognitive faculties, (a) assurance whereof, emanated on his securing the apposite evincings, from the deceased testator, upon Ex.DW2/A, being presented for registration before him, (b) thereupon, the mere fact, that, during the course of the day, the deceased testator, especially preceding his proceeding, to the office of Sub Registrar concerned, his going to hospital, (c) whereat, some tests were conducted, would not signify, of his not being in a sound mental health or his not possessing enlivened cognitive faculties, (d) unless, the validity of endorsement borne in Ex.DW2/B, occurring in Ex.DW2/A, was eroded. However, with no cogent evidence being adduced, for challenging the validity of the endorsement borne in Ex.DW2/B, occurring in Ex.DW2/A, (e) thereupon, the aforesaid factum, was not rearable as a suspicious circumstance, surrounding the valid and due execution, of testamentary disposition, borne in Ex.DW2/A.

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

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

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

Smt. Seema Gajta and others .....Appellants.

Versus

The National Insurance Company Ltd. ....Respondent.

FAO No. 321 of 2017.
Reserved on : 6th March, 2018.
Decided on : 19th March, 2018.

Motor Vehicles Act, 1988- Section 163-A- The learned Motor Accident Claims Tribunal declining relief to the claimants on the ground that the insurer had failed to have the vehicle registered after the expiry of the temporary registration number, which was an infraction of the terms and conditions of the insurance policy- Consequently, even the issues framed not answered by the Learned Tribunals- **Held-** that the insurer seeking permanent registration of the vehicle within one month of the issuance of the temporary registration number, a matter of evidence- adducing evidence in this behalf was imperative and the Learned Tribunals has failed answer the issues framed- The MACT accordingly directed to provide opportunity to the claimants lead evidence in this behalf- Consequently, appeal allowed and matter remanded to back to the Learned Tribunal with the aforesaid directions. (Para-2 and 3)

For the Appellants: Mr. Raman Sethi, Advocate.
For Respondent : Mr. Bhupender Pathania, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The legal heirs of deceased Inderjit Singh, are aggrieved by the dismissal, of their MACT Petition No. 7-S/2 of 2015, by the learned Motor Accident Claims Tribunal-II, Shimla, H.P.

2. The predecessor-in-interest of the claimants, one Inderjit Singh, while driving Alto Car bearing No. HP-03 Temp.4243, suffered his demise, on 10.07.2014. The demise, of the predecessor-in-interest, of the claimants occurred, in sequel to an accident befalling upon the aforesaid vehicle. Qua the aforesaid accident, a FIR bearing No. 42/2014, was registered at Police Station Chopal. A claim petition was instituted under Section 163-A, of the Motor Vehicles Act. However, the learned Tribunal, under the impugned award, did not return any findings upon the issue appertaining, to the demise of deceased Inderjit Singh, occurring in a motor vehicle accident nor it rendered any findings upon issue No.1 qua the entitlement for compensation, of his successors-in-interest. The grounds for declining relief to the claimants, are, anvilled upon infraction, with the terms and conditions of the Insurance Policy, being evinced vis-a-vis the relevant vehicle, (a) given deceased Inderjit Singh, in respect of the relevant vehicle, only holding a temporary registration number, and, with the mandate borne in Section 43 of the Motor Vehicles Act, rather enjoining it to hold longevity only upto one month, (b) whereas with the expiry, of the apposite temporary registration number, hence occurring, on 28.06.2014, and, with the relevant accident occurring on 10.07.2014, whereat, it remained unrenewed, (c) thereupon, affirmative findings stood rendered, by the learned tribunal, upon, the apposite issue appertaining to the vehicle, being driving in infraction of the terms and conditions of the insurance policy. The aforesaid conclusion, drawn by the learned tribunal, is solitarily bedrocked, upon its making perusal(s) of the temporary registration certificate issued, by the relevant Motor Licencing Authority concerned, certificate whereof is borne in Ex.PW1/A. However, given the respondent not, making any efforts, to elicit the apposite records, from the licencing authority concerned, with all denotations borne therein, in respect of deceased Inderjit Singh, on expiry of the temporary registration number, issued vis-a-vis the relevant vehicle, his

thereafter seeking issuance vis-a-vis the apposite vehicle, a permanent registration number, (d) whereas, adduction of the aforesaid evidence, was imperative, for ensuring formation of a secure conclusion, qua deceased Inderjit Singh, within one month, since issuance of a temporary registration number qua the vehicle concerned, seeking or not seeking qua it, allotment of a permanent registration number, and, his application for the aforesaid purpose pending approval or an affirmative order being made, upon, his apposite application preferred before the Motor Licencing Authority concerned. Consequently, omission(s) of the learned counsel, for the insurer, to elicit the aforesaid apposite record, from the licencing authority concerned, does foment, a conclusion, (e) of, absence of adduction of best evidence besides consequently its non existence on the record, of the learned Tribunal, rather disabled, it to make any befitting conclusion qua, despite, the longevity, of the temporary registration number issued vis-a-vis the vehicle concerned, remaining or not remaining intact, (f) or even to firmly conclude, of, no permanent registration number qua it being applied for nor approval being meted thereto, (g) whereas, only upon its adduction(s) therebefore, would ensue eruption, of, apt conclusion(s) vis-a-vis the issue appertaining to hence infraction being visited or not being visited qua the terms and conditions, of the Insurance policy.

3. Be that as it may, the absence of adduction, of, the aforesaid material, also constrain(s) this Court, to reverse the affirmative findings rendered thereon, by the learned tribunal. Consequently, for ensuring affording, of opportunities, to the parties at contest, especially for adducing the aforesaid best material before the tribunal, it is deemed fit, and, appropriate that the matter be remanded, to the learned tribunal, for enabling it, to, after affording opportunities, on apposite motions made therebefore, by the litigants concerned, hence ensure adduction of the aforesaid best evidence, from the quarter(s) concerned, whereafter, it shall, in accordance with law, make appraisal(s) thereof, and return fresh findings, upon issue No.4. As aforesaid, the learned tribunal, has, omitted to return findings upon issues No.1 and 2, hence, while it proceeds, to return findings upon issues No.1 and 2, it shall bear in mind, the trite factum of the instant petition, being constituted under the provisions of Section 163-A of the Motor Vehicles Act, thereupon, with the respondent being barred, to raise any defence, of deceased Inderjit Singh being negligent in driving, the aforesaid vehicle, especially, with the Hon'ble Apex Court in a judgment rendered in ***Civil Appeal No. 9694 of 2013,*** in case titled as ***United India Insurance Co. Ltd. vs. Sunil Kumar & Anr.***, relevant paragraph No. 9 whereof stand extracted herienafter:-

> "9. For the aforesaid reason, we answer the question arising by holding that in a proceeding under Section 163A of the Act, it is not open for the Insurer to raise any defence of negligence on the part of the victim."

making an explicit mandate therein, (i) of the insurer being barred to, in a petition constituted under Section 163A of the Act, hence rear a defence or plea, of the victim committing any tort, while driving the vehicle concerned, (ii) and, even if assumingly, the victim is a tortfeasor, thereupon, any petition cast under Section 163-A of the Act, yet not warranting its dismissal.

4. For the reasons aforestated, the appeal is allowed, and, impugned award is set aside, and, the petition is remanded to the learned tribunal concerned, to, in the light of the aforesaid directions, render fresh findings upon all apposite issues. The parties are directed to appear before the learned tribunal, on 6th April, 2018. The learned tribunal is directed, to, within three months therefrom, record a fresh decision, upon, the apposite petition. All pending applications also stand disposed of. Records be sent back forthwith.

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

United India Insurance Company Limited .....Appellant
Versus
Smt. Sudarshana Devi and Ors. ..... .Respondents.

FAO No. 522 of 2017
Date of Decision: 19.03.2018

Motor Vehicles Act, 1988- Section 166- Monthly income of the deceased was Rs. 18,141/- as per the cogent evidence on record- He was indisputably 38 years old at the time of accident- An addition of 50% in actual salary of the deceased towards the future prospect as he was below 40 years- multiplier of 15 shall be used- Thus, Learned Tribunal has rightly determined the compensation for dependency to the tune of Rs.36,73,440/- - The Learned Tribunal, however, fell in error while awarding compensation on account of loss of love and affection, also amounts awarded qua funeral expenses and loss of consortium need to be modified to Rs.15,000/- and Rs.40,000/- in spite of Rs.25,000/- and Rs.1 lacs as awarded by the Learned MACT below in view of judgment of Hon'ble Supreme Court in ***National Insurance Company Limited*** *v.* ***Pranay Sethi and Ors.***, **AIR 2017 Supreme Court 5157** – there is no thumb rule that interest cannot be granted @ 8% as awarded by the learned Tribunal, however, interest is reduced to 7.5% per annum from the date of filing of the petition till the realization of the whole amount in the circumstances of the present case- Claimants are, thus, entitled to Rs.37,68,440/- as compensation. (Para-6 to 8)

Cases referred:
National Insurance Company Limited v. Pranay Sethi and Ors., AIR 2017 Supreme Court 5157
Sarala Verma & Ors. v. Delhi Transport Corporation and Anr., AIR 2009 SCC 3104

For the Appellant: Mr. Jagdish Thakur, Advocate.
For the respondents: Ms. Anjali Soni Verma, Advocate, for respondents No. 1 to 4.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Being aggrieved and dis-satisfied with award dated 1.9.2017, passed by the learned MACT-II, Kangra at Dharamshala, District Kangra, H.P., in MACP No. 98-N/II/2013/2009, whereby learned Tribunal below while holding the respondents-claimants entitled for compensation, directed the appellant-company to pay a sum of Rs. 39,23,440/- along with 8% interest p.a. from the date of filing of the petition till its deposit, appellant has approached this Court by way of instant petition, praying therein to dismiss the claim petition having been filed by the respondents-claimants after setting aside the impugned award passed by the learned MAC Tribunal, Kangra.

2. Briefly stated facts as emerge from the record are that the respondents-claimants approached the learned Tribunal by way of petition filed under Section 166 of the Motor Vehicles Act, seeking therein compensation to the extent of Rs. 20,00,000/- along with interest on account of death of Mr. Subhash Chand. On 8.5.2009, at about 8.15 pm, when the deceased Subash Chand was sitting on a parapet near Cinema Hall at Raja-Ka-Talab, all of a sudden, a truck bearing No. HP-38-3667, being driven in rash and negligent manner, came and hit the deceased, who subsequently succumbed to injuries. Deceased Subhash, who was 38 years old, was serving as Senior Laboratory Technician in Primary Health Centre, Baranda and was drawing monthly emoluments to the tune of Rs. 18,141/-. Claimants being wife, minor children and mother of the deceased Subash Chand were wholly dependent upon him and due to his untimely death,

claimants, as referred herein above, filed claim petition before MACT, Kangra. Appellant Insurance Company opposed the claim of claimants on the ground that driver of offending vehicle was not having valid/effective driving licence and as such, they are not liable to indemnify the owner of the truck/offending vehicle.

3. On merits, appellant-Company while denying the accident, age and income of the deceased, contended that compensation claimed is exorbitant and same cannot be awarded to the claimants. Insurance company also claimed before the learned Tribunal below that accident did not occur due to rash and negligent driving of respondent No.6. Learned MACT below on the basis of material adduced on record by the respective parties, held the claimants entitled to the compensation to the tune of Rs. 39,23,444/- along with interest @8% p.a. from the date of filing the petition till the realization of the whole amount to be paid by the appellant-Insurance Company. In the aforesaid background, appellant-Insurance Company has approached this Court by way of instant appeal.

4. Mr. Jagdish Thakur, learned counsel representing the appellant while terming impugned award to be illegal and not sustainable in the eye of law, strenuously argued that same is not based upon proper appreciation of evidence and law on the point and as such, same deserves to be quashed and set-aside. Mr. Thakur, further contended that learned Tribunal below has erred in taking the income of deceased as Rs. 27,211/- per month because income tax payable qua the aforesaid salary ought to have been deducted by the court below while ascertaining the monthly income of the deceased. Mr. Thakur further contended that learned Tribunal below has fallen in grave error in deducting 1/4th on account of personal expenses, whereas it had to be 1/3rd. While referring to the age of the deceased, learned counsel representing the appellant-company contended that the multiplier of 14 ought to have been applied instead of multiplier of 15 and as such, judgment being contrary to the basic provisions of law, cannot be allowed to sustain. While placing reliance on the judgment passed by the Hon'ble Apex Court in case titled ***National Insurance Company Limited*** *v.* ***Pranay Sethi and Ors.***, **AIR 2017 Supreme Court 5157**, Mr. Thakur, contended that learned Tribunal has erred in awarding Rs. 25,000/- on account of funeral expenses and transportation charges. He further contended that no amount could be awarded under the head of love and affection and loss of consortium. While inviting attention of this Court to the impugned award, wherein an amount of Rs.1,00,000/-, has been awarded on account of loss of consortium, Mr. Thakur contended that as per latest judgment passed by the Hon'ble Apex Court supra, only Rs.40,000/- could be awarded under this head. Lastly, Mr. Thakur, contended that Tribunal below has awarded 8% interest on the award amount, whereas same could not be more than 6%. In this regard, he placed reliance upon judgment passed by the Hon'ble Apex Court in case titled ***Laxmidhar Nayak and Ors. v. Jugal Kishore Behera and Ors.***, in ***Civil Appeal No. 19856 of 2017*** (arising out of SLP (C) No. 31405 of 2016).

5. Ms. Anjali Soni Verma, Advocate, representing respondents No. 1 to 4, while refuting aforesaid submissions having been made by the learned counsel representing the appellant, contended that there is no illegality and infirmity in the impugned award passed by the learned Tribunal below and as such, same deserves to be upheld. She while inviting attention of this Court to the evidence led on record by the respective parties, contended that the appellant-Insurance Company, has miserably failed to prove its case. She further contended that it stands duly proved on record that deceased Subhash Chand, died due to rash and negligent driving of the driver of offending vehicle, which was admittedly insured with the appellant-Insurance Company at that relevant time. While referring to the quantum of compensation, Ms. Verma further contended that it stands duly proved on record that deceased was drawing salary of Rs. 18,141/- p.m. and as such, there is no force in the argument of learned counsel representing the appellant-company that learned MACT below wrongly took Rs. 27,211/- as monthly salary while determining the monthly income of the deceased Subhash. Ms. Verma while referring to the judgment passed by the Hon'ble Apex Court in ***National Insurance Company Limited v. Pranay Sethi and Ors*** supra fairly conceded that the claimants are entitled to Rs. 15,000/- on account of funeral expenses and Rs. 40,000/- on account of loss of consortium, however she

categorically disputed the contention put forth by Mr. Jagdish Thakur, Advocate, that no amount could be awarded in favour of the claimants under the head of "loss of love and affection".

6. Having heard the learned counsel representing the parties and perused the record, this Court is not inclined to agree with aforesaid submission having been made by the learned counsel representing the Insurance company because it stands duly proved on record that deceased Subash Chand died in an accident due to rash and negligent driving of respondent No.2 i.e. driver of the truck. Similarly, this Court finds from the evidence led on record by the respective parties that onus to prove that respondent No. 2 i.e. driver of the offending vehicle, was not having valid and effective license to drive the vehicle in question, was upon appellant insurance company, who has not been able to discharge the aforesaid onus, rather it stands duly proved on record that at that relevant time, accused was having valid driving licence to drive the offending vehicle. No evidence in support of aforesaid claim of the appellant Insurance company, has been led on record and as such, learned Tribunal below rightly decided the issue against the Insurance Company. Record further reveals that claimants with a view to substantiate the income of the deceased placed on record cogent and convincing evidence that the deceased was drawing salary of Rs. 18141/- p.m. Claimants also proved on record salary certificate of the deceased Ext.PW1/D issued by Block Medical Officer, Gangath and as such, the learned Tribunal below while placing reliance upon the judgment rendered by the Hon'ble Apex Court in ***Sarala Verma & Ors. v. Delhi Transport Corporation and Anr., AIR 2009 SCC 3104***, rightly added 50% of actual income to the income of the deceased towards the future prospects as deceased was admittedly 38 years old at the time of the accident. This Court also sees no illegality in applying the multiplier of "15", because deceased was 38 years of age at the time of the accident. As per the second schedule to the Motor Vehicles Act, 1988, for the age groups 40 to 45 years, multiplier is "15". As per **Sarla verma's** case supra, for the age groups, 41-45 years, multiplier to be adopted is "14", but in the case at hand, as has been noticed above, age of deceased at the time of accident was 38 years. Recently Hon'ble Apex Court in **Pranay Sethi's** case supra has reiterated that while determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made.

7. In the instant case, admittedly age of the deceased at the time of the accident was 38 years and as such, learned court below rightly made an addition of 50 percent of the actual salary of the deceased towards future prospects but after having perused the aforesaid judgment rendered by the Hon'ble Apex Court in Pranay Sethi's case supra, this Court is persuaded to agree with the contention of Mr. Jagdish Thakur, learned counsel representing the appellant-company that no money, if any, could be awarded under the head "loss of love and affection". Hon'ble Apex Court has categorically held that head relating to cause of loss of care and guidance for the minor children does not exist. There are only three conventional heads i.e. loss of estate, loss of consortium and funeral expenses. Hon'ble Apex Court has further quantified the amount to be paid under the aforesaid conventional heads. Relevent paras of aforesaid judgment are reproduced here in below:-

> ***47. In our considered opinion, if the same is followed, it shall subserve the cause of justice and the unnecessary contest before the tribunals and the courts would be avoided.***
>
> ***48. Another aspect which has created confusion pertains to grant of loss of estate, loss of consortium and funeral expenses. In Santosh Devi (supra), the two-Judge Bench followed the traditional method and granted Rs. 5,000/- for transportation of the body, Rs. 10,000/- as funeral expenses and Rs. 10,000/- as regards the loss of consortium. In Sarla Verma, the Court granted Rs. 5,000/- under the head of loss of estate, Rs. 5,000/- towards funeral expenses and Rs. 10,000/- towards loss of Consortium. In Rajesh, the Court granted Rs. 1,00,000/- towards loss of consortium and Rs. 25,000/- towards funeral expenses. It also granted Rs. 1,00,000/- towards loss of care and guidance for minor children. The Court enhanced***

the same on the principle that a formula framed to achieve uniformity and consistency on a socio-economic issue has to be contrasted from a legal principle and ought to be periodically revisited as has been held in Santosh Devi (supra). On the principle of revisit, it fixed different amount on conventional heads. What weighed with the Court is factum of inflation and the price index. It has also been moved by the concept of loss of consortium. We are inclined to think so, for what it states in that regard. We quote:-

> ***"17. ... In legal parlance, "consortium" is the right of the spouse to the company, care, help, comfort, guidance, society, solace, affection and sexual relations with his or her mate. That non-pecuniary head of damages has not been properly understood by our courts. The loss of companionship, love, care and protection, etc., the spouse is entitled to get, has to be compensated appropriately. The concept of nonpecuniary damage for loss of consortium is one of the major heads of award of compensation in other parts of the world more particularly in the United States of America, Australia, etc. English courts have also recognised the right of a spouse to get compensation even during the period of temporary disablement. By loss of consortium, the courts have made an attempt to compensate the loss of spouse's affection, comfort, solace, companionship, society, assistance, protection, care and sexual relations during the future years. Unlike the compensation awarded in other countries and other jurisdictions, since the legal heirs are otherwise adequately compensated for the pecuniary loss, it would not be proper to award a major amount under this head. Hence, we are of the view that it would only be just and reasonable that the courts award at least rupees one lakh for loss of consortium."***

49. Be it noted, Munna Lal Jain (2015 AIR SCW 3105) (supra) did not deal with the same as the notice was confined to the issue of application of correct multiplier and deduction of the amount.

50. This aspect needs to eb clarified and appositely stated. The conventional sum has been provided in the Second Schedule of the Act. The said Schedule has been found to be defective as stated by the Court in Trilok Chandra (supra). Recently in Puttamma and others v. K.L. Narayana Reddy and another it has been reiterated by stating:-

> ***"...we hold that the Second Schedule as was enacted in 1994 has now become redundant, irrational and unworkable due to changed scenario including the present cost of living and current rate of inflation and increased life expectancy."***

51. As far as multiplier or multiplicand is concerned, the same has been put to rest by the judgments of this Court. Para 3 of the Second Schedule also provides for General Damages in case of death. It is as follows:-

> ***"3. General Damages (in case of death):***
>
> ***The following General Damages shall be payable in addition to compensation outlined above:-***
>
> ***(i)Funeral expenses- Rs.2,000/-.***
> ***(ii) Loss of Consortium, if beneficiary is the spouse- Rs.5,000/-***
> ***(iii) Loss of Estate - Rs. 2,500/-***

(iv) Medical Expenses – actual expenses incurred before death supported by bills/vouchers but not exceeding – Rs. 15,000/-"

52. On a perusal of various decisions of this Court, it is manifest that the Second Schedule has not been followed starting from the decision in Trilok Chandra (supra) and there has been no amendment to the same. The conventional damage amount needs to be appositely determined. As we notice, in different cases different amounts have been granted. A sum of Rs. 1,00,000/- was granted towards consortium in Rajesh. The justification for grant of consortium, as we find from Rajesh, is founded on the observation as we have reproduced hereinbefore.

53. On the aforesaid basis, the Court has revisited the practice of awarding compensation under conventional heads.

54. As far as the conventional heads are concerned, we find it difficult to agree with the view expressed in Rajesh. It has granted Rs. 25,000/- towards funeral expenses, Rs. 1,00,000/- loss of consortium and Rs. 1,00,000/- towards loss of care and guidance for minor children. The head relating to loss of care and minor children does not exist. Though Rajesh refers to Santosh Devi, it does not seem to follow the same. The conventional and traditional heads, needless to say, cannot be determined on percentage basis because that would not be an acceptable criterion. Unlike determination of income, the said heads have to be quantified. Any quantification must have a reasonable foundation. There can be no dispute over the fact that price index, fall in bank interest, escalation of rates in many a field have to be noticed. The court cannot remain oblivious to the same. There has been a thumb rule in this aspect. Otherwise, there will be extreme difficulty in determination of the same and unless the thumb rule is applied, there will be immense variation lacking any kind of consistency as a consequence of which, the orders passed by the tribunals and courts are likely to be unguided. Therefore, we think it seemly to fix reasonable sums. It seems to us that reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The principle of revisiting the said heads is an acceptable principle. But the revisit should not be fact-centric or quantum-centric. We think that it would be condign that the amount that we have quantified should be enhanced on percentage basis in every three years and the enhancement should be at the rate of 10% in a span of three years. We are disposed to hold so because that will bring in consistency in respect of those heads.

55. Presently, we come to the issue of addition of future prospects to determine the multiplicand.

56. In Santosh Devi the Court has not accepted as a principle that a self-employed person remains on a fixed salary throughout his life. It has taken note of the rise in the cost of living which affects everyone without making any distinction between the rich and the poor. Emphasis has been laid on the extra efforts made by this category of persons to generate additional income. That apart, judicial notice has been taken of the fact that the salaries of those who are employed in private sectors also with the passage of time increase manifold. In Rajesh's case, the Court had added 15% in the case where the victim is between the age group of 15 to 60 years so as to make the compensation just, equitable, fair and reasonable. This addition has been made in respect of self-employed or engaged on fixed wages.

57. Section 168 of the Act deals with the concept of "just compensation" and the same has to be determined on the foundation of fairness, reasonableness and equitability on acceptable legal standard because such determination can never be in arithmetical exactitude. It can never be perfect. The aim is to achieve an acceptable degree of proximity to arithmetical precision on the basis of materials brought on record in an individual case. The conception of "just compensation" has to be viewed through the prism of fairness, reasonableness and nonviolation of the principle of equitability. In a case of death, the legal heirs of the claimants cannot expect a windfall. Simultaneously, the compensation granted cannot be an apology for compensation. It cannot be a pittance. Though the discretion vested in the tribunal is quite wide, yet it is obligatory on the part of the tribunal to be guided by the expression, that is, "just compensation". The determination has to be on the foundation of evidence brought on record as regards the age and income of the deceased and thereafter the opposite multiplier to be applied. The formula relating to multiplier has been clearly stated in Sarla Verma (supra) and it has been approved in Reshma Kumari (supra). The age and income, as stated earlier, have to be established by adducing evidence. The tribunal and the Courts have to bear in mind that the basic principle lies in pragmatic computation which is in proximity to reality. It is a well accepted norm that money cannot substitute a life lost but an effort has to be made for grant of just compensation having uniformity of approach. There has to be a balance between the two extremes, that is, a windfall and the pittance, a bonanza and the modicum. In such an adjudication, the duty of the tribunal and the Courts is difficult and hence, an endeavour has been made by this Court for standardization which in its ambit includes addition of future prospects on the proven income at present. As far as future prospects are concerned, there has been standardization keeping in view the principle of certainty, stability and consistency. We approve the principle of "standardization" so that a specific and certain multiplicand is determined for applying the multiplier on the basis of age.

58. The seminal issue is the fixation of future prospects in cases of deceased who is self-employed or on a fixed salary. Sarla Verma (supra) has carved out an exception permitting the claimants to bring materials on record to get the benefit of addition of future prospects. It has not, per se, allowed any future prospects in respect of the said category.

59. Having bestowed our anxious consideration, we are disposed to think when we accept the principle of standardization, there is really no rationale not to apply the said principle to the self-employed or a person who is on a fixed salary. To follow the doctrine of actual income at the time of death and not to add any amount with regard to future prospects to the income for the purpose of determination of multiplicand would be unjust. The determination of income while computing compensation has to include future prospects so that the method will come within the ambit and sweep of just compensation as postulated under Section 168 of the Act. In case of a deceased who had held a permanent job with inbuilt grant of annual increment, there is an acceptable certainty. But to state that the legal representatives of a deceased who was on a fixed salary would not be entitled to the benefit of future prospects for the purpose of computation of compensation would be inapposite. It is because the criterion of distinction between the two in that event would be certainty on the one hand and staticness on the other. One may perceive that the

comparative measure is certainty on the one hand and uncertainty on the other but such a perception is fallacious. It is because the price rise does affect a self-employed person; and that apart there is always an incessant effort to enhance one's income for sustenance. The purchasing capacity of a salaried person on permanent job when increases because of grant of increments and pay revision or for some other change in service conditions, there is always a competing attitude in the private sector to enhance the salary to get better efficiency from the employees. Similarly, a person who is self-employed is bound to garner his resources and raise his charges/fees so that he can live with same facilities. To have the perception that he is likely to remain static and his income to remain stagnant is contrary to the fundamental concept of human attitude which always intends to live with dynamism and move and change with the time. Though it may seem appropriate that there cannot be certainty in addition of future prospects to the existing income unlike in the case of a person having a permanent job, yet the said perception does not really deserve acceptance. We are inclined to think that there can be some degree of difference as regards the percentage that is meant for or applied to in respect of the legal representatives who claim on behalf of the deceased who had a permanent job than a person who is self-employed or on a fixed salary. But not to apply the principle of standardization on the foundation of perceived lack of certainty would tantamount to remaining oblivious to the marrows of ground reality. And, therefore, degree-test is imperative. Unless the degree-test is applied and left to the parties to adduce evidence to establish, it would be unfair and inequitable. The degree-test has to have the inbuilt concept of percentage. Taking into consideration the cumulative factors, namely, passage of time, the changing society, escalation of price, the change in price index, the human attitude to follow a particular pattern of life, etc., an addition of 40% of the established income of the deceased towards future prospects and where the deceased was below 40 years an addition of 25% where the deceased was between the age of 40 to 50 years would be reasonable.

60. The controversy does not end here. The question still remains whether there should be no addition where the age of the deceased is more than 50 years. Sarla Verma thinks it appropriate not to add any amount and the same has been approved in Reshma Kumari. Judicial notice can be taken of the fact that salary does not remain the same. When a person is in a permanent job, there is always an enhancement due to one reason or the other. To lay down as a thumb rule that there will be no addition after 50 years will be an unacceptable concept. We are disposed to think, there should be an addition of 15% if the deceased is between the age of 50 to 60 years and there should be no addition thereafter. Similarly, in case of selfemployed or person on fixed salary, the addition should be 10% between the age of 50 to 60 years. The aforesaid yardstick has been fixed so that there can be consistency in the approach by the tribunals and the courts.

61. In view of the aforesaid analysis, we proceed to record our conclusions:-

> ***(i) The two-Judge Bench in Santosh Devi should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in Sarla Verma, a judgment by a coordinate Bench. It is because a coordinate Bench***

of the same strength cannot take a contrary view than what has been held by another coordinate Bench.

(ii) As Rajesh has not taken note of the decision in Reshma Kumari, which was delivered at earlier point of time, the decision in Rajesh is not a binding precedent.

(iii) While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.

(iv) In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.

(v) For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paragraphs 30 to 32 of Sarla Verma which we have reproduced hereinbefore.

(vi) The selection of multiplier shall be as indicated in the Table in Sarla Verma read with paragraph of that judgment.

(vii) The age of the deceased should be the basis for applying the multiplier.

(viii) Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years."

8. While applying ratio of aforesaid law laid down by the Hon'ble Apex Court in Pranay Sethi's case, an amount awarded under various heads i.e. funeral expenses, loss of love and affection and loss of consortium, needs to be re-assessed, accordingly, amount awarded qua funeral expenses and loss of consortium is modified to Rs. 15,000 and Rs. 40,000 instead of Rs. 25,000/- and Rs. 1 lac, as awarded by the learned MACT below. It is quite apparent from the aforesaid law laid down by the Hon'ble Apex Court that no amount can be awarded under the head of loss of love and affection and as such, award made qua the same vide impugned order is quashed and set aside. However, this Court while exercising power under Order XLI, Rule 33, of CPC, wherein appellate Court enjoys the power to pass any decree and make any order, which ought to have been passed or made as the case may be, deems it fit to grant an amount of Rs. 15,000/- on account of loss of estate. In view of the modifications made herein above, now the respondents-claimants shall be entitled to following amount:-

Compensation for dependency:	**Rs. 36,73, 440/- (as determined by the court below)**
Funeral Expenses:	**Rs. 15,000/-**
Transportation charges:	**Rs. 25,000/-**
Loss of consortium:	**Rs. 40,000/-**
Loss of estate:	**Rs. 15,000/-**

9. Though, this Court after having perused law relied upon by the learned counsel representing the appellant in Laxmidhar Nayak 's case supra, in support of his contention that court below has fallen in grave error while awarding 8% rate of interest to the claimants, has no hesitation to conclude that there is no thumb rule/law that interest on the compensation/awarded amount cannot be @ 8%. However, in the given facts and circumstances of the case, this Court deems it fit to modify rate of interest awarded by the court below from 8% to 7.5%, meaning thereby, appellant-company shall be liable to pay compensation as determined herein above, along with up-to-date interest @ 7.5% from the date of filing of the petition till the realization of the amount by the appellant-company.

10. Consequently, in view of the detailed discussion made herein above and law laid down by the Hon'ble Apex Court, present appeal is partly allowed and impugned award passed by the learned MACT below is modified to the aforesaid extent only. Present appeal is disposed of, so also pending applications if any.

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

Subhash .....Petitioner.
Versus
State of HP .....Respondent

Cr. Revision No. 4 of 2010
Date of Decision: 20.3.2018.

Code of Criminal Procedure, 1973- Section 397- Appellant was apprehended with 600 boxes of country made liquor of make "Sirmaur No.1"- he was sentenced to undergo simple imprisonment for one year and to pay fine of Rs. 5000/- under Section 61 (1) (a) of Punjab Excise Act by Learned Trial Court – only 6 pouches were sent for chemical analysis out of the allegedly recovered liquor – Held- that the recovery allegedly effected by the police stands vitiated as it is not proved that boxes were containing liquor except 6 pouches sent for chemical analysis- prosecution failed to prove that accused was carrying liquor beyond permissible limit- Judgments passed by the Courts below quashed and set aside- accused acquitted. (Para-10 to 12)

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

For the petitioner: Mr. Deepak Kaushal, Advocate,
For the respondent: Mr. Dinesh Thakur, Additional Advocate General and Mr. Vikrant Chandel, Deputy Advocate General, for the State.
Mr. Vivek Sharma, Advocate, for co-accused Mukul Kumar and Sadanand.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant criminal revision petition filed under Section 397 of Cr.PC, is directed against the judgment dated 11.11.2009, passed by the learned Sessions Judge, Sirmaur District at Nahan, H.P., in criminal appeal No. 5-Cr.A/10 of 2005, affirming judgment of conviction dated 21.4.2005, recorded by the learned Additional Chief Judicial Magistrate Rajgarh, District Sirmaur, H.P., in Cr. Case No. 3/2 of 2002, whereby the learned court below while holding the

accused guilty of having committed offences punishable under Section 61 (1) (a) of Punjab Excise Act, as applicable to the State of HP, sentenced the accused to undergo simple imprisonment for a period of one year and to pay fine of Rs. 5000/- and in default of payment of fine, to further undergo simple imprisonment for three months.

2. In nutshell case of the prosecution is that on 13.4.2001, flying squad headed by Kuldeep Kumar Thakur, Excise and Taxation Inspector, apprehended a truck bearing No. HP-18-4524, being driven by the petitioner-accused and recovered 600 boxes of country made liquor of make "Sirmaur No.1". Since driver was unable to produce valid licence/permit to possess/retain the aforesaid boxes, he was taken into custody alongwith 600 boxes of country made liquor. Though petitioner accused produced permit with regard to 325 boxes of country made liquor but entire bulk of 600 boxes containing country made liquor was taken into custody by the police. Subsequently, on the complaint of Exercise and Taxation Inspector, FIR bearing No. 23/2001 under Section 61 of the Act ibid, came to be registered against the accused. Police after having taken into possession 600 boxes of liquor, drew samples only out of six boxes of 750 ml pouches of country made liquor make Sirmaur No.1 and sealed the same with seal impression "T". Remaining boxes i.e. 519 of 750 ml. and 75 boxes of 375 ml. were released on sapurdari to Shri Palash Ram, ETI Sarahan. Subsequently, on 14.4.2001, one Bhim Singh & Co. Solan along with Sada Nand Chauhan, moved an application to the police for release of liquor allegedly recovered by the police from the vehicle being driven by the petitioner-accused, however fact remains that the police rejected the application filed by the above named persons and as such, they moved an application before the Court concerned, who vide order dated 19.7.2001, ordered the Excise officer to release the liquor after imposing fine. Since above named persons had moved an application to get their liquor released by producing permit No.4/2001 and Pass No. 208201, they were also challaned under Section 61 (1) of Act *ibid* and Sections 467, 468, 471 and 120-B IPC.

3. After completion of investigation, police presented challan in the competent Court of law i.e. Additional Chief Judicial Magistrate, Rajgarh, District Sirmaur, HP, who on being satisfied that prima-facie case exists against the accused, charged Subhash Chand and Mukul Kumar under Section 61 (1) (a) of the Act ibid whereas accused Sadanand Chauhan and Bhim Singh came to be charged under Section 61 (1) (a) of the Act *ibid* and Sections 467, 468, 471 and 120-B of IPC, to which they pleaded not guilty and claimed trial.

4. Subsequently on the basis of evidence led on record by the prosecution, learned trial Court convicted the accused Subhash Chand and Mukul Kumar under Section 61 (1) (a) of the Act ibid and acquitted co-accused Sadaand and Bhim Singh extending benefit of doubt under Section 61 (1) (a) of the Act *ibid* and Sections 467 468, 471 and 120-B of IPC.

5. Being aggrieved and dis-satisfied with the aforesaid judgment of conviction recorded by the learned trial Court, present accused alongwith co-accused Mukul Kumar preferred an appeal before the learned Sessions Judge, Sirmaur District at Nahan. Learned Sessions Judge vide judgment dated 11.11.2009, while partly accepting the appeal preferred on behalf of Mukul Kumar, acquitted him of the charges framed against him under Section 61 (1) (a) of the Act ibid, whereas the court below held present petitioner-accused guilty of having committed offence punishable under Section 61 (1) (a) of Punjab Excise Act. In the aforesaid background, present petitioner-accused has approached this Court in the instant proceedings, seeking therein his acquittal after setting aside judgment of conviction recorded by the learned Sessions Judge, at Nahan.

6. During pendency of the present appeal, this Court also issued notices to such of those co-accused in the case, who came to be acquitted by the courts below, who are represented by Mr. Vivek Sharma, Advocate.

7. Mr. Deepak Kaushal, learned counsel representing the petitioner-accused while referring to the impugned judgment of conviction recorded by the learned Sessions Judge, vehemently contended that same is not sustainable in the eye of law as the same is not based upon proper appreciation of evidence available on record and as such, same deserves to be

quashed and set-aside. While placing reliance upon judgment passed by this Court in Criminal Appeal No. 7 of 2018, titled ***State of HP v. Jagtar Singh***, decided on 9.3.2018, learned counsel contended that since only six pouches of country liquor make Sirmaur No. 1 were drawn as samples and sent to the SFSL, recovery, if any, can be said to be of 6 pouches only and as such, judgment of conviction recorded by the court below being contrary to the law laid down by this Court, is not sustainable and as such, same deserves to be quashed and set-aside.

8. Mr. Dinesh Thakur, learned Additional Advocate General representing the State contended that there is no illegality and infirmity in the judgment of conviction recorded by the learned Sessions Judge, rather same is based upon proper appreciation of evidence and as such, there is no scope of interference, whatsoever for this Court and as such, same deserves to be upheld. Learned Additional Advocate General further contended that true it is that only six pouches of country liquor make Sirmaur No.1 were drawn as sample for sending the same to the SFSL, but those were sufficient to conclude on record that 600 boxes allegedly recovered from the vehicle being driven by the petitioner accused were containing liquor. Mr. Thakur further contended that there is no dispute that 600 boxes recovered from the truck being driven by the petitioner accused, were containing pouches of country liquor make "Sirmaur No. 1". While referring to the evidence adduced on record by the prosecution, learned Additional Advocate General, contended that prosecution proved its case beyond reasonable doubt that on the date of alleged occurrence, petitioner-accused was illegally transporting 600 boxes of liquor without there being any permit and as such, he has been rightly held guilty of having committed offence punishable under Section 61 (1) (a) of Punjab Excise Act, by the Court below.

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

10. After having carefully perused the evidence led on record by the prosecution, this Court is not persuaded to agree with the contention of the learned counsel for the petitioner-accused that there is no evidence at all on record adduced by the prosecution to connect the petitioner-accused with the recovery of 600 boxes of liquor from the truck being driven by him because admittedly prosecution by way of leading cogent and convincing evidence has successfully proved on record that on the date of alleged incident, it was the accused, who was carrying /transporting 600 boxes of liquor without there being any permit. However, this Court finds considerable force in the second argument of learned counsel representing the petitioner accused that recovery, if any, of just 6 pouches out of 600 boxes of liquor can be said to have been effected because undisputedly, only six pouches out of 600 boxes were sent for chemical analysis. This Court has no hesitation to conclude that prosecution has failed to prove its case beyond reasonable doubt that 600 boxes allegedly recovered from the truck allegedly being driven by the accused contained liquor. As has been taken note herein above, six pouches containing 750 ml liquor were sent for chemical analysis, which were found to be liquor by the chemical analyst, but there is nothing on record to show that remaining bottles contained in 600 boxes allegedly recovered from accused also contained country liquor more than permissible limit without having any licence. Needless to say, it was incumbent upon the prosecution to prove that respondent was in actual and conscious possession of illicit liquor in excess of permissible limit and as such, no conviction could be recorded by the court below merely on the strength of the report submitted by chemical analyst qua six pouches of liquor. In view of aforesaid omission on the part of the investigating agency, entire recovery allegedly effected by the police stands vitiated on account of the fact that only six pouches out of the total alleged recovery from the accused were sent for chemical analysis and as such, recovery of only six pouches of liquor is proved. At this stage, reliance is placed upon judgment passed by this Court in "***Surender Singh. V. State of H.P***.", Latest HLJ 2013 (2) 865, which reads as under:-

> ***"26. In the instant case, it be also noticed that there is yet another major flaw in the investigation by the police. Assuming that the contraband was actually recovered by the police party, police did not take samples from all the boxes. Samples only from few bottles out of some of the boxes, which they had opened, were taken. None of these witnesses have deposed***

that the remaining boxes were sealed; from outside appeared to be of the same make or brand; bearing serial numbers; the date of manufacture; or the place and the name of the manufacturer. All that these witnesses have deposed is that boxes of alcohol, as described above, were found in the vehicle. Inside the boxes could be anything. Police could not prove that the remaining boxes actually contained liquor. The samples cannot be said to be representative in character.

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

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

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

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

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

12. Consequently, in view of the aforesaid discussion as well as law referred hereinabove**,** present petition is allowed and judgments passed by the Courts below are quashed and set-aside and petitioner-accused is acquitted of the offence punishable under Section 61 (1) (a) of the Act ibid. Bail bonds furnished by the petitioner are discharged. Interim order is vacated. Fine amount, if any deposited by the petitioner, be refunded to him. Pending applications, if any, are also disposed of.

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

Kangru Ram .....Petitioner
Versus
Sriram .....Respondent

CMPMO No. 261 of 2017
Reserved on 17.03.2018
Decided on: 21.03.2018

Constitution of India, 1950- Article 227- Code of Civil Procedure, 1908- Order 26 Rule 9 readwith 151- The appointment of a Local Commissioner sought by the plaintiff before the Learned Trial Court on the basis that the dispute related to a boundary – As per the respondent, plaintiff was trying to create evidence in his favour- the Learned Trial Court had dismissed the application – **Held-** since the dispute related to the possession of "Khatti" (a source of drinking water), one each was alleged to have come into possession of each of the parties – **Further Held-** It was definitely a boundary dispute, though, filed late - The Learned Trial Court ought to have appointed a Local Commissioner – Petition disposed of in the aforesaid terms. (Para-13 to 15)

Cases referred:
Haryana Waqf Board vs. Shanti Sarup and others, (2008) 8 SCC 671
Bali Ram vs. Mela Ram and another, 2002 (3) SLC 131
Prithi Singh vs. Bakshi Ram and another, Latest HLJ 2006 (HP) 5
Liaquat Ali vs. Amir Mohammad and others, Latest HLJ 2016 (HP) 83

For the petitioner: Mr. K.D. Sood, Sr. Advocate with Mr. Het Ram Thakur, Advocate.
For the respondent: Mr. Surinder Saklani, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present petition, under Article 227 of the Constitution of India, is maintained by the petitioner/plaintiff (hereinafter to be called as "the plaintiff"), for quashing the order dated 19.05.2017, passed by learned Civil Judge (Jr. Div.), Court No. 4, Hamirpur, H.P., in CMA No. 375 of 2013, Civil Suit No. 120 of 2012, whereby an application, under Order 26, Rule 9, read with Section 151 CPC, for appointment of the Local Commissioner, was dismissed.

2. Briefly stating facts giving rise to the present petition are that the plaintiff filed an application before the leaned Court below, under Order 26, Rule 9, read with Section 151 CPC, wherein he alleged that the respondent/defendant is adjoining owner, having Khasra No. 208 and he dug the suit land and raised construction in the shape of steps and also blocked the drain/*challa* of the plaintiff. It has been further averred in the application that since main dispute *inter se* the parties is boundary dispute, the appointment of Local Commissioner is necessary as it will enable the Court to give specific findings. Lastly, the plaintiff prayed that the present application may be allowed and Local Commissioner to demarcate the suit land and to report the nature and extent of encroachment, may be appointed.

3. In reply to the application, the respondent/defendant has averred that this application is not maintainable, as the plaintiff has not produced any evidence and now moved the application. Further the application of the plaintiff cannot be allowed, as the same will amount to create evidence in favour of the plaintiff. Lastly, the respondent/defendant prayed for dismissal of the application with costs.

4. Learned Court below vide its order dated 19.05.2017, dismissed the application, so filed by the plaintiff, hence the present petition.

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

6. Learned Senior Counsel appearing on behalf of the petitioner has argued that the application, under Order 26, Rule 9, read with Section 151 CPC, was required to be allowed in order to decide the real controversy *inter se* the parties, as it is a boundary dispute and it cannot be decided without there being report of the Local Commissioner. He has further argued that as per the law laid down by Hon'ble Supreme Court and this Hon'ble Court, when there is a boundary dispute, the Local Commissioner is required to be appointed to resolve that dispute. In support of his contentions, learned Senior Counsel has placed reliance upon the following judicial pronouncements:

1. ***2008 (8) SCC 671, titled as Haryana Waqf Board vs. Shanti Sarup and others.***

2. ***2002 (3) SLC 131, titled as Bali Ram vs. Mela Ram and another.***

3. ***Latest HLJ 2006 (HP) 5, titled as Prithi Singh vs. Sakshi Ram and another.***

7. A Division Bench of Hon'ble Supreme Court in ***Haryana Waqf Board vs. Shanti Sarup and others***, (2008) 8 SCC 671, have held as under:

5. The appellate court found that the trial court did not take into consideration the pleadings of the parties when there was no specific denial on the part of the respondents regarding the allegations of unauthorised possession in respect of the suit land by them as per Para 3 of the plaint. But the only controversy between the parties was regarding demarcation of the suit land because the land of the respondents was adjacent to the suit land and the application for demarcation filed before the trial Court was wrongly rejected.

6. It is also not in dispute that even before the appellate court, the appellant Board had filed an application for appointment of a Local Commissioner for demarcation of the suit land. In our view, this aspect of the matter was not at all gone into by the High Court while dismissing the second appeal summarily. The High Court ought to have considered whether in view of the nature of dispute and in the facts of the present case, whether the Local Commissioner should be appointed for the purpose of demarcation in respect of the suit land.

7. For that reasons aforesaid, we are of the view that the High Court ought to have considered this aspect of the matter and then decided the second appeal on merits. Accordingly, we set aside the judgment and decree passed in the second appeal and the second appeal is restored to its original file.

8. The High Court is requested to decide the second appeal in the light of the observations made hereinabove within six months from the date of supply of a copy of this order to it. The appeal is thus allowed. There will be no order as to costs"

8. A co-ordinate Bench of this High Court in ***Bali Ram vs. Mela Ram and another***, 2002 (3) SLC 131, has held as under*:*

"13. Rule 9 of Order 26 of the Code of Civil Procedure (hereinafter referred to as 'the Code'), empowers the Court to issue commission to make local investigation which may be required for the purpose of elucidating any matter in dispute. Though the object of the local investigation is not

to collect evidence which can be taken in the Court, but the purpose is to obtain such evidence, which from its peculiar nature, can only be had on the spot with a view to elucidate any point which is left doubtful on the evidence produced before the Court. To issue a commission under Rule 9 of Order 26 of the Code, it is not necessary that either or both the parties must apply for issue of commission. The Court can issue local commission suo motu, if in the facts and circumstance of the case, it is deemed necessary that a local investigation is required and is proper for the purpose of elucidating any matter in dispute. Though exercise of these powers is discretionary with the Court, but in case the local investigation is requisite and proper in the facts and circumstances of the case, it should be exercised so that a final and just decision is rendered in the case."

9. A co-ordinate Bench of this High Court in ***Prithi Singh vs. Bakshi Ram and another***, Latest HLJ 2006 (HP) 5, has held as under*:*

"7 As referred to above, the dispute between the parties was in fact a boundary dispute. It could be solved only by demarcation, inasmuch as the land claimed by the plaintiff to be owned and possessed by him as different from the land claimed by the defendants to be owned and possessed by them and both the lands were adjoining each other. In such a situation, the only course open for the trial Court was to have appointed a Local Commissioner to visit the spot after issuing notice to both the parties and to demarcate the suit land in accordance with law. Instead of ordering the appointment of the Local Commissioner to demarcate the suit land, the learned trial Court proceeded to dismiss the application of the plaintiff under Order 26 Rule 9 CPC by taking the plea that the object of local investigation was not to collect evidence on behalf of the parties. In my opinion, appointment of a Local Commissioner to demarcate the suit land, in a case which involves boundary dispute would not amount to collecting on behalf of either party. On the other hand, as referred to above, this would be the only course open to the trial Court to settle the dispute between the parties by appointing a Local Commissioner to visit the spot and to submit his report after demarcation in accordance with law."

10. Learned Senior Counsel has also placed reliance upon a Procedure in "***Hadd-Shikni cases***", as prescribed in Volume (I), H.P. High Court Rules and Orders, which is as under:

"**1.** ***In "Hadd-Shikni" suits and other suits of boundary disputes of land failing within the jurisdiction of a Civil Court it is generally desirable that enquiry be made on the spot. This can usually be done in the following ways:-***

(a) by suggesting that one party or the other should apply to the Revenue Officer to fix the limits under Section 101 (1) of the Punjab Land Revenue Act. Time for such purpose should be granted under Order XVII, Rule 3, of the Code of Civil Procedure,

(b) by appointing a local commissioner, and

(C) by the Court itself making a local enquiry."

11. On the other hand, learned counsel for the respondent has argued that trial in the present case is pending since long and the petitioner has not filed the application in question earlier and now when he comes to know about the fate of his case, the present application has been filed by him. In support of his contentions, learned counsel for the respondent has placed reliance upon the judgment of a Co-ordinate Bench of this Hon'ble High Court, ***Latest HLJ 2016***

(HP) 831, titled as ***Liaquat Ali vs. Amir Mohammad and others***. The relevant extracts of the judgment are reproduced hereinbelow:

> ***"5. What is the measurement of the suit passage and whether the same has been obstructed or encroached upon are matters which were required to be proved by the petitioner by leading cogent and convincing evidence to this effect and, therefore, recourse to the appointment of Local commissioner for demarcating the suit land at this stage is impermissible as both the parties have led their evidence. Obviously the application now preferred by the petitioner is mischievous as the petitioner wants the court to collect evidence for him through the Local commissioner."***

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

13. In the present case the land is adjoining and case of the parties is that when partition took place one *Khatti* alongwith the land came to the possession of one party and one *khatti* alongwith land came to the possession of other party. Now the *khatti* of the plaintiff has been polluted due to the construction and foul discharge of water (A word "*Khatti"* means source of water for drinking purpose, which comes from the small hillock, adjoining the back side of the house).

14. This is definitely a boundary dispute *inter se* the parties and in these circumstances, report of the Local Commissioner is very material and *res integra* to decide the dispute between the parties. It has come on record that the plaintiff has approached to the Revenue Authorities for demarcation. It has also come on record that earlier the demarcation was not possible due to wrong Karukans. In these circumstance, this Court finds that the application though not moved at the earliest and as argued by the learned Senior Counsel for the plaintiff, it was maintained late, as the plaintiff first of all wants to establish by leading evidence with respect to the boundary and boundary dispute.

15. This Court after going through the records and law, cited by the learned Senior Counsel for the plaintiff/petitioner, finds that present is a fit case where the learned Court below should have appointed a Local Commissioner to give a demarcation report with regard to the land and structures of the parties, however the learned Court below has not exercised the jurisdiction vested in it.

16. Now coming to the law relied upon by the learned counsel for the respondent/defendant in ***Liaquat Ali vs. Amir Mohammad and others*** case. This Court finds that the facts of the case in hand are totally different from the case cited by the learned counsel for the respondent, as in above cited case, there existed a passage at the first instance and whether passage is there or not, is not a boundary dispute, so this judgment is not applicable to the facts of the present case.

17. The net result of the above discussion is that the learned Court below was required to exercise its jurisdiction by appointing a Local Commissioner to demarcate the land as per the procedure and it cannot be said that if the Local Commissioner is appointed, the same will create evidence in favour of the plaintiff. Accordingly, the present petition is allowed and order dated 19.05.2017, dismissing the application of the petitioner/plaintiff, under Order 26, Rule 9, read with Section 151 CPC, is set aside and it is ordered that learned Court below will appoint a Local Commissioner by allowing application of the petitioner/plaintiff. Parties through their counsel are directed to appear before the learned Court below on **2nd April, 2018**.

18. In view of the aforesaid terms, the petition, so also pending application(s), if any, shall stand(s) disposed of.

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

Oriental Insurance Company Ltd. .....Appellant.
Versus
Smt. Ram Kali & ors. .....Respondents.

FAO No. 247 of 2012.
Date of decision: March 21, 2018.

Motor Vehicles Act, 1988- Section 149 and 166- Insurance Company challenged its liability to indeminify the owner/insured when deceased/driver was not having valid driving licence- **Held-** that in view of judgment of Hon'ble Apex Court in **Mukund Dewangan** versus **Oriental Insurance Company Limited,** (2017) 14 Supreme Court Cases 663 if driver of the vehicle has effective driving licence to ply a light motor vehicle and uses such type of vehicle as transport vehicle, then he has no requirement to obtain separate endorsement to drive transport vehicle- There is no merit in the petition- petition dismissed. (Para-4)

Case referred:
Mukund Dewangan versus Oriental Insurance Company Limited, (2017) 14 Supreme Court Cases 663

For the appellant Mr. Ashwani K. Sharma, Senior Advocate with Mr. Jeevan Kumar, Advocate.
For the respondents Nemo.

The following judgment of the Court was delivered:

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

Judgment dated 31.1.2012 passed by learned Civil Judge, Rajgarh exercising the powers under Workman's Compensation Act is under challenge in the present appeal, on the grounds, inter-alia, that the deceased workman Om Parkash was not holding a valid and effective driving license to drive the offending vehicle i.e. Mahindra Pick-up, a goods carrier at the time of accident.

2. The appeal was admitted on the following substantial question of law:-

"Whether the Insurance Company is liable to indemnify the owner/insured when the deceased driver was not having a valid and effective licence to drive the alleged offending vehicle?'

3. No doubt, as per the abstract of register of driving licence Ext.RW1/B, the Registering and Licensing Authority, Rajgarh has issued a driving licence to deceased Om Parkash for driving light motor vehicle and motor cycle/scooter only on 25.3.2006. The same was valid up to 24.3.2011. The accident having taken place on 20.2.2009 was well within the validity period of the licence issued to the deceased.

4. As a matter of fact, in view of the recent judgment of the Apex Court in ***Mukund Dewangan*** versus ***Oriental Insurance Company Limited,*** (2017) 14 Supreme Court Cases 663, a light motor vehicle even if transport vehicle continues to be the same as it was even if used as transport vehicle and the licence issued for driving light motor vehicle is good enough to drive the same. No separate endorsement qua driving transport vehicle is required. The Apex Court has held so after taking into consideration the amendment in the

Motor Vehicles Act vide Act No. 54 of 1994 which is applicable w.e.f. 14.11.1994. The relevant portion of this judgment reads as follow:

> "58. "Transport vehicle" has been defined in section 2(47) of the Act, to mean a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle. Public service vehicle has been defined in section 2(35) to mean any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward and includes a maxicab, a motor cab, contract carriage, and stage carriage. Goods carriage which is also a transport vehicle is defined in section 2(14) to mean a motor vehicle constructed or adapted for use solely for the carriage of goods, or any motor vehicle not so constructed or adapted when used for the carriage of goods. It was rightly submitted that a person holding licence to drive light motor vehicle registered for private use, who is driving a similar vehicle which is registered or insured, for the purpose of carrying passengers for hire or reward, would not require an endorsement as to drive a transport vehicle, as the same is not contemplated by the provisions of the Act. It was also rightly contended that there are several vehicles which can be used for private use as well as for carrying passengers for hire or reward. When a driver is authorised to drive a vehicle, he can drive it irrespective of the fact whether it is used for a private purpose or for purpose of hire or reward or for carrying the goods in the said vehicle. It is what is intended by the provision of the Act, and the Amendment Act 54 of 1994.
>
> 59. Section 10 of the Act requires a driver to hold a licence with respect to the class of vehicles and not with respect to the type of vehicles. In one class of vehicles, there may be different kinds of vehicles. If they fall in the same class of vehicles, no separate endorsement is required to drive such vehicles. As light motor vehicle includes transport vehicle also, a holder of light motor vehicle licence can drive all the vehicles of the class including transport vehicles. It was pre-amended position as well the post-amended position of Form 4 as amended on 28.3.2001. Any other interpretation would be repugnant to the definition of "light motor vehicle" in section 2(21) and the provisions of section 10(2)(d), Rule 8 of the Rules of 1989, other provisions and also the forms which are in tune with the provisions. Even otherwise the forms never intended to exclude transport vehicles from the category of 'light motor vehicles' and for light motor vehicle, the validity period of such licence hold good and apply for the transport vehicle of such class also and the expression in Section 10(2)(e) of the Act 'Transport Vehicle' would include medium goods vehicle, medium passenger motor vehicle, heavy goods vehicle, heavy passenger motor vehicle which earlier found place in section 10(2)(e) to (h) and our conclusion is fortified by the syllabus and rules which we have discussed.
>
> 60. Thus we answer the questions which are referred to us thus:
>
> 60.1. "Light motor vehicle" as defined in section 2(21) of the Act would include a transport vehicle as per the weight prescribed in section 2(21) read with section 2(15) and 2(48). Such transport vehicles are not excluded from the definition of the light motor vehicle by virtue of Amendment Act No.54/1994.

60.2. A transport vehicle and omnibus, the gross vehicle weight of either of which does not exceed 7500 kg. would be a light motor vehicle and also motor car or tractor or a road roller, 'unladen weight' of which does not exceed 7500 kg. and holder of a driving licence to drive class of "light motor vehicle" as provided in section 10(2)(d) is competent to drive a transport vehicle or omnibus, the gross vehicle weight of which does not exceed 7500 kg. or a motor car or tractor or road-roller, the "unladen weight" of which does not exceed 7500 kg. That is to say, no separate endorsement on the licence is required to drive a transport vehicle of light motor vehicle class as enumerated above. A licence issued under section 10(2)(d) continues to be valid after Amendment Act 54 of 1994 and 28.3.2001 in the form.

60.3. The effect of the amendment made by virtue of Act No.54/1994 w.e.f. 14.11.1994 while substituting clauses (e) to (h) of section 10(2) which contained "medium goods vehicle" in section 10(2)(e), medium passenger motor vehicle in section 10(2)(f), heavy goods vehicle in section 10(2)(g) and "heavy passenger motor vehicle" in section 10(2)(h) with expression 'transport vehicle' as substituted in section 10(2)(e) related only to the aforesaid substituted classes only. It does not exclude transport vehicle, from the purview of section 10(2)(d) and section 2(41) of the Act i.e. light motor vehicle.

60.4. The effect of amendment of Form 4 by insertion of "transport vehicle" is related only to the categories which were substituted in the year 1994 and the procedure to obtain driving licence for transport vehicle of class of "light motor vehicle" continues to be the same as it was and has not been changed and there is no requirement to obtain separate endorsement to drive transport vehicle, and if a driver is holding licence to drive light motor vehicle, he can drive transport vehicle of such class without any endorsement to that effect."

5. Therefore, in view of the law now laid down by the Apex Court, the present is a case where no substantial question of law much less to speak the substantial question of law as formulated arise for adjudication by this Court in the present appeal. The appeal, as such, is dismissed.

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

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

Harnam Singh ...Appellant

Versus

The Land Acquisition Collector Kol Dam and another ...Respondents

RFAs No. 522 to 527 & 537 of 2012
Decided on: 22.03.2018

Land Acquisition Act, 1894- Section 4- Petitioners filed reference petitions for enhancement of compensation- petition dismissed by the Trial Court- **Held**- that for determining the market value of the acquired land, purpose of acquisition is relevant and not nature and classification of the land- Hence, the rate awarded on the basis of classification is incorrect- Further, held that since these appeals have arisen from common award passed by the Collector, so owners are entitled to

compensation of acquired land @ Rs. 4,69,955/- per bigha alongwith all consequential benefits – petition disposed of. (Para-3 and 9)

Cases referred:

H.P. Housing Board versus Ram Lal, 2003 (3) Shim. LC (64)
Union of India versus Harinder Pal Singh, 2005 (12) SCC 564
Gulabi versus State of H.P., 1998 (1) Shim.LC 41
Executive Engineer and another versus Dilla Ram, Latest HLJ (2008) 2 HP 1007
Viluben Jhalejar Contractor (Dead) by LRs versus State of Gujarat, (2005) 4 SCC 789
Himmat Singh and others versus State of Madhya Pradesh and another, (2013) 16 SCC 392
Peerappa Hanmantha Harijan (Dead) By Legal Representatives and others versus State of Karnataka and another, (2015) 10 SCC 469
NTPC Ltd., Kol Dam, Barmana, Bilaspur versus Ram Rakhi & another, I L R 2017 (I) HP 56

For the appellant(s): Mr. Anil Kumar God, Advocate.
For the respondents: Mr. Shiv Pal Manhans, Additional Advocate General, with Mr. Raju Ram Rahi, Deputy Advocate General, for respondent No. 1.
Mr. K.B. Khajuria, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge. *(oral)*

In all these appeals, land owners have assailed dismissal of their reference petitions preferred by them, for enhancement of compensation, being aggrieved and dis-satisfied with award No. 5 announced on 22nd January, 2003, passed under Section 11 of the Land Acquisition Act, 1894 (hereinafter referred to as 'the Act') by Land Acquisition Collector, Kol Dam, Sundernagar, District Mandi, Himachal Pradesh (hereinafter referred to as 'Collector') wherein the rate of compensation on the basis of classification of land had been awarded as under:

(i) Barani (Majrua) *₹ 4,69,955/- per bigha*
(ii) Khadyater etc. (Gair-majrua) *₹ 1,04,416/- per bigha*

2. Section 25 of the Act provides that the Court cannot award the compensation lesser than the compensation awarded by the Land Acquisition Collector under Section 11 of the Act.

3. It is well settled that at the time of determining market value of land for acquisition, the purpose for which the land is acquired is relevant and not nature and classification of land and where nature and classification of the land has no relevance for purpose of acquisition, the market value of the land is to be determined as a single unit irrespective of nature and classification of the land. In such a case, uniform rate to all kinds of land under acquisition as a single unit irrespective or their nature and classification is to be awarded. *{See H.P. Housing Board versus Ram Lal, 2003 (3) Shim. LC (64); Union of India versus Harinder Pal Singh, 2005 (12) SCC 564; Gulabi versus State of H.P., 1998 (1) Shim.LC 41; and Executive Engineer and another versus Dilla Ram, Latest HLJ (2008) 2 HP 1007.}*

4. Further, it is also settled that when the purpose of acquisition is common and no developmental activity is required to be carried out, compensation is to be awarded at uniform rate. *{See Viluben Jhalejar Contractor (Dead) by LRs versus State of Gujarat, (2005) 4 SCC 789; Himmat Singh and others versus State of Madhya Pradesh and another, (2013) 16 SCC 392; and Peerappa Hanmantha Harijan (Dead) By Legal Representatives and others versus State of Karnataka and another, (2015) 10 SCC 469}.*

5. It is undisputed that highest rate awarded by the Collector was ₹ 4,69,955/- per bigha.

6. It is brought to the notice of this Court that in **RFA No. 41 of 2012,** titled as **NTPC Ltd., Kol Dam, Barmana, Bilaspur versus Ram Rakhi & another,** arising out of the same award, i.e. award No. 5 of 2003, a co-ordinate Bench of this Court, vide its judgment, dated 11th January, 2017, has awarded rate of the land acquired at the highest rate awarded by the Collector. Further, that the same has been accepted by the parties and has attained finality. I am in agreement with the findings returned by the co-ordinate Bench in the said appeal.

7. While going through the judgment in **Ram Rakhi's case (supra),** it is noticed that date of award No. 5 of 2003 has been recorded as 15th January, 2003 whereas in present appeals, award No. 5 of 2003 has been referred by learned District Judge as dated 22nd January, 2003. Therefore, record of the said appeal, i.e. RFA No. 41 of 2012, was requisitioned from the Registry wherein record of learned District Judge is also available. From perusal of the said record, it is found that though, the Collector had proposed to announce award No. 5 on 15th January, 2003 subject to approval of the Secretary (Power) to the Government of Himachal Pradesh, however, the same was announced in Village Harnora in presence of the land owners on 22nd January, 2003.

8. On comparison of record of RFA No. 41 of 2012 and the record of the learned District Judge attached therewith with that of the present appeals, it is clear that present appeals, pertaining to the land of the same village, i.e. Village Harnora, are also arising out of the common award No. 5, dated 22nd January, 2003, passed by the Collector whereby entire land was acquired for one and the same public purpose, i.e. construction of Kol Dam. It is also undisputed that time of acquisition as well as location of the land in present case is not only proximate but identical with case decided in RFA No. 41 of 2012 and, therefore, present appeals are squarely covered by judgment in RFA No. 41 of 2012.

9. In view of the aforesaid facts and circumstances, judgment, dated 11th January, 2017, passed in **RFA No. 41 of 2012,** titled as **NTPC Ltd., Kol Dam, Barmana, Bilaspur versus Ram Rakhi & another,** is *mutatis mutandis* applicable in present appeals and rate of acquired land, as determined in the said case is also applicable to the land owners in the present appeals. Therefore, land owners are held entitled to compensation of acquired land at the rate of ₹ 4,69,955/- per bigha alongwith all consequential statutory benefits including interest and solatium under the Act.

10. All these appeals are allowed in aforesaid terms. Respondents are directed to calculate the amount and deposit the same in the Registry of this Court within three months from today.

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

Kusum Sood and another ....Appellants/Defendants.

Versus

M/s Kapoor Palace (Pvt.) Limited and others ... ..Respondents/Plaintiff.

RFA No.113 of 2006.
Judgment reserved on : 14.03.2018.
Date of decision: 22nd March, 2018.

Code of Civil Procedure, 1908- Section 96- ***Himachal Pradesh Tenancy and Land Reforms Act*****, 1972- Section 118- First Appeal-** Principle and jurisdiction of the First Appellate Court reiterated that the findings on both facts and laws could be gone into by the First Appellate

Court- First appeal held to be valuable right of the parties, unless restricted by law- the whole case is therein open for re-hearing both on questions of facts and laws. (Para-9)

Code of Civil Procedure, 1908- Section 96- *Himachal Pradesh Tenancy and Land Reforms Act*, 1972- Section 118- First Appeal- What is "Perverse"- Ratio laid down in Arulvelu and another vs. State Represented by the Public Prosecutor and another (2009) 10 SCC 206 reiterated. (Para-11 to 13)

Code of Civil Procedure, 1908- Section 96- *Himachal Pradesh Tenancy and Land Reforms Act*, 1972- Section 118- First Appeal- The plaintiff which was a private limited company had not placed on record the resolution passed by the Board of Director authorizing the plaintiff to file the suit – A copy of resolution so filed pertained to a date after the institution of the suit- The so called authorized Director was also different then who was authorized to do so – The special power of attorney issued to the Director also issued after the filing of the suit – **Held-** that plaintiff was not duly authorized and competent to file the suit. (Para-14 to 18)

Code of Civil Procedure, 1908- Section 96- *Himachal Pradesh Tenancy and Land Reforms Act*, 1972- Section 118- First Appeal- A non-agriculturist is permitted to purchase the land within the limits of municipal corporation, municipal committee or a notified area committee only up to the extent of 500 Sq. meters for a dwelling house 300 Sq. meters for a shop or a commercial establishments and in case of industrial units such area as is certified by the Department of Industry- Section 5 of the Amendment Act, 1987 also reiterates the said position- Further held- that even if the land is purchased vide separate sale deeds, but it is in excess of 300 Sq. meters in case of a commercial establishment – the permission of the State Government is necessary. (Para-27 to 33)

Code of Civil Procedure, 1908- Section 96- *Himachal Pradesh Tenancy and Land Reforms Act*, 1972- Section 118- First Appeal- Bonafide purchaser- Mutation attested in favour of the plaintiff showing that the suit land had been sold as per sale deeds and defendants knew about the mutation- **Held-** that obviously the plea of bonafide purchaser set up by the defendants was false and not available to them. (Para-39 to 40)

Cases referred:

Shasidhar and others versus Ashwini Uma Mathad and another, (2015) 11 SCC 269

Arulvelu and another vs. State Represented by the Public Prosecutor and another (2009) 10 SCC 206

Rubi Sood and another vs. Major (Retd.) Vijay Kumar Sud and others, I L R 2015 (III) HP 771

Damodar Lal vs.Sohan Devi and others (2016) 3 SCC 78

Manzoor Ahmed Magray versus Ghulam Hassan Aram and others, (1999) 7 SCC 703,

M/s Murudeshwara Ceramics Ltd. and another versus State of Karnataka and others, AIR 2001 SC 3017

Rahul Bhargava versus Vinod Kohli and others, 2008 (1) Shim. LC 385

For the Appellants	:	Mr.B.C.Negi, Senior Advocate with Mr.Suneet Goel, Advocate.
For the Respondents	:	Mr.G.D.Verma, Senior Advocate with Mr.B.C.Verma, Advocate, for respondent No.1.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

This regular first appeal under Section 96 of the Code of Civil Procedure is directed against the judgment and decree passed by the learned District Judge, Kullu, H.P. on 30.11.2005 in Civil Suit No.20/2002, whereby the suit filed by the respondent No.1/plaintiff

(hereinafter referred to as the plaintiff) came to be decreed and the appellants/defendants (hereinafter referred to as the defendants) were restrained from causing any interference with the ownership and possession of the plaintiff over the suit land or from raising any sort of construction over the same.

2. Brief facts of the case are that the plaintiff claimed a decree for declaration to the effect that it be declared owner in possession of the land measuring 1-16-0 bighas out of the land comprised in Khata Khatauni No. 207min/372min, Khasra No.2992/840, measuring 2-2-0 bighas, as described in jamabandi for the year 1992-93, situated in Phati Nasogi, Kothi and Tehsil Manali, District Kullu, H.P. (hereinafter referred to as the suit land) and sale deeds No. 245 and 246 dated 23.10.2001 executed by defendants No.3 and 4 in favour of defendants No.1 and 2 are void ab initio and ineffective qua the rights of ownership of plaintiff over the suit land. Further, a decree for permanent prohibitory injunction restraining the defendants from causing any sort interference with the possession of the plaintiff over the suit land and from raising any construction over the same and the plaintiff in the alternative claimed a decree for possession of the suit land.

3. It was averred that the plaintiff is a private limited company having Dutt Pal Kapoor, Jitender Kapoor, Smt. Surekha Kapoor and Ashok Kapoor as its Directors which has been duly registered under the Companies Act with the Registrar of Companies and the said company had authorized its Director Jitender Kapoor to file the suit. The plaintiff by virtue of sale deed No.740 dated 25.05.1987, sale deed No.756 dated 28.05.1987 and sale deed No. 822 dated 30.05.1987 purchased the suit land from Shri Jindu Ram and Smt. Revti Devi, as a result of which, the plaintiff is owner in possession of the suit land and on the strength of said sale deeds, the suit land was mutated in favour of the plaintiff vide mutation Nos. 2483, 2484 and 2485. It was further averred that plaintiff after purchasing the suit land raised boundary wall and was taking steps to get approval for the construction of a hotel on the suit land, but in the month of November, 2001, the plaintiff came to know that defendants No.1 and 2 started raising height of boundary wall raised by the plaintiff around the suit land and when the plaintiff enquired from them about the said illegal acts, they disclosed that they had purchased the suit land from defendants No.3 and 4 and were not aware that plaintiff is owner in possession of the suit land. The plaintiff disclosed to defendants No.1 and 2 that defendants No.3 and 4 had already sold the suit land to the plaintiff in the year 1987, therefore, they could not have sold the same to defendants No.1 and 2 nor defendants No.1 and 2 could have acquired any title in the suit land, but they did not pay any heed to the request of the plaintiff. The plaintiff checked and enquired about the revenue entries and found that the defendants in connivance with the revenue officials have tampered with the revenue record and got mutation Nos. 2483, 2484 and 2485 rejected in the mutation register and entries thereof deleted in connivance with the revenue officials and got the fictitious sale deeds of the suit land executed in their favour and mutations Nos. 3628 and 3629 dated 27.10.2001 sanctioned and attested in their favour. It was also averred that the defendants No.3 and 4 had no title in the suit land and to execute the sale deeds of the suit land in favour of defendants No.1 and 2, hence, the sale deeds No.245 and 246 dated 23.10.2001 executed in favour of defendants No.1 and 2 by defendants No.3 and 4 are illegal and void ab initio and thus does not create any right in their favour. The plaintiff further averred that the defendants have no right, title or interest over the suit land, but they started causing interference with the ownership and possession of the plaintiff over the suit land, hence the suit.

4. Defendants No.1 and 2 resisted and contested the suit filed by the plaintiff by filing joint written statement wherein they took preliminary objections to the effect that the suit has not been properly and legally instituted because Jitender Kapoor had no right or authority to institute the suit. The suit has not been properly valued for the purpose of court fee and jurisdiction. They also took preliminary objections qua estoppel, maintainability, limitation, suppression of material facts, cause of action and that the jurisdiction of the Civil Court is barred to entertain and try the suit in view of the provisions contained under Section 118 of the H.P. Tenancy and Land Reforms Act. On merits, defendants No.1 and 2 termed the averments

made in the plaint as wrong and incorrect. It was averred that the sale deeds as set up by the plaintiff are forged, fictitious and otherwise void ab initio in view of the provisions contained in Section 118 of the H.P. Tenancy and Land Reforms Act, 1972, therefore, the alleged sale deeds do not confer any right, title or interest upon the plaintiff. The possession of the suit land was never delivered to the plaintiff nor the plaintiff ever possessed or occupied the suit land, as a result of which, mutations entered in favour of the plaintiff were rejected. It was further averred that defendant No.2 vide sale deed No.246 dated 23.10.2001 purchased 3/7th share measuring 0-18-0 bigha out of the land comprised in Khasra No. 2992/840 measuring 22-2-0 bigha from defendant No.3 through his general power of attorney i.e. defendant No.4 for a sale consideration of Rs.4,00,000/-. Further, defendant No.1 by virtue of sale deed No. 245 dated 23.10.2001 purchased 3/7 share out of the land comprised in Khasra No.2992/840 measuring 0-18-0 bighas from defendant No.3 through his general power of attorney defendant No.4 for a consideration of Rs.4,00,000/- and on the basis of aforesaid sale deeds, defendants No.1 and 2 were delivered possession of 1-16-0 bighas of land and as such they came in possession of the so purchased land and on the basis of the sale deeds, mutation Nos. 3629 and 3628 dated 27.10.2002 have been sanctioned and attested in favour of defendants No.1 and 2. It was also averred that besides making payment of sale consideration of Rs.8,00,000/-, defendants No.1 and 2 also bore expenses of stamps and registration fee for the execution of said sale deeds. After purchase of the said land, defendants No.1 and 2 constructed stone and brick boundary wall around the suit land and barbed wire on the top of boundary wall has also been laid and they constructed three structures of steel angle iron and besides this they have laid the slab of R.C.C. pillars over the suit land which are being used by them for storage of lubricant of petrol pump and for other purposes. Defendants No.1 and 2 further averred that the process of construction took sufficient time which was in the notice and knowledge of plaintiff and its Directors, but they never raised any objection, hence, they are estopped by their acts and conduct from raising any objection or filing the suit. It was also averred that before purchasing the suit land, defendants No.1 and 2 made local investigation and had also searched revenue records and made investigation regarding ownership and possession of defendant No.3, who was recorded as owner in actual possession of the suit land and after satisfying themselves regarding the possession of defendants No.3 and 4, they finalized the purchase of suit land, hence, defendants No.1 and 2 are bonafide purchasers for valuable consideration. In case the sale deeds set up by the plaintiff are held to be valid, in that eventuality, defendants No.1 and 2 are in open, continuous, peaceful and uninterrupted possession of suit land with effect from 25.05.1987, 28.05.1987 and 30.05.1987 from the date of alleged sale deeds to the complete ouster of plaintiff and had never allowed the plaintiff or any body else to occupy the suit land and dispossess them therefrom by denying the title of the plaintiff, as a result of which, defendants No.1 and 2 have acquired title in the suit land by way of adverse possession and right, title and interest of plaintiff, if any, had already been extinguished in favour of defendants No.1 and 2, who have become owners of the suit land by way of adverse possession. Lastly, it was further averred that the alleged sale deeds in favour of the plaintiff are in contravention of provisions contained in Section 118 of the H.P. Tenancy and Land Reforms Act, hence, the plaintiff is not entitled to a decree of possession in its favour and thus prayed for the dismissal of the suit.

5. Defendants No.3 and 4 resisted and contested the suit filed by the plaintiff by filing joint written statement wherein they took preliminary objections qua limitation, maintainability, valuation and suppression of material facts. On merits, locus standi of Jitender Kapoor to institute the suit on behalf of plaintiff is disputed. They termed the averments made in the plaint as wrong and incorrect. It was pleaded that plaintiff intended to purchase the suit land and sale deeds were scribed by the plaintiff and signatures of defendant No.4 were obtained on the same, but when the same were produced before the Sub Registrar, he asked the plaintiff to produce permission of H.P. Government for purchase of suit land because plaintiff being non-agriculturist and outsider, was not competent to purchase the land in H.P. without prior permission of the H.P. Government under Section 118 of the H.P. Tenancy and Land Reforms Act. But, the said permission was not available with the plaintiff, as a result of which, sale deeds were

not registered and as the sale transaction was not complete, no possession was delivered to the plaintiff by defendants No.3 and 4. Later on, plaintiff approached defendants No.3 and 4 and represented that as the Sub Registrar had refused to register the sale deeds without the permission from the H.P. Government, which is likely to take sufficient time and even the plaintiff was not sure if the permission would be granted by the H.P. Government in its favour and as such defendants No.3 and 4 returned the sale consideration to the plaintiff. Since, bargain between the parties was not finalized and sale was not complete, defendants No.3 and 4 had not delivered possession of the suit land to the plaintiff and they remained owners in possession of the suit land. It was also averred that the plaintiff in connivance with the revenue officials and Sub Registrar illegally got the sale deeds registered without permission, notice and knowledge of defendants No.3 and 4 in violation of the provisions of Section 118 of the H.P. Tenancy and Land Reforms Act and got mutations attested and sanctioned behind the back of defendants No.3 and 4 on the basis of the void sale deeds, but later on said mutations were set aside by the revenue Officer and plaintiff never possessed or occupied the suit land. It was disputed that the plaintiff purchased the suit land and was put in possession or raised any boundary wall around the suit land and took steps for the approval of construction of hotel. Defendants No.3 and 4 admitted that they sold the suit land in favour of defendants No.1 and 2 on the strength of which defendants No.1 and 2 are the owners in possession of the suit land, hence question of dispossessing the plaintiff from the suit land does not arise and thus they prayed for the dismissal of the suit.

6. The plaintiff filed replication to the written statements filed on behalf of the defendants and thereby reaffirmed and reasserted the averments made in the plaint and controverted the contrary averments made in the written statements.

7. On the pleadings of the parties, the following issues were framed by the Court below on 16.04.2003:-

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

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

3. Whether Mr.Jitender Kapoor has got no locus standi to file the present suit and the suit is not maintainable as alleged? OPP.

4. Whether the suit is not properly valued for the purpose of court fee and jurisdiction as alleged? OPD.

5. Whether the suit is beyond pecuniary jurisdiction of this Court, if so, its effect? OPD.

6. Whether the plaintiff is estopped to file the suit due to own act and conduct? OPD.

7. Whether the suit is not within time, as alleged? OPD.

8. Whether the defendants No.1 and 2 are bonafide purchasers, as alleged, if so, its effect? OPD.

9. Relief."

8. After recording evidence and evaluating the same, the learned trial Court on 30.11.2005 decreed the suit filed by the plaintiff and it is against this judgment and decree that the present appeal came to be filed by the defendants.

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

9. Admittedly, this is a first appeal and the jurisdiction of this Court while hearing the same is very wide like the learned trial Court and it is open to the defendants to attack all findings on fact and/or on law in the first appeal and would have to be decided on the basis of following exposition of law as propounded by the Hon'ble Supreme Court in ***Shasidhar***

and others *versus* ***Ashwini Uma Mathad and another***, ***(2015) 11 SCC 269***, wherein it was observed 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.*
>
> *13. In Santosh Hazari vs. Purushottam Tiwari (Deceased) by L.Rs. (2001) 3 SCC 179, this Court held as under: (SCC pp. 188-89, para 15)*
>
> > *"15.....the appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court.....while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it."*
>
> *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 & Anr., (2005) 12 SCC 303, while considering the scope of Section 96 of the Code this Court observed as follows: (SCC p.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 & Anr. 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 3-5)

> *"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, 2014(12) Scale 171."

10. Adverting to the facts, it would be noticed that issues No.1, 2, 6 and 8 were clubbed by the learned trial Court and issues No.1 and 2 were answered in the affirmative, whereas, issues No.6 and 8 were answered in the negative. Strong exception is taken to the aforesaid findings on the ground that the same are factually and legally incorrect and are perverse and, therefore, deserve to be set aside.

11. What is 'perverse' was considered by the Hon'ble Supreme Court in a detailed judgment in ***Arulvelu and another*** *vs.* ***State Represented by the Public Prosecutor and another (2009) 10 SCC 206*** wherein it was held as under:-

"*26. In M. S. Narayanagouda v. Girijamma & Another AIR 1977 Kar. 58, the Court observed that any order made in conscious violation of pleading and law is a perverse order. In Moffett v. Gough, (1878) 1 LR 1r 331 the Court observed that a perverse verdict may probably be defined as one that is not only against the weight of evidence but is altogether against the evidence. In Godfrey v. Godfrey 106 NW 814, the Court defined `perverse' as turned the wrong way, not right; distorted from the right; turned away or deviating from what is right, proper, correct etc.*

27. The expression "perverse" has been defined by various dictionaries in the following manner:

1. Oxford Advanced Learner's Dictionary of Current English Sixth Edition

PERVERSE:- Showing deliberate determination to behave in a way that most people think is wrong, unacceptable or unreasonable.

2. Longman Dictionary of Contemporary English - International Edition

PERVERSE: Deliberately departing from what is normal and reasonable.

3. The New Oxford Dictionary of English - 1998 Edition

PERVERSE: Law (of a verdict) against the weight of evidence or the direction of the judge on a point of law.

4. New Webster's Dictionary of the English Language (Deluxe Encyclopedic Edition)

PERVERSE: Purposely deviating from accepted or expected behavior or opinion; wicked or wayward; stubborn; cross or petulant.

5. Stroud's Judicial Dictionary of Words & Phrases, Fourth Edition

PERVERSE: A perverse verdict may probably be defined as one that is not only against the weight of evidence but is altogether against the evidence.

28. In Shailendra Pratap & Another v. State of U.P. (2003) 1 SCC 761, the Court observed thus: (SCC p.766, para 8

"8…We are of the opinion that the trial court was quite justified in acquitting the appellants of the charges as the view taken by it was reasonable one and the order of acquittal cannot be said to be perverse. It is well settled that appellate court would not be justified in interfering with the order of acquittal unless the same is found to be perverse. In the present case, the High Court has committed an error in interfering with the

order of acquittal of the appellants recorded by the trial court as the same did not suffer from the vice of perversity."

29. In Kuldeep Singh v. The Commissioner of Police & Others (1999) 2 SCC 10, the Court while dealing with the scope of Articles 32 and 226 of the Constitution observed as under: (SCC p.14, paras 9-10)

"9. Normally the High Court and this Court would not interfere with the findings of fact recorded at the domestic enquiry but if the finding of "guilt" is based on no evidence, it would be a perverse finding and would be amenable to judicial scrutiny.

10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."

30. The meaning of `perverse' has been examined in H. B. Gandhi, Excise and Taxation Officer-cum- Assessing Authority, Karnal & Others v. Gopi Nath & Sons & Others 1992 Supp (2) SCC 312, this Court observed as under: (SCC pp. 316-17, para 7)

"7. In the present case, the stage at and the points on which the challenge to the assessment in judicial review was raised and entertained was not appropriate. In our opinion, the High Court was in error in constituting itself into a court of appeal against the assessment. While it was open to the respondent to have raised and for the High Court to have considered whether the denial of relief under the proviso to Section 39(5) was proper or not, it was not open to the High Court re-appreciate the primary or perceptive facts which were otherwise within the domain of the fact-finding authority under the statute. The question whether the transactions were or were not sales exigible to sales tax constituted an exercise in recording secondary or inferential facts based on primary facts found by the statutory authorities. But what was assailed in review was, in substance, the correctness - as distinguished from the legal permissibility - of the primary or perceptive facts themselves. It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."

12. What is 'perverse' has further been considered by this Court in ***RSA No.436 of 2000***, titled ***'Rubi Sood and another*** *vs.* ***Major (Retd.) Vijay Kumar Sud and others***, decided on 28.05.2015 in the following manner:-

"25..... A finding of fact recorded by the learned Courts below can only be said to be perverse, which has been arrived at without consideration of material evidence or such finding is based on no evidence or misreading of evidence or is grossly erroneous that, if allowed to stand, it would result in miscarriage of justice, is open to correction, because it is not treated as a finding according to law.

26. If a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or even the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then the finding is rendered infirm in the eye of the law.

27. If the findings of the Court are based on no evidence or evidence, which is thoroughly unreliable or evidence that suffers from vice of procedural irregularity or the findings are such that no reasonable persons would have arrived at those findings, then the findings may be said to be perverse.

28. Further if the findings are either ipse dixit of the Court or based on conjectures and surmises, the judgment suffers from the additional infirmity of non application of mind and thus, stands vitiated."

13. What is 'perversity' recently came up for consideration before the Hon'ble Supreme Court in ***Damodar Lal*** *vs.* ***Sohan Devi and others (2016) 3 SCC 78*** wherein it was held as under:-

"8. "Perversity" has been the subject matter of umpteen number of decisions of this Court. It has also been settled by several decisions of this Court that the first appellate court, under Section 96 of The Civil Procedure Code, 1908, is the last court of facts unless the findings are based on evidence or are perverse.

9. In Krishnan v. Backiam (2007) 12 SCC 190, it has been held at paragraph-11 that: (SCC pp. 192-93)

> *"11. It may be mentioned that the first appellate court under Section 96 CPC is the last court of facts. The High Court in second appeal under Section 100 CPC cannot interfere with the findings of fact recorded by the first appellate court under Section 96 CPC. No doubt the findings of fact of the first appellate court can be challenged in second appeal on the ground that the said findings are based on no evidence or are perverse, but even in that case a question of law has to be formulated and framed by the High Court to that effect."*

10. In Gurvachan Kaur v. Salikram (2010) 15 SCC 530, at para 10, this principle has been reiterated: (SCC p. 532)

> *"10. It is settled law that in exercise of power under Section 100 of the Code of Civil Procedure, the High Court cannot interfere with the finding of fact recorded by the first appellate court which is the final court of fact, unless the same is found to be perverse. This being the position, it must be held that the High Court was not justified in reversing the finding of fact recorded by the first appellate court on the issues of existence of landlord-tenant relationship between the plaintiff and the defendant and default committed by the latter in payment of rent."*

11. In the case before us, there is clear and cogent evidence on the side of the plaintiff/appellant that there has been structural alteration in the premises rented out to the respondents without his consent. Attempt by the respondent-defendants to establish otherwise has been found to be totally non-acceptable to the trial court as well as the first appellate court. Material alteration of a property is not a fact confined to the exclusive/and personal knowledge of the owner. It is a matter of evidence, be it from the owner himself or any other witness speaking on behalf of the plaintiff who is conversant with the facts and the situation. PW-1 is the vendor of the plaintiff, who is also his power of attorney. He has stated in unmistakable terms that there was structural alteration in violation of the rent agreement. PW-2 has also supported the case of the plaintiff. Even the witnesses on behalf of the defendant, partially admitted that the defendants had effected some structural changes.

12. Be that as it may, the question whether there is a structural alteration in a tenanted premises is not a fact limited to the personal knowledge of the owner. It can be proved by any admissible and reliable evidence. That burden has been successfully discharged by the plaintiff by examining PWs-1 and 2. The

defendants could not shake that evidence. In fact, that fact is proved partially from the evidence of the defendants themselves, as an admitted fact. Hence, only the trial court came to the definite finding on structural alteration. That finding has been endorsed by the first appellate court on re-appreciation of the evidence, and therefore, the High Court in second appeal was not justified in upsetting the finding which is a pure question of fact. We have no hesitation to note that both the questions of law framed by the High Court are not substantial questions of law. Even if the finding of fact is wrong, that by itself will not constitute a question of law. The wrong finding should stem out on a complete misreading of evidence or it should be based only on conjectures and surmises. Safest approach on perversity is the classic approach on the reasonable man's inference on the facts. To him, if the conclusion on the facts in evidence made by the court below is possible, there is no perversity. If not, the finding is perverse. Inadequacy of evidence or a different reading of evidence is not perversity.

13. In Kulwant Kaur v. Gurdial Singh Mann (2001) 4 SCC 262, this Court has dealt with the limited leeway available to the High Court in second appeal. To quote para 34: (SCC pp.278-79)

> *"34. Admittedly, Section 100 has introduced a definite restriction on to the exercise of jurisdiction in a second appeal so far as the High Court is concerned. Needless to record that the Code of Civil Procedure (Amendment) Act, 1976 introduced such an embargo for such definite objectives and since we are not required to further probe on that score, we are not detailing out, but the fact remains that while it is true that in a second appeal a finding of fact, even if erroneous, will generally not be disturbed but where it is found that the findings stand vitiated on wrong test and on the basis of assumptions and conjectures and resultantly there is an element of perversity involved therein, the High Court in our view will be within its jurisdiction to deal with the issue. This is, however, only in the event such a fact is brought to light by the High Court explicitly and the judgment should also be categorical as to the issue of perversity vis-à-vis the concept of justice. Needless to say however, that perversity itself is a substantial question worth adjudication — what is required is a categorical finding on the part of the High Court as to perversity. In this context reference be had to Section 103 of the Code which reads as below:*
>
> ***'103. Power of High Court to determine issues of fact.-** In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal,—*
>
> > *(a) which has not been determined by the lower appellate court or by both the court of first instance and the lower appellate court, or*
> >
> > *(b) which has been wrongly determined by such court or courts by reason of a decision on such question of law as is referred to in Section 100."*
>
> *The requirements stand specified in Section 103 and nothing short of it will bring it within the ambit of Section 100 since the issue of perversity will also come within the ambit of substantial question of law as noticed above. The legality of finding of fact cannot but be termed to be a question of law. We reiterate however, that there must be a definite finding to that effect in the judgment of the High Court so as to make it evident that Section 100 of the Code stands complied with."*

14. In S.R. Tiwari v. Union of India (2013) 6 SCC 602, after referring to the decisions of this Court, starting with Rajinder Kumar Kindra v. Delhi

Administration, (1984) 4 SCC 635, it was held at para 30: (S.R.Tewari case[6], SCC p. 615)

> *"30. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality. If a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with. (Vide Rajinder Kumar Kindra v. Delhi Admn. [(1984) 4 SCC 635 : 1985 SCC (L&S) 131 : AIR 1984 SC 1805] , Kuldeep Singh v. Commr. of Police [(1999) 2 SCC 10 : 1999 SCC (L&S) 429 : AIR 1999 SC 677] , Gamini Bala Koteswara Rao v. State of A.P. [(2009) 10 SCC 636 : (2010) 1 SCC (Cri) 372 : AIR 2010 SC 589] and Babu v. State of Kerala[(2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179] .)"*
>
> *This Court has also dealt with other aspects of perversity."*

14. Adverting to the facts, it would be noticed that the learned District Judge has held the suit to be properly instituted by holding that Jitender Kapoor had an authority to file the suit on behalf of the plaintiff. However, it would be noticed that the learned trial Court ignored the fact that the plaintiff was a Private Limited Company and could have, therefore, acted only through resolution duly passed in accordance with law.

15. No doubt, resolution Ex.PW2/A and power of attorney Ex.PW2/B have been produced on record, however, neither the original records of resolution nor the original power of attorney was produced by the plaintiff. This was despite the specific objection taken at the time when PW-2 Datt Pal Kapoor was being examined. The defendants had specifically objected to the production of the aforesaid documents in the statement of PW-2 and it was specifically observed by the learned trial Court at that time that both these objections will be considered and decided at the time of arguments. However, the learned trial Court did not even bother to consider much less decide these objections at the time of disposal of the suit. Now, in case, the resolution Ex.PW2/A is seen, it would be evident that the same is a copy of resolution alleged to have been passed in the meeting of Board of Directors held on 10.09.2003, whereas, the suit admittedly was instituted nearly a year prior to that i.e. on 23.09.2002.

16. That apart, in case the contents of the resolution are perused, authority was sought to be granted to Shri Dutt Pal Kapoor and Shri Ashok Kapoor, Directors, of the Company for further pursuing "*action against person involved in fraud or illegal sale of company's land measuring approx. 36 biswas situated behind Sood Petrol Pump, Manali (District Kullu)."*

17. In this background, if the plaint is perused, it would be noticed that the same had been filed by Jitender Kapoor and not by anyone of the so-called authorized Directors of the Company. Unfortunately, the learned trial Court has ignored all these material aspects which go to the root of the case.

18. Further, in case, the special power of attorney Ex.PW2/A, that has been placed on record, is perused, it would be noticed that the same was executed only on 08.01.2004 that too before the Notary Public, whereas, as already observed earlier, the suit had been instituted on 23.09.2002.

19. Above all, the learned trial Court has gravely erred in ignoring the fact that the records of the company which would otherwise constitute primary evidence have not been produced before the Court. There is practically no legal evidence on record to show that the plaintiff is a Company incorporated under the Companies Act, certificate of incorporation and

memorandum of association showing that the company could invest funds in land or undertake business for running a hotel, resolution authorizing the Directors or persons in this behalf, to purchase the land was neither pleaded nor proved on record.

20. Further, no evidence was led by the plaintiff to prove that the suit land had been purchased by the plaintiff for valuable consideration as neither the method nor the mode of payment neither pleaded nor proved. Even, the books of accounts of the Company which are statutorily required to be maintained had not been produced in evidence and, therefore, not proved.

21. Once, this is the factual position, obviously the learned trial Court has erred in holding that the genuineness, authenticity, validity, due execution and registration of the sale deeds have not been disputed on behalf of the defendants.

22. Intriguingly, all the aforesaid findings have been arrived at only on the basis of the statement of the registration Clerk, Office of Sub Registrar, Kullu, who had produced the records of the sale deeds. However, sale deeds were not the primary evidence and at best were secondary evidence for which specific permission had to be sought for and obtained from the Court. Even if, this aspect of the matter is ignored for the time being, even then, it would be noticed that while being cross examined this witness had categorically stated that no permission from the State Government side in favour of the plaintiff to purchase the land was available there on the record and there was no document/evidence attached with the summoned record to prove that the plaintiff was paying revenue to the Government of Himachal Pradesh. In her further cross examination by defendants No.3 and 4, it was categorically admitted by this witness that there was no resolution of the plaintiff-company to purchase the suit land in the records so summoned. Further, it was admitted that there was no certificate of registration of the company.

23. Above all, the plaintiff has led no evidence whereby it could be established that they were ever put in possession of the suit land after execution of the alleged sale deeds. Rather, PW-2 has candidly admitted the possession of the defendants over the suit land.

24. It would also be noticed that the learned trial Court negated the contention of the defendants that the plaintiff was not entitled to purchase the suit land in view of the specific bar contained in Section 118 of the H.P. Tenancy and Land Reforms Act (for short the 'Act'). Without even caring to go through the principal Act, the learned trial Court relied on Section 5 of the H.P. Tenancy and Land Reforms (Amendment), Act, 1987 which reads thus:-

> *"Section :5: Savings:- Notwithstanding anything contained in this Act, any transfer of land, situated within the territorial jurisdiction of a municipal corporation, municipal committee of a notified area committee, for any of the purposed, i.e. for the construction of a dwelling house, a shop or a commercial establishment or office or industrial unit, made before the day which the Himachal Pradesh Tenancy and Land Reforms (Amendment) Act, 1987, is published in the official Gazette after its assent, shall be deemed always to have been made in accordance with the law as if sub-section(2) of Section 118 of the Principal Act had not been amended by Section 4 of this Act."*

25. Now, in case the Act as was promulgated and notified on 15th February, 1974 is seen, it would be noticed that Section 118 thereof originally read as under:-

> Transfer of "***118.*** *(1) Save as provided in this Chapter, no transfer (including land to sales in execution of a decree of a Civil Court or for recovery of non- agri-arrears of land revenue) by way of sale, gift, exchange, lease or culturists mortgage with possession shall be valid in favour of a person who barred is not an agriculturist.*
>
> *(2) Nothing in sub-section (1) shall be deemed to prohibit the transfer of any land by an agriculturist in favour of,-*
>
> *(a) landless labourers;or*
>
> *(b)landless persons belonging to scheduled castes and scheduled tribes; or*

(c) village artisans; or

(d) landless persons carrying on an allied pursuit; or

(e) State Government; or

(f) Co-operative Societies and new Banks constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970."

The term "agriculturist" was defined in Section 2(2) in the following terms:-

"(2) "agriculturist" means a person who cultivates land personally in an estate situated in Himachal Pradesh;"

26. A plain reading of the aforesaid provisions leave no manner of doubt that there could be no valid transfer in favour of a person, who was not an agriculturist even through a decree of a Civil Court, or a proceeding for recovery of arrears of land revenue, by way of sale gift, exchange, lease or mortgage with possession unless such transfer was protected under sub-section (2) of Section 118.

27. The principal Act came to be amended for the first time vide H.P. Tenancy and Land Reforms (Amendment) Act, 1976 (Act No.15 of 1976) whereby, for the first time, a non-agriculturist was permitted to purchase land within the limits of Municipal Corporation, Municipal Committees, Notified Area Committees, up to extent of 500 square meters for a dwelling house and 300 square meters for a shop, commercial establishment and in case of industrial units such area as was certified by the Department of Industries of the State Government. It is apt to reproduce the amendment carried out in the second proviso of Section 118 of the principal Act which reads thus:-

"21. In second proviso of Section 118 of the principal Act,

(a) in clause (f) of sub-section (2) for the words brackets and figures "new banks" constituted under the banking Companies (Acquisition And transfer of undertakings) Act, 1970" the word "bank" shall be substituted;

(c) after clause (f) the following clause shall be added namely:-

(1) a non-agriculturist with in the limits of municipal corporation, municipal committees notified area committees for any one of the purpose i.e., for the construction of a 'dwelling' house a shop or commercial establishment of office or industrial unit subject to condition that transfer to land for such purpose shall not exceed:-

(i) in case of dwelling house 500 square meters;

(ii) in case of a shop commercial establishment or office-300 square meters;

(iii) in case of an industrial units such areas as may be certified by the department of industries of the State of the Government;

(iv) a non-agriculturist with permission of the State of the Government for the purpose to be prescribed."

28. The principal Act thereafter came to be amended subsequently vide H.P. Tenancy and Land Reforms (Amendment) Act, 1987 (Act No.6 of 1988) wherein again the provisions of Section 118 were completely substituted in the following manner:-

*"**4. Substitution of section 118.-** In the principal Act, for section 118, the following section shall be substituted, namely:-*

"118(1). Notwithstanding anything to the contrary contained in any law, contract, agreement, custom or usage for the time being in force, but save as otherwise provided in this Chapter, no transfer of land (including sales in execution of a decree of a civil Court or for recovery of arrears of land revenue), by way of sale, gift, exchange, lease; mortgage with possession or creation of a tenancy shall be valid in favour of a person who is not an agriculturist.

(2) Nothing in Sub-section (1) shall be deemed to prohibit the transfer of land by any person in favour of-

(a) a landless labourer; or

(b) a landless person belonging to a scheduled caste or a scheduled tribe; or

c) a village artisan; or

(d) a landless person carrying on an allied pursuit; or

(e) the State Government; or

(f) a co-operative society or a bank; or

(g) a person who has become non-agriculturist on account of the acquisition of his land for any public purpose under the land Acquisition Act, 1894; or

(h) a non-agriculturist who purchases or intends to purchase land for the construction of a house or shop, or purchases a built up house or shop from the Himachal Pradesh State Housing Board established under the live Himachal Pradesh Housing Board Act, 1972 or from the Development Authority constituted under the Himachal Pradesh Town and Country Planning Act, 1977 or from any other statutory corporation set up under any State or Central/ enactment; or

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

Provided that a person who is a non-agriculturist but purchases land with the permission of the State Government under Clause (i) of this sub-section shall, irrespective of such permission, continue to be a non-agriculturist for the purposes of this Act:

Provided further that a non-agriculturist in whose case permission to purchase land is granted by the State Government, shall put the land to such use for which the permission has been granted, within a period of two years or a further such period, not exceeding one year, as may be granted by the State Government to be counted from the day on which the deed covering the sale of the land is registered and if he fails to do so, the land so purchased by him shall vest in the State Government free from all encumbrances.

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

Provided that the Registrar or the Sub-Registrar may register any transfer-

(i) where the lease is made in relation to a part or whole of a building; or

(ii) where the mortgage is made for procuring the loans for construction or improvements over the land either from the Government or from any other financial institution constituted or established under any law for the time being in force or recognized by the State Government.

(4) It shall be lawful for the State Government to make use of the land which is vested or may be vested in it under Sub-section (2) or Sub-section (3) for such purposes as it may deem fit to do so.

Explanation--For the purpose of this Section, the expression "land" shall include

(i) land, the classification of which has changed or has been caused to be changed to "Gair-mumkin", "Gair-mumkin Makan" or any other Gair-mumkin land by whatever name called, during the past five year countable from the date of entry in the revenue records to this effect:

(ii) land recorded as "Gair-mumkin", "Gair-mumkin Makan" or any other Gairmumkin land, by whatever name called in the revenue records, except constructed area which is not subservient to agriculture; and

(iii) land which is a site of a building in a town or a village and is occupied or let out not for agricultural purposes or purposes subservient to agriculture.

5. Savings.--Notwithstanding anything contained in this Act, any transfer of land, situate within the territorial jurisdiction of a municipal corporation, municipal committee or a notified area committee, for any of the purposes, i.e. for the construction of a dwelling house, a shop or a commercial establishment or office or industrial unit, made before : the day on which the Himachal Pradesh Tenancy and Land Reforms (Amendment) Act, 1987, is published in the Official Gazette after its assent, shall be deemed always to have been made in accordance with the law as if Sub-section (2) of Section 118 of the principal Act had not been amended by Section 4 of this Act."

29. It was in this Act that the "savings" were introduced vide Section 5 as has been reproduced hereinabove. In this background, the reliance placed by the learned trial Court on Section 5 of the Amendment 1987 is totally misplaced as the transfer in question was not at all protected vide aforesaid section. Rather, it is evidently clear that it was in the amendment carried out, for the first time, in the year 1976 that the non-agriculturist was permitted to purchase the land up to 500 square meters for construction of a residential house and up to 300 square meters for construction of a shop or commercial establishment. Whereas, in the instant case, admittedly, the land had been purchased to raise/construct a hotel, as has been categorically stated by PW-2 Dutt Pal Kapoor, in the last lines of his examination-in-chief.

30. That apart, it would be noticed that the suit land was purchased vide three separate sale deeds i.e. exhibits P-1 to P-3 and in each of the sale deeds the land sold is 12 biswas (1 biswa=40.46 sq.meter, 12 biswas =480 sq. meters) which is in excess of 300 square meters and, therefore, could not have been purchased by the plaintiff without seeking an express permission of the State Government (Section 118, sub-section (2)(i) (supra). Thus, the contrary findings recorded by the learned trial Court are perverse and, are therefore, liable to be set aside.

31. However, learned counsel for the plaintiff would argue that prohibition on transfer of land under Section 118 is not absolute as his client even now can seek permission of the State Government and would place strong reliance upon the judgments of the Hon'ble Supreme Court in ***Manzoor Ahmed Magray*** *versus* ***Ghulam Hassan Aram and others, (1999) 7 SCC 703***, ***M/s Murudeshwara Ceramics Ltd. and another*** *versus* ***State of Karnataka and others, AIR 2001 SC 3017*** and a judgment rendered by a learned Single Judge of our own High Court in ***Rahul Bhargava*** *versus* ***Vinod Kohli and others, 2008 (1) Shim. LC 385.***

32. I have minutely gone through the aforesaid judgments and find that none of them are applicable to the facts situation as obtaining in the instant case.

33. In ***Manzoor Ahmed Magray's case*** (supra), the Hon'ble Supreme Court while dealing with a somewhat similar provision where there was a prohibition on transfer of orchard held that this provision was not absolute and the question of obtaining previous permission as contemplated in the Act would arise at the time of execution of the sale deed on the basis of decree for specific performance and Section 3 of the Act therein did not bar the maintainability of the suit and such permission could be obtained by filing proper application after the decree had been passed and, therefore, it could not be stated that the decree for specific performance was not required to be passed.

34. In ***M/s Murudeshwara Ceramics Ltd.'s case*** (supra), the Hon'ble Supreme Court was seized of a matter wherein again transfer of land could not be effected without seeking exemption from the State Government and it was held that such exemption could be granted subsequent to the sale.

35. In ***Rahul Bhargava's case*** (supra), the facts before the Court were that plaintiff entered into an agreement for sale with the defendants, but the defendants refused to execute the sale deed and, therefore, a suit for specific performance was filed. Since, the plaintiff was not an agriculturist, he sought for and granted permission to purchase the land which was valid for 180 days, but the said permission expired during the pendency of the litigation. It was in this background that this Court held that the permission to purchase the land could again be obtained and accordingly decreed the suit.

36. As observed above, none of the aforesaid cases deal with the facts situation obtaining in this case because admittedly the plaintiff herein neither at the time of the alleged purchase nor thereafter at the time of filing of the suit or for that matter even till date has not applied for permission for purchase of the land in accordance with law which clearly proves that the plaintiff had got these three sale deeds registered in his favour in violation of the law. Thus, the contrary findings rendered by the learned trial Court cannot withstand judicial scrutiny and are thus liable to be set aside.

37. As regards the findings on issue No.8 regarding the question whether defendants No.1 and 2 are bonafide purchasers for consideration the learned trial Court has held that there is no evidence on record to hold and conclude that defendants No.1 and 2 are bonafide purchasers. Such findings are based upon correct appreciation of pleadings as also evidence available on record and, therefore, warrant no interference.

38. It would be noticed that in the suit filed by the plaintiff, specific averments had been made in para-2 thereof to the effect that the sale deeds were duly registered by the Sub Registrar and thereafter mutations Nos. 2483, 2484 and 2485 were also attested in favour of the plaintiff on 03.09.1987. Now, in case the written statement qua these averments is perused, it would be noticed that the same have been answered in the following manner:-

> *"it is further submitted that the mutations No.2493, 2484 and 2485, got entered by the plaintiff on the basis of the forged and fictitious sale deeds, were dismissed by the concerned Revenue Officer, vide orders dated 19.7.88"*

39. Thus, it is admitted by the defendants that on the basis of the sale deeds exhibits P-1 to P-3, mutations No.2483, 2484 and 2485 had been attested in favour of the plaintiff and this fact is not denied by the defendants and the only plea put forth by them was that these mutations were dismissed by the concerned Revenue Officer vide his order dated 19.07.1988. Admittedly, the alleged order dated 19.07.1988 has not been produced on record by the defendants and, therefore, an adverse inference is liable to be drawn against the defendants.

40. That apart, once the defendants were aware of the aforesaid mutations, then obviously, they knew that the plaintiff had already purchased the suit land and, therefore, admittedly, being the subsequent purchasers, their plea of being bonafide purchasers for consideration is false and is rather not available to them.

41. Now adverting to the findings qua issue No.6 with regard to the plea of estoppel raised by the defendants, the learned trial Court is absolutely correct in coming to the conclusion that there is no evidence available on record to hold that the plaintiffs are estopped from filing the present suit by their own act and conduct. That apart, the learned trial Court has observed that the defendants on the one hand were raising a plea based on title while, on the other hand, were claiming ownership on the basis of the adverse possession which was not available to them as these were mutually destructive pleas.

42. In view of the aforesaid discussion, though this Court has no difficulty in affirming the findings rendered by the learned Court on issues No.6 and 8, however, in view of the detailed discussion as aforesaid, this Court has no difficulty in concluding that the findings recorded by the learned trial Court on issues No.1 and 2 are grossly perverse and thus are liable to be set aside.

43. Now, adverting to the findings on issue No.3 regarding Mr. Jitender Kapoor, having no locus standi to file the present suit, the said question has been answered in favour of the plaintiff. However, such findings again cannot withstand judicial scrutiny and are liable to be set aside for the reasons already stated in paragraphs 14 to 20 (supra). The findings on remaining issues i.e. issues No.4, 5 and 7 have not been assailed or challenged by any of the parties and, therefore, such findings call for no interference.

44. Even though, the findings recorded by the learned trial Court on issues No.1 and 2 are perverse and are liable to be set aside, yet no relief can be granted to the defendants as even they have failed to prove that they are bonafide purchasers and have further failed to prove that their possession with efflux of time has ripened into adverse possession. It is duly proved on record that the so-called purchase made by the plaintiff was in violation of provisions of Section 118 of the Act. Therefore, in terms of sub-section (3D) of Section 118, the suit land along with structure, buildings or other attachments, if any, are liable to be vested in the State Government free from all encumbrances and it shall be lawful to the State Government to make use of the land so vested in it. Ordered accordingly. The State Government is directed to take possession of the land within 7 days and thereafter use the same for such purposes as it may deem fit to do so.

45. Consequently, the appeal is disposed of in the aforesaid manner, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of. Copy 'dasti'.

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

Smt. Kanta Devi and Ors. .....Appellants.

Versus

Smt Manju and Ors. .....Respondents.

RSA No. 531 of 2007
Date of Decision: 23.3.2018.

Specific Relief Act, 1963- Section 34 and 38- Plaintiffs alleged that defendant No.2 in connivance with defendantNo.1 executed the sale deed of the land of the plaintiff playing fraud upon them by incorporating unauthorized term having power of executing sale in the power of attorney- **Held-** that in case of fraud, undue influence or coercion the pleadings must disclose full particulars of the same- general allegations are insufficient for making the Court to take notice of such averment in the pleadings- Further held that when there is concurrent findings of the fact and the law of the two courts below, such findings cannot be interfered with unless same are found to be perverse- no merit in the petition and same is dismissed. (Para-22, 23 and 27)

Cases referred:
Kripa Ram and Ors. v. Smt. Maina, 2002 (2) Shim.L.C. 213
Laxmidevamma and Others vs. Ranganath and Others, (2015) 4 SCC 264

For the appellants: Mr. Sanjay Sharma, Advocate.
For the respondents: Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant regular second appeal is directed against the judgment and decree dated 5.7.2007, passed by the learned District Judge, Shimla, in CA No. 40-S/13 of 2006, affirming the judgment and decree dated 8.3.2006, passed by the learned Civil Judge (Junior Division), Court

No.3, Shimla, District Shimla, H.P., in CS No. 111/1 of 1999, whereby suit for declaration and permanent prohibitory injunction having been filed by the plaintiffs-appellants ***(herein after referred to as "the plaintiffs")***, came to be dismissed.

2. In nutshell facts of the case, as emerge from the record are that plaintiffs filed suit in the Court of learned Civil Judge, claiming that they are owner in possession of the suit land as described in the impugned judgment and decree passed by the court below and defendants who have no right, title and interest of any kind in the suit land, and as such, they may be restrained from alienating, encumbering changing or in any manner deal with the suit land/property.

3. Plaintiffs averred in the plaint that they are illiterate and simpleton persons and as such, defendant No.2 namely Gurdyal Singh, resident of village Tundal, Tehsil Kandaghat, District Solan, H.P. taking undue advantage of their illiteracy and innocence, approached them on 8.12.1998 with a proposal for sale of land to the extent of 8-18 bighas out of their share and in this regard, got executed an agreement. Plaintiffs further alleged that no consideration was paid by defendant No. 2 to plaintiffs' No. 2 and 3. Subsequently, defendant No. 2 approached all the plaintiffs with the representation that since suit land is joint between the plaintiffs and one Shri Ramanand S/o Gajya, plaintiffs are required to execute general power of attorney in his favour to facilitate partition of the land inter-se plaintiffs and above named person namely Ramanand. Plaintiffs believing aforesaid representation/version put forth by defendant No.2 to be true, executed general power of attorney(s) in his favour on 5.4.1999 and 3.10.1998, which were subsequently registered in the office of Sub Registrar, Shimla. Plaintiffs claimed that contents of General Power of attorney were never read over or explained to them and defendant No.2 took active interest in execution of General Power of Attorney and he without their knowledge and consent, malafidely got incorporated in the General Power of Attorney that defendant No. 2 shall have the right to sell the land. Plaintiff further claimed that they had never consented to such proposal but defendant No. 2 by misrepresenting the true facts exercised undue influence over them and got the GPA executed. Plaintiffs further claimed that intention of defendant No.2 was only to grab the land of the plaintiffs and accordingly, he got the sale deed executed of the entire share of the plaintiffs on 5.4.1999 in favour of defendant No.1. Plaintiffs also stated that they were taken to the office of Tehsildar, Kandaghat by defendant No. 2 for registration of GPA though they are residents of District Shimla. In nutshell, plaintiffs alleged that defendant No.2 in connivance with defendantNo.1 in order to deprive them from their property, executed the sale deed of the share of the plaintiff to the extent of 17-16 bighas for the meager sale consideration of Rs. 75,000/-, which was also not paid by defendant No. 2 to the plaintiffs.

4. The defendants refuted the aforesaid allegations put forth in the plaint by filing the written statement, wherein they raised preliminary objections with regard to the proper valuation and jurisdiction. Defendant No.1 further claimed that she is an owner of the suit land as it was sold to her by defendant No.2 as an attorney of the plaintiffs. She further claimed that at the time of the execution of the sale deed, possession was also handed over to her on 12.4.1999. Defendant further claimed that she was not aware of the agreement dated December, 1998. Defendant No.1 specifically denied that power of attorney was got executed by defendant No.2 for the partition of the suit land. She further stated that plaintiffs No. 2 and 3 expressing their interest to sell the land on 1.4.1999, agreed in presence of defendant No. 2, to sell the same to the extent of 9bighas 18 biswas for a consideration of Rs. 3,00,000/-. She also stated that plaintiffs No. 2 and 3 made her to believe/understand that defendant No. 2 is their power of attorney, which fact was otherwise confirmed by defendant No.2. As per defendant No.1, substantial amount of consideration was paid by her to defendant No.2 in the presence of plaintiff and consequent thereupon, all the plaintiffs agreed to sell the suit land measuring 17-16 bighas for a total consideration of Rs. 4,51,000/-. She further stated before the court below that she was made to understand that plaintiff No. 1 had also executed power of attorney in favour of defendant No.2, who subsequently approached her for registration of sale deed. Plaintiffs also agreed to pay the registration fee of the sale deed. Defendant No.1 further claimed that plaintiffs are in the habit of cheating people and in past, they had also executed an agreement with some

person from Punjab, but after having received the amount of consideration, declined to execute the sale deed. Defendants specifically denied that sale deed was executed between the parties for a sum of Rs. 75,000/- but in fact an amount of Rs. 451000 was paid to defendant No.2 at the time of execution of sale deed. Plaintiffs by way of replication re-asserted/re-affirmed the claim put forth in the plaint, however, denied the averments contained in the written statement.

5. On the basis of aforesaid pleadings, learned court below framed following issues:-

"1.Whether the plaintiffs are entitled for the decree of declaration, as alleged? OPP

2. Whether the sale deed dated 12.4.21999 executed in favour of the defendant No.1 by the defendant No.2 is illegal and wrong? OPP

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

4. Whether the suit has not been properly valued for the purpose of court fee and jurisdiction ? OPD

5. Whether the suit is bad for non-joinder and mis-joinder of necessary parties? OPD

6. Whether the plaintiffs have not approached the court with clean hands? OPD

7. Whether the plaintiffs are estopped from filing the present suit due to their own act, conduct, deed and promises? OPD

8. Whether the suit in the present form is not maintainable? OPD

9. Relief."

6. Subsequently, learned trial Court on the basis of evidence led on record by the respective parties, dismissed the aforesaid suit filed by the plaintiffs. Plaintiffs, being aggrieved and dissatisfied with the judgment and decree passed by the learned trial Court filed an appeal under Section 96 of CPC in the court of learned District Judge, Shimla, which also came to be dismissed vide judgment dated 5.7.2007. In the aforesaid background, plaintiffs have approached this Court in the instant proceedings, laying therein challenge to the impugned judgments and decrees passed by the courts below.

7. This Court vide order dated 18.12.2008, admitted the instant appeal on the following substantial questions of law No. 1, 3, 4 and 5.

"1. Whether the learned District Judge and learned Trial Court failed to take into consideration the fact that the sale deed which was executed within a period of only seven days from the execution of the General Power of Attorney is shrouded with suspicision and has been wrongly relied upon?

3. Whether the learned Courts below vitiated the entire trial by holding main ingredient of the case i.e. defendant No.2, ex-parte, who misrepresented the facts and exercised undue influence over the appellants and finally succeed in his illegal designs?

4. Whether the learned Courts below further failed to take into consideration the fact that at the time of execution of sale deed the consideration amount was paid to the Defendants No.2 by the defendant No.1 not the appellants?

5. Whether the learned Courts below have mis-construed, mis-appreciated and misunderstood the oral as well as documentary evidence?

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

9. Since this Court had an occasion to peruse the pleadings as well as evidence, be it ocular or documentary adduced on record by the respective parties, during the proceedings of the case, this Court in not persuaded to agree with the contention put forth by the learned counsel for the plaintiffs that courts below have misread, mis-construed and mis-appreciated the evidence led on record by the defendants, especially statements of DWs No.2, 3 and 4, rather this Court having carefully examined entire record finds no illegality and infirmity in the judgments and decree passed by the courts below, which certainly appear to be based upon proper appreciation of evidence led on record. Otherwise also questions of law detailed herein above are not question of law much less substantial questions of law, rather same are question of fact which have been duly and properly examined by the courts below.

10. In nutshell, case of the plaintiffs is that they at no point of time had executed general power of attorney authorizing defendant No.2 to execute sale deed in favour of defendant No.1, but unfortunately, plaintiffs have not been able to prove their case by leading cogent and convincing evidence.

11. Smt. Kanta Devi, one of the plaintiff while examining herself as PW3 stated that since their uncle Ramanand was co-sharer, defendant No. 2 approached them that he will get the land partitioned and in this regard, they are required to execute the power of attorney in his favour. She further stated that she had not executed power of attorney in favour of defendant No.2 to sell the land. She further stated that defendant No. 2 had not prepared any document at Kandhaghat nor she had put any signatures on any document there. However, in her cross-examination, PW3 categorically stated that she 2-3 days' prior to the execution of the general power of attorney, they had called defendant No.2, who in turn had taken her thumb impression in her house on the blank papers. She further admitted that she had agreed to sell the land measuring 17-16 bighas, however earlier it was 9-18 bighas. She further denied that sale consideration of the land measuring 17-16 bighas was settled for Rs. 4,51,000/-.

12. Smt. Banti Devi, plaintiff No. 2 while examining herself as PW4 claimed that they are in possession of more than 17 bighas of land at Bharari Shimla and their uncle is also co-sharer with them in this very land. It has also come in her statement that defendant No.2 came with her and plaintiff No. 3 for purchase of 8 bighas of land about six years ago and in this regard, agreement Ext.PW4/A was executed with defendant No.2. It has also come in her statement that she and plaintiff No. 3 had executed power of attorney with defendant No. 2 for partition of the land. This witness further deposed before the court below that when defendant No. 2 had obtained their signatures on Ext.PW2/A, it was blank. It has also come in the statement of this witness that they had gone to register the general power of attorney in the office of Tehsildar, but at that time, they were told by PW2 that same is annexed with partition proceedings but in her cross examination, this witness stated that they had gone to the office of the Sub-Registrar, Kandaghat, for execution of the general power of attorney. She denied that Tehsildar had read over the contents of general power of attorney and thereafter, they admitting the same to be correct put their signatures on it. In her cross-examination, she categorically admitted that when they put their signatures on Ext.PW2/A, it was already written. Interestingly, this witness in her cross examination admitted that they had told husband of defendant No. 1 that defendant No. 2 namely Gurdyal Singh, was their power of attorney. Apart from above, this witness also admitted in her cross examination that they had told husband of DW1 that defendant No. 2 shall be the power of attorney of plaintiff No. 1 also.

13. If the statements made by these material plaintiff witnesses are read in conjunction juxtaposing each other, it can be safely inferred that plaintiffs were in touch with defendant No.1 for the sale of suit land and in this regard, they had authorized defendant No.2 as GPA. Though these witnesses have made an endeavor to prove on record that signatures, if any, made by them on the papers were for the purposes of preparation of GPA to effect partition between them and their uncle Ramanand, but as has been noticed herein above, it has come in the cross-examination of these witnesses that they had repeatedly informed husband of DW1 that defendant No. 2 was their power of attorney. If the argument having been made by the learned

counsel representing the plaintiffs that plaintiffs had executed general power of attorney in faovur of defendant No. 2 for effecting partition, is accepted, it is not understood that how husband of defendant No.1 came in picture. It has specifically come in the statement of PW4 Smt. Banti Devi that defendant No.2 had come to her for purchase of 8 bighas of land about six years ago. In this regard, agreement Ext.PW4/A was also executed.

14. After having carefully perused statements of these plaintiff witnesses, one thing is quite apparent from record that plaintiffs namely Kanta Devi and Banti Devi, had executed general power of attorney in favour of defendant No.2, who subsequently, sold the land to defendant No.1.

15. Leaving everything aside, this Court finds from the record that the stance put forth by the learned counsel representing the plaintiffs during his submissions is altogether contrary to the stand taken in the written statement because admittedly there is no allegation of fraud or collusiveness alleged by the plaintiffs in their plaint.

16. Entire reading of plaint nowhere suggests that plaintiffs leveled allegations, if any, against defendant No. 2 of forgery, rather their consistent stand is that they had put their signatures on the documents Ext.PW2/A, executing general power of attorney in favour of defendant No.2, to represent them in partition proceedings.

17. On the other hand, defendant examined one Shri Dhani Ram Verma, as DW1, who remained posted as Tehsildar at Kandhaghat from year 1996 to 1999, during which period, he was exercising powers of Sub-Registrar. He categorically stated before the court below that on 13.10.1998, Basanti Devi and Geeta Devi, plaintiffs produced before him power of attorney for registration and they were identified by one Med Ram, Ex-Pardhan of Gram Panchayat Kandhaghat. He further stated that he had read over the contents of the general power of attorney to plaintiffs namely Basanti Devi and Geeta whereafter they put their signatures in circle "A" in his presence. He further stated that Ext.PW2/B was produced before him by Smt. Kanta Devi for registration, which was executed in favour of defendant No.2 namely Gurdyal Singh. This defendant witness further stated that Smt. Kanta Devi was identified by one Shri Krishan Dutt.

18. Cross examination conducted on this witness nowhere suggests that plaintiffs were able to extract anything contrary to what he stated in his examination-in-chief, rather it can be safely stated that the plaintiffs were unable to shatter his testimony.

19. DW2 namely Bal Krishan, also stated that Gurdyal Singh is his neighbour and deal was finalized for sale of the land to the tune of Rs. 4,51,000/. He further stated that Devinder Thakur had paid a sum of Rs. 2,75,000/- as advance to defendant No.2 Shri Gurdyal Singh. He further stated that he had also met Smt. Kanta Devi when she executed power of attorney to sell the land in favour of DW2 Gurdyal Sigh. This witness also stated that Smt. Kanta Devi had put her signatures on the power of attorney and the Tehsildar had read over the contents of the same to Smt. Kanta Devi. It has also come in his statement that at the time of the registration of the sale deed, Devinder Thakur, had paid sum of Rs. 75,000/- to Gurdyal Singh and sum of Rs. 2,75,000/- was also paid on 12.10.1998, in his presence. In his cross-examination, this witness further admitted that Gurdyal Singh was not the owner of the suit land and Smt. Manju (Defendant No. 1) had a direct talk for the purchase of land with Gurdyal Singh. Interestingly, it has also come in the statement of this witness that another witness Jagdish Datt Sharma was called by the Gurdyal Singh, who on his asking also put his signatures on the sale deed. He further stated that sale deed was not prepared on the day when Ext.PW2/B was prepared. He stated that he and Jagdish had come to Shimla on the asking of Gurdyal Singh and the Tehsildar read over the contents of the sale deed to him and no amount was paid at the time of the registration of the sale deed and the sale deed was executed for a sum of Rs. 75,000/- and this amount was paid by husband of defendant No.1 two days prior to the registration of the sale deed. He categorically stated in cross examination that deal was settled for a total consideration of Rs. 4,50,000/- in his presence.

20. Smt. Manju Bhardwaj, defendant No.1 while examining herself as DW3 deposed that a talk with regard to the sale of suit land had taken place between her husband and Gurdyal Singh, as Gurdyal Singh was the General Power of Attorney of plaintiffs No. 2 and 3. She stated that sale deed was executed on 12.4.1999 in her presence and in presence of all three sisters (plaintiffs). In her cross examination, she admitted that a sum of Rs. 1,00,000/- was paid to Gurdyal Singh on 5.4.1999, but she was unable to state who scribed the sale deed Ext. PW1/A.

21. DW4 Devinder Kumar, also corroborated the version put forth by PW3 that he had prior acquaintance with DW 2 Gurdyal Singh, who had come to him in the first week of October, 1998 with a proposal to sell the land. He further stated that after having seen the land, he asked DW2 to come alongwith owner of the land.

22. Having closely perused/analyzed aforesaid versions put forth by the defendant witnesses, it can be safely concluded that defendant No.2 Gurdyal Singh approached the plaintiffs with a proposal to sell the land at Chail owned and possessed by the plaintiffs. As has been noticed above, it has clearly come in evidence that plaintiffs were present at the time of execution of sale deed. DW1 Dhani Ram who was Tehsildar at that relevant time, has categorically stated that power of attorney Ext.PW2/A, whereby defendant No.2 was authorized to sell the land, was presented to him by the plaintiffs and he had read over the contents of the same to them. It stands duly proved on record that power of attorney Ext.PW2.A was registered by DW1 in accordance with law and at that time, plaintiff never made any attempt to lodge protest with regard to the averments contained in the same, rather they believing them to be correct put/appended their signatures. Plaintiffs have not led any evidence suggestive of the fact that defendant No. 2 procured General Power of Attorney Ext.PW2/A fraudulently using undue influence upon the plaintiffs, rather intention of plaintiffs to sell the land through defendant No. 2 is quite apparent from the statement made by the plaintiffs themselves. It is not understood that if defendant No. 2 fraudulently executed PW2/A General Power of Attorney, what prevented the plaintiffs from lodging any complaint against him in the police or in the competent court of law.

23. It has been repeatedly held by the Hon'ble Apex Court as well as this Court that in case of fraud, undue influence or coercion, the pleadings of the parties must disclose full particulars and the case can only be decided on the particulars and there can be no departure from them in evidence. But as has been noticed in the case at hand, there are no pleadings with regard to fraud, undue influence, if any, exercised by the defendants, made in the plaint. General allegations are insufficient even to amount to an averment of fraud of which any court, ought to take notice.

24. Reliance is placed on Judgment passed by this Court in ***Shri Kripa Ram and Ors. v. Smt. Maina, 2002 (2) Shim.L.C. 213***, relevant paras whereof are reproduced herein below:-

> ***10. Section 60 of the Registration Act specifically provides that certificate endorsed on the document, registered by the Registrar, shall not only be admissible in evidence for the purpose of proving that document has duly been registered in the manner provided under the Act but also that the facts mentioned in the document referred to in Section 59 have taken place as mentioned herein.***
>
> ***It is now well settled that presumption of due execution of a document arises from the endorsement of the Sub Registrar under Section 60 of the Act. As far back as in 1928 Privy Council in Sennimalai Goundan and another v. Sellappa Goundan and others, AIR 1929 Privy Council 81, interpreting the provisions of Section 60(2) read with Section 115 of the Evidence Act held that where a person admits execution before the Registrar after the document has been explained to him, it cannot subsequently be accepted that he was ignorant of the nature of transaction. In that case, the plaintiff alleged that his father and brothers, with an intention of defrauding the plaintiff of his legitimate***

share in the family properties, entered into a fraudulent collusive partition. The trial Court found that plaintiff's case was proved and he decreed the suit. In appeal, it was held that the plainti9ff failed to make out the alleged fraud and allowed the appeal. The decree of the trial Court was set aside. The Subordinate Judge had found that the partition was unequal because the land allotted to the plaintiff was less than allotted to other brothers. It was found that contemporaneously with the partition, some land that fell into the share of plaintiff Karuppa were conveyed to his second wife Nachakkal by a registered sale deed. Nachakkal gave evidence that the transaction was bogus, as she never paid the consideration for the sale through she admitted execution of the sale deed before the Registrar. Her story that she was ignorant of the nature of the transaction, it was held, cannot be accepted as she had admitted the execution of the sale deed before the Registrar.

11. A Division Bench of this Court Kanwarani Madna Vati and Anr. V. Raghunath Singh and others, AIR 1976 HP 41, interpreting the provisions of Section 62 of the Registration Act, held that here is a resumption of correctness of the document if its execution is admitted before the Registrar. The Division Bench in para-20 observed:

> ***"Under Section 60(2) of the Registration Act the certificate given by the registering officer shall be admissible for the purpose of proving that the document has been duly registered in the manner provided by this Act and that the facts mentioned in Section 59 have occurred as therein mentioned. Therefore, there is a presumption, which attaches to the correctness of the endorsements made on the document by the registering officer. These endorsements show the presentation of the document personally by Smt. Madna Vati for registration. She was identified by Kr. Jowala Singh and her signatures were also obtained by the registering officer on both the endorsements, i.e., the endorsement of presentation and that of admitting the contents of the documents and the receipt of the consideration by her. In order to rebut this it was necessary for the defendant No.2 to have produced the Sub Registrar. She did not produce him in the witness box. Therefore, the presumption of correctness shall become conclusive." (Emphasis supplied).***

12. In the present case as noticed earlier, there is endorsement of the Sub Registrar to the 3effect that the contents were read over and explained to the vendor-plaintiff Mania Devi and, therefore, the presumption is that Sub-Registrar (DW3) himself is categorical in his evidence that the contents of the sale deed were read over to Maina Devi. He duly proved the endorsements. Therefore, in the circumstances, learned first appellate Court was not right while reversing the findings of the trial Court on the grounds that the contents of the sale deed were not read over or explained to the plaintiff."

25. In view of the detailed discussion made herein above, this Court sees no force in the argument of learned counsel representing the plaintiff that courts below have not read the evidence in its right perspective while determining the controversy at hand, rather this Court is of the view that courts below have dealt with each and every aspect of the matter meticulously and as such, there is no scope of interference whatsoever by this Court. Substantial questions of law are answered accordingly.

26. At this stage, Mr. Neeraj Gupta, Advocate, representing the defendants contended that this court has very limited jurisdiction to re-appreciate the evidence in the instant proceedings, especially in view of the concurrent findings recorded by the courts below. In this regard, to substantiate his aforesaid plea, he placed reliance upon the judgment passed by the Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others, (2015) 4 SCC 264,*** relevant para whereof reads as under:-

> ***"16. Based on oral and documentary evidence, both the courts below have recorded concurrent findings of fact that plaintiffs have established their right in 'A' schedule property. In the light of concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for re-appreciation 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 plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100 C.P.C., 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."***

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

28. In the facts and circumstances discussed above, this Court is of the view that findings returned by the trial Court below, which were further upheld by the first appellate Court, do not warrant any interference of this Court as findings given on the issues framed by the trial Court below as well as specifically taken up by this Court to reach the root of the controversy appear to be based on correct appreciation of oral as well as documentary evidence. Hence, the appeal fails and dismissed accordingly. There shall be no order as to costs.

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

Pushpender Kumar ....Petitioner.

Versus

State of H.P. and others ....Respondents

CWP No. 6288 of 2012

Date of Decision 24th March, 2018

Constitution of India, 1950- Article 226- Pensionary benefits of the father of the petitioner were withheld- Petitioner sought release of the said benefits along with interest @ 15% per annum- pensionary benefits not released due to penalty of recovery of Rs. 2,51,914/- imposed by the Conservator of Forests- Penalty was, however, waived on representation of the father of the petitioner- Father of the petitioner had, however, died during the pendency of the representation- the amount due has already been released- **Held-** that petitioner would have been entitled for interest had his father being exonerated from charge levelled against him as per Rules 9 and 68 of

the CCS (Pension) Rules but it is not so in the present case - Hence, no merits in the petition- petition dismissed. (Para-6 and 7)

Cases referred:

S.K.Dua vs. State of Haryana and another, 2008)3 SCC 44

D.D.Tewari (dead) through LRs vs. Uttar Haryana Bijli Vitran Nigam Ltd. and others, (2014)8 SCC 894

For the Petitioner:	Shri Rajiv Rai, Advocate.
For the Respondents:	Shri Shiv Pal Manhans, Additional Advocate General with Mr.R.R.Rahi, Deputy Advocate General for respondents No.1 to 3 and Mr.V.B.Verma, Central Government Counsel, for respondent No.4.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.(Oral)

Petitioner, son of a deceased retired employee Shri Jagdishanand, has filed present writ petition seeking direction to respondents to release GPF amount of his father and also for the release of entire retiral benefits along with interest at the rate of 15% per annum from the date of superannuation of his father till the date of realisation of amount, which were due after his superannuation but not released for department proceedings.

2. Respondents have contested the petition stating that Jagdishanand, father of the petitioner, had retired as Deputy Ranger of Forest from the department on 31.12.1990, but his pensionary benefits were not released due to penalty of recovery of Rs.2,51,914/- imposed upon him by Conservator of Forests, Rampur against which the delinquent employee had filed an appeal, during the pendency of which, he had expired on 29.12.2003. It is also contended that part of retiral benefits i.e. GPF, GIS had already been released to the father of petitioner during May 1991 and August 1992 and in support of this contention copies of relevant pages of cash book have also been placed on record as Annexures R-1 and R-2. It is further stated that retiral benefits i.e. DCRG, leave encashment and pension etc. have also been released. Letter dated 8.7.1991 is also placed on record as Annexure R-3 to establish that pension has also been released by Accountant General H.P. vide PPO No. 22589/HP. Copy of office order dated 27.3.1997 (Annexure R-IV) issued by the Conservator of Forest Rampur Forest Circle has been placed on record whereby amount of DCRG and leave encashment of deceased Jagdishanand was forfeited and withheld with further direction to take steps for recovery of balance amount out of penalty Rs.2,51,914/-.

3. During pendency of appeal/representation of deceased employee against order dated 27.3.1997 he had expired on 29.12.2003. Thereafter present petition was preferred on 17.07.2012.

4. As evident from communication dated 1.11.2012, (Annexure R-6) after death of father of petitioner and filing of present petition, representation of father of petitioner was considered by the Government and approval for waiving off the penalty in favour of deceased employee was communicated by the Additional Secretary (Forest) to the Government of H.P. vide letter dated 25.10.2012. This comunication was also sent to the DFO Kinnaur by the office of Chief Conservator of Forest for information with direction to release of all pending dues of the retired official to the legal heirs of retired official immediately. Thereafter vide communication dated 3.11.2012 (Annexure R-7) petitioner was informed in this regard by the Divisional Forest Officer Kinnaur with further information that GIS amounting to

Rs.105/- and GPF amounting to Rs.30,000/- stood released to the retiree during the months of May 1991 and August 1992. Along with this letter (Annexure R-7), cheques No. 145770 and 145771 dated 3.11.2012 amounting to Rs.28380/- and 19210/- against the payment of amount of DCRG and leave encashment of deceased employee late Shri Jagdishanand was also transmitted in favour of the petitioner.

5. In the aforesaid circumstances, as on date, there is nothing due to be paid to the petitioner on account of retiral benefits of late Shri Jagdishanand. However, it is contended by learned counsel for the petitioner that interest on delayed payment of DCRG and leave encashment has not been paid and as evident from communication dated 1.11.2012 (Annexure R-6) the employee i.e. deceased father of the petitioner was exonerated from charge levelled against him, petitioner is entitled for interest upon payment made in the year 2012 from the date of retirement of his father till date of payment.

6. Rule 9 of CCS (Pension) Rules empowers the Government to withhold the pension or gratuity or both either in full or in part or withdrawing the pension in full or part, either permanently or for a specified period or to order a recovery from pension or gratuity of the whole or part of any pecuniary loss caused to the Government by the servant, if, in any departmental or judicial proceedings, for grave misconduct or negligence on the part of employee during the period of his service including service rendered upon re-employment after retirement.

7. Rule 68 of the CCS (Pension) Rules provides interest on delayed payment of gratuity, in case the delay in payment is attributtable to the administrative lapses and delay in payment is not caused on account of failure on the part of the Government servant to comply with the procedure laid down by the Government for processing his pension papers. It is clarified by the Government vide O.M. No.1(4)/Pen.Unit/82, dated 10th January, 1983 that in order to mitigate the hardship to the Government servants who, on conclusion of proceedings, are fully exonerated, it has been decided that interest on delayed payment of retirement gratuity may also be allowed in their cases and in such cases, the grautuity will be deemed to have fallen due on the date following the date of retirement for the purpose of payment of interest on delayed payment of gratuity. However, it is further clarified that the benefit of these instructions would not be available to such of the Government Servants who die during pendency of judicial/disciplinary proceedings against them and against whom the proceedings are consequently dropped.

8. In present case, communication dated 1.11.2012 (Annexure R-6) clearly indicates that it is undisputed in the present case that after disciplinary proceedings, recovery was imposed upon deceased father of the petitioner and he died during pendency of his representation/appeal against the said order. Thereafter Government of H.P. had approved for waiving off the penalty of recovery in favour of the deceased and thereafter on the basis of said waiving off the penalty, deceased employee was exonerated from the charges levelled against him. Therefore, in present case, it is not an exoneration simplicitor but it is pursuant to the waiver of recovery and therefore, delinquent in present case can not be said to have been fully exonerated. Here, exoneration is in consequence of waiver of recovery of penalty. Hence keeping in view the provisions of Rule 9 read with Section 68 of CCS (Pension) Rules read with O.M. No. 1(4)/Pen.Unit/82, dated 10.1.1983 and O.M.No.7(1) PU/79, dated 11.7.1979, petitioner is not entitled for any interest for delayed payment of DCRG and leave encashment.

9. Learned counsel for the petitioner, in support of his contention, has relied upon the pronoucement of the Apex Court reported in ***(2008)3 SCC 44 titled S.K.Dua vs. State of Haryana and another and (2014)8 SCC 894 titled D.D.Tewari (dead) through LRs vs. Uttar Haryana Bijli Vitran Nigam Ltd. and others.***

10. In ***S.K.Dua's*** case, disciplinary proceedings were finally dropped and all retiral benefits were extended to the employee after four years and in those circumstances, it was held that employee was entitled to the interest of such benefits and in those circumstances, prima facie finding that grievances voiced by the appellant appeared to be well founded, he was held entitled to the intererst on retiral benefits. Whereas in present case, proceedings had not been dropped and father of the petitioner has been exonerated for waiver of penalty imposed upon him by the Government after his death.

11. In ***D.D.Tiwari's case*** retiral benefits of the employee were withheld on the ground that some amount was due to the employer but no disciplinary proceedings were pending against employee on the date of his retirement and it was found by the Court that erroneously witholding of gratuity amount for which employee was legally entitled entailed the penalty on delayed payment and for that reason, employer was also held liable to make payment of penalty amount on delayed payment of gratuity under the provisions of Payment of Gratuity Act, 1972. Facts of present case are entirely different to the case in ***D.D.Tiwari's case.***

12. In view of above, present petition being devoid of any merit is dismissed.

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

State of Himachal Pradesh ...Appellant.
Versus
Tharban Lal ...Respondent.

Cr. Appeal No.248 of 2009
Reserved on: 27.02.2018
Decided on: 26.03.2018

N.D.P.S. Act, 1985- Section 20- Accused apprehended by the police party on the basis of suspicion of carrying contraband- His bag was searched without associating any independent witnesses- Charas weighing 800 grams was recovered- **Held-** that non-association of independent witness is not fatal in every case, evidence of the official witnesses can be believed- No honest effort was, however, made to find independent witness in the present case – the same is fatal for the prosecution case specially when there are contradictions in the versions of the official witnesses- non-production of seals by official witnesses with which contraband was sealed and re-sealed has also significant bearing on the fate of the prosecution case, especially in view of non-association of independent witnesses- Further held- that presumption of culpable mental state as contemplated in Section 35 of the N.D.P.S. Act shall come into effect only, once prosecution had successfully proved the recovery of contraband from the possession of the accused beyond reasonable doubt- no case for interference in the judgment of acquittal recorded by the Trial Court is made out- Appeal is accordingly dismissed. (Para-9, 22 and 27)

Cases referred:

State of Haryana versus Mai Ram, son of Mam Chand, (2008) 8 Supreme Court Cases 292
State of Punjab versus Nirmal Singh, (2009) 12 Supreme Court Cases 205
State of Punjab versus Leela, (2009) 12 Supreme Court Cases 300
State of Punjab versus Surjit Singh and another, (2009) 13 Supreme Court Cases 472
Kulwinder Singh and another versus State of Punjab, (2015) 6 Supreme Court Cases 674
Karamjit Singh versus State (Delhi Administration), 2003 Cri.L.J. 2021

Ram Lal and another versus State of H.P., Latest HLJ 2005 (HP) (DB)143
Ian Roylance Stillman versus State of Himachal Pradesh, 2002 (2) Shim. L.C. 16
State represented by Inspector of Police, Chennai versus N.S. Gnaneswaran, (2013) 3 Supreme Court Cases 594
Noor Aga versus State of Punjab and another, (2008) 16 SCC 417
State of Punjab versus Baldev Singh, (1999) 6 SCC 172
Ritesh Chakarvarti versus State of M.P., (2006) 12 SCC 321
Paramjeet Singh alias Pamma versus State of Uttarakhand, (2010) 10 SCC 439

For the appellant: Mr. M.A. Khan, Mr. S.C. Sharma, Narinder Guleria and Mr. Nand Lal thakur, Additional Advocate Generals, with Mr. Kunal Thakur, Deputy Advocate General.
For the respondent: Mr. Anup Chitkara and Ms. Sheetal Vyas, Advocates.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge.

This appeal has been preferred by the State of Himachal Pradesh against acquittal of respondent-Tharban Lal vide judgment, dated 29th October, 2008, passed by the learned Special Judge, Kullu, in Sessions Trial No. 52/06 arising out of case FIR No. 248/2005 registered at Police Station Manali under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'NDPS Act').

2. Prosecution case, in brief, is that on 19th November, 2005, at about 2.45 p.m., PW-3 SI Lal Singh, alongwith HC Gangvir Singh (not examined), HHC Nand Lal (not examined), PW-1 HC Deepak Kumar and PW-2 Constable Sanjay Kumar, departed Police Post Patlikuhl for patrolling and detection of crime relating to excise and narcotics after recording DDR No. 10 Ex. PW-3/B. At about 4.50 p.m., near 15-miles bridge, in the jungle, police party noticed a person coming from upper side having a rucksack on his shoulder, who, on seeing the police party, took u-turn and started running towards jungle, whereupon the police party, on suspicion of some contraband being carried by the said person, overpowered him. On inquiry, he disclosed his identity as respondent. Thereafter, PW-2 Constable Sanjay Kumar was sent by PW-3 SI Lal Singh in search of independent witnesses, who did not find any independent witness and came back on the spot, whereafter PW-3 SI Lal Singh associated PW-1 HC Deepak Kumar and PW-2 Constable Sanjay Kumar as witnesses in search and seizure procedure.

3. After compliance of Section 50 of NDPS Act, vide memo Ex. PW-1/A, whereupon respondent opted to be searched by the police party present on the spot, the Investigating Officer, i.e. PW-3 SI Lal Singh, gave his personal search to respondent vide memo Ex. PW-1/B and thereafter, conducted search of bag carried by the respondent. During search, charas was recovered from the bag, which, on weighment, was found to be 800 grams. After separating two samples of 25 grams each from the recovered contraband, samples as well as remaining bulk of charas were sealed in separate parcels with seal 'T'. NCB Form, copy whereof is Ex. PW-1/D, was prepared in triplicate after taking sample seal impressions of seal 'T' on separate piece of cloth Ex. PW-1/C and on the the NCB Form. The seal was handed over to PW-2 Constable Sanjay Kumar and three parcels were taken into possession vide memo Ex. PW-1/E. Thereafter, rukka Ex. PW-2/A was prepared and sent to Police Station Manali by PW-3 SI Lal Singh through PW-2 Constable Sanjay Kumar for registration of FIR. After registration of FIR No. 248/2005 Ex. PW-8/A, the case file was brought back by PW-2 Constable Sanjay Kumar to the spot. Statements of witnesses were recorded and spot map Ex. PW-3/A was prepared. Respondent was arrested vide memo Ex. PW-1/F and his mother, as indicated in endorsement on memo Ex. PW-1/F encircled in red at point 'A', was informed about the arrest of respondent.

4. As per prosecution case, case property was produced before PW-8 SHO Jagdish Chand, who re-sealed the parcels with seal 'L', took sample seal impression on a separate piece of cloth Ex. PW-8/C, and filled columns No. 9 to 11 in NCB Form in triplicate and deposited the entire case property in malkhana with PW-5 HC Hari Singh. On 1st December, 2005, PW-5 HC Hari Singh, through PW-7 HHC Bir Singh, sent the sample parcels of charas alongwith documents to CTL Kandaghat vide RC No. 150/05, copy whereof is Ex. PW-5/B. After depositing the case property, PW-7 HHC Bir Singh handed over the receipt Ex. PW-5/C to PW-5 HC Hari Singh. After receiving the report of Chemical Examiner Ex. PA, PW-8 SHO Jagdish Chand prepared the challan and presented the same in the Court.

5. During trial, prosecution has examined eight witnesses to prove its case. After recording his statement under Section 313 of the Code of Criminal Procedure (hereinafter referred to as 'CrPC'), respondent has chosen not to lead any evidence in his defence. On conclusion of trial, the respondent stands acquitted. Hence, the appeal.

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

7. PW-1 HC Deepak Kumar, PW-2 Constable Sanjay Kumar and PW-3 SI Lal Singh are the only spot witnesses. There is no independent witness associated by the police in present case and the prosecution is relying upon testimonies of official witnesses only.

8. There is no dispute with regard to case law cited by learned Additional Advocate General in pronouncements of the apex Court in cases titled **State of Haryana versus Mai Ram, son of Mam Chand,** reported in **(2008) 8 Supreme Court Cases 292; State of Punjab versus Nirmal Singh,** reported in **(2009) 12 Supreme Court Cases 205; State of Punjab versus Leela,** reported in **(2009) 12 Supreme Court Cases 300; State of Punjab versus Surjit Singh and another,** reported in **(2009) 13 Supreme Court Cases 472;** and **Kulwinder Singh and another versus State of Punjab,** reported in **(2015) 6 Supreme Court Cases 674,** wherein it has been held that in absence of any infirmity in the evidence of official witnesses, conviction can be based on the testimony of official witnesses only and there is no legal bar to convict an accused in absence of independent witnesses only on the basis of statements of official witnesses unless there is material to discredit their statements or some infirmity is pointed out in their evidence as trustworthy, credible and unimpeachable evidence of official witnesses beyond reproach is sufficient to convict an accused for the reason that it is the quality, not the quantity, which matters.

9. It is settled position that prosecution case is not to be rejected outrightly on the sole ground that there are no independent witnesses as the official witnesses are also independent witnesses unless proved to be inimical towards the accused like any other witnesses, however, keeping in view the fact that they are highly interested in success of the prosecution case being part of prosecution agency, their statements, in absence of independent witnesses, are to be scrutinized with greater care and caution as the question of personal liberty of a person is involved in a criminal trial.

10. It is also contended by learned Additional Advocate General that mere non-association of independent witnesses does not render the recovery of contraband illegal; there is no law for corroboration of evidence of official witnesses by independent witnesses; presumption is that every person acts honestly and the veracity of official witnesses is not to be suspected without any good ground and non-examination/ non-association of independent witnesses is not always fatal for prosecution. In support of his contention, learned Additional Advocate General has relied upon **Kulwinder Singh's case (supra); Karamjit Singh versus State (Delhi Administration),** reported in **2003 Cri.L.J. 2021; Ram Lal and another versus State of H.P.,** reported in **Latest HLJ 2005 (HP) (DB)143;** and **Ian Roylance Stillman versus State of Himachal Pradesh,** reported in **2002 (2) Shim. L.C. 16.** Undisputed ratio of law cited by learned Additional Advocate General is of no help to prosecution in present case as it is also settled law of land that provisions to associate independent witnesses are not ornamental in

nature but are mandatory so as to ensure fair trial in a criminal case. Exemption from associating independent witnesses is an exception for reasonable grounds based upon peculiar facts and circumstances of a particular case. No doubt, the Courts, after believing the official prosecution witnesses only, convict the accused, but, it does not exempt the prosecution from associating the independent witnesses wherever, in normal circumstances, it is possible to associate independent witnesses.

11. According to PW-1 HC Deepak Kumar and PW-2 Constable Sanjay Kumar, PW-3 SI Lal Singh had deputed PW-2 Constable Sanjay Kumar to locate some local/ independent witnesses, however, PW-3 SI Lal Singh has not uttered even a single word in this regard. In his deposition, PW-3 SI Lal Singh has stated that on suspicion that respondent might be carrying some incriminating article with him, he (PW-3) apprised the respondent about his legal right of being searched either in presence of Magistrate or Gazetted Officer or in the presence of police present on the spot and on consent of respondent to be searched in the presence of police present on the spot, he prepared the consent memo, gave the personal search to respondent and conducted the search of bag being carried by the respondent. Statement of PW-3 SI Lal Singh, with respect to efforts made to locate independent witnesses, is contrary to the statements of PW-1 HC Deepak Kumar and PW-2 Constable Sanjay Kumar.

12. PW-3 SI Lal Singh has not assigned any reason for not making any effort to associate the independent witnesses. Even PW-1 HC Deepak Kumar and PW-2 Constable Sanjay Kumar have also not indicated any reasonable explanation for non-availability of independent witnesses. There is evidence on record that shops, residences and National Highway were at a distance from 50 meters to 500 meters from the spot. In the month of November, at 5.00 p.m., it is impossible to believe that no one was available either in shops or in residences or National Highway situated on the spot. Even, it is admitted by prosecution witnesses that 15-miles bridge connects number of villages from National Highway and it is a busy road. It is not a case of prosecution that persons approached by PW-2 Constable Sanjay Kumar were not willing to join the investigation, but the only statement which has come on record is that independent witnesses were not available.

13. All the three witnesses, in their cross-examination, have admitted that within a distance ranging from 25 meters to 300 meters, there were shops, residences and fish hatchery farm and that the shops and residences were visible from the bridge. It is claimed in the statements of PW-1 HC Deepak Kumar and PW-2 Constable Sanjay Kumar that respondent was spotted at a distance of about 150-200 meters from 15-miles bridge and it is admitted by them that there were shops and residences situated at a distance ranging from 250 to 500 meters from the bridge. The recovery of contraband is claimed to have taken place at about 5.00 p.m. and at that time, there was every possibility of availability of independent witnesses especially in view of the admissions of these official witnesses in their cross-examination about existence of shops and residences near the spot of recovery.

14. Therefore, here is not a case where the prosecution has been able to prove that either no independent witness was possible to be associated with all out honest efforts made by the police or the independent witnesses contacted by the police were not willing and ready to join the investigation.

15. It is case of the prosecution that respondent was noticed by the police party coming on the road, who, on seeing police party, took a u-turn and started running towards the jungle. PW-3 SI Lal Singh, in his examination-in-chief, has claimed to have laid a Nakka on the spot and in his cross-examination, he has categorically stated that at the time of laying Nakka, police party was hiding and concealing its presence on the spot. His version is self-contradictory. In case, police party was hiding itself, then version of prosecution, that respondent took u-turn on noticing the police party, is false, which raises a serious doubt on the genesis of prosecution case.

16. PW-3 SI Lal Singh, in the Court, has deposed that after sending PW-2 Constable Sanjay Kumar with Rukka to the police station, he recorded statements of witnesses, prepared spot map and before return of PW-2 Constable Sanjay Kumar with the case file from the Police Station after recording FIR, he informed the respondent about grounds of his arrest vide memo Ex. PW-1/F and also informed his mother by means of a wireless message. Whereas, in special report Ex. PW-6/A, PW-3 SI Lal Singh has stated contrary to the same by recording that statement of PW-2 Constable Sanjay Kumar under Section 161 CrPC was recorded on 15-miles bridge, where PW-2 Constable Sanjay Kumar met PW-3 SI Lal Singh with case file on return from the Police Station and respondent was arrested at 8.05 p.m. at 15-miles bridge and information of his arrest was given. The sequence of events mentioned by him in special report Ex. PW-6/A is contrary to what he has deposed in the Court.

17. PW-1 HC Deepak Kumar, in his statement, has stated that after taking possession of the recovered contraband, respondent was informed about ground of arrest and was arrested vide memo Ex. PW-1/F and his mother was informed, as desired by him, thereafter, rukka was prepared and handed over to PW-2 Constable Sanjay Kumar. Whereas, according to PW-2 Constable Sanjay Kumar and PW-3 SI Lal Singh and also as per contents of rukka Ex. PW-2/A, the rukka was prepared after seizure of the contraband, but prior to arrest of respondent-accused.

18. Further, PW-1 HC Deepak Kumar has stated that he did not remember as to what was recovered from the possession of respondent during his personal search conducted by the Investigating Officer before the arrest. However, he claimed preparation of memo of personal search Ex. PW-1/G at the time of arrest whereas PW-3 SI Lal Singh is silent about preparation of the memo of personal search of respondent and in the cross-examination, he has categorically stated that no other memo, except stated by him in his examination-in-chief, was prepared by him.

19. As per prosecution case, the Investigating Officer had given his personal search to respondent, but, PW-2 Constable Sanjay Kumar is completely silent about the same and has stated that after preparation of consent memo Ex. PW-1/A, PW-3 SI Lal Singh took the search of the bag. In cross-examination, he has not deposed about preparation of memo of search of Investigating Officer Ex. PW-1/B and has categorically stated that no other memo, except which were referred by him in his examination-in-chief, was prepared by the Investigating Officer.

20. PW-1 HC Deepak Kumar has deposed that during patrolling, they stopped at 15-miles bridge for some time and also went towards Naggar bridge. He has not stated about patrolling at Pangan road. On the other hand, PW-2 Constable Sanjay Kumar has stated that they also patrolled at Pangan road, but, remained silent about patrolling towards Naggar bridge. PW-3 SI Lal Singh has categorically stated that they did not go towards the road leading to Naggar bridge and he has also evaded to reply specifically about the names of other places where they carried out patrolling. He has also denied to have remembered as to whether any Nakka was laid on 15-miles bridge or they had checked any vehicle there.

21. In view of the discrepancies, contradictions and infirmities noticed hereinabove, testimonies of official witnesses, examined in present case, cannot be made basis to convict the respondent as from the evidence on record and in the given facts and circumstances of present case, the version of prosecution appears to be concocted.

22. There is no dispute with regard to contention of learned Additional Advocate General canvassed by relying upon pronouncement of apex Court in case titled as **State represented by Inspector of Police, Chennai versus N.S. Gnaneswaran,** reported in **(2013) 3 Supreme Court Cases 594;** and judgment, dated 1st September, 2016, rendered by this Court in **Criminal Appeal No. 201 of 2016,** titled as **State of Himachal Pradesh versus Kishori Lal,** that non-production of original seal in the Court is not fatal to the prosecution case unless it is established on record that such non-production has caused serious prejudice to the accused. But, in present case, there were no independent witnesses associated by the police and the seal,

after seizure, was handed over to PW-2 Constable Sanjay Kumar, who was none else but a police official serving in the same Police Station. Another seal, after re-sealing, was also kept by PW-8 SHO Jagdish Chand with him. For the contradictions, discrepancies and non-association of independent witnesses; as discussed above, it was necessary for the prosecution to at least produce the original seal(s) in the Court so as to corroborate the version of official witnesses in absence of independent witnesses in the given circumstances of the present case.

23. According to prosecution story, after recovery to 800 grams of charas from respondent, two samples of 25 grams each were taken out from the bulk and sealed in separate parcels and one sample was sent for chemical analysis. At the time of leading evidence in the Court, only bulk parcel Ex. P-1 and sample parcel Ex. P-2 were produced in the Court whereas sample parcel sent for chemical examination was never produced in the Court so as to connect the remaining bulk charas Ex. P-1 and the sample parcel Ex. P-2 with the sample parcel sent for chemical examination. In absence of physical production of the sample sent for chemical examination, it cannot be said that the prosecution has been able to connect the Chemical Examiner's report Ex. PA with the remaining bulk parcel Ex. P-1 or another sample parcel Ex. P-2. The physical evidence of a case of this nature, being property of the Court, should have been produced in the Court and non-production thereof definitely warrant drawing of negative inference within the meaning of Section 114 (g) of the Evidence Act *{See Noor Aga versus State of Punjab and another, (2008) 16 SCC 417}*

24. A stamp has been affixed on Chemical Examiner's report Ex. PA stating therein that seal/seals on the sample parcel were tallied with the specimen impression of seal/seals and were found to be the same, intact and unbroken, but, perusal of record indicates that no sample of re-sealing seal 'L' is on record nor the statements of witnesses, including PW-8 SHO Jagdish Chand, depict that such sample seal was ever taken. In absence of creditworthy evidence of official witnesses, it is also an additional ground for doubting the fairness of the procedure adopted by the prosecution during investigation.

25. In present case, for unreliable evidence of official witnesses, non-production of sample parcel sent for chemical examination is also fatal to the prosecution case for want of production of missing link between the parcels produced in the Court and chemical Examiner's report Ex. PA.

26. As deposition of spot official witnesses has not been found to be trustworthy and confidence inspiring, testimonies of remaining witnesses, other than spot official witnesses, who were associated for completion of investigation, are not necessary to be discussed.

27. No doubt, Section 35 of NDPS Act provides presumption of culpable mental state of an accused for commission of offence by him, for possession of narcotic drugs, including charas, on his failure to account the said possession satisfactorily, however, said presumptions will come into play only after prosecution has successfully proved the recovery of contraband from the possession of the accused beyond reasonable doubt. Section 54 of NDPS Act places the burden of proof on the accused as regards possession of contraband to account for the same satisfactorily. Sections 35 and 54 of the NDPS Act, no doubt, raise presumptions with regard to the culpable mental state on the part of accused and also places the burden of proof on this behalf on the accused, but, presumption would operate only in the event the pre-requisite circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and legal burden would be shifted to the accused only when it stands satisfied. *{See Noor Aga versus State of Punjab and another, (2008) 16 SCC 417}*

28. In present case, for discrepancies and contradictions in statements of spot official witnesses with respect to sequence of events, missing narration of certain events claimed to have happened by the prosecution and also about the manner in which the events alleged to have taken place, the veracity of prosecution story is under suspicion. Thus, evidence on record is not sufficient to attract the provisions of Sections 35 and 54 of NDPS Act in present case.

29. It is also well settled principle of criminal jurisprudence that more serious the offence, the stricter is the degree of proof. A higher degree of assurance, thus, would be necessary to convict an accused. It must be kept in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed. {*See State of Punjab versus Baldev Singh, (1999) 6 SCC 172; Ritesh Chakarvarti versus State of M.P., (2006) 12 SCC 321; Noor Aga versus State of Punjab and another, (2008) 16 SCC 417; and Paramjeet Singh alias Pamma versus State of Uttarakhand, (2010) 10 SCC 439*}

30. In view of above discussion, the evidence led by the prosecution cannot be considered to be cogent, reliable, trustworthy and confidence inspiring so as to be relied upon to convict the respondent for the offence charged.

31. Respondent is also having advantage of being acquitted by the trial Court fortifying the presumption of innocence in his favour which stands unrebutted and for want of pointing out any cogent, reliable, convincing and trustworthy evidence against the respondent, it cannot be said that acquittal of respondent has resulted into travesty of justice or has caused miscarriage of justice. Therefore, no case for interference is made out. Accordingly, the appeal is dismissed. Bail bonds furnished by the respondent and his surety are discharged. Case property be dealt with as directed by the trial Court in impugned judgment. Record be sent back.

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

Raj Kumar ....Petitioner.

Versus

Bhakra Beas Management Board and others ....Respondents.

CWP No.: 10554 of 2012
Date of Decision: 28.03.2018

Constitution of India, 1950- Article 226- Petitioner appointed against the post of Khansama on temporary basis was given salary in the pay scale of Rs. Rs.750-1410/-, whereas, other Khansama appointed on the same post on temporary basis was allowed pay scale of Rs. 830-1600/-- **Held-** that there is no justification of giving pay on lower scale to the petitioner, when on perusal of the appointment letters of both the persons, there is no difference in the conditions of the two appointments- Further held that such discrimination is violative of Article 14 of the Constitution- Respondent/Board is directed to pay salary to the petitioner in the higher scale – further directed to pay the arrears inthree months- petition disposed of as allowed. (Para-5 and 6)

For the petitioner: Mr. Varun Rana, Advocate.
For the respondents: Mr. Naresh Kumar Sood, Senior Advocate, with Mr. Aman Sood, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

There is a very short issue involved in the present petition. Vide Annexure P-1, dated 14.05.1997, the petitioner was offered appointment on temporary basis as a Khansama by the respondent-Board in the pay scale of Rs.750-1410/- with initial start of Rs.770/-. Vide Annexure P-2, one Sh. Gajraj Singh was also appointed as Khansama purely on temporary basis by the said Board, on the same terms and conditions, on which the petitioner was so appointed, except that the appointment of Gajraj Singh was in the pay scale of Rs.830-1600/-. According to the petitioner, when both he and Gajraj Singh stood appointed against the

post of Khansama, purely on temporary basis, then there could not have been any discrimination *intra* both of them, as far as grant of pay scale is concerned. It is in these circumstances that the present petition has been filed by the petitioner, praying for the following reliefs:

> *"(i) Direct the respondents to remove the anomaly/disparity in pay scale of the petitioner and grant the petitioner pay scale of Rs.830-1600/- from the date of his appointment i.e. 16.05.1997.*
>
> *(ii) Direct the respondents to calculate the arrears of salary due to the petitioner which was not granted to him due to lesser pay scale and pay the same in lump sum.*
>
> *(iii) Direct the respondents to pay interest @9% p.a. on the due amount from 16.05.1997.*
>
> *(iv) Direct the respondents to grant all consequential benefits to the petitioner.*
>
> *(v) Direct the respondents to pay the costs of litigation.*
>
> *(vi) Or any other orders or directions which this Hon'ble Court may deem fit be passed in the interest of justice."*

2. By way of reply so filed by the respondent-Board, the claim of the petitioner has been refuted.

3. When this case was heard on 20.09.2017, this Court passed the following order:

> "*Learned counsel for the petitioner submits that the petitioner shall be satisfied in case he is granted parity in the pay scale at least from the month of May, 1997 with other incumbents, who were appointed as Khansamas on temporary basis in the same month in the pay scale of Rs.830-1600/-.*
>
> *A perusal of Annexure P-1 demonstrates that the petitioner was offered a temporary post of Khansama in Beas Sutlej Link Project under the respondent-Board in the pay scale of Rs.750/- with initial start of Rs.770-1410/-. On the other hand, Annexure P-2 demonstrates that one Sh. Gajraj Singh was also offered a temporary post of Khansama in Beas Sutlej Link Project under the respondent-Board, but in the pay scale of Rs.830-1600/-. This communication is dated 20th May, 1997. Why this discrepancy is there in the pay scales of two Khansamas, who have been temporarily engaged in the year 1997 by the respondent-Board, in my considered view, has not been satisfactorily explained in the reply so filed by the respondent-Board. Documents on record also demonstrate that intra department communications exist to the effect that there was discrepancy in the pay scale of petitioner vis-à-vis similarly situated persons and higher authorities were requested to look into the matter. In these circumstances, before this Court proceeds with the case on merit, let respondent-Board file an affidavit explaining as to why the persons who were offered appointment on temporary post of Khansama in the month of May, 1997 were offered different pay scales. Let the needful be done within a period of four weeks.*
>
> *List on **8th November, 2017.**"*

4. In compliance to the said order, an affidavit has been filed by the Additional Superintending Engineer, BRSC & PD Division, BBMB, Sundernagar, District Mandi, wherein the act of the respondents has been justified on that ground that though the initial appointment of the petitioner as well as Gajraj Singh on temporary basis was as a Khansama, but subsequently, Special Secretary, BBMB decided that petitioner be appointed in the pay scale of Rs.750-1410/- under the Category of Helper-Cook, whereas Gajraj Singh be appointed in the pay scale of Rs.830-1600/- as a Cook. Relevant para of the affidavit is quoted hereinbelow:

> *"2. That in compliance to the aforementioned direction, the deponent submits that the anomaly which the petitioner is raising before this Hon'ble Court by way of*

present writ petition, on the representation of the petitioner and that too during the pendency of the present writ petition, the matter/issue of the petitioner was taken up for consideration by the Chief Engineer, BSL Project, BBMB, Sundernagar, District Mandi (H.P.) with the Special Secretary, BBMB, Madhya Marg, Chandigarh and vide communication bearing number 4557-58/R&R/4139/R-4, dated 10/05/2017. The Special Secretary has decided the same while conveying that the petitioner was appointed in the pay Scale of Rupees 750-1410 with IS 770 revised to Rupees 2720-4775 (w.e.f. 01/01/1996) under the category of "Helper-Cook", whereas Gajraj Singh had been appointed in the scale of Rupees 830-1600 revised to Rupees 2930-5300 under the category of "Cook". True copy of the communication dated 10/05/2017 is attached herewith as ***Annexure R-A*** *for the perusal of the Hon'ble Court."*

5. Having heard learned counsel for the parties and having perused the pleadings, this Court is of the considered view that there is an apparent discrimination meted out to the petitioner by the respondents. It is not in dispute that the appointment of the petitioner, though on temporary basis was against the post of Khansama. It is also not in dispute that the appointment of Sh. Gajraj Singh was also against the post of Khansama and on temporary basis. Whereas the petitioner was appointed as such on 14.07.1997, Sh. Gajraj Singh was appointed as such on 10.05.1997. A perusal of the appointment letters Annexure P-1 and P-2 demonstrates that there is no difference whatsoever in the terms and conditions of the appointments of such two persons except pay scale. Justification which has been given in the affidavit so filed by the respondent-Board, can not be accepted, when admittedly in the appointment letters, the terms and conditions of appointment of both Gajraj Singh and the petitioner are the same.

6. Article 14 of the Constitution of India prohibits discrimination. Though classification is permitted, however, to satisfy the test of reasonability, the same should satisfy the following twin test:

"(a) classification ought to be based on intelligible differentia; and

(b) intelligible differentia must have some nexus with the object to be achieved."

7. In the present case, both the petitioner as well as Sh. Gajraj Singh were appointed as Khansamas. Thus, there is no intelligible differentia between these two persons. Therefore, the act of the respondents of granting different pay scales to said persons, in my considered view, is violative of Article 14 of the Constitution of India.

8. This Court is not oblivious of the fact that Gajraj Singh was appointed later in time, but then, as a model employer, it was expected from it to have had brought the pay of the petitioner at par with Gajraj Singh after the appointment of later on higher pay scale. By not doing so, respondent-Board has discriminated between similarly situated persons, thus violating Article 14 of the Constitution of India.

9. Accordingly, this petition is allowed and the act of respondents of discriminating the petitioner vis-à-vis similarly situated persons in matter of pay scale is held to be bad. Respondents are directed to pay to the petitioner the pay scale of Rs.830-1600/- as revised from time to time against the post of Khansama from the date of filing of the petition with all consequential benefits. It is clarified that in case the arrears are paid to the petitioner by the respondent-Board within a period of three months from today, then no interest shall be payable on the same, however, in case arrears are not paid within the said period, then the arrears shall also carry simple interest @6% per annum.

Petition stands disposed of, so also pending miscellaneous applications, if any.

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

Cr. Appeals No. 252 & 253 of 2017
Reserved on: 15.03.2018
Decided on: 29.03.2018

Cr. Appeal No. 252 of 2017:

Rahul Kumar .....Appellant.
Versus
The State of H.P. .....Respondent.

Cr. Appeal No. 253 of 2017:

Raj Kaur @ Rano .....Appellant.
Versus
The State of H.P. .....Respondent.

N.D.P.S. Act, 1985- Section 20- Accused persons were convicted by the Learned Trial Court as they were found carrying 1.500 grams charas in the vehicle during the night in the routine checking of the vehicle- Independent witnesses were not associated by the prosecution- **Held-** that non-association of independent witness is not fatal to the prosecution case- obligation to take public witness is not absolute- it may not be possible to find independent witness at odd hours of night on highway in the chance recovery- the learned Trial Court properly appreciated the evidence and rightly convicted the accused persons- no merits in the appeal- appeal dismissed. (Para-18 to 22)

Cases referred:
Ajmer Singh vs. State of Haryana, (2010) 3 Supreme Court Cases 746
Deep vs. State of H.P., 2016(1) Criminal Court Cases 625 (H.P.) (DB)

For the appellant(s): Mr. B.L. Soni, Advocate.
For respondent: Mr. Vinod Thakur, Mr. Sudhir Bhatnagar, Additional Advocates General with Mr. J.S.Guleria and Mr. Bhupinder Thakur, Deputy Advocates General.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeals have been preferred by the appellants/accused/convicts (hereinafter referred to as "the accused") laying challenge to judgment, dated 04.02.2017, passed by learned Special Judge, Hamirpur, H.P., in Sessions Trial No. 20 of 2015, whereby the accused persons were convicted for the offence punishable under Section 20(ii)(c) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as "the ND&PS Act").

2. The factual matrix, as per the prosecution story, may succinctly be summarized as under:

On 24.04.2015, at about 10:45 p.m., a police party was on routine Highway patrol duty and a *nakka* was laid on Super Highway at a distance of 100 meters from Police Post Jahu. The police party started checking the vehicles and around 11:24 p.m. a white Santro Car, having registration No. PB10AJ-9504, which was coming from Bhambla side and going towards, Bhota, was signaled to stop for checking. There were two occupants in the vehicle. Accused Rahul Kumar was driving the vehicle and accused Raj Kaur @ Rano was sitting on the front passenger seat. On asking, the accused persons could not show the documents of the vehicle, so the vehicle was impounded by the police under Section 207 of the Motor Vehicles Act, 1988, vide

infringement report No. 0371735, dated 24.04.2015. Police personnel conducted search of the vehicle in presence of the accused persons and the official witnesses. The search yielded to recovery of a light blue colour carry bag, which was kept in the dicky, near the speaker. The bag was checked and the same was found stuffed with a black colour substance, which on burning and smelling was found to be *charas.* The *charas* was in the form of small sticks and pancakes. An electronic scale was brought from Police Post Jahu and on weighment *charas* was found to be 1.5 kgs. The police completed sealing formalities and NCB form, in triplicate, was filled in. Facsimile seal was taken at serial No. 8 of NCB-1 form, in triplicate, and the seal was handed over to Constable Dinesh Kumar for safe custody. The sealed parcel, containing carry bag and contraband, was taken into possession in presence of official witnesses, viz., Constable Dinesh Kumar and Constable Daler Singh. Photographs, from the digital camera, were also clicked. After completion of search, recovery and seizure formalities, *rukka* was sent to Police Station Bhoraj, through HHG Satish Kumar, for registration of FIR, whereupon FIR was registered against both the accused. SHO, Police Station Bhoranj was requested to depute a Lady Constable for further proceedings. SHO deputed Lady Constable Santosh Kumari and she was sent to the spot. The accused persons were arrested and spot map was prepared. The statements of the witnesses were also recorded. Subsequently, police personnel alongwith the accused persons went to Police Station, Bhoranj, and the accused persons were handed over to SHO, Mukesh Kumar. SHO conducted resealing proceedings and sample seal was taken on a separate piece of cloth. SHO also filled the relevant columns of NCB-1 form, in triplicate. Parcel, containing contraband, was handed over to HC Subhash Chand for safe custody. Resealing certificate was also issued and an entry was made in Daily Station diary, vide GD Entry No. 9(A) dated 25.04.2015. Entries were also made, qua the deposit of the sealed parcel, in *Malkhana* Register No. 19 at serial No. 43/674. On 27.04.2015, the case property alongwith relevant documents were sent to Forensic Science Laboratory, Junga, for chemical analysis. Report, under Section 57 of the ND&PS Act, through Constable Daler Singh, was sent to SDPO, Barsar, by ASI Vijay Kumar, qua which an entry was made at serial No. 4, dated 27.04.2015, in the Special Reports Register. Investigation qua the vehicle, in which the accused persons were transporting the contraband, was done and it was found to be owned by accused Tarsem Singh. Chemical analysis report revealed the presence of canabiniods, including the presence of tetrahyrocannabinol and the microscopic examination indicated the presence of characteristic cystolithic hairs. *Charas* was found to be present in the exhibit and the quantity of purified resin, as found in the exhibit, stated to be *'charas'* is 23.63% w/w/, thus the exhibit was found to be extract of 'cannabis' and sample of *'charas'*. After completion of the investigation, *challan* was prepared and presented in the Court.

3. The prosecution, in order to prove its case, examined as many as fifteen witnesses. Statements of the accused persons were recorded under Section 313 Cr.P.C., wherein they pleaded not guilty and claimed to be tried.

4. The learned Trial Court, vide impugned judgment dated 04.02.2017, convicted the accused persons Rahul Kumar and Raj Kaur @ Rano for the offence punishable under Section 20(ii)(c) of the ND&PS Act and sentenced them to undergo rigorous imprisonment for a term of twelve years each and to pay a fine of Rs.1,00,000/- (rupees one lac) and in default of payment of fine, they were further ordered to undergo simple imprisonment for a term of six months, hence the present appeal preferred by the accused persons Rahul Kumar and Raj Kaur @ Rano.

5. The learned counsel for the appellants has argued that the appellants are innocent and have been falsely implicated in this case. He has argued that no recovery was effected from the conscious and exclusive possession of the appellants. He has argued that as per the prosecution story the alleged material was recovered from the dicky of the car and it was seized by the police. The appellants were neither having knowledge about the contraband nor the contraband was recovered from them, so they be acquitted after setting aside the judgment of the learned Trial Court, which is passed on the basis of surmises and conjectures and the prosecution has failed to prove the case against the accused. He has further argued that the learned Trial Court without appreciating the fact that the prosecution has failed to prove the guilt

of the accused persons beyond the shadow of reasonable doubt convicted the accused persons. The prosecution also did not examine any independent witness. Conversely, the learned Additional Advocate General has argued that the contraband was recovered from the conscious and exclusive possession of the appellants and the judgment of conviction and sentence passed by the learned Trial Court is as per law. Thus, the appeal be dismissed.

6. In rebuttal, the learned Counsel for the appellants has argued that as no independent witness has been examined by the prosecution and the appellants did not have knowledge of contraband, so they be given benefit of doubt and be acquitted and the appeal be allowed.

7. In order to appreciate the rival contentions of the parties we have gone through the record carefully.

8. Before discussing the prosecution evidence in depth few vital aspects of the prosecution case needs discussion. On 24.04.2015, at about 11:00 p.m., police personnel had set up a *nakka* on Super Highway near Jahu. At about 11:24 p.m. they intercepted a white Santro Car, having registration No. PB-10AJ-9504, and the accused persons Rahul Kumar and Raj Kaur @ Rano were its occupants. The accused persons, on being asked, could not produce the documents of the vehicle and when the vehicle was searched 1.5 kgs of *charas* was recovered from the dicky of the vehicle. In the wake of the above circumstances, as portrayed by the prosecution, it was a chance recovery during midnight on a highway. In the present case, admittedly no independent witnesses were examined, but as the recovery was effected during odd hours of night and that too on a highway, there were bleak chances of procuring independent witnesses. Therefore, in the case in hand only official prosecution witnesses have been examined and now their evidence is to be analyzed on the touchstones of truthfulness and veracity. It is settled law of criminal jurisprudence that conviction can be based on the testimony of official witnesses and it is not necessary that in each and every case, public persons must be joined in investigation.

9. There are two pillars to the edifice of the prosecution story. First, the statements of the official prosecution witnesses and second is the documentary evidence, which have come on record. The members of the patrol duty, on the relevant night, were HC Anupam Sharma, Constable Dinesh Kumar, Constable Daler Singh, HHG Sudesh Kumar, HHG Satish Kumar and HHG Ranbir Singh. Out of these persons, Constable Dinesh Kumar (PW-1), Constable Daler Singh (PW-2), HHG Satish Kumar (PW-3) and HC Anupam Sharma (PW-14) were examined by the prosecution.

10. PW-1, Constable Dinesh Kumar, deposed that on 24.04.2015, during the period from 11:00 p.m. to 02:00 a.m., he alongwith HC Anupam Sharma, Constable Daler Singh, HHG Satish Kumar, HHG Sudesh Kumar and HHG Ranbir Singh laid a *nakka* on Super Highway, near Police Post Jahu. At about 11:24 a.m., they intercepted a white car, having registration No. PB-10AJ-9504, which was signaled to stop. There were two occupants in the vehicle and one was a lady. They, on being asked, did not produce documents of the vehicle, so the vehicle was impounded under Section 207 of the M.V. Act. The driver divulged his name as Rahul Kumar, resident of House No. 347, Ward No. 25, Muhalla Patti Muhabat Ki, P.S. South City, Tehsil and District Moga, Punjab, and the lady disclosed her name as Raj Kaur @ Rano, resident of Muhalla Sadan Bali Wasti, P.S. South City, Moga, district Moga, Punjab. He has further deposed that a blue colour carry bag was recovered from the dicky, near the speaker and on checking the same, it contained some substance, which was in the shape of sticks and chapatti. On smelling the substance was found to be *charas.* Constable Daler Singh brought digital scale from Police Post, Jahu and the *charas* alongwith the carry bag was weighed and found to be 1.5 kgs. As per the version of this witness, *charas* alongwith the carry bag was sealed in a cloth parcel by affixing nine seals of impression 'K'. NCB form, in triplicate, was prepared and the seal impression was taken separately on NCB form. Impressions of seal 'K' were separately taken on a piece of cloth, which is Ex. PW-1/A, which bears his signatures and the signatures of HC Anupam Sharma and also the signatures of the accused persons. He has further deposed that seal after its use was

handed over to him and HC Anupam Sharma prepared *rukka,* which was sent through HHG Satish Kumar, to Police Station Bhoranj for registration of a case. Photographs were also taken and site plan was prepared. On 25.04.2015, at about 04:00 a.m., HHG Satish Kumar came on the spot alongwith the case file and Lady Constable Santosh Kumari. His statement was recorded, the accused persons were arrested and taken to Police Station. This witness, in his cross-examination, has deposed that prior to checking the vehicle of the accused persons, 4-5 vehicles were checked, but they did not *challan* any of them. He denied that at a distance of 200-250 meters from the *nakka* there is *abadi.* He admitted that the I.O. did not made any effort to associate any independent witness. As per this witness, personal search of both the accused persons were conducted after the recovery of the *charas.*

11. PW-2, Constable Daler Singh, reiterated the version, as deposed by PW-1, Constable Dinesh Kumar. He deposed that he was asked by I.O. to bring digital scale from Police Post, Jahu, so he brought the same. As per this witness, *charas* alongwith the carry bag was weighed and found to be 1.5 kgs. This witness, in his cross-examination, has admitted that about 300 meters from the spot there is one under construction electricity sub station, green valley school and *abadi.* As per this witness, I.O. tried to associate independent witnesses, but no one was present there. PW-3, HHG Satish Kumar, also reiterated the versions, as deposed by PW-1 and PW-2, so there is no variance noticed in his deposition. This witness, in his cross-examination, has deposed that he is not aware about the proceedings undertaken by the Investigating Officer after the vehicle was *challaned* under the Motor Vehicles Act. He feigned his ignorance that who had prepared the parcel, Ex. P-1, and in what manner. As per this witness, at a distance of 70 meters there is electric sub-station, Green Valley School and other *abadi* surrounding the Police Post. However, the Investigating Officer did not make any effort to associate any independent witness. When he returned from Police Station, Bhoranj, alongwith the case file, all the police personnel were on the spot.

12. Another important witness in the case in hand is PW-14, HC Anupam Sharma (Investigating Officer). As per the deposition of PW-14, on 24.04.2015, around 10:45 p.m., he alongwith Constable Dinesh Kumar, Constables Daler Singh, HHG Sudesh Kumar, HHG Satish Kumar and HHG Ranbir Singh, was on routine Highway patrol duty towards Jahu etc. He has further deposed that qua patrol duty *Rapat* No. 24, *Rajnamcha* dated 24.04.2015, which is, Ex.PW-6/A, has been entered. *Nakka* was laid about 100 meters from Police Post Jahu and in between 11:00 p.m. to 2:00 a.m. They checked vehicles during this period and about 11:24 p.m. a white Santro car, having registration No. PB-10AJ-9504 was intercepted, which was coming from Bhambla and going towards Bhota. The vehicle was stopped and it was being driven by a male and a female was also sitting in the vehicle. He asked for the documents of the vehicle, but the driver failed to produce the same, so the vehicle was impounded under Section 207 of the M.V. Act and to this effect infringement report and *challan* are Ex. PW-14/A-1 and Ex. PW-14/A-2, respectively. He has further deposed that male divulged his name as Rahul Kumar son of Balwinder Singh, resident of Ward No. 25, House No. 347, Patti Muhabatan Ki, P.S. City Moga, District Moga and female disclosed her name Raj Kaur @ Rano, daughter of Jasbir Singh, resident of Near Science College, Jeevan Basti, Jagroan, District Ludhiana (accused No. 1 and 2, respectively). He asked the accused persons to take their belongings from the vehicle, but they responded that there is nothing in the vehicle. He searched the dicky of the vehicle and found a carry bag, which was kept near the sound speaker. The bag was checked and found containing black colour substance, which was in the form of small sticks and *chapaties*. On smelling and burning the recovered stuff was found to be *charas,* so he sent Constable Daler Singh (PW-2) to Police Post, Jahu for bringing digital weighing scale. On weighment the contraband was found to be 1.5 kgs. As per this witness, the vehicle was searched on the spot in presence of police personnel and the accused persons. He, after putting the recovered contraband in a cloth parcel, sealed the same by affixing nine seals of impression 'K'. NCB-1 form, in triplicate, Ex. PW-14/B, was filled in and facsimile seal impression 'K' was taken on NCB-1 form, in triplicate. Sample seal was separately kept in a cloth, which is Ex. PW-1/A, and after its use, it was handed over to Constable Dinesh Kumar (PW-1). Sealed parcel alongwith relevant documents was taken into

possession and vehicle was also seized vide common recovery and seizure memo, Ex. PW-1/B, in presence of Constables Dinesh Kumar (PW-1) and Daler Singh (PW-2). During the proceedings, photographs, Ex. PW-12/A-1 to Ex. PW-12/A-13 were also clicked. *Rukka,* Ex. PW-14/C, was sent through HHG Satish Kumar (PW-3) to Police Station, Bhoranj, for registration of FIR and consequent thereto FIR, Ex. PW-9/A, was registered. He telephonically requested SHO, P.S. Bhoranj for deputing a Lady Constable. He prepared the spot map, Ex. PW-14/D, and recorded the statements of the official witnesses, except the statement of HHG Satish Kumar. When Lady Constable Santosh Kumari (PW-4) reached around 03:30 a.m. the accused persons were arrested vide arrest memos, Ex. PW-14/E and Ex. PW-4/A. At about 04:00 a.m. HHG Satish Kumar (PW-3) returned on the spot and his statement was also recorded. Subsequently, he alongwith the accused persons, case property and police personnel proceeded to Police Station, Bhoranj, in a private vehicle. Constable Dinesh Kumar (PW-1) drove the vehicle of the accused persons to Police Station, Bhoranj and they reached there at 05:10 a.m. The accused persons, case property and other relevant documents were presented before SHO Inspector Mukesh Kumar, Police Station, Bhoranj. SHO handed over to him resealing certificate, which is Ex. PW-9/C. He also carried the personal search of the accused persons in Police Station, Bhoranj. After taking remand of the accused persons, case file was handed over to ASI Vijay Kumar, Incharge Police Post, Jahu, for further investigation.

13. PW-14 has further deposed that on 13.07.2015 the case file was again handed over to him by ASI Vijay Kumar for ascertaining and tracing the owner of the vehicle. Thus, on 14.07.2015, he made a communication with District Transport Officer, Ludhiana, vide letter, Ex. PW-14/F, and the vehicle was found registered in the name of Tarsem Singh son of Gurdev Singh, resident of 1453/14, Janta Nagar, Gill Road, Ludhiana. He visited the address and met one Kulwant Singh, son of Sarsa Singh, who divulged that he has purchased House No. 1453/14 from previous owner Gurdev Singh. He recorded the statement of Kulwant Singh (PW-5). He also obtained a report from Manjeet Kaur, Councilor, Ward No. 66, Ludhiana, and also recorded her statement. Then, he returned and handed over the case file to SHO, Police Station Bhoranj. As per this witness, he could not associate independent witnesses at the time of search and recovery, due to odd hours. This witness, in his cross-examination, has deposed that on the spot also personal search of the accused persons was carried out to ascertain whether they are carrying any weapon or not. Prior to the arrest of the accused persons, their search was carried out. He again stated that personal search was carried out after the arrest of the accused persons. As per the testimony of this witness, personal search of the accused was not carried out in his presence and he also feigned his ignorance that any copy of arrest memo was supplied to the accused persons or not. He did not make any effort to associate any independent witness, as the *charas* was recovered per chance, so he did not find it incumbent to associate independent witnesses.

14. PW-4, Lady Constable Santosh Kumari, deposed that on 25.04.2015, at about 02:15 a.m., she was informed by MHC, Police Station Bhoranj that accused persons have been nabbed near Police Post, Jahu, on the highway. She reached on the spot at 03:30 p.m. and was associated in the investigation. In her presence personal search of accused Raj Kaur was conducted, qua which personal search memo was prepared. Vide memo, Ex. PW-4/A, which bears her signatures, accused Raj Kaur was apprised the grounds of arrest by the Investigating Officer and her father was informed about the arrest. Statements of the witnesses were recorded in her presence. Thereafter, accused persons were taken to Police Station, Bhoranj. This witness, in her cross-examination, has deposed that she visited the spot in her personal vehicle, which was being driven by her *devar.* She did not go to Police Post, Jahu on that day. PW-6, Shri Kulwant Singh, deposed that he had purchased House No. 1453 in the year 2007 from Shri Gurdev Singh and Tarsem Singh (accused) is son of Gurdev Singh. He has further deposed that after selling his house he went to Barnala and later he returned to Ludhiana. PW-6, Constable Ashwani Kumar, deposed that copy of *Rapat* No. 24, *Rojnamcha,* dated 24.04.2015, is correct, as per original record, which is Ex. PW-6/A and he has prepared the same.

15. PW-7, HHC Mahinder Singh, brought the original record to the Court, which pertained to GD entry No. 3(A), dated 25.04.2015, copy of which is Ex. PW-7/A-1, copy of GD

entry No. 8(A), dated 25.04.2015, copy whereof is Ex. PW-7/A-2, copy of GD entry No. 9(A), dated 25.04.2015, Ex. PW-7/A-3 and copy of GD entry No. 11(A), dated 27.04.2015, Ex. PW-7/A-4. As per this witness, aforesaid documents are correct as per the original record. PW-8, HHC Sanjay Kumar, deposed that on 27.04.2015, MHC Subhash, Police Station Bhoranj, vide RC No. 83/15, handed over him a sealed parcel, which was bearing nine seals of impression 'K' and three seals bearing impression 'A' alongwith docket, copy of FIR, copy of seizure memo, NCB forms, in triplicate, and sample seals "K" and "A". He safely deposited the case property on the same day at SFSL, Junga and receipt was handed over to MHC. PW-9, Inspector Mukesh Kumar, the then SHO Police Station, Bhoranj, deposed that on 25.04.2015, at about 3:10 a.m., HHG Satish Kumar (PW-3) came to police station with *rukka,* whereupon FIR, Ex. PW-9/A, was registered. Thereafter, the case file was given to HHG Satish Kumar. On the same day, at about 05:10 a.m., HC Anupam (PW-14) came to the police station alongwith the accused persons and the case property. The case property was a sealed parcel, having nine seals of impression 'K', containing 1.5 kgs of *charas.* NCB form, in triplicate, alongwith sample seal having impression 'K' was also presented before him. He resealed the parcel by affixing three seals of impression 'A' and facsimile seal was taken on a separate piece of cloth, which is Ex. PW-9/B. He also filled in the relevant columns of NCB form and the case property was handed over to MHC for safe custody. He issued resealing certificate, which is Ex. PW-9/C.

16. PW-10, HC Subhash Chand, deposed that on 25.04.2015, Inspector Mukesh Kumar (PW-9) and HC Anupam Sharma (PW-14) deposited with him a sealed parcel, bearing nine seals of impression 'K' and three seals of impression 'A', containing 1.5 kgs of *charas,* NCB-1 form, in triplicate, sample seals 'K' and 'A' and vehicle No PB-10AJ-9504 alongwith its key. He made apt entries qua the aforesaid case property at Sr. No. 43/674 in *malkhana* register No. 19, copy whereof is Ex. PW-10/A. He has further deposed that on 27.04.2015, vide RC No. 83/15, Ex. PW-10/B, the case property, except the vehicle, alongwith copy of seizure memo and copy of FIR was sent to SFSL, Junga, through LHC Sanjay Kumar (PW-8). After deposit of the case property, receipt was handed over to him. He also updated column No. 12 in NCB-1 form, in triplicate. He has further deposed that on 16.05.2015 the case property alongwith the FSL report, Ex. PX, was received and to this effect an entry is on Ex. PW-10/A. PW-11, HC Karam Singh, Reader to SDPO, Barsar, deposed that on 26.04.2015, at about 02:15 p.m., Constable Daler Singh (PW-2) came with Special Report, which was sent by Incharge, Police Post, Jahu. SDPO, Barsar, received the same and it was handed over to him for making entry in the special Reports Register. The Special Report is Ex. PW-2/A and requisite entry was made at Sr. No. 4, dated 27.04.2015, copy whereof is Ex.PW-11/A. PW-12, Shri Virender Kumar, Photographer, deposed that on 31.05.2015, ASI Vijay Kumar (PW-13), gave him a digital camera alongwith the memory card for developing photographs. He got developed photographs, Ex. PW-12/A-1 to Ex. PW-12/A-13 and certificate under Section 65-B of the Evidence Act, is Ex. PW-12/B.

17. PW-13, ASI Vijay Kumar, deposed that on 26.04.2015, investigation was handed over to him by SHO, Police Station, Bhoranj. He prepared special report, Ex. PW-13/A, and sent the same to SDPO, Barasr, through Constable Daler Singh (PW-2). He also recorded the statements of the official witnesses and after receipt of FSL report, Ex. PX, prepared *challan* and presented the same in the Court. PW-15, Shri Surinder Bhandari, Junior Assistant, DTO Ludhiana, Punjab, brought the registration record of vehicle having registration No. PB-10AJ-9504. The vehicle was registered in the name of Tarsem Singh son of Shri Gurdev Singh, resident of 1453/14, Janta Nagar, Gill Road, Ludhiana. DTO report, in this regard, is Ex. PW-14/G.

18. After exhaustively discussing and analyzing the evidence, which has come on record, undisputedly, the present case is of a chance recovery and the recovery was effected during odd hours of night, so the possibility of associating independent witnesses at that time was subtle. In ***Ajmer Singh vs. State of Haryana, (2010) 3 Supreme Court Cases 746,*** the Hon'ble Supreme Court, vide para 20, has held as under:

> ***"20. We cannot forget that it may not be possible to find independent witness at all places, at all times. The obligation to take public witnesses***

is not absolute. If after making efforts which the court considered in the circumstances of the case reasonable, the police officer is not able to get public witnesses to associate with the raid or arrest of the culprit, the arrest and the recovery made would not be necessarily vitiated. The Court will have to appreciate the relevant evidence and will have to determine whether the evidence of the police officer was believable after taking due care and caution in evaluating their evidence."

Thus, the non-association of independent witnesses by the police cannot at all be said to be fatal to the prosecution case. Now, the statements of official prosecution witnesses and other link witnesses need examination on the touchstone of credibility and veracity.

19. As per the testimony of PW-1, Constable Dinesh Kumar, on 24.04.2015, he alongwith HC Anupam (PW-14), Constable Daler Singh (PW-2), HHG Satish Kumar (PW-3), HHG Sudesh Kumar and HHG Ranbir Singh had laid a routine *nakka* near Police Post, Jahu, on Super Highway from 11:00 p.m. to 02:00 a.m. (25.02.2015). They, at about 11:24 p.m., stopped a white car, having registration No. PB-10AJ-9504, which was coming from Bhambla side. There were two occupants in the vehicle, a male (driver) and a female. On being asked, the driver could not produce documents of the vehicle, thus vehicle was impounded under section 207 of M.V. Act. Driver disclosed his name as Rahul Kumar son of Shri Balwinder Singh, Ward No. 25, House No. 347, Muhalla Patti Muhabat Ki, Police Station south City, Tehsil and District Moga (Punjab) and the lady disclosed her name as Raj Kaur @ Rano daughter of Jasbir Singh, resident of Muhalla Sadan Bali Wasti, Police Station South City, Moga, district Moga (Punjab). The vehicle was searched and a blue colour carry bag was recovered from the dicky, which was kept near the speaker. The bag was checked in presence of the accused persons and found containing some substance, which was in the shape of sticks and *chapatti*. The substance, on smelling and tasting was found to be *charas*. Thereafter, Constable Daler Singh (PW-1) was sent to Police Post, Jahu, and he brought digital scale. The contraband, on weighment, alongwith the carry bag was found to be 1.5 kgs. The recovered contraband alongwith the carry bag was sealed in a cloth parcel and sealed with nine seals having impression 'K' and NCB form, in triplicate, was prepared. PW-1 has further deposed that sample seal was taken on a separate piece of cloth, which is Ex. PW-1/A, which bears his and the signatures of Constable Daler Singh (PW-2), HC Anupam Sharma (PW-14) and that of the accused persons. Seal after its use was handed over to him for safe custody. Investigating Officer, HC Anupam Sharma (PW-14) prepared *rukka* and sent the same to Police Station, Bhoranj, through HHG Satish Kumar (PW-3) for registration of a case. Photographs were also clicked and Investigating Officer prepared the site plan. As per the version of PW-1 at about 04:00 a.m. on 25.04.2015 HHG Satish Kumar (PW-3) returned to the spot with a case file and Lady constable Santosh Kumari. The accused persons were arrested and apprised the grounds of arrest. Subsequently, the accused persons alongwith the case property were taken to Police Station Bhoranj. Thus, the testimony of PW-1 fully inspires confidence and there is nothing to disbelieve his testimony.

20. PW-2, Constable Daler Singh, deposed that on 24.04.2015, he alongwith HC Anupam (PW-14), Cosntable Dinesh Kumar (PW-1), HHG Sudesh Kumar and HHG Ranbir Singh laid a *nakka* near Police Post, Jahu, on Super Highway from 11:00 p.m. to 02:00 a.m. (25.02.2015). He has reiterated the version of PW-1 by deposing that at about 11:24 p.m. a white car, having registration No. PB-10AJ-9504, came from Bhambla side and was signaled to stop. There were two occupants in the car, viz., driver (male) and a female. They could not produce the documents of the vehicle, so the vehicle was impounded under the M.V. Act. The driver disclosed his name as Rahul son of Shri Balwinder Singh, Ward No. 25, House No. 347, Muhalla Patti Muhabat Kee, Police Station South City, Tehsil and District Moga (Punjab) and the lady disclosed her name as Raj Kaur @ Rano daughter of Jasbir Singh, resident of Muhalla Sadan Bali Wasti, Police Station South City, Moga, District Moga (Punjab). Search of the vehicle was conducted by the Investigating Officer and a blue carry bag was recovered, which was kept in the dicky near the speaker. In presence of the accused persons, the bag was checked and found containing some substance in the shape of sticks and *chapatti*. The recovered substance, on

smelling by Investigating Officer, was found to be *charas.* Investigating Officer sent him to Police Post, Jahu, and he brought digital scale. The contraband was weighed alongwith the carry bag and found to be 1.5 kgs. He has further deposed that carry bag was sealed in a cloth parcel with nine seals of impression 'K' and NCB form, in triplicate, was prepared. Seal impression 'K' was also taken on the NCB form and sample seal was taken separately on a piece of cloth, Ex. PW-1/A, which bears his and the signatures of Constable Dinesh Kumar (PW-1), HC Anupam Sharma (PW-14) as well as the accused persons. Seal, after its use, was handed over to Constable Dinesh Kumar (PW-1). Investigating Officer (PW-14) prepared *rukka,* which was sent to Police Station Bhoranj, through HHG Satish Kumar (PW-3), for registration of a case. Investigating Officer also clicked photographs and prepared the site plan. At about 04:00 a.m. on 25.04.2015 HHG Satish Kumar returned to the spot with a case file and Lady Constable Santosh Kumari. He has further deposed that accused persons were arrested and apprised the ground of their arrest. Subsequently, the accused persons alongwith the case property were taken to Police Station, Bhoranj. PW-2 has identified parcel, Ex. P-1, carry bag, Ex. P-2 and *charas,* Ex. P3, in the Court, which were allegedly recovered from the accused on the spot. He has further deposed that on 26.04.2015 he was given Special Report, Ex. PW-2/A, by the Investigating Officer, which he handed over to SDPO, Barsar and his statement in this respect was recorded by the Investigating Officer on 31.05.2015.

21. PW-3, HHG Satish Kumar, has also reiterated the versions, of PW-1 and PW-2, so now only the statement of PW-14, Investigating Officer Anupam Sharma, needs to be looked into. The statement of this witness has already been examined at length in earlier part of this judgment. We find nothing in the statement of PW-14 to disbelieve his version, rather his statement is fully corroborated by other official prosecution witnesses.

22. After exhaustively discussing the evidence, which has come on record, we find that the present case is of chance recovery, thus the provisions of Section 50 of the ND&PS Act are not attracted. The learned counsel for the appellants has placed reliance on a judgment of this Court rendered in ***Deep vs. State of H.P., 2016(1) Criminal Court Cases 625 (H.P.) (DB),*** wherein it has been held that the purpose of joining independent witnesses at the time of arrest, search and sealing process is to inspire confidence that all codal formalities were completed on the spot at the time of arrest, and sealing process, in the absence of same no reliance can be placed on the search and seizure. Relevant paras of the judgment (supra) are reproduced hereunder:

> ***"25. Thus, the prosecution has failed to prove the case against the accused beyond reasonable doubt for the commission of offence under Section 20 of the N.D & P.S., Act, since the mandatory provisions have not been complied with and the manner in which the case property was taken out and re-deposited, coupled with the fact that no independent witnesses, though available were associated.***
>
> ***26. Accordingly, in view of the analysis and discussion made hereinabove, the appeals are allowed. Judgment of conviction and sentence dated 4/5.1.2011, rendered by the learned P.O. Fast Track Court, Mandi, H.P., in Sessions Trial No. 16 of 2009, is set aside. Accused are acquitted of the charges framed against them by giving them benefit of doubt. Fine amount, if any, already deposited by the accused is ordered to be refunded to them. Since the accused are in jail, they be released forthwith, if not required in any other case."***

However, keeping in view the fact that in the case in hand it is of chance recovery, that too during the odd hours of night on a highway and also keeping in view the ratio laid by Hon'ble Supreme Court in ***Ajmer Singh vs. State of Haryana (2010) 3 Supreme Court Cases 746,*** as discussed above, the independent witnesses cannot be found at all places and at all times, thus the obligation to associate public witnesses during search, sealing process and arrest of the accused is not absolute. We, in wake of the facts that it was a chance recovery effected during odd hours

of night and in the course of routine traffic checking, are satisfied that search, recovery of contraband, sealing of contraband and arrest etc. are not vitiated for the reason that independent witnesses were not associated. We also, after taking due care and caution in evaluating the evidence of official prosecution witnesses, find that the evidence, which has come on record, inspires confidence and thus believable.

23. In view of what has been discussed hereinabove, the appeals are without merits, as the statements of the prosecution witnesses, which have been exhaustively discussed hereinabove, inspire confidence. The non-joining of independent witnesses, which were not available during odd hours of night, cannot be said to be fatal to the prosecution case, as the recovery was effected during late hours of night, public witnesses could not be expected there. The statements of the official prosecution witnesses inspire confidence and the other relevant material, which has come on record, proves the case of the prosecution beyond the shadow of reasonable doubt. The evidence of the official prosecution witnesses and other material, which has come on record, unambiguously establish that the prosecution has proved the guilt of the accused persons beyond the shadow of reasonable doubt. Thus, as the prosecution has proved the guilt of the accused persons beyond the shadow of reasonable doubt, we find no infirmity in the judgment of conviction passed by the learned Trial Court. The appeals are without merits, deserve dismissal and are accordingly dismissed.

24. In view of the above, the appeals, so also pending application(s), if any, stand(s) disposed of.

****

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

State of H.P. and others ...Appellants

Versus

Dinesh Chauhan and others. ...Respondents.

R.F.A. No. 5 of 2005.
Reserved on : 19.3.2018
Date of decision: 29.03.2018.

Constitution of India, 1950- Article 226- Deceased/Sandhya Devi admitted in the district Hospital Solan as emergency case as she was bleeding and labour pain had started on 25.4.1996 - she died on 26.4.1996- it is alleged that death has taken place due to negligent behaviour of defendants No.4 and 5, medical officers as they did not attend upon her properly – **Held-** that complainant has to clearly make out a case of negligence whenever a medical practitioner is charged with or proceeded against criminally- the plaintiff has failed to bring any evidence establishing willful negligence on the part of the Doctors concerned – Medical Practitioner is not liable to be held negligent, simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference to another – there is no merit in the petition, hence, same is dismissed. (Para-34 to 39)

Cases referred:

Arulvelu and another vs. State Represented by the Public Prosecutor and another (2009) 10 SCC 206

Rubi Sood and another vs. Major (Retd.) Vijay Kumar Sud and others, I L R 2015 (III) HP 771

Damodar Lal vs.Sohan Devi and others (2016) 3 SCC 78

Shasidhar and others versus Ashwini Uma Mathad and another, (2015) 11 SCC 269,

Prafulla Ranjan Sarkar vs. Hindusthan Building Society Ltd., AIR 1960 Calcutta 214

Martin F. D'SOUZA vs. Mohd. Ishfaq (2009) 3 SCC 1)

Indian Medical Association vs. V.P. Shantha and others (1995) 6 SCC 651
Jacob Mathew vs. State of Punjab and another (2005) 6 SCC 1
Bolam vs. Friern Hospital (1957) 1 WLR 582 : (1957) 2 All ER 118

For the appellants : Mr. Vinod Thakur and Mr. Sudhir Bhatnagar, Addl. Advocate Generals, with Mr. Bhupinder Thakur, Deputy Advocate General.
For the respondents : Mr. Raman Sethi, Advocate, for respondent No.1.
Mr. R.K. Bawa, Senior Advocate, with Mr. Ajay Kumar Sharma, Advocate, for respondent No.2.
Respondent No.3 already exparte.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The State has filed this first appeal against the judgment and decree dated 5.1.2001 passed by learned District Judge, Solan (for short 'trial Court') in Civil Suit No. 8/1 of 1997 whereby it awarded an amount of Rs. 2,25,000/- as damages to the plaintiff/respondent No.1 on account of death of Sandhya and on the principle of vicarious liability this amount was directed to be paid by the appellants.

2. Brief facts of the case as set out in the plaint are that Sandhya (deceased) was working as Instructor at Angan Bari Teachers Training Centre, Theog and her marriage was solemnized on 11.5.1995. Immediately after her marriage, she conceived pregnancy and since November, 1995 she was on medical leave. On 25.4.1996 she was admitted in District Hospital, Solan as an emergency case. Defendant No.6 Dr. R.P. Sahani was in the OPD and got her admitted as she was bleeding and labour pain had started. Dr.Sahani handed over the case to Dr. Kamlesh Sharma, defendant No.5, as it related to the department of Gynaecology. At about 6.30 it was realized that Gynaecologist i.e. Dr. Maya Ahuja, defendant No.4 being specialist should be called. As a result, she was sent for and came at 9.00 p.m. After examining the deceased, defendant No.4 allegedly left the hospital. According to the plaintiff, the condition of Smt. Sandhya deteriorated as the bleeding went on unabated. This caused anxious moments for PW-2 being her father. He went to defendant No.4 at her residence and asked her to further examine the patient, but the defendant No.4 did not come to the hospital. According to the plaintiff, defendant No.4 only came at 9.00 a.m. on the following day i.e. 26.4.1996 and got ultrasound test of Smt. Sandhya conducted and in the said test it was found that fetus was dead and dead child was delivered. It was because of the profuse and continuous bleeding that the deceased ultimately had to refer to IGMC, Shimla, but even then the defendant No.4 commanded to retain the patient. The said defendant No.4 is alleged to have not attended upon the patient properly and neglected to look after her according to the professional ethics.

3. It was further averred that from 9.00 p.m. on 25.4.1996 to 3.30 a.m. on 26.4.1996, the defendant No.4 left the patient to her own fate despite knowing her serious and deteriorating condition and it was on account of non-serious attitude of defendant No.4 towards the patient that she ultimately died. The plaintiff maintained that had the defendant No.4 being a Gynaecologist attended to the patient promptly and properly she would not have died. It was on these allegations that the plaintiff, who is the husband of the deceased, filed the suit for damages wherein the defendants No. 1 to 3 i.e. State of Himachal Pradesh, through Secretary (Health), Director Health and Chief Medical Officer, Solan, were impleaded as parties with the allegation that the said defendants were vicariously liable for the death of Sandhya.

4. The defendants No.1 to 3 filed joint written statement wherein it was averred that defendant No.4 was very much alive to the medical treatment of the deceased Sandhya and therefore, there was no lapse, laxity or misconduct on her part in rendering treatment to the

deceased. It was further averred that despite giving best medical treatment, the deceased died due to post partum hemorrhage

5. The defendant No.4 Dr. Maya Ahuja filed a separate written statement wherein she averred that she never came to the hospital at 9.00 p.m. on 25.4.1996 as alleged and further denied having been given any treatment to the patient at that time. She further averred that first call given to her to attend upon the patient was at 2.45 a.m. on 26.4.1996 and she immediately came to the hospital at 3.30 a.m. on the same date i.e. 26.4.1996 and examined, treated and ensured all possible medication to the patient. Defendant No.4 further maintained that she left the hospital at 5.00 p.m. on 25.4.1996 and resumed her duty on the following day i.e. 26.4.1996 at 9.00 a.m. According to her, it was defendant No.5 Dr. Kamlesh, who was on duty on the intervening night of 25th and 26th April, 1996 and, therefore, it was her duty to attend upon the patient on the intervening night. She further averred that right from 9.00 a.m. on 26.4.1996 she was in the OPD as she was on duty there to examine the patients. The condition of the patient at the time she left OPD was normal. She admitted that the blood group 'O negative', which was required to be transfused to Sandhya, was not available in the hospital. She further admitted that the patient was referred to IGMC, Shimla, but lateron could not be shifted because of deterioration in her health. Lastly, it was averred that defendant No.4 was not in any manner negligent or careless in rendering medical treatment to the deceased.

6. The defendants No. 5 and 6 filed their written statement wherein they supported the stand of defendant No.4.

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

1. *Whether Smt. Sandhya wife of plaintiff died on 26.4.1996 in District Hospital, Solan due to the negligent conduct of defendant No.4 by not properly treating and attending Smt. Sandhya Devi, as alleged? OPP*
2. *If issue No.1 is proved, whether defendant No.4 committed breach of the duty in not attending Smt. Sandhya properly, as alleged? OPP*
3. *Whether Smt. Sandhya at the time of delivery died due to negligence of defendant No.4?OPP*
4. *If issues No.1 to 3 are proved, whether the plaintiff is entitled to damages, if so, to what extent and from whom? OPP(Recast on 6.9.1999)*
5. *Whether legal and valid notice under Section 80 CPC has been served? OPP*
6. *Whether the suit is malicious and frivolous as alleged? OPD-4.*
7. *Whether the suit is not maintainable as alleged? OPD-4.*
8. *Relief.*

8. After recording the evidence and evaluating the same, the learned trial Court decreed the suit by awarding damages of Rs.2,25,000/- and the said amount was held to be recoverable only from defendants No. 1 to 3.

9. It is in this backdrop that the defendant No.1 i.e. State of Himachal Pradesh has filed the instant appeal on the ground that the findings recorded by the learned trial Court are perverse and based upon surmises and conjectures and, therefore, deserves to be set-aside. It is further argued by learned Additional Advocate General that the learned trial Court has not even considered the pleadings of the plaintiff which were wholly different and therefore could not be made basis for awarding compensation, more particularly, when it is settled law that when no amount of evidence for which there is no foundation led in the pleadings could be looked into by the trial Court.

10. On the other hand, Mr. Raman Sethi, Advocate assisted by Ms. Parminder Kaur, Advocate, would vehemently argue this is different case where *res ipsa loquitur* could have been applied as a young lady has lost her life only on account of the sheer negligence of defendants No. 4 to 6, more particularly, defendant No.4 and, therefore, the judgment and decree as passed by learned trial Court needs to be upheld.

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

11. What is 'perverse' was considered by the Hon'ble Supreme Court in a detailed judgment in ***Arulvelu and another*** *vs.* ***State Represented by the Public Prosecutor and another (2009) 10 SCC 206*** wherein it was held as under:-

> ***"26. In M. S. Narayanagouda v. Girijamma & Another AIR 1977 Kar. 58, the Court observed that any order made in conscious violation of pleading and law is a perverse order. In Moffett v. Gough, (1878) 1 LR 1r 331 the Court observed that a perverse verdict may probably be defined as one that is not only against the weight of evidence but is altogether against the evidence. In Godfrey v. Godfrey 106 NW 814, the Court defined `perverse' as turned the wrong way, not right; distorted from the right; turned away or deviating from what is right, proper, correct etc.***
>
> ***27. The expression "perverse" has been defined by various dictionaries in the following manner:***
>
> > ***1. Oxford Advanced Learner's Dictionary of Current English Sixth Edition***
> >
> > ***PERVERSE:- Showing deliberate determination to behave in a way that most people think is wrong, unacceptable or unreasonable.***
> >
> > ***2. Longman Dictionary of Contemporary English - International Edition***
> >
> > ***PERVERSE: Deliberately departing from what is normal and reasonable.***
> >
> > ***3. The New Oxford Dictionary of English - 1998 Edition***
> >
> > ***PERVERSE: Law (of a verdict) against the weight of evidence or the direction of the judge on a point of law.***
> >
> > ***4. New Webster's Dictionary of the English Language (Deluxe Encyclopedic Edition)***
> >
> > ***PERVERSE: Purposely deviating from accepted or expected behavior or opinion; wicked or wayward; stubborn; cross or petulant.***
> >
> > ***5. Stroud's Judicial Dictionary of Words & Phrases, Fourth Edition***
> >
> > ***PERVERSE: A perverse verdict may probably be defined as one that is not only against the weight of evidence but is altogether against the evidence.***
>
> ***28. In Shailendra Pratap & Another v. State of U.P. (2003) 1 SCC 761, the Court observed thus: (SCC p.766, para 8***
>
> > ***"8...We are of the opinion that the trial court was quite justified in acquitting the appellants of the charges as the view taken by it was reasonable one and the order of acquittal cannot be said to be perverse. It is well settled that appellate court would not be justified in interfering with the order of acquittal unless the same is found to be perverse. In the present case, the High Court has***

committed an error in interfering with the order of acquittal of the appellants recorded by the trial court as the same did not suffer from the vice of perversity."

29. In Kuldeep Singh v. The Commissioner of Police & Others (1999) 2 SCC 10, the Court while dealing with the scope of Articles 32 and 226 of the Constitution observed as under: (SCC p.14, paras 9-10)

> ***"9. Normally the High Court and this Court would not interfere with the findings of fact recorded at the domestic enquiry but if the finding of "guilt" is based on no evidence, it would be a perverse finding and would be amenable to judicial scrutiny.***
>
> ***10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."***

30. The meaning of `perverse' has been examined in H. B. Gandhi, Excise and Taxation Officer-cum- Assessing Authority, Karnal & Others v. Gopi Nath & Sons & Others 1992 Supp (2) SCC 312, this Court observed as under: (SCC pp. 316-17, para 7)

> ***"7. In the present case, the stage at and the points on which the challenge to the assessment in judicial review was raised and entertained was not appropriate. In our opinion, the High Court was in error in constituting itself into a court of appeal against the assessment. While it was open to the respondent to have raised and for the High Court to have considered whether the denial of relief under the proviso to Section 39(5) was proper or not, it was not open to the High Court re-appreciate the primary or perceptive facts which were otherwise within the domain of the fact-finding authority under the statute. The question whether the transactions were or were not sales exigible to sales tax constituted an exercise in recording secondary or inferential facts based on primary facts found by the statutory authorities. But what was assailed in review was, in substance, the correctness - as distinguished from the legal permissibility - of the primary or perceptive facts themselves. It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."***

12. What is 'perverse' has further been considered by this Court in ***RSA No.436 of 2000***, titled ***'Rubi Sood and another*** *vs.* ***Major (Retd.) Vijay Kumar Sud and others***, decided on 28.05.2015 in the following manner:-

> ***"25..... A finding of fact recorded by the learned Courts below can only be said to be perverse, which has been arrived at without consideration of material evidence or such finding is based on no evidence or misreading of evidence or is grossly erroneous that, if allowed to stand, it would result***

in miscarriage of justice, is open to correction, because it is not treated as a finding according to law.

26. If a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or even the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then the finding is rendered infirm in the eye of the law.

27. If the findings of the Court are based on no evidence or evidence, which is thoroughly unreliable or evidence that suffers from vice of procedural irregularity or the findings are such that no reasonable persons would have arrived at those findings, then the findings may be said to be perverse.

28. Further if the findings are either ipse dixit of the Court or based on conjectures and surmises, the judgment suffers from the additional infirmity of non application of mind and thus, stands vitiated."

13. What is 'perversity' recently came up for consideration before the Hon'ble Supreme Court in ***Damodar Lal*** *vs.* ***Sohan Devi and others (2016) 3 SCC 78*** wherein it was held as under:-

"8. "Perversity" has been the subject matter of umpteen number of decisions of this Court. It has also been settled by several decisions of this Court that the first appellate court, under Section 96 of The Civil Procedure Code, 1908, is the last court of facts unless the findings are based on evidence or are perverse.

9. In Krishnan v. Backiam (2007) 12 SCC 190, it has been held at paragraph-11 that: (SCC pp. 192-93)

> ***"11. It may be mentioned that the first appellate court under Section 96 CPC is the last court of facts. The High Court in second appeal under Section 100 CPC cannot interfere with the findings of fact recorded by the first appellate court under Section 96 CPC. No doubt the findings of fact of the first appellate court can be challenged in second appeal on the ground that the said findings are based on no evidence or are perverse, but even in that case a question of law has to be formulated and framed by the High Court to that effect."***

10. In Gurvachan Kaur v. Salikram (2010) 15 SCC 530, at para 10, this principle has been reiterated: (SCC p. 532)

> ***"10. It is settled law that in exercise of power under Section 100 of the Code of Civil Procedure, the High Court cannot interfere with the finding of fact recorded by the first appellate court which is the final court of fact, unless the same is found to be perverse. This being the position, it must be held that the High Court was not justified in reversing the finding of fact recorded by the first appellate court on the issues of existence of landlord-tenant relationship between the plaintiff and the defendant and default committed by the latter in payment of rent."***

11. In the case before us, there is clear and cogent evidence on the side of the plaintiff/appellant that there has been structural alteration in the premises rented out to the respondents without his consent. Attempt by the respondent-defendants to establish otherwise has been found to be

totally non-acceptable to the trial court as well as the first appellate court. Material alteration of a property is not a fact confined to the exclusive/and personal knowledge of the owner. It is a matter of evidence, be it from the owner himself or any other witness speaking on behalf of the plaintiff who is conversant with the facts and the situation. PW-1 is the vendor of the plaintiff, who is also his power of attorney. He has stated in unmistakable terms that there was structural alteration in violation of the rent agreement. PW-2 has also supported the case of the plaintiff. Even the witnesses on behalf of the defendant, partially admitted that the defendants had effected some structural changes.

12. Be that as it may, the question whether there is a structural alteration in a tenanted premises is not a fact limited to the personal knowledge of the owner. It can be proved by any admissible and reliable evidence. That burden has been successfully discharged by the plaintiff by examining PWs-1 and 2. The defendants could not shake that evidence. In fact, that fact is proved partially from the evidence of the defendants themselves, as an admitted fact. Hence, only the trial court came to the definite finding on structural alteration. That finding has been endorsed by the first appellate court on re-appreciation of the evidence, and therefore, the High Court in second appeal was not justified in upsetting the finding which is a pure question of fact. We have no hesitation to note that both the questions of law framed by the High Court are not substantial questions of law. Even if the finding of fact is wrong, that by itself will not constitute a question of law. The wrong finding should stem out on a complete misreading of evidence or it should be based only on conjectures and surmises. Safest approach on perversity is the classic approach on the reasonable man's inference on the facts. To him, if the conclusion on the facts in evidence made by the court below is possible, there is no perversity. If not, the finding is perverse. Inadequacy of evidence or a different reading of evidence is not perversity.

13. In Kulwant Kaur v. Gurdial Singh Mann (2001) 4 SCC 262, this Court has dealt with the limited leeway available to the High Court in second appeal. To quote para 34: (SCC pp.278-79)

> ***"34. Admittedly, Section 100 has introduced a definite restriction on to the exercise of jurisdiction in a second appeal so far as the High Court is concerned. Needless to record that the Code of Civil Procedure (Amendment) Act, 1976 introduced such an embargo for such definite objectives and since we are not required to further probe on that score, we are not detailing out, but the fact remains that while it is true that in a second appeal a finding of fact, even if erroneous, will generally not be disturbed but where it is found that the findings stand vitiated on wrong test and on the basis of assumptions and conjectures and resultantly there is an element of perversity involved therein, the High Court in our view will be within its jurisdiction to deal with the issue. This is, however, only in the event such a fact is brought to light by the High Court explicitly and the judgment should also be categorical as to the issue of perversity vis-à-vis the concept of justice. Needless to say however, that perversity itself is a substantial question worth adjudication — what is required is a categorical finding on the part of the High Court as to perversity. In this context reference be had to Section 103 of the Code which reads as below:***

> ***'103. Power of High Court to determine issues of fact.- In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal,—***
>
> > ***(a) which has not been determined by the lower appellate court or by both the court of first instance and the lower appellate court, or***
> >
> > ***(b) which has been wrongly determined by such court or courts by reason of a decision on such question of law as is referred to in Section 100."***
>
> ***The requirements stand specified in Section 103 and nothing short of it will bring it within the ambit of Section 100 since the issue of perversity will also come within the ambit of substantial question of law as noticed above. The legality of finding of fact cannot but be termed to be a question of law. We reiterate however, that there must be a definite finding to that effect in the judgment of the High Court so as to make it evident that Section 100 of the Code stands complied with."***

14. In S.R. Tiwari v. Union of India (2013) 6 SCC 602, after referring to the decisions of this Court, starting with Rajinder Kumar Kindra v. Delhi Administration, (1984) 4 SCC 635, it was held at para 30: (S.R.Tewari case[6], SCC p. 615)

> ***"30. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality. If a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with. (Vide Rajinder Kumar Kindra v. Delhi Admn. [(1984) 4 SCC 635 : 1985 SCC (L&S) 131 : AIR 1984 SC 1805] , Kuldeep Singh v. Commr. of Police [(1999) 2 SCC 10 : 1999 SCC (L&S) 429 : AIR 1999 SC 677] , Gamini Bala Koteswara Rao v. State of A.P. [(2009) 10 SCC 636 : (2010) 1 SCC (Cri) 372 : AIR 2010 SC 589] and Babu v. State of Kerala[(2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179] .)"***
>
> ***This Court has also dealt with other aspects of perversity."***

14. Admittedly, this is a first appeal and the jurisdiction of this Court while hearing the same is very wide like the learned trial Court and it is open to the defendants to attack all findings on fact and/or on law in the first appeal and would have to be decided on the basis of following exposition of law as propounded by the Hon'ble Supreme Court in ***Shasidhar and others*** *versus* ***Ashwini Uma Mathad and another, (2015) 11 SCC 269***, wherein it was observed 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.

13. In Santosh Hazari vs. Purushottam Tiwari (Deceased) by L.Rs. (2001) 3 SCC 179, this Court held as under: (SCC pp. 188-89, para 15)

> ***"15.....the appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court.....while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it."***

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 & Anr., (2005) 12 SCC 303, while considering the scope of Section 96 of the Code this Court observed as follows: (SCC p.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 & Anr. 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 3-5)

"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, 2014(12) Scale 171."

15. Adverting to the facts, it would be necessary to first refer to the pleadings in the suit. It is not in dispute that the suit has been filed on the basis of tortuous liability based on the plea of negligence of defendants No. 4 to 6, particularly, defendant No.4. It is more than settled that where negligence or contributory negligence is charged, full details must be given of the acts on which the party pleading relies as constituting negligence. (Refer:***Prafulla Ranjan Sarkar*** vs. ***Hindusthan Building Society Ltd., AIR 1960 Calcutta 214***).

16. Now, therefore, it would be necessary to advert to the pleadings of negligence set out in the suit. From a complete reading of the plaint, it would be noticed that the plea of negligence is contained in paras 3 and 4 of the plaint wherein it is stated that after admission of Sandhya in the hospital on 25.4.1996 at about 5.30 p.m. the doctor on duty told the parents of Sandhya that she will be attended upon by Gynaecologist /specialist and a person/official of District Hospital, solan was sent to call defendant No.4 to attend late Sandhya. However, the defendant No.4 only came to the hospital at about 9.00 p.m. and told the parents of Sandhya that she was normal and there was nothing to worry about it and accordingly Sandhya was shifted to maternity room as she was suffering from labour pains. After giving some instructions to nurses, defendant No.4 went to her residence and did not come back even on calling and in the meanwhile Sandhya's condition had become critical. The defendant No.4 was so carelessness and negligent in attending Sandhya that she only came on the next day and referred Sandhya for ultra sound which was conducted on 26.4.1996 at 9.30 a.m. and by that time her condition was all the more critical. After that Sandhya was again brought to maternity room where she delivered a dead child and her condition thereafter became serious and was referred to IGMC, Shimla. However, before she could be taken to IGMC, Shimla, defendant No.4 had again taken her to the maternity ward and started her examination and in the meanwhile, she died in District Hospital, Solan on 26.4.1996. It is further alleged that Sandhya had died due to carelessness of defendant No.4 because had she examined Sandhya well in time and given proper treatment, her life could have been saved. It is further averred that Sandhya had died due to breach of duty on the part of defendant No.4 as even despite emergency, defendant No.4 did not attend upon Sandhya, as a result whereof she died.

17. Now, adverting to the written statement filed by defendant No.4, it would be noticed that she has tried to controvert all allegations set out in the plaint. She admitted that Sandhya was admitted in the hospital on 25.4.1996 at about 6.30 p.m. and not 5.00 p.m. as was alleged by the plaintiff. It was further averred that when she was brought to the hospital, then Dr. R.P. Sahni was on duty, who admitted her to the hospital and recorded his note that Sandhya was pregnant and was a bleeding case and she was accordingly put under the care of Dr. Kamlesh Sharma, who started the treatment. This defendant denied having come to the hospital at 9.00 p.m. on 25.4.1996 and further allegation of the plaintiff that she told the parents of Sandhya and gave certain instructions, were totally denied by her. Since her duty was off at 5.00 p.m. on 25.4.1996, she left the hospital to resume her duty on the next day i.e. 26.4.1996 at 9.00 a.m. However, in the intervening night of 25.4.1996 and 26.4.1996 at 2.45 a.m. Dr. Kamlesh

Sharma recorded that the patient should be shown to Gynaecologist and it was then at 3.30 a.m. on 26.4.1996 that defendant No.4 was summoned from the residence and she immediately reached the hospital without any loss of time and advised treatment to the patient. The patient was given all possible medical treatment i.e. glucose through intravenous and blood transfusion and was given all other medicines available with the hospital that were required before and after delivery. She was also presented for ultra sound and the report was that fetus was dead. This ultra sound test was done at about 9.00 a.m. on 26.4.1996 when the patient was quite normal and her condition was neither critical nor serious. It was then that defendant No.4 went to Out Door Patient (OPD) at 9.00 a.m. because her duty was there to examine out door patients and at that time the pulse condition of the patient was quite normal. Thereafter she remained under the care of Dr. Kamlesh Sharma, who was first on call duty. The consent of the present guardian i.e. father of Sandhya was taken as the plaintiff was not there to look after his wife and the father of Sandhya consented to the delivery by her daughter at any risk. Thus, it was with the consent of father of Sandhya that delivery took place and the same was normal. The parents of Sandhya had already been told previously that they should keep the blood ready which may be required after delivery as whatever blood was available in the hospital had been transfused to the patient. After delivery Sandhya suffered from postpartum haemorrhage and other complications, even then the mother and father of Sandhya could not make any arrangement of blood. The death of Sandhya was the direct result of postpartum haemorrhage and for no other reasons and, therefore, there was no negligence on the part of defendant No.4. Since the postpartum haemorrhage trouble had arisen after the delivery, the parents of deceased who were there were told to take the patient to IGMC, Shimla, but she died of the above said trouble in the hospital. However, before that all necessary medical treatment was given by defendant No.4.

18. The plaintiff did not file any replication to the written statement of defendant No.4.

19. Now, adverting to the evidence led by the plaintiff. PW-1 Dinesh Chauhan, is the husband of deceased Sandhya, but admittedly he was not there in the hospital at the relevant time and, therefore, his statement being based upon hear say is not admissible in evidence. However, the plaintiff has examined Bhagwan Singh as PW-2, who happens to be the father of deceased Sandhya, who had in fact got her admitted in the hospital.

20. PW-2 deposed that his daughter had been admitted by Dr. Sahani and at that time she remained normal for some time, however, thereafter her condition deteriorated because of profuse bleeding. After that he was informed in the hospital that there is a lady doctor specialist and she would be coming at 9 O'clock. She came and assured him that Sandhya's condition would be all right and thereafter she left. He thereafter tried to contact her over telephone but could not do so and was informed that she would be available only in the morning and he was asked to arrange for two bottles of blood. Defendant No.4 came at 9.30 a.m. and ordered for an ultra sound. After that the treatment continued and at about 12 O'clock his daughter Sandhya was ordered to be referred to Shimla, but when he consulted Gynaecologist i.e. defendant No.4 she refused to refer her and in between 12.30 – 1.00 p.m. Sandhya died. In case defendant No.4 would have referred Sandhya at night, then hopefully his daughter Sandhya would have survived.

21. In cross-examination by defendants No. 1, 3, 5 and 6, the witness stated that on 26.4.1996 by 10.00 a.m. he was convinced that medical treatment being given to his daughter was not proper, however, he did not deem it proper to make a complaint to the CMO as he was not permitted to go inside nor the situation was appropriate for doing so. He did not know whether the patient had been given all of blood by that time, which they had arranged for, or not. He denied that the doctor had asked him to arrange for more blood. He stated that he discussed with my son-in-law about the statement which was required to be given to the Court. He had accompanied his son-in-law and narrated the entire incident to the lawyer. He admitted that the glucose had been administered to his daughter, but specifically stated that blood had not been transfused. One boy had donated blood in the hospital in his presence and his name was duly

entered in the records. He denied the suggestion that excessive bleeding led to the death of his daughter as he could not arrange for the blood. He further denied the suggestion that the treatment as given by the doctor was right and proper and stated that his daughter died due to the negligence on the part of the doctor.

22. In cross-examination by defendant No.4, this witness stated that he had filed a written complaint to the CMO about the negligence on her part that had led to the death of his daughter. He did not consider it necessary to have the post mortem conducted. He further stated that when the complaint was moved to the CMO, he had assured that the inquiry would be got conducted, but he was not associated in the inquiry. He did not complain against Maya Ahuja i.e. defendant No.4 and stated that he had gone to call her twice i.e. at 4.00 p.m. and 7.00 a.m. on 26.4.1996. Her residence was below the Co-operative office. He stated that he did not know about the condition of child when the ultra sound was conducted. He denied the suggestion that defendant No. 4 was present there from 4 O'clock to 9 O'clock. Volunteered to state that she had come at 9.30 and Dr. Kamlesh had given treatment in her absence. At 7.00 a.m. defendant No. 4 informed him to arrange for blood. He went to Kandaghat at 8 O'clock and brought along a boy for donating blood, but could not re-collect his name. He had met the boy at 8.30 a.m. and both of them had come back by taxi, but he did not remember the registration number of the taxi. He had hired the taxi from Solan and paid Rs.400/- for to and fro journey. He met the boy in the Bazaar at Kandaghat and boy's father was a lawyer. He did not remember the name of boy or his father. He had never visited their residence, rather he stated that he knew the name of the boy at that time but by now, he had forgotten it. He denied the suggestion that Sandhya did not die of negligence or mistake on the part of the doctors, but admitted the suggestion that death was caused due to postpartum haemorrhage.

23. Now adverting to the evidence of the defendants. Dr. H.K. Premi, Professor of Obstetrics and Gynaecology, IGMC, Shimla was examined as DW-1 by defendant No.4, who in his examination-in-chief stated that he was Professor of Obsteritics and Gynaecology for the last three months. According to him, haemorrhage during pregnancy is responsible for 25 to 60% of maternal deaths occurring during pregnancy and labour and out of this post partum haemorrhage (Atonic) type is the most common. This type of haemorrhage is leading cause of maternal mortality in India as well as in our State. He stated that he had examined the records of the present case that was presented to him and on the basis of such record, he was of the opinion that fetal death in this case must have occurred because of retroplacental clot formation alongwith separation of the placenta. This type of haemorrhage to cause foetus death should be to the tune of 2.5 litres or more and or 1/3rd of the placenta should have separated to produce the death of the foetus and this retroplacental haemorrhage in turn can explain the post partum haemorrhage (Atonic) which the patient had and which eventually resulted in a death. According to him, such a massive haemorrhage it is mandatory first to replace the fluids in the form of ringers lacted, normal saline, dextro saline to maintain the renal and cerebral perfusion. Blood has to be given after the cessation of the bleeding to improve the oxygen carrying capacity of the patient. But transfusing the patient while she is profusely bleeding will be a futile exercise. He further stated that when the patient is in the state of labour pain and shock and further bleeding profusely in a particular hospital while under the treatment of a Gynaecologist, it is not advisable to refer her to any institution having advanced or better medical facilities. The blood group O negative is highly scarce and rarely available.

24. On being cross-examined by defendants No. 1 to 3, 5 and 6, he categorically admitted that after going through the records that was made available to him, he was of the opinion that the death of Sandhya occurred not because of any negligence or lapse on the part of the doctor or the mode of treatment adopted by them and further stated that in India, the major reason for such haemorrhage and the consequential death is the anemic state with which the patient actually suffered. The anemic pregnancy in India is 40 to 90%. The routine antenatal check up by the Gynaecologist avoids such like complications and consequential deaths occurring thereof.

25. In cross-examination by the plaintiff, the witness categorically admitted that he had not seen the original record of the patient i.e. Sandhya deceased and the same were not brought before him. At that stage the Court deferred the statement of this witness and on being re-called, specifically stated that he had not been asked by the Civil Hospital to give any opinion and further no record has been made available to him.

26. DW-2 H.B. Kashyap, Chief Pharmacist, D.H.Solan, only produced the record as was sought for.

27. Defendant No.4 Maya Ahuja appeared as DW-3, stated that she had been working in Civil Hospital, Solan as Gynae Specialist for a period of five years and had during this period conducted more than 1000 cases of delivery. Before that she had been working as Registrar in George Medical College, Lucknow. She had seen the original file regarding Sandhya serial No. 1252 of Civil Hospital, Solan, who according to her was admitted in the hospital by Medical Officer on duty Dr. Sahani on 25.4.1996 at 6.30 p.m. After admission, she was being treated by Dr. Kamlesh Sharma, who was on duty for that day. On the next day i.e. 26.4.1996 at 2.45 a.m. Dr. Kamlesh Sharma had called her to give special opinion regarding the said patient, upon which she immediately rushed to the spot within 15-20 minutes. On reaching the hospital, she examined the patient and on the basis of physical findings concluded that the patient was in labour pains. The condition of the foetus was not made out by the physical finding so the treatment was given to enhance the labour and even ultra sound was advised. The condition of the patient and foetus was explained to the attendant and risk involved was also explained in details and signatures taken. She proved Ext. DA, Ext.DB and Ext.DC which were the opinion and advice given by her. She further stated that ultra sound test was not available even in emergency during the night time. She advised the ultra sound examination of the patient which was conducted at 10 .00 a.m. on 26.4.1996. On receipt of the ultra sound report, it was revealed that the foetus was dead and there was a retroplacental clot that was present. As the case was of a serious nature and therefore, as a precautionary measure, she got the consent of the father of the deceased on form Ext.DD. On such consent being given, further treatment was carried out. At 12.30 p.m., she asked the attendants of the deceased to arrange blood which was of O negative which is rarely available and was not available in the hospital at the relevant time. The statement of the mother of the deceased Ext.DE was taken which was in her own hand and duly signed by her in her presence whereby she expressed her inability to arrange for the blood at that time. The patient delivered a dead male foetus at 12.45 p.m., the placenta deliver was normal. However, the uterus was filled with clots and the patient was having severe post partum haemorrhage but the bleeding could not be controlled and bimanual uterine massage was done, bitadine pack was put in the uterus to control the bleeding. Injection methergin 4-5 AMP and injection prostidin two Amp. was given. Intera venous lomodex was running and one unit of blood was also run. Despite all these measures, patient could not be revived. This treatment was given vide Ext.DF. According to this witness, this was the best and maximum possible treatment that could be given by her to the patient. One unit of blood was supplied at 12. P.m. by the Blood Bank of Civil Hospital. The witness reiterated that the attendants of the patient could not make available the blood despite having been asked to arrange the same in advance. She further stated that the father of the deceased never brought any person to her for blood donation and further stated that 20-60 percent of patient of maternal death are due to the post partum haemorrhage. She stated that ultra sound revealed that there was retroplacental clot formation and death of the foetus. To cause the death of foetus the size of retroplacental must have been of substantial size i.e. loss of 1-2 litres of blood in the uterus and this blood in the uterus prevents the uterus from contraction of muscles of uterus meaning to atony and that leads to post partum haemorrhage. Before the report of ultra sound the adequate management of patient had already started with I.v. line blood that had been given to the patient. The treatment was given by her in the hospital and was more than sufficient, but the attendants of the deceased failed to make available any blood. She further clarified that even if the blood was made available it would not have mattered much. She further stated that since the patient was already in labour pain and therefore it was not advisable to her for medical reasons to shift the patient to Shimla hospital or PGI, Chandigarh, more so, when the

patient had been bleeding profusely as there was all possibilities of the patient collapsing on the way. She stated that it was wrong on the part of the plaintiff to state that she had been summoned between 9.00 p.m. on 25.4.1996 to 2.00 a.m. on 26.4.1996. She stated that Dr. Kamlesh Sharma had examined this case at 2.45 a.m. on 26.4.1996 and she was there in the hospital at 3.30 a.m. Lastly she stated that cause of death of Sandhya was because of post partum haemorrhage and not on account of any act of any negligence on her part.

28. On being cross-examined by the plaintiff, the witness stated that in general practice in medical treatment serious patient, are always attended first. She denied the suggestion that she came to know at about 9.00 a.m. in the morning of 26.4.1996 that foetus had died in the uterus. She further denied the suggestion that she left the patient unattended and gone to the OPD at 9.00 a.m. on 26.4.1996. She further denied that there is no facility to treat patients like Sandhya in Civil Hospital, Solan. She clarified that prescription slip mark 'A' was not initialed by her and further stated that she could not say by whom the same was signed. She admitted her signature on Ext.DG and admitted that as per Ex. PG the patient was referred by her to Kamla Nehru Hospital, Shimla because of non-availability of blood. At that time the patient started collapsing, therefore, the treatment was started with the consent of her attendants. She further clarified that blood group O negative is a rare blood and was not available in the hospital. She did not refer the patient to IGMC, Shimla because this blood group O negative is/was not available there also, but admitted that she had not sought any information with regard to this from IGMC, Shimla. But clarified that she was knowing it as a Doctor that generally this blood group O negative was not available there also. She stated that the patient Sandhya was bleeding and was in labour pain. She was an anemic and her condition was not critical or serious at that time. She denied the suggestion that father of Sandhya Sh. Bhagwan Singh had approached her at about 8.00 p.m. and 9.00 p.m. on 25.4.1996 and she further denied that in response to this call, she had come to the hospital and after imparting instructions to nursing staff had left the hospital. She further denied the suggestion that after imparting instruction, she was again given a call by the father of deceased Sandhya but had not come to attend the patient. She admitted that Sandhya remained under her treatment and medication from 3.30 a.m. to 1.00 p.m. on 26.4.1996. She denied the suggestion that despite the death of foetus and clotting having occurred in uterus, she did not care about Sandhya and failed to attend her by remaining busy with the treatment of outdoor patients.

29. In response to the court question, this witness stated that she had visited the patient from 3.30 a.m. to 1.00 p.m. on 26.4.1996 approximately 10-12 times. After 12.00 p.m. till her death, she remained with the patient at her bed side. She gave a call to the Surgeon Dr. S.R. Sharma, Dr. Ashok Handa, Anaethist and Physician A. K.Arora, who came and helped her in reviving the patient.

30. On resumption of cross-examination, she admitted that any call given to the Specialist or other doctors, is recorded by the concerned doctor giving the call, but the call given to the aforesaid doctors was not recorded by her because she was busy attending the patient whose condition was deteriorating drastically. She denied that entire prescription and diagnosis of the patient was written by her after the patient had already died. She clarified that the reference regarding the calling of aforesaid doctors could not be noted down in the medical record after the death because the file had already gone to the CMO. She stated that the death certificate was not issued by the doctor attending the patient and is given by the Medical Superintendent. She further stated that the dead body of the patient was handed over by nursing staff to the relatives. The regular night duty of doctor remains from 9.00 p.m. to 9.00 a.m. She stated that her visiting time was not mentioned in the record. She denied the suggestion that it was incumbent upon the doctor to mention the time on the description of every visit. She denied the suggestion that the death of Sandhya occurred because she came late in response to the call given to her to attend the patient and thereafter remained negligent in giving her medical treatment. She further denied that non-availability of blood group O negative was the cause of death of the patient and clarified that cause of her death was post partum haemorrhage. She

lastly stated that the death occurred because bleeding in the uterus itself which led to the excessive bleeding after the delivery of dead foetus.

31. No evidence was led by other defendants i.e. 1 to 3, 5 and 6.

32. At this stage, Mr. Raman Sethi, learned counsel for respondent No.1 would argue that this is a fit case where the doctrine of *res ipsa loquitur* is applicable and, therefore, the plaintiff is in no obligation to further prove the negligence as the same is writ large. I am afraid that such plea cannot be accepted. Simply because a patient has not favourably responded to a treatment given by a doctor or a surgery has failed, the doctor cannot be held straightway liable for medical negligence by applying the doctrine of *res ipsa loquitur*. No sensible professional would intentionally commit an act or commission which would result in harm or injury to the patient. Even the best professionals, what to say of the average professional, sometimes have failures. A lawyer cannot win every case in his professional career but surely he cannot be penalized for losing a case provided he appeared in it and made his submissions. (Refer: ***Martin F. D'SOUZA vs. Mohd. Ishfaq (2009) 3 SCC 1).***

33. The duties which a doctor owes to his patient are clear. A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person when consulted by a patient owes him certain duties, viz., a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give or a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the patient. The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law require. (Refer: ***Indian Medical Association vs. V.P. Shantha and others (1995) 6 SCC 651).***

34. A medical practitioner faced with an emergency ordinarily tries his best to redeem the patient out of his suffering. He does not gain anything by acting with negligence or by omitting to to an act. Obviously, therefore, it will be for the complainant to clearly make out a case of negligence before a medical practitioner is charged with or proceeded against criminally. A surgeon with shaky hands under fear of legal action cannot perform a successful operation and a quivering physician cannot administer the end-dose of medicine to his patient. If the hands be trembling with the dangling fear of facing a criminal prosecution in the event of failure for whatever reason – whether attributable to himself or not, neither can a surgeon successfully wield his life-saving scalpel to perform an essential surgery, nor can a physician successfully administer the life-saving dose of medicine. Discretion being the better part of valour, a medical professional would feel better advised to leave a terminal patient to his own fate in the case of emergency where the chance of success may be 10% (or so), rather than taking the risk of making a last ditch effort towards saving the subject and facing a criminal prosecution if his effort fails. Such timidity forced upon a doctor would be a disservice to society. (Refer ***Jacob Mathew vs. State of Punjab and another (2005) 6 SCC 1).***

35. Negligence in civil law is understood to be an omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not

36. Medical negligence has been lucidly and elaborately explained by the Hon'ble Supreme Court in ***Jacob Mathew's*** case (supra) wherein it was observed as under:

> ***Negligence by professionals***
>
> ***"18. In the law of negligence, professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skill or skilled persons generally. Any task which is required to be performed with a special skill would generally be admitted or undertaken to be performed only if the person possesses the requisite skill for performing that task. Any reasonable man entering into a profession***

which requires a particular level of learning to be called a professional of that branch, impliedly assures the person dealing with him that the skill which he professes to possess shall be exercised and exercised with reasonable degree of care and caution. He does not assure his client of the result. A lawyer does not tell his client that the client shall win the case in all circumstances. A physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100% for the person operated on. The only assurance which such a professional can give or can be understood to have given by implication is that he is possessed of the requisite skill in that branch of profession which he is practising and while undertaking the performance of the task entrusted to him he would be exercising his skill with reasonable competence. This is all what the person approaching the professional can expect. Judged by this standard, a professional may be held liable for negligence on one of two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not necessary for every professional to possess the highest level of expertise in that branch which he practices. In Michael Hyde and Associates v. J.D. Williams & Co. Ltd., [2001] P.N.L.R. 233, CA, Sedley L.J. said that where a profession embraces a range of views as to what is an acceptable standard of conduct, the competence of the defendant is to be judged by the lowest standard that would be regarded as acceptable. (Charlesworth & Percy, ibid, Para 8.03)

19. An oftquoted passage defining negligence by professionals, generally and not necessarily confined to doctors, is to be found in the opinion of McNair J. in Bolam v. Friern Hospital Management Committee, [1957] 1 W.L.R. 582, 586 in the following words:

> ***"Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill . A man need not possess the highest expert skill... It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art." (Charlesworth & Percy, ibid, Para 8.02).***

21. The degree of skill and care required by a medical practitioner is so stated in Halsbury's Laws of England (Fourth Edition, Vol.30, Para 35):-

> ***"35. The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence, judged in the light of the particular circumstances of each case, is what the law requires, and a person is not liable in negligence because someone else of greater skill and knowledge would have prescribed different treatment or operated in a different way; nor is he guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible***

body of medical men skilled in that particular art, even though a body of adverse opinion also existed among medical men.

Deviation from normal practice is not necessarily evidence of negligence. To establish liability on that basis it must be shown (1) that there is a usual and normal practice; (2) that the defendant has not adopted it; and (3) that the course in fact adopted is one no professional man of ordinary skill would have taken had he been acting with ordinary care."

The abovesaid three tests have also been stated as determinative of negligence in professional practice by Charlesworth & Percy in their celebrated work on Negligence (ibid, para 8.110).

23. The decision of House of Lords in Maynard v. West Midlands Regional Health Authority, [1985] 1 All ER 635 (HL) by a Bench consisting of five Law Lords has been accepted as having settled the law on the point by holding that it is not enough to show that there is a body of competent professional opinion which considers that decision of the defendant professional was a wrong decision, if there also exists a body of professional opinion, equally competent, which supports the decision as reasonable in the circumstances. It is not enough to show that subsequent events show that the operation need never have been performed, if at the time the decision to operate was taken, it was reasonable, in the sense that a responsible body of medical opinion would have accepted it as proper. Lord Scarman who recorded the leading speech with which other four Lords agreed quoted the following words of Lord President (Clyde) in Hunter v. Hanley 1955 SLT 213 at 217), observing that the words cannot be bettered:

> ***"In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and one man clearly is not negligent merely because his conclusion differs from that of other professional menThe true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of if acting with ordinary care...."***

Lord Scarman added:

> ***"A doctor who professes to exercise a special skill must exercise the ordinary skill of his speciality. Differences of opinion and practice exist, and will always exist, in the medical as in other professions. There is seldom any one answer exclusive of all others to problems of professional judgment. A court may prefer one body of opinion to the other, but that is no basis for a conclusion of negligence."***

His Lordship further added that :

> ***"[A] judge's 'preference' for one body of distinguished professional opinion to another also professionally distinguished is not sufficient to establish negligence in a practitioner whose actions have received the seal of approval of those whose opinions, truthfully expressed, honestly held, were not preferred."***

24. The classical statement of law in Bolam's case has been widely accepted as decisive of the standard of care required both of professional men generally and medical practitioners in particular. It has been invariably cited with approval before Courts in India and applied to as touchstone to test the pleas of medical negligence. In tort, it is enough for

the defendant to show that the standard of care and the skill attained was that of the ordinary competent medical practitioner exercising an ordinary degree of professional skill. The fact that a defendant charged with negligence acted in accord with the general and approved practice is enough to clear him of the charge. Two things are pertinent to be noted. Firstly, the standard of care, when assessing the practice as adopted, is judged in the light of knowledge available at the time (of the incident), and not at the date of trial. Secondly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that point of time on which it is suggested as should have been used.

25. A mere deviation from normal professional practice is not necessarily evidence of negligence. Let it also be noted that a mere accident is not evidence of negligence. So also an error of judgment on the part of a professional is not negligence per se. Higher the acuteness in emergency and higher the complication, more are the chances of error of judgment. At times, the professional is confronted with making a choice between the devil and the deep sea and he has to choose the lesser evil. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Which course is more appropriate to follow, would depend on the facts and circumstances of a given case. The usual practice prevalent nowadays is to obtain the consent of the patient or of the person incharge of the patient if the patient is not be in a position to give consent before adopting a given procedure. So long as it can be found that the procedure which was in fact adopted was one which was acceptable to medical science as on that date, the medical practitioner cannot be held negligent merely because he chose to follow one procedure and not another and the result was a failure.

26. No sensible professional would intentionally commit an act or omission which would result in loss or injury to the patient as the professional reputation of the person is at stake. A single failure may cost him dear in his career. Even in civil jurisdiction, the rule of res ipsa loquitur is not of universal application and has to be applied with extreme care and caution to the cases of professional negligence and in particular that of the doctors. Else it would be counter productive. Simply because a patient has not favourably responded to a treatment given by a physician or a surgery has failed, the doctor cannot be held liable per se by applying the doctrine of res ipsa loquitur.

30. The purpose of holding a professional liable for his act or omission, if negligent, is to make the life safer and to eliminate the possibility of recurrence of negligence in future. Human body and medical science both are too complex to be easily understood. To hold in favour of existence of negligence, associated with the action or inaction of a medical professional, requires an in-depth understanding of the working of a professional as also the nature of the job and of errors committed by chance, which do not necessarily involve the element of culpability.

31. The subject of negligence in the context of medical profession necessarily calls for treatment with a difference. Several relevant considerations in this regard are found mentioned by Alan Merry and Alexander McCall Smith in their work "Errors, Medicine and the Law"

(Cambridge University Press, 2001). There is a marked tendency to look for a human actor to blame for an untoward event a tendency which is closely linked with the desire to punish. Things have gone wrong and, therefore, somebody must be found to answer for it. To draw a distinction between the blameworthy and the blameless, the notion of mens rea has to be elaborately understood. An empirical study would reveal that the background to a mishap is frequently far more complex than may generally be assumed. It can be demonstrated that actual blame for the outcome has to be attributed with great caution. For a medical accident or failure, the responsibility may lie with the medical practitioner and equally it may not. The inadequacies of the system, the specific circumstances of the case, the nature of human psychology itself and sheer chance may have combined to produce a result in which the doctor's contribution is either relatively or completely blameless. Human body and its working is nothing less than a highly complex machine. Coupled with the complexities of medical science, the scope for misimpressions, misgivings and misplaced allegations against the operator i.e. the doctor, cannot be ruled out. One may have notions of best or ideal practice which are different from the reality of how medical practice is carried on or how in real life the doctor functions. The factors of pressing need and limited resources cannot be ruled out from consideration. Dealing with a case of medical negligence needs a deeper understanding of the practical side of medicine.

32. At least three weighty considerations can be pointed out which any forum trying the issue of medical negligence in any jurisdiction must keep in mind. These are: (i) that legal and disciplinary procedures should be properly founded on firm, moral and scientific grounds; (ii) that patients will be better served if the real causes of harm are properly identified and appropriately acted upon; and (iii) that many incidents involve a contribution from more than one person, and the tendency is to blame the last identifiable element in the chain of causation the person holding the 'smoking gun'.

41. Dr. Laxman Balkrishna Joshi v. Dr. Trimbak Bapu Godbole and Anr. (1969) 1 SCR 206 was a case under Fatal Accidents Act, 1855. It does not make a reference to any other decided case. The duties which a doctor owes to his patients came up for consideration. The Court held that a person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for that purpose. Such a person when consulted by a patient owes him certain duties, viz., a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to be given or a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the patient. The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires. The doctor no doubt has a discretion in choosing treatment which he proposes to give to the patient and such discretion is relatively ampler in cases of emergency. In this case, the death of patient was caused due to shock resulting from reduction of the fracture attempted by doctor without taking the elementary caution of giving anaesthetic to the patient. The doctor was held guilty of negligence and liability for damages in civil law. We hasten

to add that criminal negligence or liability under criminal law was not an issue before the Court as it did not arise and hence was not considered.

45. M/s Spring Meadows Hospital and Anr. v. Harjol Ahluwalia through K.S. Ahluwalia and Anr. (1998) 4 SCC 39 is again a case of liability for negligence by a medical professional in civil law. It was held that an error of judgment is not necessarily negligence. The Court referred to the decision in Whitehouse & Jorden, [1981] 1 ALL ER 267, and cited with approval the following statement of law contained in the opinion of Lord Fraser determining when an error of judgment can be termed as negligence:-

> ***"The true position is that an error of judgment may, or may not, be negligent, it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant holds himself out as having, and acting with ordinary care, then it is negligence. If, on the other hand, it is an error that such a man, acting with ordinary care, might have made, then it is not negligence."***

48. We sum up our conclusions as under:-

(1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The definition of negligence as given in Law of Torts, Ratanlal & Dhirajlal (edited by Justice G.P. Singh), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: 'duty', 'breach' and 'resulting damage'.

(2) Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. So also, the standard of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time

(that is, the time of the incident) at which it is suggested it should have been used.

(3) A professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence.

(4) The test for determining medical negligence as laid down in Bolam's case [1957] 1 W.L.R. 582, 586 holds good in its applicability in India.

(5) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of mens rea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

(6) The word 'gross' has not been used in Section 304A of IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be 'gross'. The expression 'rash or negligent act' as occurring in Section 304A of the IPC has to be read as qualified by the word 'grossly'.

(7) To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.

(8) Res ipsa loquitur is only a rule of evidence and operates in the domain of civil law specially in cases of torts and helps in determining the onus of proof in actions relating to negligence. It cannot be pressed in service for determining per se the liability for negligence within the domain of criminal law. Res ipsa loquitur has, if at all, a limited application in trial on a charge of criminal negligence."

37. The basic principle relating to medical negligence is known as the Bolam Rule as laid down in ***Bolam vs. Friern Hospital (1957) 1 WLR 582 : (1957) 2 All ER 118*** and the same has been approved by the Hon'ble Supreme Court in ***Jacob Mathew's*** case. Fixing negligence is the standard of the ordinary skilled doctor exercising and professing to have that special skill, but a doctor need not possess the highest expert skill.

38. Despite the aforesaid principles, difficulties have been faced by the Courts in the application of those general principles to specific cases. The Courts have recognised that law, like medicine, is an inexact science. However, the Courts have recognised that (i) Judges are not experts in medical science, rather they are laymen and, therefore, this itself often difficult for them to decide cases relating to medical negligence. Moreover, Judges have usually to rely on testimonies of other doctors which may not necessarily in all cases be objective, since like in all professions and services, doctors too sometimes have a tendency to support their own colleagues who are charged with medical negligence. The testimony may also be difficult to understand, particularly in complicated medical matters, for a layman in medical matters like a Judge; and (ii) a balance has to be struck in such cases. While doctors who cause death or agony due to medical negligence should certainly be penalized, it must also be remembered that like all professionals doctors too can make errors of judgment but if they are punished for this no doctor can practice his vocation with equanimity. Indiscriminate proceedings and decisions against doctors are counterproductive and serve society no good. They inhibit the free exercise of judgment by a professional in a particular situation.

39. A medical practitioner is not liable to be held negligent simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference to another. There is a tendency of confuse a reasonable person with an error-free person. An error of judgment may or may not be negligent. It depends on the nature of the error. Also, now what is reasonable and what is unreasonable is a matter on which even experts may disagree. Also, they may disagree on what is a high level of care and what is a low level of care. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field. For instance, he would be liable if he leaves a surgical gauze inside the patient after an operation, or operates on the wrong part of the body, and he would be also criminally liable if he operates on someone for removing an organ for illegitimate trade.

40. The standard of care has to be judged in the light of knowledge available at the time of the incident and not at the date of the trial. Also, where the charge of negligence is of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that point of time.

41. The higher the acuteness in an emergency and the higher the complication, the more are the chances of error of judgment. At times, the professional is confronted with making a choice between the devil and the deep sea and has to choose the lesser evil. The doctor is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Which course is more appropriate to follow, would depend on the facts and circumstances of a given case but a doctor cannot be penalized if he adopts the former procedure, even if it results in a failure.

42. There may be a few cases where an exceptionally brilliant doctor performs an operation or prescribes a treatment which has never been tried before to save the life of a patient when no known method of treatment is available. If the patient dies or suffers some serious harm, the doctor should not be held liable. Science advances by experimentation, but experiments sometimes end in failure. However, in such cases, it is advisable for the doctor to explain the situation to the patient and take his written consent.

43. Apart from the above, as held in ***Jacob Mathew's*** case (supra), negligence in the context of medical profession necessary calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from the one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows, a practice acceptable to the medical profession of that day, he/she cannot be held liable for negligence merely because a better alternative course

or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the doctor followed.

44. Now, adverting to the judgment rendered by the learned trial Court, it would be seen that the said Court has been swayed more by emotions than by reasons. The learned Court below has failed to take into consideration the pleadings with respect to the negligence and thereafter ignored the evidence available on record, which in no manner establishes the negligence on the part of the defendants, more particularly defendant No.4.

45. The plaintiff has failed to establish the plea of negligence on the part of any of the defendants either in the pleadings or in the evidence so led, therefore, there are no reasons for the trial Court to have drawn a conclusion by infusing its own concepts of morality and so called professional ethics and professional aptitude and thereby decreed the suit by holding the defendant No.4 to be negligent.

46. Undoubtedly, this is an unfortunate case where Sandhya died in the hospital, but her death cannot be attributed to any laxity or negligence on the part of the doctors, attending to her, more particularly defendant No.4.

47. The plaintiff has led no evidence to show that in what manner defendant No.4 has not acted with standard of care, whereas defendant No.4 has led sufficient evidence to show that she acted in accordance with the general and approved practice. In fact the only allegations set-out against defendant No.4 appears to be that she did not attend the patient promptly on 25.4.1996 and thereafter did not attend her after 9.00 a.m. on 26.4.1996. However, both these allegations are belied from the pleadings as also the evidence led on record.

48. As observed by the Hon'ble Supreme Court, no sensible professional would intentionally commit an act or omission which would result in loss or injury to the patient as the professional reputation of the person is at stake and a single failure may cost him/her dear in his/her career.

49. Apart from the above, it is the responsibility of the government hospital to ensure that there is always a doctor on duty who is available round the clock and the doctor on duty is not only expected but is duty bound to constantly monitor the patient round-the-clock. But then there is no rule which requires a particular doctor be it even a specialist to work round the clock for 24 hours. The doctors have the fixed duty time and work in shifts. It is only when there is an emergency that the specialist in the concerned field is called upon to attend upon the patient. In the instant case, admittedly, defendant No.4 had rendered duty from 9.00 a.m. to 5.00 p.m. on 25.4.1996 and thereafter as per the rules and practice after completing her shift, it was the shift of Dr. Kamlesh Sharma, who after facing difficulty in treating the patient had called upon defendant No.4 to attend upon the patient at 2.45 a.m. and it is not in dispute that defendant No.4 in fact came and attended the patient at 3.30 a.m. on 26.4.1996 and only after treating her, she left for her residence. Not only this, as per the duty roster, she again reported at 9.00 a.m. on 26.4.1996 and thereafter attended the patient.

50. Lastly even defendants No. 1 to 3 could not have been held vicariously liable, that too, observing that there have been mal-administration of the hospital or that they have been non-serious attitude and indifferent work culture aggravated by the negligent act performed by defendant No.4.

51. In view of the aforesaid discussion, I find merit in this appeal and the same is accordingly allowed. The judgment and decree dated 5.1.2001 passed by learned District Judge, Solan in Civil Suit No. 8/1 of 1997 is set-aside and resultantly the suit filed by the plaintiff is ordered to be dismissed. The pending application(s) if any, also stands disposed of, leaving the parties to bear their own costs.

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

Court on its own motion ...Petitioner.

Versus

The Chief Secretary to the Government of Himachal Pradesh and others ...Respondents.

CWPIL No.224 of 2017
Date of Decision : March 6, 2018

Constitution of India, 1950- Article 226 -**Code of Criminal Procedure, 1973-** Sections 154, 156 and 170- Registration of First Information Report- One 'G' went missing and a missing report was lodged with P.S. B.S.L. Sundernagar- However, his dead body was found near Beas Kund at Rohtang and cremated by police being unclaimed- Relatives identified from photographs as body being of 'G' and requested SHO, P.S. Manali for registration of FIR – Their request declined on ground that FIR was to be registered with P.S. BSL Sundernagar where missing report was initially filed- Petition filed in High Court against police inaction- Held- Police can register an FIR of cognizable offence and if on investigation, it is found that crime was not committed within jurisdiction of that police station, it can transfer same to police station concerned in terms of Section 170 of Cr.P.C. (Para- 5 to 7 and 11)

Cases referred:

Satvinder Kaur v. State (Govt. of NCT of Delhi), (1999) 8 SCC 728
Naresh Kavarchand Khatri v. State of Gujarat and another, (2008) 8 SCC 300
Asit Bhattacharjee v. Hanuman Prasad Ojha, (2007) 5 SCC 786
Rasiklal Dalpatram Thakkar v. State of Gujarat and others, (2010) 1 SCC 1

For the Petitioner : Mr. Rajnish Maniktala, Amicus Curiae.
For the Respondents : Mr. Ashok Sharma, Advocate General, with Mr. Ranjan Sharma and Mr. Adarsh Sharma, Additional Advocates General.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice

On the basis of a Letter Petition dated 30.10.2017, so addressed by Krishni Devi, resident of village Uvah, P.O. Sianji, Tehsil Sundernagar, District Mandi, Himachal Pradesh, this Court, taking suo moto cognizance, issued notice.

2. Letter petitioner alleged that on 15.10.2017 at about 8.40 a.m., her son Gopal Sharma @ Vicky received a phone call and after informing that he would return in ten minutes, left on his motorcycle towards Mahadev (District Mandi). Since her son did not return and his whereabouts were not known, she went to Police Station, BSL Colony (Sundernagar) to lodge missing report. There, police advised her to wait for two days, suggesting that perhaps he would come back. On 20.10.2017, again she went to lodge the report, when again they asked her to wait and search for him. Again on 23.10.2017, when she went to the Police Station, she was informed that location of the person, on whose call her son had left, was traced to a place somewhere near Manali (District Kullu) and when an endeavour was made to search such person, the mobile phone was found to be switched off. On 26.10.2017, she arranged money and went towards Manali to trace her son. After seeing the footage of the video recorded at various points, she learnt that her son had been to Manali. Lateron, police officials informed that a dead body, which was found near Beas Kund at Rohtang, was cremated on 21.10.2017. Through photographs the body was identified to be that of her son.

3. Significantly, only after much delay, FIR was registered at the concerned Police Station. What is crucial is that allegedly police officials at Police Stations, Sundernagar and Manali refused to register the FIR, purely on the basis of jurisdictional issue.

4. The Superintendent of Police, District Kullu, Himachal Pradesh, filed his affidavit dated 20.11.2017, stating that on 17.10.2017, Police Post Marhi, under Police Station Manali, received an information about an unidentified dead body. Immediately, inquest report was prepared and necessary action taken, after completion of formalities, including conduct of postmortem of the dead body and keeping the same in the mortuary at the Hospital at Manali, information was sent to all concerned. The dead body was handed over to Municipal Council, Manali for cremation, which was, pursuant to orders passed by the Sub Divisional Magistrate, Manali. This was on 21.10.2017.

5. Further, on 26.10.2017, relatives of the deceased reached Police Station, Manali and identified the person, whose dead body was found, to be Gopal Sharma alias Vickky son of Kamlesh Sharma, resident of Vilalge Uvah, P.O. Sianji, Tehsil Sundernagar, District Mandi, Himachal Pradesh.

6. Also, on 27.10.2017, Smt. Krishni Devi, mother of the deceased, got recorded her statement that her son stood kidnapped by Pankaj Sharma alias Panku and Vineet Kumar alias Vikky. Resultantly, FIR No.130/17, dated 27.10.2017, stood registered against such persons at Police Station, Sundernagar. Arrests were made and action taken, in accordance with law.

7. On 20.11.2017, the Superintendent of Police, Mandi, District Mandi, Himachal Pradesh has filed his affidavit, informing the Court that investigation revealed complicity of another person, namely Jeewan Kumar, who was also arrested.

8. On 1.1.2018, the Deputy Inspector General of Police, Southern Range, Shimla, filed his affidavit, highlighting the steps taken by the Police officials in effectively and efficiently carrying out the investigation. We may observe that prior thereto, on 18.12.2017, this Court had passed the following interim order:

> "Having heard learned Counsel for the parties, at this stage, we are of the considered view that interest of justice would be met if some senior level Officer(s) other than Districts Mandi and Kullu were to examine the matter. Learned Amicus states that if at this stage Court is not inclined to have the matter investigated through Central Bureau of Investigation, at least, the State CID can be asked to inquire the same.
>
> Keeping in view the overall attending circumstances and independent of the SIT, which already stands constituted, and without reflecting on their conduct, we feel that interest of justice would be served if senior level Officer, i.e. Inspector General of Police, Shimla (South Zone) is to just examine the issue and submit his report, examining the grievance of the letter petitioner and the issue highlighted by the learned Amicus Curiae in his suggestions/report, within two weeks.
>
> List on 02.01.2018." (Emphasis supplied)

It is pursuant thereto that the aforesaid affidavit came to be filed.

9. Yet another affidavit of compliance, dated 8.1.2018, stands filed by the Deputy Inspector General of Police, Southern Range, Shimla. We are satisfied about the manner in which now the investigation stands conducted. It cannot be said that there is any misdirection, delay or that views of the complainant have not been taken note of. The alleged perpetrators of crime stand identified and arrests made.

10. As such we are of the considered view that no other and further orders are required to be passed in the present proceedings, save and except that on a vital issue and that being with regard to non-registration of the FIR at the first instance, best highlighted by the

Deputy Inspector General of Police, Southern Range, in his affidavit dated 8.1.2018, referred to supra, in the following terms:

> "That as per the statement of Inspector Anil Kumar, SHO PS Manali, Sh Shiv Kumar, the brother-in-law of Gopal Sharma, made a verbal request for registration of an FIR in a matter. However, HHC Sh Khem Raj no.375 of PS BSL Colony, Sunder Nagar, who was present with the relatives of Sh Gopal Sharma on the spot said that a missing report was registered at PS BSL Colony, Sunder Nagar and it was a continuous offence, therefore, FIR would be registered at PS BSL Colony, Sunder Nagar. As per the statement of Inspector Anil Kumar, SHO PS Manali, Sh Shiv Kumar asked the SHO of PS Manali where should the FIR in the matter be registered. The SHO informed him that the missing report of the deceased was registered at PS BSL Colony, Sunder Nagar and hence an FIR in the matter should be registered there, as the offence of abduction and murder started from the jurisdiction of PS BSL Colony and it continued further towards Manali. On this, the relatives of Sh Gopal Sharma returned from the Police Station. As per the statement of Sh Khem Raj HHC of PS BSL Colony, SHO of Police Station Manali, Sh Anil Kumar told Sh Shiv Kumar that he would be able to register a case after taking an opinion in this matter from District Attorney. If he says a case is not made out in the jurisdiction of his Police Station, an FIR would not be registered at Police Station Manali and they would have to go to Police Station BSL Colony, Sunder Nagar for registration of a case."
>
> (Emphasis supplied)

11. Law on the question of jurisdiction vis-à-vis registration of FIR is now well settled. Police can register an FIR on commission of a cognizable crime and if on scrutiny or investigation, it is found that the crime was not conducted within the jurisdiction of that Police Station, it can transfer the same to the concerned Police Station.

12. In *Satvinder Kaur v. State (Govt. of NCT of Delhi),* (1999) 8 SCC 728, the Apex Court has considered the question of registration of FIR at length and taking note of different Sections of Cr.P.C. observed that the territorial jurisdiction was prescribed under sub-section (1) of Section 156 Cr.P.C. to the extent that a Police Officer can investigate any cognizable case, which a Court having jurisdiction over the local area within the limits of said Police Station would have power to enquire into or try under the provisions of Chapter XIII. However, sub-section (2) of Section 156 Cr.P.C. makes it clear that proceedings of Police Officer in any case cannot be called in question on the ground that the case was one which such Officer was not empowered to investigate. The Supreme Court further observed that Section 170 Cr.P.C. specifically provides that if, upon investigation, it appears to the Officers In-charge of the Police Station that crime was not committed within the territorial jurisdiction of Police Station, that FIR can be forwarded to the Police Station having jurisdiction over the area in which crime is committed.

13. The Apex Court in *Naresh Kavarchand Khatri v. State of Gujarat and another,* (2008) 8 SCC 300, reiterating its earlier view taken in *Asit Bhattacharjee v. Hanuman Prasad Ojha,* (2007) 5 SCC 786, held that only in the event an investigating officer, having regard to the provisions contained in Sections 154, 162, 177 and 178 of the Code of Criminal Procedure, arrived at a finding that the alleged crime was not committed within his territorial jurisdiction, could he forward the first information report to the police having jurisdiction in the matter.

14. Further, in *Rasiklal Dalpatram Thakkar v. State of Gujarat and others,* (2010) 1 SCC 1, the Court observed that without conducting investigation, it would be improper on the part of the Investigating Agency to forward its report with the observation that since entire cause of action, in relation to the alleged offence, had taken place at another place, the investigation be transferred to the Police Station having jurisdiction. The Court was dealing with a case where part of the cause of action had taken place at Ahmedabad, yet the Investigating Agency had submitted its report, stating that since the transaction had taken place in Mumbai, the matter stood transferred to that place. Under these circumstances, the Court observed as under:

> "31. Section 156(3) Cr.P.C. contemplates a stage where the learned Magistrate is not convinced as to whether process should issue on the facts disclosed in the complaint. Once the facts are received, it is for the Magistrate to decide his next course of action. In this case, there are materials to show that the appellant had filed his application for loan with the Head Office of the Bank at Ahmedabad and that the processing and the sanction of the loan was also done in Ahmedabad which clearly indicates that the major part of the cause of action for the complaints arose within the jurisdiction of the Chief Metropolitan Magistrate, Ahmedabad. It was not, therefore, desirable on the part of the Investigating Agency to make an observation that it did not have territorial jurisdiction to proceed with the investigation, which was required to be transferred to the Police Station having jurisdiction to do so.
>
> 32. On the materials before him the learned Magistrate was fully justified in rejecting the Final Report submitted by the Economic Offences Wing, State CID (Crime) and to order a fresh investigation into the allegations made on behalf of the Bank. The High Court, therefore, did not commit any error in upholding the views expressed by the Trial Court. As mentioned hereinbefore, Section 181(4) Cr.P.C. deals with the Court's powers to inquire or try an offence of criminal misappropriation or of a criminal breach of trust if the same has been committed or any part of the property, which is the subject of the offence, is received or retained within the local jurisdiction of the said Court."

15. Coming to the instant facts, it has come on record that the complainant (mother of the deceased), had visited the concerned Police Station at Sundernagar, pointing out that her son was missing. It is in this backdrop, officials of the said Police Station were duty bound to have registered the case at the first instance. Rather than asking the complainant to search for her son and come back to the Police Station, forcing her to return for the very same purpose on more than three occasions. The police officials of Police Station, Sundernagar, in our considered view, were negligent to this extent.

16. Under these circumstances, we dispose of the present petition, in the following terms:

(a) Investigation of the FIR, in terms of affidavit, dated 1.1.2018, filed by the Deputy Inspector General of Police, Suthern Range, Shimla, be got completed, expeditiously, in accordance with law and the matter taken to its logical end.

(b) The Director General of Police, Himchal Pradesh, shall issue directions to all the Station House Officers, within the State of Himachal Pradesh, asking them to take appropriate action for registering the complaint, in accordance with law. The police officials cannot ignore the fact that in rural areas the complainants are not only illiterate but are also not familiar or well versed with the procedures of law.

(c) Special courses for training the police officials, posted in the Police Stations, be got conducted on periodical basis, with special emphasis on dealing with the complaints of the nature with which we are concerned, more so in the light of observations made by the Apex Court in *Satvinder Kaur (supra), Naresh Kavarchand Khatri (supra)* and *Rasiklal Dalpatram Thakkar(supra).*

17. We place on record our appreciation for the assistance rendered by Mr. Rajnish Maniktala, learned Amicus, who, on the instructions of this Court, contacted the letter petitioner and obtained necessary feedback.

In view of the above we close the present proceedings. Pending application(s), if any, also stand disposed of.

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

Court on its own motion ....Petitioner
Versus
State of H.P. & Others ....Respondents

CWPIL No.9 of 2017
Date of decision: 08.03.2018

Constitution of India, 1950- Article 226**- H.P. Land Revenue Act, 1954-** Section 163- Letter petitioners alleged of encroachment having been made over Government land by "K.K." and prayed for necessary direction to concerned department for resumption of land- 'K.K.' denied allegation of encroachment - Claimed that his grand-father was a non-occupancy tenant in land and long standing entries of 'gair marusi' were illegally and arbitrarily changed to 'Kabzan' - Qua change of revenue entries appeal of K.K. and his brothers, pending before ASO-Dharmshala- Meanwhile, eviction proceedings under Section 163 of Act were also initiated against 'K.K.' before A.C. 1st Grade, Nadaun – Held- Case involved disputed questions of facts and law- Petition disposed of with directions to ASO, Dharamshala/A.C. 1st Grade, Nadaun to expedite proceedings. (Para- 14)

Conduct of party- Suppression of Material Facts- With a view to get construction activity of 'K.K.' being carried by him on land alleged to be encroached stopped, letter petitioners concealed fact that their application seeking temporary injunction against 'K.K.' already stood dismissed by Civil Judge, Nadaun - Letter petitioners were found to have concealed material facts from Court, therefore, warned to be more cautious and responsible in future while dealing with court matters - Costs of Rs.1,000/- imposed on letter petitioners and directed to be deposited with State Legal Services Authority (Para-16)

For the Petitioners: Ms.Veena Sharma, Advocate as Amicus Curiae,
For Respondents-State: Mr.Ashok Sharma, Advocate General with Mr.Ranjan Sharma, Mr.Adarsh K.Sharma, Ms.Reeta Goswami and Mr.Nand Lal Thakur, Additional Advocate Generals and Ms.Swaleen Jaswal and Mr.J.K. Verma, Deputy Advocate Generals.
For Respondent No.5: Mr.R.L. Sood, Senior Advocate with Mr.Arjun Lall, Advocate.

The following judgment of the Court was delivered:

Per Sandeep Sharma, J. (Oral)

Instant petition came to be registered as Public Interest Litigation on the basis of communication dated 8.4.2017 sent by local residents of village Kangoo, Tehsil Nadaun, District Hamirpur, H.P., who alleged that person namely; Kamal Kishor son of Shri Madan Singh, resident of village Malag, Post Office Kangoo, Tehsil Nadaun, District Hamirpur, after having encroached upon Government land, has illegally constructed shops at Kangoo Bus Stop.

2. Letter petitioner further alleged that apart from constructing shops on Government land, person, named hereinabove, has also encroached upon other Government land comprised in Khata No.288, Khatauni Nos.413, 416, 418, 422, Khasra Nos.666, 667, 458, 656, 657, 658, 660, 661, 665, 668, Kitta 10, area measuring 4-25-25 hectare, situate at Mahal Malag, Mauza Badohag, Tehsil Nadaun, District Hamirpur, H.P. and at present he is laying foundation for house.

3. Letter petitioner alleged that since Kamal Kishore is an influential person of the area, no action is being taken against him by the administration. Earlier also a complaint dated 27.2.2017 was made to the Deputy Commissioner, Hamirpur, H.P., who had recommended Sub Divisional Magistrate, Nadaun to take action, but despite that Kamal Kishore, respondent No.5, failed to stop the illegal construction, rather he managed to stall all actions proposed to be initiated against him by the Government machinery. Petitioner also placed on record news item published in daily newspapers *"Dainik Jagran"* and *"Aap Ka Faisla"* dated 30.3.2017.

4. Petitioner, by way of letter, which has been taken note above, prayed that necessary directions be issued to the concerned Department for resuming land, allegedly encroached by respondent No.5, so that no loss is caused to the public exchequer.

5. Taking note of serious allegation made in the letter petition, this Court directed learned Deputy Advocate General to have instructions in the matter and also called upon respondent No.5 to file his response.

6. During pendency of present proceedings, this Court also summoned letter petitioners; namely; S/Shri Ram Singh son of Shri Birbal, Desh Raj son of Shri Bardu, Rajesh Babu Gautam son of Shri Dharam Singh and Jeet Singh son of Shri Sant Ram, who reiterated their allegations as contained in the letter petition through amicus curiae Ms.Veena Sharma, Advocate.

7. It may be noticed that during the pendency of present proceedings, four affidavits dated 30.6.2017, 14.9.2017, 21.11.2017 and 6.3.2018 came to be filed on behalf of respondents No.1 to 4 through Deputy Commissioner, Hamirpur, District Hamirpur, H.P. All the allegations of encroachment allegedly made against respondent No.5, have been virtually accepted by the Deputy Commissioner, Hamirpur in his affidavit detailed hereinabove. In all the affidavits, it has been categorically stated that respondent No.5 is an encroacher over the Government land and in this regard proceedings under Section 163 of the H.P. Land Revenue Act, 1954 *(hereinafter referred to as the 'Act')* stand already initiated.

8. In the latest affidavit dated 6.3.2018, Deputy Commissioner has categorically stated that Government of Himachal Pradesh is owner of the land in question and the question of title raised by respondent No.3 qua the same shall be decided by concerned Revenue Court in accordance with the provisions of law.

9. Respondent No.5 i.e. Kamal Kishore also filed affidavit in terms of directions issued by this Court, wherein he refuted all allegations of encroachment allegedly made by him on the Government land and contended that his grandfather; namely; Shri Ran Singh son of Shri Hira was recorded as *"Gair Maurusi Tenant"* in cultivating possession in respect of Khasra Nos.656, 657, 658, 660, 661, 668 from the year 1950-51 with Raja Rajinder Chand, Nadaun as the owner thereof. Respondent No.5 also placed on record copy of Jamabandi for the year 1950-51 in support of his claim. Aforesaid entries as contained in Jamabandi for the year 1950-51 continued to remain undisturbed and unchanged till the year 1996-97, when State Government ordered vestment of land in question in favour of State. Respondent No.5 has admitted that for the first time the possession in the name of S/Shri Pritam Singh, Ashok Kumar, Kamal Kishore, respondent No.5 and their younger brother Shri Rajinder Singh all sons of late Shri Madan Singh son of late Shri Ran Singh, was illegally and arbitrarily changed from that of the long standing *"Gair Maurusi"* in column No.4 to *"Kabazan"* qua which appeal, having been filed by them, is already pending before learned ASO, Dharamshala (Annexure R-5/C). Respondent No.5 also stated in his affidavit that present Public Interest Litigation has been initiated at the instance of Ram Singh, Desh Raj, Rajesh Babu Gautam and Jeet Singh, who have approached this Court by suppressing material facts that they had filed a Civil Suit No.73/2017, which is still pending adjudication in the Court of Civil Judge(Jr.Division), Nadaun, District Hmairpur, H.P. and since no interim relief was granted by learned Civil Judge, they approached this Court by way of present letter petition levelling therein false allegations.

10. Taking note of averments contained in the affidavit of respondent No.5, this Court directed the Deputy Commissioner, Hamirpur as well as private respondent to file their response to the same.

11. Deputy Commissioner, Hamirpur again reiterated its stand taken in his first affidavit and alleged that revenue entry from non-occupancy tenants to *'Kabzan'* of land in question was incorporated in compliance to order passed by AC Ist Grade, Settlement Nadaun in case No.471/96, dated 1.5.1997 and rapat to this effect was recorded vide Rapat No.253 dated 29.5.1997. Factum with regard pendency of appeal already came to be admitted as a matter of record. Deputy Commissioner has further stated that pursuant to aforesaid report submitted by AC Ist Grade, mutation came to be effected and attested in favour of respondents-State, but no appeal was ever laid against the same by respondent No.5 and as such the same has attained finality.

12. On the other hand, letter petitioners, by way of supplementary affidavit filed in terms of order passed by this Court, again reiterated the allegations with regard to encroachment made by respondent No.5, but have also admitted factum with regard to their having filed Civil Suit in the Court of learned Civil Judge (Jr.Division).

13. Letter petitioners have admitted that taking note of the fact that since no interim injunction was granted and respondent No.5 was helbent in carrying out construction over Government land, they approached this Court and there was no malafide intention behind this action of their.

14. After having gone through the material available on record, especially affidavit filed by Deputy Commissioner, there appears to be some truth in the allegation levelled by the letter petitioners, but this Court, taking note of allegations and counter allegations levelled by the letter petitioners and respondent No.5, sees no occasion to keep the present petition alive, especially when there are disputed questions of facts and law. Moreover, as is quiet apparent from the affidavit filed by Deputy Commissioner, proceedings qua alleged encroachment made by respondent No.5 stand already initiated against him and the same are pending before learned AC Ist Grade, Nadaun and as such, this Court is of the view that pendency of present petition before this Court may further delay the proceedings pending before the Revenue Authorities below and as such deems it proper to dispose of present petitioner with the following directions:-

(i) Proceedings initiated under Section 163 of the Act against respondent No.5, pending before Revenue Authority, shall be decided expeditiously, preferably within a period of six months from the date of passing of this Order. Needless to say, Revenue Authority, while deciding proceedings as referred above, shall afford an opportunity of being heard to all the parties so that principle of natural justice is met.

(ii) As is quiet evident from the material available on record that respondent No.5, being aggrieved with the change of entry in revenue record, had approached ASO, Dharamshala (Annexure R-5/C) much prior to the initiation of eviction proceedings against him under Section 163 of the Act, this Court directs that the Revenue Authority concerned, before taking any action pursuant to proceedings initiated under Section 163 of the Act, shall decide appeal, if any, pending before ASO, Dharamshala because that may have bearing on the proceedings initiated under Section 163 of the Act. In case proceedings are pending before the ASO, Dharamshala, as has been claimed by respondent No.5, same shall be decided by the authority concerned on the top most priority, most preferably, within a period of two months from today so that further action in the matter is taken with the utmost promptitude.

15. With the aforesaid observations/directions, nothing survives in the present petition and the same is accordingly closed. Affidavit of compliance shall be filed by the Deputy Commissioner after expiry of period of six months as granted hereinabove. At this stage, this

Court may take note of the fact that though allegation contained in the letter petition sent to this Court prima facie appears to be correct. But it is also fact, rather is clearly evident from the record that the letter petitioners suppressed material factum with regard to their having filed Civil Suit before the learned Civil Judge qua same subject matter and as such, we find considerable force in the arguments of Shri R.L. Sood, learned Senior Counsel representing respondent No.5, that letter petitioners, one of whom is a retired army official, have not approached this Court with clean hands and they, with a view to get the construction activity being carried out by respondent No.5 on the land allegedly encroached by him stopped, concealed material factum with regard to dismissal of their interim application in the Civil Suit having been filed by them before the Civil Court. Though, this Court, after having interacted with the letter petitioners is persuaded to agree with the contention of learned amicus curiae Ms.Veena Sharma that letter petitioners had no malafide intention but they all being educated and aware of legal consequences ought to have more careful and cautious while sending communication to this Court.

16. Taking note of aforesaid irresponsible act of letter petitioners, this Court would have proceeded to award exemplary costs, but taking note of the nature of issue, which is definitely of great public importance, raised by letter petitioners, this Court warn them to be more cautious and responsible in future while dealing with the Court matters. Since we are of prima facie view that attempt has been made by letter petitioners to hoodwink this Court by suppressing material facts, this Court deems it proper to impose token costs of Rs.1000/- which shall be deposited with the H.P. State Legal Services Authority.

17. We also wish to place on record appreciation qua the efforts put in by Ms.Veena Sharma, Advocate, Amicus Curiae, who, on the instructions of this Court, regularly contacted letter petitioners and obtained necessary feed back.

18. Copy of instant order shall be made available to Deputy Commissioner, Hamirpur and all other concerned parties for necessary compliance including Amicus Curiae, who in turn shall inform letter petitioners with regard to passing of the aforesaid judgment.

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

Rekha Devi .... Petitioner
Versus
State of H.P. and others ... Respondents

CWP No. 4998 of 2012.
Date of decision: 08.03.2018.

Limitation Act, 1963- Section 5**- Applicability of -** Policy Guidelines regarding 'Aganwari Worker' – No power is conferred in policy guidelines on Appellate Authority for condoning delay - Held- Appeal cannot be entertained by Appellate Authority filed after expiry of 15 days from date of appointment of a person as an Aganwari Worker – Section 5 of Act has no applicability. (Para- 9)

Case referred:
Raksha Devi v. State of H.P. and ors. 2010(2) Him.L.R. (DB) 964

For the petitioner: Mr. V.S. Chauhan, Advocate.
For respondents No. 1 to 3: Mr. Desh Raj Thakur, Addl. AGwith Mr. Kamal Kant Chandel, Dy. AG.
For respondent No. 4: Ms. Manika Mittal, Advocate vice Mr. Jai Ram Sharma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (*Oral*)

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

"a) To issue a writ of certiorari or direction in nature thereof to quash and set aside the impugned order Annexure P-4 dated 21.04.2012 to be null and void and nonest in the eyes of law as the same have been passed by ignoring the guidelines/directions of this Hon'ble Court.

b) Direct the respondents to produce all the relevant record pertaining to the present case.

c) Pass any writ, direction or order which this Hon'ble Court deems fit and proper in the facts and circumstances of the case so that the justice can be done to the petitioner"

2. The issue involved in this petition is in a very narrow compass. The moot issue is as to whether the Appellate Authority could have entertained and decided an appeal which was received by the said authority against the appointment of an Anganwari worker beyond the period of limitation so prescribed in the guidelines.

3. Brief facts necessary for adjudication of the present writ petition are that respondent-State had initiated a process for appointment of Anganwari Worker for Anganwari Centre, Thalog, Tehsil Arki, District Solan, for which, interviews were conducted on 18.07.2007, in which, petitioner as well as the private respondent appeared. Pursuant to the said interview, present petitioner was offered appointment vide appointment letter dated 03.08.2007, Annexure P-1.

4. Feeling aggrieved by the appointment of the petitioner, the private respondent filed an appeal before the Additional District Magistrate on 29th August, 2007 i.e. beyond the limitation period of 15 days as provided in the policy alongwith an application for condonation of delay in filing the application. The appeal was not only entertained, but also adjudicated on merit. Vide order dated 18.06.2009, Annexure P-2, said authority held the appointment of the present petitioner to be bad in law.

5. Feeling aggrieved, the petitioner preferred an appeal and Appellate Authority remanded the matter back for adjudication afresh. The appeal was decided by District Collector, Solan, again on merit vide order dated 21.4.2012, which stands assailed by way of this petition, vide which order, appointment of the petitioner again was held to be bad in law.

6. Feeling aggrieved, the petitioner filed the present writ petition.

7. It is not in dispute that as per the guidelines in vogue, a person feeling aggrieved by the appointment of another person, either as an Anganwari Worker or an Anganwari Helper, could have assailed the said appointment by filing an appeal within a period of 15 days from the date when the said appointment was made. It is also not in dispute that an appeal was preferred by the private respondent in the present case beyond the period of said 15 days.

8. Hon'ble Division Bench of this Court in **Raksha Devi v. State of H.P. and ors**. 2010(2) Him.L.R. (DB) 964, has clearly and categorically held that as the guidelines provided a period of 15 days for filing an appeal, the statutory authority in terms of the policy guidelines, i.e. the Appellate Authority does not has any power under Section 5 of the Limitation Act and there is no power conferred also in the guidelines for condonation of delay. Hon'ble Division Bench has further held that the time period to file an appeal cannot be enlarged by the Appellate Authority beyond the period of 15 days. If the appeal has not been filed within the prescribed time, the appeal is only to be dismissed since the appellate Authority has no power to condone the delay in filing the appeal. Para 19 of the judgment is quoted herein-below.

"Another legal contention is as to whether the Appellate Authority has power to condone delay in filing appeal. The Guidelines provide a period of 15 days for filing an appeal. Being a statutory authority, in terms of the Policy Guidelines, the Appellate Authority does not have the power under Section 5 of the Limitation Act. No power is conferred also in the guidelines for condonation of delay. Therefore, he cannot enlarge the time, by condoning delay in filing the appeal. In other words, if an appeal is not filed within the prescribed time, it has only to be dismissed, since the Appellate Authority has no power to condone the delay in filing the appeal."

9. In view of law so laid down by Hon'ble Division Bench of this Court, in my considered view, the impugned order is not sustainable as though the Collector subsequently was deciding the appeal pursuant to matter having been remanded back by the Divisional Commissioner, still the fact remains that appeal initially preferred against the appointment of the petitioner was beyond the period of 15 days as provided in the guidelines. As such, as the appeal was filed beyond the period of 15 days, the Appellate Authority concerned had no power to entertain or adjudicate the same on merit.

Accordingly, this writ petition is allowed and respondents are directed to take all steps to implement appointment order dated 03.08.2007, Annexure P-1. Pending miscellaneous application(s), if any, also stand disposed of. No order as to costs.

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

H.P.S.I.D.C. Ltd. .... Plaintiff

Versus

M/s Kanol Herbals (P) Ltd & Ors. .... Defendants

Civil Suit No.20 of 2003.
Judgment Reserved on: 06.03.2018
Date of decision: 09.03.2018

Code of Civil Procedure, 1908- Order XXIX Rule 1- Suit by company- Board of Directors delegated powers to Managing Director to nominate person to institute suit- Suit instituted by person nominated by Managing Director- Plaint accompanied with authorization letter issued by Managing Director in favour of such person- Held- Suit duly instituted by company. (Para-26)

State Financial Corporation Act, 1951- Section 29(4)- Plaintiff company taking over assets of M/s RKB Herbals and reselling them to defendant No.1 for Rs.96 lacs- Defendants No.2 to 4 stood guarantors of defendant No.1 – Defendants executed agreement with plaintiff and agreed to pay sale price with interest in installments – On failure of defendants, plaintiff-company filing suit for recovery in High Court - Defendants contending that assets of M/s RKB Herbals constituted 'immovable property' and could be sold to D-1 through registered instrument only - Being so, suit for recovery not maintainable- Held- In agreement executed interse parties, defendants specifically agreed that amount in question be treated as 'loan' and further agreed to pay it in installments – Defendants also agreed that their liability would be continuing one till payment- They also paid some installments towards agreed amount – Therefore, it was loan agreement and plaintiff entitled to recover amount by way of recovery suit. (Para-37)

Cases referred:

Gajraj Jain vs. State of Bihar and Others, (2004)7 SCC 151

Meghmala and Others vs. G.Narasimha Reddy and Others, (2010)8 SCC, 383

Suraj Lamps and Industries Pvt.Ltd. vs. State of Haryana, (2012)1 SCC 656

Karnataka State Industrial and Development Corporation Limited vs. S.K.K. Kulkarni and Others, (2009)2 SCC 236
Hukam Chand Shyam Lal vs. Union of India and Others, (1976)2 SCC 128
Bhau Ram vs B. Baijnath Singh And Others, AIR 1961 1327
Bar Council Of Delhi And Anr. Etc vs Surjeet Singh And Ors. Etc. Etc, AIR 1980 1612
Shyam Telelink Ltd. now Sistema Shyam Teleservices Ltd. Vs. Union of India, (2010)10 SCC 165
Karam Kapahi & Ors vs M/S Lal Chand Public Charitabl, (2010)9 SCC 753
Jai Narain Parasurampuria (Dead) vs Pushpa Devi Saraf & Ors. (2006)7 SCC 756.)
State of Punjab & Ors. vs. Dhanjit Singh Sandhu, 2014 AIR SCW 4485
M/s.Disco Electronics Ltd., (In Liquidation), AIR 1997 Delhi 251
Haryana Financial Corporation and Another vs. Jagdamaba Oil Mills and Another, (2002)3 SCC 496
Mahesh Chandra vs. Regional Manager, U.P. Financial Corporation and Others, (1993)2 SCC 279
H.P.S.I.D.C. vs. M/s.Manson India Pvt.Ltd. and Others, 2008(3) Shim.L.C. 300
Gokhul Mahaton vs. Shevoprasad Lal Seth and Others, AIR 1939 Patna 433
Suda Ram Finance vs. Nur Jahan, (2016)13 SCC 117
Devi Dass Dhani Ram vs. Padma Golhlia, AIR 1959 M.P. 413
Shiv Dayal vs. Ram Rikh, AIR 1955 Rajasthan 188
Jawahar Lal vs. Mathura Prasad, AIR 1934 Allahabad 661
Deepak Bhandari vs. Himachal Pradesh State Industrial Department Corporation Ltd., AIR 2014 SC 961

For the Plaintiff:	Mr.Ajay Kumar Sood, Senior Advocate with Mr.Dheeraj K.Vashishta, Advocate.
For Defendants 1 to 4:	Mr.R.L. Sood, Senior Advocate with Mr.Arjun Lall, Advocate.
Defendant No.5:	Ex-parte.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

Instant Civil Suit has been instituted by the plaintiff, Himachal Pradesh State Industrial Development Corporation Limited *(for short 'H.P.S.I.D.C. Ltd.')*, a Government Company within the meaning of Section 617 of Companies Act, 1956 against the defendants, claiming a decree for a sum of Rs.40,20,631/- with future interest.

2. Defendant No.1 is a Private Limited Company, whereas defendants No.2 to 4 are its Guarantors. Defendant No.5-Himachal Pradesh Financial Corporation, who is a proforma defendant, stood ex-parte on 21.7.2004.

3. Aforesaid suit came to be filed on behalf of plaintiff-Company through Shri Pawan Kumar Bali, Manager Project(Legal), who is authorized by Managing Director of plaintiff-Company to sign, verify plaint, institute suit on behalf of the plaintiff-Company and to appoint advocate etc. for prosecuting the suit. Plaintiff pleads that defendant No.1 made an offer of Rs.96 lacs to the proforma defendant No.5 to purchase the taken over assets of M/s.RKB Herbals (P) Ltd., village Shillu Patta Road, Parwanoo, District Solan, H.P. Aforesaid offer made on behalf of defendant was finalized in favour of defendant No.1 for a sum of Rs.96 lacs only for the entire taken over assets of M/s.RKB Herbals (P) Ltd. The plaintiff and proforma defendant No.5 had pari-passu and joint charge on the assets of M/s.RKB Herbals (P) Ltd.

4. The averments made in the plaint further reveal that plaintiff-Company had given a term loan of Rs.52.54 lacs to M/s.RKB Herbals (P) Ltd. and in this regard requisite documents were executed by it on 10.2.1983, 7.4.1986, 17.11.1988 & 22.6.1987. Since M/s.RKB Herbals (P) Ltd. failed to pay the term loan, property/assets in question came to be taken over by plaintiff

and proforma defendant No.5. Offer of defendant No.1 to purchase the entire taken over assets of M/s.RKB Herbals (P) Ltd. at a value of Rs.96 lacs was accepted by the plaintiff and proforma defendant No.5 and as such hypothecated/mortgaged assets of M/s.RKB Herbals (P) Ltd. were sold to the defendant No.1 for Rs.96 lacs. As per averments contained in the plaint, defendant No.1 paid Rs.24 lacs against total sale consideration of Rs.96 lacs and for payment of balance amount executed an agreement.

5. Plaintiff has pleaded that as per agreement of purchase dated 30.3.1994, executed *interse* parties, out of balance sale price of Rs.72 lacs, the plaintiffs were to receive Rs.47.37 lacs and proforma defendant No.5 was to receive Rs.24.63 lacs. Defendant No.1 agreed to pay the balance sale price to the plaintiff and defendant No.5 in ten half yearly installments commencing from 10.4.1995. It is further averred by the plaintiff that the aforesaid amount was to be repaid by 10.10.1999 in the following manner:-

	HPSIDC Plaintiff	***HPFC Proforma Defendant No.5***	***Date of payment***
i)	Rs.4,73,700/-	2,46,300/-	10.04.1995
ii)	Rs.4,73,700/-	2,46,300/-	10.10.1995
iii)	Rs.4,73,700/-	2,46,300/-	10.04.1996
iv)	Rs.4,73,700/-	2,46,300/-	10.10.1996
v)	Rs.4,73,700/-	2,46,300/-	10.04.1997
vi)	Rs.4,73,700/-	2,46,300/-	10.10.1997
vii)	Rs.4,73,700/-	2,46,300/-	10.04.1998
viii)	Rs.4,73,700/-	2,46,300/-	10.10.1998
ix)	Rs.4,73,700/-	2,46,300/-	10.04.1999
x)	Rs.4,73,700/-	2,46,300/-	10.10.1999
	Rs.47,37,000/-	Rs.24,63,000/-	

6. Plaintiff further averred that the defendant agreed to pay interest on the balance purchase amount @ 17.5% with six monthly rests. It is further averred in the plaint that for securing the payment of the balance sale consideration and interest thereon, defendant No.1 executed purchase agreement on 30.3.1994 with respect to payment of Rs.72 lacs with the plaintiff and proforma defendant No.5 jointly.

7. Plaintiff further averred that defendants No.2 to 4 stood guarantee with respect to the balance sale consideration of the agreement dated 30.3.1994 and as a consequence of which executed deed of guarantee on 30.3.1994 and 19.7.1994, guaranteeing therein payment of balance sale consideration and interest thereon as per agreement dated 30.3.1994. Plaintiff further averred that defendants No.2 to 4 being guarantors are liable to pay outstanding amount alongwith interest to the plaintiff because their liability being guarantors is joint and several and it is continuing guarantee provided by defendants No.2 to 4 in favour of the plaintiff-Company in respect of the balance sale consideration payable to the plaintiff-Company by defendant No.1. Plaintiff has further pleaded that since assets of M/s.RKB Herbals (P) Ltd. were sold jointly by the plaintiff and proforma defendant No.5 under one agreement of sale dated 30.3.1994, they kept their pari-passu charge on the said assets for unpaid sale consideration in proportion to their share.

8. It has further been averred in the plaint that as per documents executed by defendant No.1 in favour of the plaintiff-Company, as has been taken note hereinabove, the

balance amount of purchase together with agreed interest was to be repaid in half yearly installments commencing from 10.4.1995 and the last installment was to be repaid on or before 10.10.1999.

9. Defendant No.1 continued to pay principal amount and interest and last payment towards principle amount was made on 3.1.2000 and last payment towards installments of interest was received on 20.5.2000. Since defendants No.1 to 4 continued to commit default and were irregular in repayment of dues and they failed to comply with terms and conditions of purchase agreement, as detailed hereinabove, and had also failed to pay the installment of principal amount and interest thereon in accordance with the re-payment schedule entered in the agreement of purchase, referred hereinabove, plaintiff issued recall-cum-take over notice on 3.11.2000. Possession of assets was taken over on 4.12.2000 by proforma defendant No.5 and the plaintiff under Section 29 of the State Financial Corporations Act, 1951 *(for short 'SFC Act'),* whereafter, the assets were sold by proforma defendant No.5 with the consent of plaintiff after giving due notice to the defendants No.1 to 4. Plaintiff further averred that plant and machinery were sold for Rs.3.45 lacs on 30.3.2002 and land and building was sold for Rs.70 lacs on 30.1.2003, whereafter sale proceeds were shared between plaintiff and proforma defendant No.5 as under:-

"i)	***HPSIDC***	***Rs.48,01,338.00***
ii)	***HPFC***	***Rs.25,43,662.00***
	Total	***Rs.73,45,000.00"***

10. As per averments contained in the plaint, after adjustment of Rs.48,01,338/- received from the sale of assets on 30.3.2002 and 30.1.2003 respectively, a sum of Rs.1,02,18,573/- was still due to the plaintiff from defendants No.1 to 4 as on 31.1.2003. But, plaintiff of its own waived a sum of Rs.61,97,942/- by calculating interest on simple basis and thereafter found a sum of Rs.40,20,631/- still payable by defendants No.1 to 4 on account of shortfall in the amount payable by them to the plaintiff and as such issued demand notice dated 5.2.2003 for Rs.40,20,631/-. In the aforesaid background, plaintiff further averred that liability of defendants No.1 to 4 is joint and several and since they have failed to pay the amount, it was compelled to file the present suit.

11. Apart from above, plaintiff has also claimed that since the transaction between plaintiff and defendants is of commercial nature, the plaintiff is entitled to pendentelite and future interest at the contractual rate of interest as per the purchase agreement @ 17.5% P.A. with half yearly rests.

12. As per plaintiff, cause of action accrued to the plaintiff against the defendants firstly on 30.3.1994 when the agreement of purchase was executed and thereafter on the dates on which the amount was agreed to be repaid between 10.4.1995 to 10.4.1999 and also on 20.5.2000, when defendant No.1 made payments towards loan amount and the on 4.12.2000 when assets were taken over by defendant No.5, then on 30.3.2002 and 30.1.2003 when assets were sold and sale proceeds were received by the plaintiff from proforma defendant No.5 and lastly on 5.2.2003 when demand notice was issued. With the aforesaid pleadings/averments contained in the plaint, plaintiff has sought decree in the sum of Rs.40,20,631/- with costs and interest @ 17.5.% per annum from the date of suit till realization of the decreetal amount with half yearly rests in its favour and against the defendants.

13. Defendants No.2 to 4 contested the suit by way of filing joint written statement and took preliminary objections regarding malafide, mis-conceived, estoppel, mis-representation, suppression and concealment of material facts, limitation, cause of action and maintainability of the suit in the present form etc.

14. Defendants, while claiming that suit filed by the plaintiff is malafide, mis-conceived and is not maintainable, have categorically contended that the plaintiff did not grant

any loan or advance to the first defendant and as such, the plaintiff has no cause of action against the defendants. Defendants further pleaded that plaintiff is estopped by its own acts and conduct to file and maintain the suit because in the present suit, the purchase agreement was executed *inter-se* plaintiff, proforma defendant No.5 and defendant No.1 on 30.3.1994. In the purchase agreement, it was represented by the plaintiff that the HPSIDC initiated take-over action under Section 29 of the *'SFC Act'* against the debtor (previous owners R.K.B. Herbals Private Limited) and took over the possession of the mortgaged hypothecated assets of the debtors Unit at Village Shillu, Patta Road, Parwanu on 10.7.1992, for sale of the said assets in order to recover outstanding loan dues of both the Corporations. Defendants further averred that Section 29 of the *'SFC Act'* is not applicable to the plaintiff Corporation as it is not Financial Corporation within the meaning of Section 2(b) of the *'SFC Act'*. It is averred that the plaintiff by way of misrepresentation of facts allured the first defendant to enter into the covenant/instrument and as such, present suit deserves to be dismissed. Defendants have also sought dismissal of the suit on the ground of the limitation and have claimed that suit is barred in law in as much as it is based on a covenant/instrument (purchase agreement in question), which is against the provisions of the Indian Contract Act as also beyond the power purview and jurisdiction of the *'SFC Act'*. Defendants have further averred that plaintiff has connived with defendant No.5 by entering into tripartite agreement although in-fact defendant No.5 was never empowered by Sections 25 and 26 of the *'SFC Act'* to grant loan or advances to the first defendant as wrongly alleged and claimed by the plaintiff. Defendants have claimed that bare perusal of covenant/instrument would go to show that balance consideration amount of Rs. 72 lacs has been shown as loans to the defendants, which are in fact not loans or advances to the first defendant, and it is highly unethical, unlawful, illegal, unconstitutional to treat the balance consideration amount as loans by the plaintiff and the proforma defendant No.5, which are the instruments of the State. As per defendants, they have paid total amount of Rs.57,20,260/- to the plaintiff and Rs.23,38,032/- to defendant No.5, which fact has been totally concealed/suppressed by the plaintiff in the plaint. Defendants, while giving reaction on the plaint on the law of limitation, have further pleaded that purchase agreement itself was executed on 30.3.1994. As per the purchase agreement, installments were to be paid as per the table framed therein. The period for the payment of the installments commenced on 10.4.1995 and the last installment due and payable was on or before 10.10.1999. As per the averments made in the plaint itself show that the first defendant paid towards principal lastly on 3.1.2000 and payments towards interest were made by the first defendant, which, according to the plaintiff, was received on 20.5.2000.

15. It is averred by the defendants that the payment was made by a bank draft on 15.5.2000 and not on the 20.5.2000, as wrongly averred in the plaint and that the suit has been filed and presented before the Hon'ble Court on 19.5.2003 and admitted on 20.5.2003. It is further averred that the present suit is barred under the provisions of Limitation Act, 1963, as the same is beyond the statutory period of three years and therefore, the same is liable to be dismissed on this ground also.

16. It is further averred that the plaintiff, in collusion with the proforma defendant No.5, has caused irreparable loss and injury to the defendants by not only wrongly taking possession of the Factory Unit sold to the first defendant, but also misappropriating the consideration amount of Rs.80,58,290/- paid to them. Defendants further averred that they have also been wronged by illegal re-sale of the land & building to Bakson Drugs and Pharmaceuticals Co. Ltd., Parwanoo at the throw away price of Rs.70,00,000/- and plant & machinery at Rs.3,45,000/- respectively. Defendants have further averred that the plaintiff and proforma defendant No.5 have already realized an amount of Rs.1,54,03,290/- and as such claim set up of Rs.40,20,631/- in the present suit is wholly misconceived and untenable. It is further averred that the plaintiff and defendant No.5 wrongfully sold the Herbal Unit for the balance sum of Rs.15,41,710/- and realized Rs.73,45,000/- from the sale proceeds and as such have made the wrongful claims against the defendants.

17. Defendants pleads that the throw away prices at which the said factory and plant and machinery have been sold are clear and unmistakable evidence of collusion and conspiracy between the plaintiff and the proforma defendant No.5 to defraud the defendants to enrich themselves at the expense of the defendants.

18. On merits, defendant Nos. 2 to 4 also refuted the allegations contained in the plaint. Defendants have denied the authorization given to Shri Pawan Kumar Bali to sign or verify the plaint or to act on behalf of the plaintiff, in any manner. It is also averred that if the function of the plaintiff is to provide financial assistance in the form of Term Loan, EQUITY and Soft Loans, in that eventuality neither the plaintiff nor the proforma defendant ever granted any loan or made any advances to the defendants or any of them in regard to the transaction in this suit and that the discussions between the parties for the sale and purchase of Herbals' assets and properties were conducted solely by and between the defendants and the plaintiff and the proforma defendant never came into the picture at all until 30.3.1994, when, upon the execution of the said indenture of purchase, the defendants came to know for the first time that the plaintiff and the proforma defendant were the sellers of Herbals' assets and properties and they allegedly were the secured Creditors of Herbals Unit in respect of very large sums of money. It is the claim of the defendants that the said indenture of purchase dated 30.3.1994 is unlawful, illegal, un-constitutional, contrary to public policy of India and other Laws. Defendants further claimed that similarly, the purported guarantees alleged to be executed on the basis of the alleged Indenture of Purchase dated 30.3.1994 are also unlawful, illegal and contrary to public policy. It is averred that the original of Indenture of Purchase and Deeds of Guarantee and other documents are not in the custody of the proforma defendant.

19. It is averred by the defendants that although from time to time and also in the year 2000 the first defendant made various payments to the plaintiff and the plaintiff in most of those cases wrongfully appropriated them to the interest account and not to the principal installment account and thereby the plaintiff caused undue prejudice to the defendants. It is alleged by the defendant that the claim of the plaintiff for Rs.40,20,631/-, as made in the plaint, is wholly without merit as no sum is/was ever due or owing by the defendants or any of them to the plaintiff. It is further alleged that since the aforesaid sum of Rs.40,20,631/- is not due or payable by them to the plaintiff, the claim for interest thereon at the rate of 17.5% per annum or at any other rate is wholly misconceived. It is alleged by the defendants that except the Indenture of Purchase, dated 30.3.1994, which was executed at Shimla, no cause of action accrued within the jurisdiction of Himachal Pradesh. It is also averred that no cause of action accrued in favour of the plaintiff because notice, dated 3.11.2000, under Section 29 of the Act issued by the proforma defendant, was served upon the defendants at Kolkata, which is situated outside the aforesaid jurisdiction. In the aforesaid background, defendants have prayed for dismissal of the aforesaid suit with costs.

20. The plaintiff filed replication reaffirming its own case and refuting the case of the defendants as pleaded in the written statement.

21. On the pleadings of the parties, the following issues came to be framed on 09.07.2004:-

> ***"1. Whether the plaintiff Company is incorporated under the Companies Act, 1956 and whether Shri P.K. Bali is competent to file the present suit on behalf of the plaintiff Company as alleged? OPP.***
>
> ***2. Whether the plaintiff Company is entitled to recover the suit amount alongwith interest as claimed or at any other rate? OPP.***
>
> ***3. Whether the suit of the plaintiff is within limitation? OPP.***
>
> ***4. Whether the suit is not properly valued for purpose of Court fees and jurisdiction? OPD.***

5. Whether this Hon'ble Court has no jurisdiction to try this suit? OPD.

6. Whether the plaintiff company is estopped from filing the suit on account of its acts, deeds and conduct etc. as alleged? OPD

7. Whether the plaintiff and proforma defendant sold the taken over assets at throw away prices as alleged? OPD

8. Whether the purchase agreement dated 30.3.1994 is illegal and void as alleged and if so its effect? OPD.

9. Whether the plaintiff delayed the delivery of the factory premises to the defendants by about six months, if so, its effect? OPD.

10. Relief."

22. Before exploring answer to aforesaid issues framed by this Court on 9th July, 2004, certain facts are required to be noticed. On 10th September, 2004, evidence of plaintiff was closed on the statement of learned counsel representing the plaintiff, whereafter repeatedly the matter was adjourned by this Court for examination of defendants' evidence. Subsequently, on 30th August, 2005, an application bearing OMP No.413 of 2005 under Order 26 Rule 4 of the Code of Civil Procedure came to be filed on behalf of defendant No.2 through his Attorney for recording his statement as his own witness on Commission. Vide order dated 30th August, 2005, this Court appointed Commissioner for recording statement of defendant No.2 at Kolkata, however, fact remains that time was repeatedly enlarged for recording statement of defendant on the requests having been made by the defendants. On 24th March, 2006, this Court recorded that Local Commissioner has recorded the statement of witness of the defendants and accordingly closed evidence of the defendants. Subsequently on 5th October, 2007, an application bearing OMP No.18 of 2007 under Order 22 Rules 3 and 9 CPC read with Section 5 of the Limitation Act came to be filed on behalf of the plaintiff for bringing on record legal representatives of deceased defendant No.2. On 26th February, 2009, proposed legal representative; namely; Udit Kanoi was ordered to be proceeded ex-parte since he refused to take the notice.

23. On 4th June, 2009, ex-parte order, passed by this Court against defendant No.2, was set aside, whereafter time was granted to defendant No.2 for moving an application for amendment of written statement. Vide order dated 10th September, 2010, this Court allowed/permitted newly added defendant No.2 to file additional written statement. Newly added defendant, after having filed additional written statement, claimed that some additional issues arise from the additional written statement, however, fact remains that this Court vide order dated 4th April, 2011, rejected the aforesaid prayer, having been made on behalf of newly added defendant No.2 on the ground that in the additional written statement, newly added defendant No.2 has taken more or less same stand, as has been taken by the original defendants No.2 to 4 in the earlier written statement filed on 20.12.2003. Defendants being aggrieved with the order dated 4th April, 2011 preferred LPA No.179 of 2011 before the Division Bench of this Court, which came to be rejected vide judgment dated 28.9.2011.

24. This Court, while passing order dated 4.4.2011, specifically observed in para-27 of its order that newly added defendant No.2 Udit Kanoi in substance has taken same pleas as have been taken by original defendants No.2 to 4 in their written statement, which findings came to be upheld by the Division Bench of this Court in LPA referred hereinabove. Now, this Court shall proceed to decide the issues framed hereinabove.

Issue No.1:

25. Mr.R.L. Sood, learned Senior counsel representing the defendants, contended that suit has not been filed by the competent person. PW-2, Mr.Pawan Kumar Bali, has failed to prove Ex.P-2, whereby the Managing Director of the plaintiff was authorized to nominate an officer to institute the present suit. Mr.Sood, while referring to Ex.P-2, submitted that Mr.Pawan Kumar Bali has failed to identify his signatures on Ex.P-2 or to prove the contents of the same in accordance with law. While seeking dismissal of the suit on this sole count, learned Senior

counsel has further contended that PW-2; namely; Mr.Pawan Kumar Bali, has failed to properly prove or exhibit, Ex.P-3 as he has failed to identify the signatures of the Managing Director on Ex.P-3, whereby he is/was authorized to file the suit. Mr.Sood further contended that mere exhibition of documents by marking them as exhibits, even without any objection from the other side cannot and does not dispense with the proof required in law to prove them and as such suit deserves to be dismissed.

26. Aforesaid arguments/submissions, having been made by learned Senior counsel, are not tenable on the face of documentary evidence adduced on record by the plaintiff, which has been proved in accordance with law. Plaintiff-Company was incorporated as a Company under the Companies Act, 1956 vide Certificate Ex.P-1, proved in evidence by PW-2 Shri Pawan Kumar Bali, whose deposition in that regard remained un-rebutted during cross-examination. Perusal of Ex.P-2 clearly suggests that Board of Directors of plaintiff-Corporation vide Resolution dated 18.6.1997 considered the proposal for delegation of various powers to the Managing Director/Head of Division and other Officers. Board of Directors vide aforesaid resolution approved delegation of powers as contained in Annexure-I annexed with Ex.P-2, perusal whereof suggests that Managing Director of the plaintiff-Corporation was authorized to nominate a officer to institute the present suit. Since Ex.P-2 bears no signatures of Managing Director being a copy of resolution of Board of Directors, authenticity of which is also not under challenge, PW-2 Pawan Kumar Bali, who was authorized to institute the present suit on behalf of the plaintiff, is/was not required to identify the signatures of Managing Director, if any, on the Ex.P-2. Perusal of Ex.P-3, whereby Managing Director authorized PW-2 Pawan Kumar Bali in terms of Board's Resolution No.18 of 18.6.1997 i.e. Ex.P-2 for filing suit, verifying and signing the pleadings on behalf of plaintiff-Corporation, clearly suggests that it bears signatures of Managing Director, which has been duly identified/verified by PW-2 in his examination-in-chief. PW-2 Pawan Kumar Bali, Manager Project(Legal) of the plaintiff Corporation has proved on record Resolution Ex.P-2 and Authorization letter Ex.P-3. There is no evidence on record to prove that suit has not been filed by the competent person. There cannot be any quarrel with the submissions of learned Senior Counsel that mere exhibition of documents by marking them as exhibits, even without any objection from the other side cannot and does not dispense with the proof required in law to prove them, but, in the instant case, as has been discussed hereinabove, documents Ex.P-2 and Ex.P-3 have not been merely exhibited, but the same have been proved in accordance with law by PW-2. Moreover, no suggestion worth the name has been put to this witness in his cross-examination conducted by defendants qua the aforesaid aspect of the matter. Law relied upon by learned Senior Counsel in support of aforesaid submissions has no application in the present case because documents Ex.P-2 and Ex.P-3 duly exhibited have been proved in accordance with law by plaintiff by examining PW-2 Shri Pawan Kumar Bali and as such, there is no need to refer the same. Accordingly, in view of above, issue is decided in favour of the plaintiff and against the defendants.

Issue Nos.4 & 5:

27. Onus to prove that suit is not properly valued for the purpose of court fee and jurisdiction is/was on the defendants, but neither there is any evidence led on record nor any argument addressed in this regard and as such the same are decided against the defendants. I hold that the suit has been properly valued for the purpose of court fee and jurisdiction.

Issue Nos.2, 6 and 8:

28. All these issues being interconnected and inter linked can conveniently be disposed of together in order to avoid the repetition of evidence and findings and as such same are being taken up together for consideration. Onus to prove issues No.6 & 8 is on defendants, whereas issue No.2 is to be proved by the plaintiff.

29. Mr.Ajay Kumar, learned Senior counsel, representing the plaintiff while inviting the attention of this Court to Ex.P-4 i.e. agreement of purchase, contended that pursuant to offer made by defendant No.1 for purchase of taken over assets of M/s RKB Herbals Pvt.Ltd, plaintiff agreed to sell the taken over assets for Rs.96 lacs. Defendant No.1 gave Rs.24 lacs to plaintiff as

well as proforma defendant No.5 against total sale consideration and for further balance of Rs.72 lacs executed agreements with the Corporations. Out of the balance sale consideration of Rs.72 lacs, the plaintiff-Corporation was to receive Rs.47.37 lacs, whereas proforma defendant No.5 was to receive Rs.24.63 lacs, as agreed *interse* parties vide agreement dated 30.3.1994 Ex.P-4. As per agreement, amount was agreed to be paid in ten half yearly installments starting from 10.4.1995 and ending on 10.10.1999 as per details given in the agreement and also reproduced in para-4 of the plaint. Vide aforesaid agreement, defendants were also liable to pay interest @ 17.5% per annum with half yearly rests on the balance sale consideration of Rs.72 lacs. Since defendants failed to adhere to the repayment schedule as agreed interse parties vide agreement Ex.P-4, plaintiff issued recall-cum-take over notice on 3.11.2000 and assets were taken over on 4.11.2000 by proforma defendant No.5 under Section 29 of the *'SFS Act'*. Assets, taken over by proforma defendant No.5, were sold with the consent of plaintiff. Plant and machinery were sold on 30.3.2002 for Rs.3.45 lacs and the land and building was sold for Rs.70 lacs on 30.1.2003, whereafter, sale proceeds were distributed amongst the plaintiff and proforma defendant No.5 as detailed in para-10 of the plaint i.e. Rs.48,01,338/- to the plaintiff-Corporation and Rs.25,43,662/- to the proforma defendant No.5. Though after adjusting aforesaid amount received from the sale of the assets, a sum of Rs.1,02,18,573/- was found due to the plaintiff from defendants No.1 to 4 as on 31.1.2003, however, the plaintiff of its own waived a sum of Rs.61,97,942/- by calculating interest on simple basis and thereafter found a sum of Rs.40,20,631/- still payable by defendants No.1 to 4 on account of shortfall in the amount payable by them to the plaintiff and as such a demand notice dated 5.2.2003 came to be issued against defendants for Rs.40,20,631/-.

30. Mr.Sood, while referring to the deeds of guarantee dated 30.3.1994 and 19.7.1994 (Ex.P-7 & Ex.P-8) duly executed by defendants No.2 to 4 with respect to balance sale consideration, contended that defendants No.2 to 4 being guarantors are liable to pay outstanding amount alongwith interest to the plaintiff because their liability being guarantors is joint and several and it is continuing guarantee provided by defendants No.2 to 4 in favour of the plaintiff-Company in respect of the balance sale consideration payable to the plaintiff-Company by defendant No.1. Mr.Sood further contended that plaintiff is also entitled to pendentelite and future interest at the contractual rate of interest as per the purchase agreement @ 17.5% P.A. with half yearly rests.

31. Mr.R.L. Sood, learned Senior Counsel representing the defendants, contended that Ex.P-4 i.e. alleged agreement of purchase is illegal because plaintiff-Corporation alone as the owner was required under law to sell and transfer the taken over assets by a registered sale deed alone. In law it could not enter into an agreement of purchase with the defendant No.1-Company and as such same being against law is unenforceable and illegal and the suit based on the same is bound to be dismissed.

32. To substantiate his aforesaid arguments, learned Senior Counsel placed reliance upon judgment passed by Hon'ble Apex Court in ***Gajraj Jain vs. State of Bihar and Others, (2004)7 SCC 151***. While seeking reliance upon aforesaid judgment, learned Senior Counsel strenuously argued that it is an established/settled law that after taking over the mortgaged/hypothecated immovable and movable assets of RKB Herbals the plaintiff-Corporation became the owners thereof, therefore, the mandatory provisions as contained in Section 29(4) of the *'SFC Act'* casts a statutory obligation on the plaintiff to sell the same by executing a registered sale deed in favour of any party including the present defendant No.1. Mr.Sood, while refuting submissions/arguments advanced by Mr.Ajay Kumar Sood, learned Senior Counsel that agreement of purchase Ex.P-4 was a sale of immovable property in terms of Section 54 of Transfer of Property Act, 1882, contended that "Sale" is a transfer of ownership in exchange of a price paid or promised or part paid or part promised. Learned Senior Counsel contended that such transfer in the case of tangible immovable property of the value of Rs.100/- and upwards or in the case of a reversion or other intangible things can be made only by a registered instrument and as such agreement to sell Ex.P-4 does not amount to the sale of the taken over immovable assets of M/s RKB Herbals and as such agreement of sale could not be entered into in view of the mandatory

provisions of Section 29(4) of the *'SFC Act'*. Mr.Sood further contended that Ex.P-4 is infact only an agreement of purchase and same is not enforceable against the defendants. No agreement to sell and corresponding purchase of immovable property could be entered into or executed between the parties in view of the law laid down in ***Gajraj Jain's*** case *supra.*

33. Mr.Sood, learned Senior Counsel further argued that agreement to sell Ex.P-4 cannot be termed as "Term Loan Agreement" because no loan amount was ever made available by the plaintiff or proforma defendant No.5 to defendant No.1-Company for the purchase of the immovable property in question. He further argued that agreement although illegal, at best provides for agreed upon sale consideration to be paid in future by way of installments alongwith interest. Since neither amount was advanced by the plaintiff/defendant No.5 to defendant No.1 nor it had changed hands between the parties, plaintiff at best could file suit for specific performance, praying therein for decree against defendant No.1 for recovery of unpaid sale consideration amount alongwith interest. While placing reliance upon judgment passed by Hon'ble Apex Court in ***Meghmala and Others vs. G.Narasimha Reddy and Others, (2010)8 SCC, 383*** and ***Suraj Lamps and Industries Pvt.Ltd. vs. State of Haryana, (2012)1 SCC 656***, Mr.Sood contended that an agreement to sell does not create any right to title in favour of intending buyer and transfer of immovable property by way of sale can only be made by a deed of conveyance of sale In the absence of duly stamped/registered sale deed no right title or interest in the immovable property passes in favour of anyone. Learned Senior Counsel further contended that State Financial Corporation is a special statute, therefore, the provisions thereof have to be strictly construed as held.

34. Mr.Sood, learned Senior Counsel, while referring to judgment passed by Hon'ble Apex Court in ***Karnataka State Industrial and Development Corporation Limited vs. S.K.K. Kulkarni and Others, (2009)2 SCC 236,*** contended that when a statute mandates that a power has to be exercised in a certain way, it can only be exercised in that way alone and in no other manner. Learned Senior Counsel further contended that something prohibited in law cannot be pleaded and as such agreement of purchase Ex.P-4, which is prohibited in law, cannot be enforced against the defendants. In this regard he placed reliance upon the judgment passed by Hon'ble Apex Court in ***Hukam Chand Shyam Lal vs. Union of India and Others, (1976)2 SCC 128.***

35. In nutshell, case, as projected by learned Senior counsel representing the defendants, is that Ex.P-4, purchase agreement to sell, is illegal and could not be acted upon or enforced against the defendants. However, this Court, after having perused purchase agreement Ex.P-4 as well as other documents adduced on record by plaintiff, is not inclined to accept aforesaid submissions of learned Senior Counsel. It is quiet apparent from the pleadings adduced on record by the respective parties that there is no dispute, if any, with regard to execution of purchase agreement Ex.P-4, which has been duly proved in accordance with law by PW-2 Shri Pawan Kumar Bali in witness box. Factum with regard to execution of agreement referred in Ex.P-4 has also been acknowledged/ admitted in the written statement having been filed by the defendants.

36. In the written statement as well as arguments advanced during the proceedings of the case endeavour has been made to suggest that the plaintiff-Corporation was not well within its rights or empowered under any law to sell the taken-over assets without there being any registered sale deed. It may be noticed that purchase agreement Ex.P-4 came to be executed on 30.3.1994 *interse* plaintiff and defendant and at no point of time, question, if any, with regard to validity of purchase agreement, was raised by the defendants and for the first time, defendants raised issue with regard to the validity of purchase agreement Ex.P-4 in the written statement filed on 30.12.2003 i.e. approximately after nine years of execution of purchase agreement and it is also not in dispute, rather it clearly emerge from documents adduced on record by the plaintiff that pursuant to aforesaid purchase agreement, defendants took over the possession of the taken over assets and also paid installments towards repayment of loan as agreed *interse* parties in terms of purchase agreement dated 30.3.1994. Now question remains that whether the

defendant is entitled to raise aforesaid question with regard to validity of purchase agreement dated 30.3.1994 i.e. after nine years that too when the parties to the lis acted upon the same.

37. At this stage, it may also be noticed that parties to the lis specifically agreed *interse* them that balance sale amount of Rs.72 lacs shall be treated as a loan in proportion to the original pari-passu agreement between plaintiff and proforma defendant No.5. Defendants specifically agreed by way of aforesaid agreement that he shall pay an amount of Rs.47.37 lacs to HPSIDC i.e. plaintiff and Rs.24.63 lacs to HPFC i.e. proforma defendant No.5, out of the total sale consideration of Rs.96 lacs alongwith interest and both the Corporations i.e. plaintiff and proforma defendant No.5 shall have joint charge in the aforesaid proportion upon the aforesaid assets sold to the purchaser. Purchase agreement further provides that plaintiff as well as proforma defendant No.5 shall have the right to proceed against the purchaser in the event of default jointly or severally and in the event of realization of amount from the purchaser, they shall distribute the sale proceeds of the assets on the pari-passu basis. It is also not in dispute that out of sale consideration of Rs.96 lacs defendant, who happened to be purchaser in terms of purchase agreement, had deposited with the plaintiff-Corporation a sum of Rs.24 lacs, which amount came to be distributed between the plaintiff and proforma defendant No.5 as per the terms of their pari-passu agreement. Defendant also agreed to pay balance sale consideration amounting to Rs.72 lacs to plaintiff and proforma defendant No.5 by way of installments with effect from 10.4.1995 to 10.10.1999 payable on or before 10th of April and 10th October every year alongwith interest in the manner as prescribed in the re-payment schedule. In the agreement in question, i.e. Ex.P-4, defendants also undertook that their liability shall be continuing one till the whole amount alongwith interest is paid to the plaintiff-Corporation. It has also been undertaken by the defendants (purchasers) that on account of default in payment of any one or more installments of principal amount or of interest, the amount due may be recalled at once by the said plaintiff-Corporation, which, otherwise purchaser undertake to pay within a month of the issuance of recall notice by the plaintiff-Corporation and proforma defendant No.5 to the purchaser. Most importantly, clause-(h) of terms and conditions contained in agreement of purchase Ex.P-4, clearly suggests that purchaser i.e. defendants agreed to repay the sale consideration as a loan and in this regard right is reserved to the plaintiff and proforma defendant No.5 to recover the same through other lawful means of recovery, as arrears of land revenue and under Section 29 of the *'SFC Act'*, meaning thereby that the plaintiff is/was well within its rights to recover the balance sale consideration, which was to be considered as loan in terms of purchase agreement, by way of filing instant suit for recovery. Aforesaid remedy provided under clause-(h) to the plaintiff-Corporation is independent of right available to it to initiate proceedings, if any, under Section 29 of the *'SFC Act'*. Clause-(h), provided in purchase agreement, clearly suggests that plaintiff or proforma defendant No.5 could resort to either of remedies i.e. suit for recovery of balance sale consideration or takeover the assets resorting to the provisions of law contained under Section 29 of the *'SFC Act'*.

38. In the case at hand, plaintiff-Corporation has filed suit for recovery of balance sale consideration, which was to be termed as loan in terms of purchase agreement and as such aforesaid submissions/arguments raised by learned Senior Counsel representing the defendants are not tenable in the eye of law. Plaintiff-Corporation is/was well within its rights to file suit for recovery of amount due from defendants on account of balance sale consideration, which was to be considered as loan in terms of agreement Ex.P-4. Whether proceeding, if any, under Section 29 of the *'SFC Act'* by plaintiff-Corporation or proforma defendant No.5, could be initiated or resorted to, is not an issue before this Court and as such submissions/arguments advanced on this account are wholly misconceived and bound to be rejected. Otherwise also, as emerge from pleadings and also stated during the proceedings of the case that defendants have already laid challenge to the action initiated by plaintiff and proforma defendant No.5 resorting to provisions contained under Section 29 of the *'SFC Act'* by way of Civil Writ Petition before this Court, which is still pending for adjudication.

39. PW-1 Shri Rakesh Kaul, an official of the defendant No.5-Corporation, merely produced the record of the defendants, since original agreement was on the file of the proforma defendant No.5.

40. PW-2 Shri Pawan Kumar Bali has successfully proved on record that he is the signatory of the plaint and Principal Officer of the plaintiff-Corporation. PW-2, while making his statement before the Court, also proved Ex.P-4 i.e. the agreement dated 30.3.1994 incorporating terms and conditions of sale. Perusal of agreement clearly suggests that it is an agreement of purchase, containing therein schedule of re-payment. Clause 2(e) of Ex.P-4 clearly provides that the liability of defendants would be continuing one till the whole amount alongwith interest is paid. Similarly, Clause 2(g) stipulates that the plaintiff and proforma defendant No.5 would continue to be owners of land and machinery as unpaid sellers till full consideration is paid. Clause 2(h) and 2(k) of the agreement i.e. Ex.P-4 specifically empowers plaintiff and proforma defendant No.5 to invoke Section 29 of the *'SFC Act'* and take over possession of the sold movable and immovable property to recover their outstanding dues from the defendants. Ex.P-5 is the List of Assets sold to the defendants. Ex.P-6 is the Trust Letter executed by defendants No.1 and 2. Clause 2 and 2(e) of the Trust Letter also provides that the assets would remain as security for recovery of loan and the Corporations i.e. plaintiff and proforma defendant No.5, shall be entitled to invoke *'SFC Act'* to recover the amount in case of default by the defendants. Ex.P-9 is the recall-cum-take over Notice issued before taking over of plant & machinery. Exts.P-10 to P-12 are letters received from proforma defendant No.5 regarding sale of assets by it. Ex.P-13 is Demand Notice issued by the plaintiff after sale of assets. Exts.P-14 to P-26 are the letters sent by the defendants and Exts.P-27 to P-31 are replies given by the plaintiff. Ex.P-32 is the copy of ledger account. PW-2 has categorically stated before the Court that the last payment was received from the defendants on 20.5.2000. He further in his cross-examination stated that the building and land was sold on 30.1.2003 for Rs.70 lacs and plant and machinery was sold on 30.3.2002 for Rs.3.45 lacs.

41. PW-3 Shri Santosh Sharma, Deputy Manager of the plaintiff-Corporation also proved the account statement, i.e. ledger Ex.P-32. Cross-examination conducted upon aforesaid plaintiff witnesses nowhere suggests that defendants are/were able to extract anything material from their cross-examination. Rather, careful perusal of statements having been made by the plaintiff witnesses clearly suggests that they proved the case of the plaintiff to the hilt.

42. In the case at hand, defendants only led one witness to prove their case. Perusal of statement of Shri Hari Krishan Kanoi, whose statement was recorded on Commission at Kolkata as CW-1 on 21.2.2006, clearly suggests that the same is not in consonance with the stand taken by the defendants in the written statement. Interestingly, written statement was also not signed by any of the defendants, rather the same came to be signed by one Shri Jose Mukahtu, who was never examined by the defendants. CW-1, in his cross-examination, categorically admitted his signatures on Ex.P-25, Ex.P-17 and Ex.P-6. He also admitted Exts. P-14 to P-16, P-18 to P-24 having been signed by Shri K.K. Lodha, Chief Executive of the Company. The fact remains that the defendants with a view to prove their case did not produce any document such as account book or balance sheets of the Company. It has specifically come in his cross-examination that he never served any notice on the plaintiff and proforma defendant No.5 regarding forcible signing of the documents. It has also come in his cross-examination that he came to know with regard to sale of the assets in 2003 and he did not file any written complaint against the same.

43. At the cost of repetition, it may be observed that the defendants have acted on the said agreement and obtained possession of the property agreed to be sold to them on deferred payment. They even paid part of the sale consideration and also remitted amounts from time to time towards remaining part payment of the sale price which was treated as loan. Similarly, perusal of Exts. P-14 to P-26, i.e. letters written by the defendants, clearly suggests that the defendants had no objection about the transaction entered into between them and the plaintiff and proforma defendant No.5. Now, the question which arises for consideration of this Court is

that, can the defendants be allowed to take a somersault and claim that the agreement Ex.P-4 and consequent thereto transaction took place between them and the plaintiff is illegal, especially when it stands duly proved on record that pursuant to execution of aforesaid documents, both the parties acted upon the same and defendants kept on making payments towards balance sale consideration strictly in terms of Schedule of payment prescribed in the agreement itself. There is considerable force in the arguments of Shri Ajay Kumar Sood, learned Senior counsel representing the plaintiff, that the defendants have taken their benefit under the agreement and allowed the Corporation to change its position by handing over the movable and immovable assets to them and when it came to the question of payment of money, they cannot be allowed to change their position. It is also apparent from the perusal of letters sent by the defendants, Exts.P-14 to P-26, that before filing the written statement, no objection was ever raised by the defendants with regard to legality of the transaction, pursuant to agreement of purchase Ex.P-4. Under the law, defendants cannot be allowed to approbate and reprobate in the same breath. It has been repeatedly held by the Constitutional Courts that the doctrine of approbate and reprobate is one among the species of estoppel and it applies to the conduct of the parties and the very purpose/object of estoppel is to prevent fraud and secure justice between the parties by promoting honesty and good faith. The aforesaid doctrine is based on the *maxim Qui approbate non-reprobate* i.e. take advantage of one portion of the document and reject the other.

44. Provisions contained in Section 115 of the Indian Evidence Act enunciating the principles of estoppel are attracted to the facts of the present case. Under the principles of approbation and reprobation, which are certainly applicable to the facts of the present case, the defendants are estopped from questioning the validity of agreement and subsequent transaction by calling it as illegal transaction that too after having taken benefit of the same. The doctrine of approbation and reprobation is based upon the principle that a party at the same time cannot be allowed to affirm and disaffirm the same transaction. This principle is so just and reasonable in itself and often expressed in the terms that one can not be allowed to approbate and reprobate of the same transaction, which are to administer justice according to equity and good conscience and promote honesty in business dealings. ***(See: Bhau Ram vs B. Baijnath Singh And Others, AIR 1961 1327, Bar Council Of Delhi And Anr. Etc vs Surjeet Singh And Ors. Etc. Etc, AIR 1980 1612, Shyam Telelink Ltd. now Sistema Shyam Teleservices Ltd. Vs. Union of India, (2010)10 SCC 165, Karam Kapahi & Ors vs M/S Lal Chand Public Charitabl, (2010)9 SCC 753, Jai Narain Parasurampuria (Dead) vs Pushpa Devi Saraf & Ors. (2006)7 SCC 756.).***

45. Reliance is placed upon ***State of Punjab & Ors. vs. Dhanjit Singh Sandhu, 2014 AIR SCW 4485,*** wherein the Hon'ble Apex Court has held as under:-

> ***"21. As noticed above, the facts are quite different from the facts in Tehal Singh's case. In the instant case, the respondents-allottees accepted the terms and conditions of the allotment letter and possession were taken but they did not raise any construction upto 2000. There was a specific condition that non-construction of building would lead to the resumption of the said plot under the provisions of the Acts and the Rules. As noticed above, when the allottees did not raise construction on the plot, the demand was raised for payment of non-construction fee/extension fee in order to avoid resumption of the plot by the Authority, allottee paid the extension fee. After availing the benefit of extension on payment of extension fee, the allottee sent a letter to the Estate Officer demanding refund of the extension fee on the basis of amended Rule 13 of 1995 Rules. The said demand was rejected by the Estate Officer by passing the reasoned order in compliance of the directions of the High Court. In the facts of the instant case, we have no doubt in our mind in holding that the ratio decided in Tehal Singh's case will not apply in the instant case. In our considered opinion defaulting allottes of valuable plots cannot be allowed to approbate and reprobate by first agreeing to abide by terms***

and conditions of allotment and later seeking to deny their liability as per the agreed terms.

22. The doctrine of "approbate and reprobate" is only a species of estoppel, it implies only to the conduct of parties. As in the case of estoppel it cannot operate against the provisions of a statute. (vide C.I.T. vs. Mr. P. Firm Maur, AIR 1965 SC 1216).

> ***It is settled proposition of law that once an order has been passed, it is complied with, accepted by the other party and derived the benefit out of it, he cannot challenge it on any ground. (Vide Maharashtra State Road Transport Corporation vs. Balwant Regular Motor Service, Amravati & Ors., AIR 1969 SC 329). In R.N. Gosain vs. Yashpal Dhir, AIR 1993 SC 352, this Court has observed as under:– "Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that "a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage."***

23. This Court in Sri Babu Ram Alias Durga Prasad vs. Sri Indra Pal Singh (dead) by Lrs., AIR 1998 SC 3021, and P.R. Deshpande vs. Maruti Balram Haibatti, AIR 1998 SC 2979, the Supreme Court has observed that the doctrine of election is based on the rule of estoppel- the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppel in pais (or equitable estoppel), which is a rule in equity. By that law, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had.

24. The Supreme Court in The Rajasthan State Industrial Development and Investment Corporation and Anr. vs. Diamond and Gem Development Corporation Ltd. and Anr., AIR 2013 SC 1241, made an observation that a party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience.

25. It is evident that the doctrine of election is based on the rule of estoppel the principle that one cannot approbate and reprobate is inherent in it. The doctrine of estoppel by election is one among the species of estoppel in pais (or equitable estoppel), which is a rule of equity. By this law, a person may be precluded, by way of his actions, or conduct, or silence when it is his duty to speak, from asserting a right which he would have otherwise had."

46. In ***Shyam Telelink Ltd. now Sistema Shyam Teleservices Ltd. Vs. Union of India, (2010)10 SCC 165,*** the Hon'ble Apex Court has held:-

> ***"23. The maxim qui approbat non reprobat (one who approbates cannot reprobate) is firmly embodied in English Common Law and often applied by Courts in this country. It is akin to the doctrine of benefits and burdens which at its most basic level provides that a person taking advantage under an instrument which both grants a benefit and imposes a burden***

cannot take the former without complying with the latter. A person cannot approbate and reprobate or accept and reject the same instrument.

24. In Ambu Nair v. Kelu Nair, AIR 1933 PC 167, the doctrine was explained thus: (1A p.271)

> ***"Having thus, almost in terms, offered to be redeemed under the usufructuary mortgage in order to get payment of the other mortgage debt, the appellant, Their Lordships think, cannot now turn round and say that redemption under the usufructuary mortgage had been barred nearly seventeen years before he so obtained payment. It is a well- accepted principle that a party cannot both approbate and reprobate. He cannot, to use the words of Honyman, J. in Smith v. Baker (1873) LR 8 CP 350 at p. 357:***
>
> ***'...at the same time blow hot and cold. He cannot say at one time that the transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid, and at another time say it is void for the purpose of securing some further advantage'."***

25. The view taken in the above decision has been reiterated by this Court in City Montessori School v. State of Uttar Pradesh and Ors. (2009) 14 SCC 253. To the same effect is the decision of this Court in New Bihar Biri Leaves Co. v. State of Bihar 1981 (1) SCC 537 where this Court said: (New Bihar case, (1981)1 SCC 537, SCC p.558, para 48)

> ***"48. It is a fundamental principle of general application that if a person of his own accord, accepts a contract on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which proved advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. The maxim is qui approbat non reprobat (one who approbates cannot reprobate). This principle, though originally borrowed from Scots Law, is now firmly embodied in English Common Law. According to it, a party to an instrument or transaction cannot take advantage of one part of a document or transaction and reject the rest. That is to say, no party can accept and reject the same instrument or transaction (Per Scrutton, L.J., Verschures Creameries Ltd. v. Hull & Netherlands Steamship Co.)"***

26. The decision of this Court in R.N. Goswain v. Yashpal Dhir AIR 1993 SC 352, brings in the doctrine of election in support of the very same conclusion in the following words : (SCC pp.687-88, para 10)

> ***"10. Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that "a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage".***
>
> ***[See: Verschures Creameries Ltd. v. Hull and Netherlands Steamship Co. Ltd. (1921) 2 KB 608, at p.612, Scrutton, L.J.] According to Halsbury's Laws of England, 4th Edn., Vol. 16:***
>
> ***"1508. Examples of the common law principle of election.- After taking an advantage under an order (for example for the payment of***

costs) a party may be precluded from saying that it is invalid and asking to set it aside."

47. Reliance is also placed on ***Jai Narain Parasrampuria (Dead) and Others vs. Pushpa Devi Saraf & Others, (2006)7 SCC 756,*** wherein the Hon'ble Apex Court has held as under:-

> ***"37. In Bank of India & Ors. etc. vs. O.P. Swarnakar & Ors. etc. [(2003) 2 SCC 721], this Court took notice of the following passage from Halsbury's Law of England, 4th Edn., Vol.16 (Reissue), para 957 at p.844:***
>
> ***"On the principle that a person may not approbate and reprobate a special species of estoppel has arisen. The principle that a person may not approbate and reprobate expresses two propositions:***
>
> ***(1) That the person in question, having a choice between two courses of conduct is to be treated as having made an election from which he cannot resile.***
>
> ***(2) That he will be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct, which he has first pursued and with which his subsequent conduct is inconsistent."***

48. In ***Bar Council of Delhi And Another (etc.etc.) vs. Surjeet Singh And Others (etc.etc.), AIR 1980 SC 1612,*** the Hon'ble Supreme Court has held as under:-

> ***"11. The contesting respondents could not be defeated in their writ petitions on the ground of estoppel or the principle that one cannot approbate and reprobate or that they were guilty of laches. In the first instance some of the contesting respondents were merely voters. Even Shri Surjeet Singh in his writ petition claimed to be both a candidate and a voter. As a voter he could challenge the election even assuming that as a candidate after being unsuccessful he was estopped from doing so. But to be precise, we are of the opinion that merely because he took part in the election by standing as a candidate or by exercise of his right of franchise he cannot be estopped from challenging the whole election when the election was glaringly illegal and void on the basis of the obnoxious proviso. There is no question of approbation and reprobation at the same time in such a case. A voter could come to the High Court even earlier before the election was held. But merely because he came to challenge the election after it was held it cannot be said that he was guilty of any laches and must be non-suited only on that account.***
>
> ***14. Mudholkar J., delivering the leading and the majority judgment of a Full Bench of the Nagpur High Court in Kanglu Baula Kotwal & another v. Chief Executive Officer, Janpad Sabha, Durg and others, rejected the plea of estoppel to challenge the election at page 58, para 25 in these terms:-***
>
> ***"As regards the petitioners who were also candidates at the elections but were defeated, the learned counsel said that those who took their chances at the elections and failed should not now be allowed to challenge elections of their opponents on the ground that the electoral rolls were defective. The plea is in substance one of estoppel. There can be no question of any estoppel, because it cannot be said that the position of the other side has in any way altered by reason of something done or not done by the petitioners."***

49. Applying the ratio laid down in the aforesaid exposition of law laid down by the Hon'ble Apex Court vis-à-vis facts of the present case, this Court has no hesitation to conclude that the principle of estoppel and doctrine of approbation and reprobation are attracted in the

present case and as such plea/contention raised by learned Senior Counsel representing the defendants that the agreement of purchase being illegal and contrary to the provisions of law is not enforceable, cannot be accepted at this stage and as such same deserves to be rejected.

50. Mr.R.L. Sood, learned Senior Counsel representing the defendants, while placing reliance upon ***Gajraj Jain's*** case *supra*, argued that after taking over the mortgaged/ hypothecated immovable and movable assets of M/s.RKB Herbals, the plaintiff-Corporation became the owner thereof and as such mandatory provision, as contained in Section 29(4) of the *'SFC Act',* casts a statutory obligation on the plaintiff to sell the same by executing a registered sale deed in favour of any party including the present defendant No.1.

51. At this stage, it would be apt to take note of Section 29(4) of the *State Financial Corporation Act, 1951*:-

> ***"29. Rights of Financial Corporation in case of default.***
>
> ***(1) ... ...***
>
> ***(2) ... ...***
>
> ***(3) ... ...***
>
> ***(4) [Where any action has been taken against an industrial concern] under the provisions of sub-section (1), all costs, [charges and expenses which in the opinion of the Financial Corporation have been properly incurred] by it [as incidental thereto] shall be recoverable from the industrial concern and the money which is received by it shall, in the absence of any contract to the contrary, be held by it in trust to be applied firstly, in payment of such costs, charges and expenses and, secondly, in discharge of the debt due to the financial Corporation, and the residue of the money so received shall be paid to the person entitled thereto.]"***

52. After having carefully examined aforesaid provision of law in the light of judgment rendered by the Hon'ble Apex Court in ***Gajraj Jain's*** case *supra*, this Court is persuaded to agree with the contention of learned Senior Counsel representing the plaintiff that there is no prohibition in law for the plaintiff-Corporation to enter into agreement of sale and sell the property on deferred payment with the stipulation that the sale deed would be executed after receipt of entire sale consideration. In-fact, concept of ownership, as mentioned under Section 29 of the *'SFC Act',* is limited one and the very object and purpose behind taking over management and possession is to secure and realize the loans advanced by it. While taking over possession under Section 29 of the *'SFC Act'*, the owner always retains the right of ownership of the property and property does not pass on to the Financial Corporation, but it is only for certain purposes for affecting recovery of its dues by the sale. In this regard reliance is placed upon judgment passed by Hon'ble Delhi High Court in the case of ***M/s.Disco Electronics Ltd., (In Liquidation), AIR 1997 Delhi 251,*** wherein in para 28 of the judgment the Hon'ble Court has held as under:-

> ***"28. In my view, in the taking over of possession under section 29 of the State Financial Corporation Act, the owner always retains the right of ownership of the property does not pass to the financial corporation, but it is only for certain purposes of affecting recovery of its dues by the sale and to remove any impediments in their way that the statute by a deeming provision has granted to the financial corporation powers of the owner for limited purposes of realizing the security, to convey good marketable title to the purchaser, and to defend any legal action, but the property absolutely does not vest in it. ... ..."***

53. After having carefully gone through the aforesaid provisions of law as well as law laid down by Delhi High Court, this Court is inclined to agree with the contention of Shri Ajay Kumar Sood, learned Senior counsel representing the plaintiff that there is no prohibition in law that the Corporation could not enter into an agreement of sale and sell the property on deferred

payment with the stipulation that sale deed would be executed after receipt of entire sale consideration. Ex.P-4 is an agreement of purchase dated 30.3.1994 incorporating terms and conditions of sale. Schedule of repayment is given in the agreement. Clause 2(e) of agreement Ex.P-4 clearly provides that the liability of the defendants would be continuing one till the whole amount alongwith interest is paid. Similarly, clause 2(g) stipulates that the plaintiff and proforma defendant No.5 would continue to be owners of land and machinery as unpaid sellers till full consideration is paid. On the top of everything, clause 2(h) and 2(k) of the agreement Ex.P-4 empowers the plaintiff and proforma defendant No.5 to invoke Section 29 of the *'SFC Act'* and take over possession of sold movable and immovable property to recover their outstanding dues from the defendants. Ex.P-6 is the Trust Letter executed by defendants No.1 and 2. Clause 2 and 2(e) of the Trust letter further stipulates that the assets would remain as security for recovery of loan and the Corporations will be entitled to invoke *'SFC Act'*. Para 2(h) of the agreement Ex.P-4 specifically provides that the balance sale consideration would be treated as loan and would be recoverable by resorting to section 29 of the *'SFC Act'*.

54. Mr.R.L. Sood, learned Senior Counsel, while placing reliance upon ***Gajraj Jain's*** case *supra*, contended that it is established position in law that after taking over the mortgaged/hypothecated immovable and movable assets of M/s.RKB Herbals, the plaintiff-Corporation became the owner thereof and, as such, the mandatory provision of Section 29(4) of the *'SFC Act'* casts a statutory obligation on it to sell the same by executing a Registered Sale Deed in favour of any party including the present defendant No.1-Company also. But, the aforesaid submission does not appear to be correct. In ***Gajraj Jain's*** case *supra*, it has been nowhere held by Hon'ble Apex Court that there is total prohibition of sale of taken over assets/property by an agreement of sale, rather in para-11 of judgment, which is reproduced hereinbelow, Hon'ble Apex Court has dealt with the issue involved in the case that what is the difference between 'mortgage and a charge':-

> ***"11. In the light of the aforestated judgment of this Court, the issue which arises for determination is - whether respondent 2 Corporation acted reasonably and in accordance with Section 29 of the 1951 Act in transferring the assets of the Company on 19.3.2002 and in entering into agreement for sale with Respondent 4 on 26.4.2002. As stated above, Respondent 2 Corporation had a paramount first charge on the assets of the flour mill whereas the Central Bank of India had the second charge thereon. There is a difference between a charge and mortgage. In the case of a charge under Section 100 of the TP Act, there is no transfer of interest in the property. A charge is not a jus in rem. It is jus ad rem. It creates a right of payment out of the property/fund charged with the debt or out of proceeds of the realisation of such property, a phrase used in Section 29(1) of the 1951 Act. A charge as defined under Section 100 of TP Act may be enforced by sale [See Mulla Civil Procedure Code (15th Edn.) p.2420]. We have discussed the concept of charge as it has a direct bearing on the interpretation of Section 29 of the 1951 Act."***

55. Bare reading of aforesaid para of the judgment suggests that issue which had arisen for determination of the Hon'ble Apex Court was whether respondent No.2-Corporation acted reasonably and in accordance with Section 29 of the *'SFC Act'* in transferring the assets of the Company on 19.3.2002 and in entering into agreement for sale with Respondent No.4 on 26.4.2002. In the above captioned case, issue before Hon'ble Apex Court was that the Corporation had received downright payment of Rs.28.85 lakhs (its own dues) and the balance of Rs.170 lakhs was received by it in the form of a promise to it by Respondent No.4 to pay the dues of Central Bank of India, which was not even a party to the arrangement. The Corporation, with a view to recover its dues, issued public notice dated 22.2.2002 and tenders were to be submitted by 21.3.2002. Under the said notice, the tenders were to be opened on 22.3.2002 and the assets were taken over on 18.3.2002. However, the Corporation handed over assets to Respondent No.4 on 19.3.2002 against down payment of Rs.28.85 lacs and a part payment was

made by demand draft dated 9.3.2002. The appellant Gajraj Jain had cleared the dues of the Corporation on 21.3.2002 i.e. before opening of tenders on 22.3.2002.

56. In the aforesaid background, action of Financial Corporation was found to be breach of law by Hon'ble apex Court as under:-

> ***"15. In addition to the vitiating circumstances enumerated above, we find that under the public notice dated 22.2.2002, tenders were invited. They were to be submitted by 21.3.2002. Under the said notice, the tenders were to be opened on 22.3.2002. The take over of assets is on 18.3.2002. However, on 19.3.2002, the corporation hands over the assets to respondent no.4 against down payment of Rs.28.85 lacs plus promise to the corporation that the purchaser undertakes to pay the dues of Central Bank of India. A part of the amount of Rs.28.85 lacs was paid by demand drafts dated 9.3.2002. These circumstances indicate collusion between respondent no.2 corporation, respondent 3 and respondent no.4. The take over of assets is ordered on 18.3.2002 and on 19.3.2002, the assets are handed over to respondent no.4 against down payment of Rs.28.85 lacs in demand drafts dated 9.3.2002. Under section 29(1) of the Act, the corporation is entitled to sell or lease the assets in order to realise the pledged/hypothecated or mortgaged property. Under what colour of title were the assets handed over to respondent no.4 on 19.3.2002? Was it under sale, lease or repayment of loan? There is no explanation as to how respondent no.4 could have drawn demand drafts in favour of corporation on 9.3.2002 when their offer to purchase was on 17/19.3.2002. It is alleged on behalf of respondent no.4 that they were given the assets with a specific understanding of return of property if a higher offer was received in the auction. No such understanding is recited in the minutes of the tender committee nor in the recitals in the impugned agreement dated 26.4.2002. We do not find any resolution/minutes of the Board of Directors of the corporation in that regard. In the agreement dated 26.4.2002, it has been recited that Rs.90 lacs were advanced as loan in 1988 by corporation to the company against equitable mortgage of land and assets. Under section 69 of T.P. Act, equity of redemption existed in favour of the company. A mere agreement for sale of assets cannot extinguish the equity of redemption; it is only on execution of conveyance that the mortgagor's right of redemption will be extinguished. [See: T.P. Act by Mulla page 794]. In the present case, till today there is no conveyance and, therefore, on 21.3.2002 when appellant herein paid Rs.28.85 lacs to the corporation representing its full dues, there was complete liquidation of the dues of the corporation and yet the corporation did not return the assets to the company and arbitrarily and for extraneous reasons adjusted the said amount to the account of M/s Aditya Flour Mills. The reason is obvious. The corporation intended to sell the assets only to respondent no.4 for a paltry amount of Rs.28.85 lacs. It has been repeatedly urged before us, on behalf of respondent no.4, that the assets in question were not worth Rs.10 crores as alleged by the appellant. Even if we assume that respondent no.4 is right in its submission, even then, in terms of the offer of respondent no.4, the property was worth Rs.198 lacs. But the corporation handed over the assets and agreed to sell them against down payment of Rs.28.85 lacs. No reason has been given by the corporation as to why it did not insist on the full payment of Rs.198.85 lacs. Be that as it may, the appellant herein cleared the dues of the corporation on 21.3.2002, before opening of tenders on 22.3.2002, and yet the corporation did not return the assets to the company. Even the tender***

money deposited by the appellant was returned without any demand from the appellant so that it could be argued by the corporation that the appellant had withdrawn from the auction and therefore the offer of respondent no.4 was accepted. In fact, the document at page 186 shows that appellant refused to collect the earnest money and, therefore, the amount was kept by the corporation in a separate account. Lastly, in the case of Narandas Karsondas v. S. A. Kamtam & Anr. reported in [AIR 1977 SC 774], it has been held that putting of property to auction does not extinguish the right of redemption. Therefore, on 21.3.2002, the company had a right to redeem the assets. It was submitted that the appellant intended to buy the assets in his own name. We do not find merit in this argument. The record shows that the appellant as the director of the company offered to clear the dues of the corporation for which he insisted on the return of the title deeds (transfer papers) of M/s Katihar Flour Mills. In any event, in this case, we are concerned with the conduct of the corporation which was required to act in accordance with section 29 of the 1951 Act and not unreasonably. In this connection, it may further be pointed out that under the public notice inviting tenders, the corporation was obliged to call for matching offers from the directors/promoters/guarantors. The corporation did not call for such offers as its object was to keep out all counter-offers. Lastly, we are satisfied that the impugned agreement dated 26.4.2002 has been entered into without any consideration in favour of Central Bank of India. In conclusion, we may state that in the present case, respondent no.2 corporation has misused its authority and power in breach of law by taking into account extraneous matters and by ignoring relevant matters which has rendered all its acts ultra-vires. [See: Express Newspapers Pvt. Limited & Ors. v. Union of India & Ors. AIR 1986 SC 872 para 118].

16. In the circumstances, we set aside the impugned judgment and order of the High Court and grant to the appellant the reliefs claimed by him in the writ petition. We hereby set aside the agreement dated 26.4.2002 and we direct respondent no.2 - corporation to transfer Rs.28.85 lacs, wrongly appropriated to the account of M/s Aditya Flour Mills, to the account of M/s Katihar Flour Mills (P) Ltd. Consequent upon such appropriation, the loan taken by the said company shall stand repaid. We further direct the concerned District Judge to restore possession of the assets (handed over by respondent no.2 - corporation to respondent no.4 - company on 19.3.2002) to M/s Katihar Flour Mills (P) Ltd. In this connection, the District Judge is directed to draw-up an inventory of the assets. In case of shortfall, it would be open to M/s Katihar Flour Mills (P) Ltd. to take such steps as they may be advised. Consequent upon our setting-aside the agreement dated 26.4.2002, we direct the corporation to return the amount paid to it by respondent no.4 on 19.3.2002."

57. If the judgment passed by Hon'ble Apex Court in the aforesaid case is read in its entirety, it nowhere suggests that there is total prohibition in law for the plaintiff-Corporation to enter into agreement of sale by transfer of assets/property and, as such, the reliance placed upon aforesaid judgment by learned Senior Counsel for the defendants is wholly misplaced and same cannot be applied in the facts and circumstances of the present case. Facts of the case, as were before the Hon'ble Apex Court in ***Gajraj Jain's*** case *supra*, do not fit in with the fact situation of the present case. By now it is well settled that Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed and the judgments of the Courts are not to be construed as statutes and to interpret words, phrases and provisions of a statute, it may become necessary for judges to

embark into lengthy discussions but the discussion is meant to explain and not to define. At this stage it would be apt to take note of judgment rendered by Hon'ble Supreme Court in ***Haryana Financial Corporation and Another vs. Jagdamaba Oil Mills and Another, (2002)3 SCC 496,*** wherein, while over-ruling its earlier judgment passed in ***Mahesh Chandra vs. Regional Manager, U.P. Financial Corporation and Others, (1993)2 SCC 279***, the Hon'ble Apex Court has categorically held as under:-

> ***"19. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are not to be read as Euclid's theorems nor as provisions of the statute. These observations must be read in the context in which they appear. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statues, they do not interpret judgments. They interpret words of statutes, their words are not to be interpreted as statutes. In London Graving Dock Co. Ltd. v. Horton 1951 AC 737 (at p. 761), Lord Mac Dermot observed: (All ER p.14C-D)***
>
> > ***"The matter cannot, of course, be settled merely by treating the ipsissima vertra of Willes, J. as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge."***
>
> ***20. In Home Office v. Dorset Yacht Co. (1970 (2) All ER 294) Lord Reid said, "Lord Atkin's speech..is not to be treated as if it was a statute definition. It will require qualification in new circumstances." Megarry, J. in (1971) 1 WLR 1062 observed: "One must not, of course, construe even a reserved judgment of even Russell L.J. as if it were an Act of Parliament." And, in Herrington v. British Railways Board, (1972) 2 WLR 537 Lord Morris said:***
>
> > ***"There is always peril in treating the words of a speech or a judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case."***
>
> ***21. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.***
>
> ***22. The following words of Lord Denning in the matter of applying precedents have become locus classicks:***
>
> > ***"Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."***
> >
> > **** * ****
> >
> > ***"Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it."***

58. Mr.R.L. Sood, learned Senior Counsel, also placed reliance upon the judgment passed by a Division Bench of this Court in case titled: ***H.P.S.I.D.C. vs. M/s.Manson India Pvt.Ltd. and Others, 2008(3) Shim.L.C. 300*** to suggest that bare perusal of Section 29 of the *'SFC Act'* suggests that the Financial Corporation is authorized and empowered to take over the management or possession of the property, which was pledged, mortgaged, hypothecated or assigned to it and that since no property was pledged, mortgaged, hypothecated or assigned by defendant No.1 in favour of Corporation, defendant No.1 is continued to be an exclusive owner of the property in question and as such no power vests upon the plaintiff Corporation and proforma defendant No.5 under Section 29 of the *'SFC Act'* to take over the already taken over assets of M/s.RKB Herbals. It would be apt to take note of para-25 of aforesaid judgment:

> ***"25. A bare perusal of the aforesaid provision shows that the State Financial Corporation has a right to transfer by way of lease or sale only the property which was pledged, mortgaged, hypothecated or assigned to the Financial Corporation. There is no material on record to show that the property which was hypothecated with the plaintiff was either pledged or mortgaged or hypothecated or assigned to the Financial Corporation. There is no explanation as to how the Financial Corporation sold the assets which were not hypothecated with it. In fact the material placed on record only shows that the unit was sold. There is nothing on record to show that whether the goods which were hypothecated with the plaintiff and were subject-matter of the two hypothecation agreements were ever in fact sold by the HPFC."***

59. Interestingly, in the case at hand factum with regard to aforesaid tripartite agreement executed by the plaintiff, proforma defendant No.5 and defendants have not been denied in the written statement, rather wholly untenable stand has been taken that defendant No.2 was made to sign on the documents forcibly, but even in this regard no evidence has been led on record.

60. In ***H.P.S.I.D.C. vs. M/s.Manson India Pvt.Ltd.*** case *supra*, facts are altogether different because in that case there was no material on record to show that the property, which was hypothecated with the plaintiff, was either pledged or mortgaged or hypothecated or assigned to the Financial Corporation. Similarly, no explanation, if any, was rendered that how the Financial Corporation sold the assets, which were not hypothecated with it. Apart from above, there was nothing on the record to show that the Unit was sold. But, in the case at hand, as has been discussed in detail hereinabove, there was tripartite agreement between plaintiff, proforma defendant No.5 and the defendants. Clause 2(g) of agreement stipulates that plaintiff and proforma defendant No.5 would continue to be owners of land and machinery as unpaid sellers till full consideration is paid and they shall have right to invoke Section 29 of the *'SFC Act'* to take over possession of sold movable and immovable property to recover their outstanding amount from the defendants. (See: clauses 2(g), 2(h) and 2(k) of agreement Ex.P-4).

61. After having carefully perused pleadings and evidence adduced on record of the case, this Court has no hesitation to conclude that purchase agreement dated 30.3.1994 Ex. P-4, is legal and enforceable against defendants for recovery of outstanding amount and plaintiff-Company is well within its rights to file suit for recovery of outstanding dues since agreement to purchase Ex.P-4 stands duly proved in accordance with law. Plaintiff-Company is also entitled to recover the suit amount alongwith interest as claimed in the plaint and it is not estopped from filing the suit on account of its acts, deeds and conduct, rather taking note of facts and evidence available on record, this Court has no hesitation to conclude that the conduct of the defendants' has not been above the board and at this stage they cannot be allowed to defeat the claim of the plaintiff terming the agreement Ex.P-4 to be illegal and un-enforceable. Accordingly, all the aforesaid issues are decided in favour of the plaintiff and against the defendants.

Issue No.3:

62. The instant issue has arisen for the consideration of this Court out of preliminary objection raised by the defendants. Needless to say that limitation is a mixed question of law and facts and as such, whether defendants have succeeded in discharging the onus, which is definitely upon them qua issue at hand, needs to be determined in the light of given facts and circumstances as well as law on the point.

63. As has been discussed hereinabove above in detail, agreement of purchase Ex.P-4 came to be executed inter se plaintiff and defendants on 30.3.1994, whereby plaintiff, pursuant to offer made by defendant No.1 for the purchase of taken over assets of M/s.RKB Herbals Pvt.Ltd., agreed to sell the taken over assets for the total consideration of Rs.96 lacs. It is also not in dispute that defendant No.1 paid Rs.24 lacs to plaintiff and proforma defendant No.5 at the time of execution of aforesaid agreement and further for payment of balance amount i.e. Rs.72 Lacs executed agreement with Corporation. As per agreement Ex. P-4 amount was agreed to be paid in ten half yearly installments starting from 10.4.1995 and ending on 10.10.1999 as stands detailed in the agreement. Since defendants failed to adhere to the repayment schedule as agreed interse the parties vide agreement Ex.P-4, plaintiff issued recall-cum-take over notice on 3.11.2000 and ultimately assets were taken over on 4.12.2000 by the proforma defendants. Taken over assets were sold on 30.1.2003, whereafter sale proceeds were distributed amongst plaintiff and proforma defendant No.5 as stands mentioned in para-10 of the plaint. Since after adjustment of amount received from the sale of assets, some amount was found due to the plaintiff and proforma defendant No. 5 from defendants No.1 to 4 as on 31.1.2003, demand notice dated 5.2.2003 came to be issued against defendants for Rs.40,20,631/-.

64. Mr.R.L. Sood, learned Senior Counsel vehemently argued that though no loan was ever advanced by the plaintiff-Corporation to defendant No.1, but even otherwise last installment was payable on or before 10.10.1999, as per own case set up by the plaintiff and as such limitation would commence on the first or atleast the last default in payment of installments. He also argued that once limitation starts, it cannot be rested and as such suit was required to be filed on or before 9.4.1998 and/or at best it could be filed on 9.10.2002 i.e. within three years of default in the payment of last installment. Mr.Sood further argued that even for the sake of arguments it is considered that a loan had been advanced and the same had to be paid back in installments then also the suit is barred by limitation because the plaintiff-Corporation has failed to incorporate any pleading in the plaint to show that how the suit is within limitation, which is mandatorily required under Order 7 Rule 6 of the Code of Civil Procedure.

65. Learned Senior Counsel further contended that it has been specifically provided in clause-(f) of the agreement Ex.P-4 that in the event of defendant No.1, making any default, in the payment of anyone or more installments of principal amount, or of interest, the plaintiff-Corporation shall have the right to immediately recall the complete amount due by issuance of a recall notice, by the plaintiff or proforma defendant No.5. He further contended that the recall notice was issued on 23.9.1999 vide Ex.P-28 and as such, the suit was required to be filed positively on or before 22.9.2002. While placing reliance upon Article 37 of Limitation Act 1963, Mr.Sood contended that the suit is hopelessly barred by limitation. He further contended that since the default in the payment was made right from the beginning i.e. from the date of installments which was due on 10.04.1995 and positively from the date of recall notice i.e. 23.9.1999, therefore, the suit could be filed on or before 22.09.2002. In support of aforesaid submissions, Mr.Sood placed reliance upon the following judgments:-

Gokhul Mahaton vs. Shevoprasad Lal Seth and Others, AIR 1939 Patna 433, Suda Ram Finance vs. Nur Jahan, (2016)13 SCC 117, Devi Dass Dhani Ram vs. Padma Golhlia, AIR 1959 M.P. 413, Shiv Dayal vs. Ram Rikh, AIR 1955 Rajasthan 188, Jawahar Lal vs. Mathura Prasad, AIR 1934 Allahabad 661.

66. While refuting contentions put forth on behalf of Mr.Ajay Kumar, learned Senior Counsel representing the plaintiff that suit is within limitation since the sale proceeds of the assets were received on 30.03.2002. Mr.Sood placed reliance upon judgment delivered by the Division Bench of this Court in ***H.P.S.I.D.C. vs. M/s.Manson India's*** case *supra* and stated that plaintiff had neither granted any loan nor had mortgaged or hypothecated any of its assets to the plaintiff-Corporation and as such assets continued to be in the ownership of the plaintiff-Corporation, therefore, the suit is hopelessly barred by limitation.

67. After having carefully perused material available on record, especially evidence led on record by the plaintiff, this Court is not persuaded to agree with the aforesaid contention raised by learned Senior Counsel representing the defendants. Agreement Ex.P-4 clearly reserves right to the plaintiff to recover balance amount by sale of property sold to the defendants. Needless to say that the sold property both movable and immovable was made security for payment of money and as such the case of the plaintiff is squarely covered by Section 100 of the Transfer of Property Act vis-à-vis agreement Ex.P-4, whereby the defendants had agreed that in case of default the plaintiff and proforma defendant No.5 shall have the right to take over the possession of the plant, machinery, land and building and recover their money by sale thereof. Limitation in the case at hand would definitely start from the date when the property was put to sale and not from the date of default. In the present case, movable assets i.e. plant and machinery was admittedly sold on 30.3.2002 and land and building was sold on 30.1.2003, which fact has not been disputed by the defendants either in the written statement or by way of oral evidence. Hon'ble Apex Court in case titled: ***Deepak Bhandari vs. Himachal Pradesh State Industrial Department Corporation Ltd., AIR 2014 SC 961*** has categorically held that limitation period for recovery of balance amount would start only after adjusting the proceeds from the sale of assets of the industrial concern because the Corporation would be in a position to know as to whether there is a shortfall or there is excess amount realized only after the sale of the mortgage/hypothecated assets. Since law on the issue is no more *res integra*, more particularly, in the light of judgment rendered by Hon'ble Apex Court in ***Deepak Bhandari's*** case *supra*, this Court sees no reason to refer to the judgments relied upon by the learned Senior Counsel representing the defendants in support of aforesaid contentions qua issue of limitation and as such same need not be referred to. Otherwise also, it may be noticed that during arguments learned Senior Counsel representing the defendants was unable to distinguish the judgment rendered by Hon'ble Apex Court in ***Deepak Bhandari's*** case supra as far as facts of the present case are concerned.

68. In view of above, suit, which has been filed on 22.4.2003 i.e. after sale of movable and immovable assets of taken over property, is well within the period of limitation. As has been taken note above, no evidence, whatsoever, has been led on record to dispute the factum placed on record by the plaintiff with regard to sale of movable and immovable taken over assets on 30.1.2003, whereafter plaintiff as well as proforma defendant No.5 after adjusting the aforesaid amount received from the sale of assets found a sum of Rs.40,20,631/- still payable by the defendants on account of shortfall in the amount payable by them and accordingly issued demand notice dated 5.2.2003. Leaving everything aside, it stands duly proved on record that last payment was made by the defendants on 20.5.2000. Ledger/account book Ex.P-32 placed on record by the plaintiff has been duly proved in accordance with law by the plaintiff. PW-3 Deputy Manager of the plaintiff-Corporation has proved on record account statements/ledger Ex.P-32. Cross-examination conducted on this witness nowhere suggests that the defendants were able to extract something contrary to what he has stated in his examination-in-chief. On the other hand, defendants have not led any evidence on record to prove that loan payment towards balance sale consideration was made by bank draft on 15.5.2000 and not on 20.5.2000 and as such if it is assumed that suit was to be filed at the time of first default even then suit, which admittedly came to be filed on 22.4.2003 is/was well within limitation. Hence for the reasons stated above, issue in hand is decided in favour of the plaintiff and against the defendants.

Issue Nos.7 & 9

69. Though defendants in their written statement have pleaded that plaintiff delayed the delivery of the factory premises in favour of the plaintiff for about six months and subsequently they sold the taken over assets in throw away prices, but no evidence, if any, has been led on record by the defendants to prove aforesaid case set up by it in the written statement. Onus to prove aforesaid issues was on the defendants, but, there is no evidence led on record that communication, if any, was sent by the defendants to the plaintiff-Corporation alleging therein that delay is being caused by the plaintiff in the delivery of the factory premises pursuant to the agreement entered into between the parties Ex.P-4. Though CW-1 defendant Hari Kishan Kanoi in his statement stated that factory premises were not handed over immediately after execution of the agreement, but, as has been taken note above, no documentary evidence has been led on record by the defendants. Similarly no evidence has been led on record by the defendants suggestive of the fact that defendants, with a view to fetch adequate price of the property in question, had brought better buyer. Both these issues are, therefore, decided in favour of the plaintiff and against the defendants.

70. **Relief:**

In view of the findings on all the above issues, the present suit is decreed in the sum of Rs.40,20,631/- alongwith interest @ 15.5% per anum from the date of filing of the suit till its realization in favour of the plaintiff and against the defendants No.1 to 4. Parties are left to bear their own costs. A decree sheet be prepared, accordingly.

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

Saroj and others ...Petitioners

Versus

Beena and others ...Respondents

CMPMO No. 392 of 2017
Decided on: March 12, 2018

Code of Civil Procedure, 1908- Order XXVI Rule 9- Appointment of Local Commissioner- Necessity thereof- In partition suit instituted earlier, property was divided by metes and bounds- And possession of respective shares was also delivered to co-sharers- In subsequent suit, there is no necessity for appointment of Local Commissioner for identifying part of said property again – Subsequent dispute regarding possession over any such property being a question of fact, is to be decided by Court and not by Local Commissioner. (Paras- 13 and 14)

For the petitioners: Mr. Kulbhushan Khajuria, Advocate.
For the respondents: Mr. Karan Sharma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Being aggrieved and dissatisfied with order dated 22.8.2017 passed by the learned District Judge, Chamba, in Civil Appeal No. 46/2002, whereby objections having been filed by the respondents-plaintiffs ("respondents' hereinafter) to the report of local commissioner dated 15.7.2003, came to be allowed and report dated 15.7.2003 prepared by Naib Tehsildar, Chamba, was set aside, petitioners-defendants have approached this Court by way of instant proceedings.

2. Necessary facts as emerge from the record are that one Shri Anirudh (deceased) and others, plaintiffs before the trial Court, filed a civil suit bearing No. 59/97 against one Kamla (since deceased) and others, for possession of one room in the ground floor situate over Khasra No. 560/1, with further prayer to restrain the defendants from blocking the entrance/staircase of the plaintiffs. Plaintiffs pleaded before the Court below that they are recorded as joint owner-in-possession of the land comprised in Khasra Nos. 559 and 560 measuring 108 square yards and 2 square feet, which property stood already partitioned between the parties through a decree dated 7.6.1977 passed by the learned Sub Judge, Chamba. Possession of aforesaid property was received by the plaintiffs to the extent of their share after passing of the decree. Deceased Hiru, predecessor-in-interest of the plaintiffs was allotted property comprised in Khasra Nos. 559, 560/1 and 558/1 and since then plaintiffs continued to be in possession of the same. However, one room in the ground floor was temporarily given to the defendants for use as kitchen in the building comprised in Khasra No. 560/1 with an understanding that the defendants would vacate it as and when required by the plaintiffs. There was a staircase leading to the upper storey from the ground floor adjoining to the said room occupied by the defendants but defendants forcibly took possession of aforesaid staircase and they were not allowing plaintiffs to use the same. Defendants were requested time and again to hand over the vacant possession of the said room but they failed to do so as such, civil suit as detailed herein above came to be instituted at the behest of the plaintiffs for decree of mandatory injunction.

3. Defendants by way of written statement denied the claim of the plaintiffs and averred that one room in the ground floor and one room in the first floor were allotted to the defendants in the partition of Khasra No. 560 by the learned Senior Sub Judge, Chamba. It was admitted that predecessor-in-interest of the plaintiffs had filed a suit for partition which was decreed by the Court on 7.6.1977. Thereafter, Hiru filed an execution for possession of 1/3rd share but he died during these proceedings and present plaintiffs came to be brought on record. Partition of property comprised in Khasra Nos. 560, 561 and 559 was carried out by the local commissioner and 1/3rd share thereof was handed over to the plaintiffs. It was further asserted that out of Khasra No. 560, which consisted of a double storeyed house, Khasra No. 560/2 measuring 43 square yards and 3 square feet was allotted to the defendants, in which one room was in the ground floor and one room in the first floor and since then, defendants are in possession of one room in ground floor. However, room in the first floor, which had fallen to the share of defendants continued to be in possession of the plaintiffs, who despite requests, did not vacate the same and filed the suit to harass them. It was categorically denied that the defendants were obstructing the plaintiffs from using the staircase. It was claimed that there was a common staircase to the building comprised in Khasra No. 560/1, which had been allotted to the plaintiffs and Khasra No. 560/2 had been allotted to the defendants.

4. Learned trial Court on the basis of aforesaid pleadings, decreed the suit of the plaintiffs for possession of suit property. However, the fact remains that the judgment and decree passed by learned trial Court came to be assailed by way of an appeal having been filed by the defendants. During proceedings of the appeal, learned District Judge visited the spot and called for record of execution petition No. 13/79 (Civil suit No. 172 decided on 7.6.77 titled Hiru vs. Moti Ram). Learned District Judge after having perused the record of execution petition, found it necessary to demarcate the property and accordingly, appointed Naib Tehsildar, Chamba, as a local commissioner, who submitted his report on 15.7.2003. Respondents/plaintiffs (Anirudh and others) filed their objections but learned District Judge without first deciding the objections filed by respondents proceeded to decide the main appeal. Ultimately vide judgment and decree dated 12.1.2004 he set aside the judgment and decree passed by learned trial Court.

5. Being aggrieved with aforesaid judgment passed by learned District Judge, respondents filed RSA No. 205/2004 titled Smt. Beena & ors. vs. Parbhat Bhushan & others before this Court, which was decided on 15.5.2017, wherein this Court, while setting aside the judgment and decree passed by the learned District Judge, remanded the matter back to it to first decide the objections preferred by the respondents to the report of local commissioner.

6. In this background, vide impugned order dated 22.8.2017, objections filed by the respondents to the report of local commissioner, dated 15.7.2003, came to be disposed of, whereby learned District Judge, after having perused material adduced on record by the respective parties, set aside the demarcation report dated 15.7.2003, prepared by the Naib Tehsildar, Chamba.

7. Mr. Kulbhushan Khajuria, learned counsel representing the petitioners, vehemently argued that the learned court below has fallen into grave error while entertaining objections to the report of the local commissioner filed by the respondents, especially when spot inspection was ordered to be conducted on the spot with the consent of the parties. Mr. Khajuria, further contended that the report submitted by local commissioner is legal and valid and same could not be discarded by the learned Court below. Mr. Khajuria, further contended that the local commissioner was appointed by the learned court to ascertain the factual position of the suit property, who, exactly on the basis of factual position existing on the spot, prepared report and such report could not be set aside. Lastly, Mr. Khajuria contended that the appellate court arrived at a wrong conclusion that the possession qua disputed premises was to be determined by the Court and not by the local commissioner because as per compromise on the basis of decree, defendants have been recorded as owner of that room. While referring to the report of the local commissioner, Mr. Khajuria contended that it has specifically come in his report that defendant Kamla is owner of the said room but the room is in possession of the plaintiffs, therefore, plaintiffs have filed the suit for possession, which was dismissed. Mr. Khajuria contended that once trial Court had come to specific conclusion that plaintiffs are not entitled for possession of the room in dispute, no reliance could be placed on the objections to the report of local commissioner filed by the respondents. While referring to the judgment passed by the trial court, learned counsel representing the petitioners contended that trial Court has categorically observed that demarcation of Khasra Nos. 560/1 and 560/2 was essential and accordingly on the request of parties, Naib Tehsildar, Chamba went to the spot and demarcated the disputed room and found that plaintiffs were already in possession of one room in the ground floor and that is why, trial court came to the conclusion that once local commissioner had given report that plaintiffs were already in possession of one room in the ground floor over Khasra No. 560/1, they could not be held entitled to decree of possession qua said room. Mr. Khajuria further contended that bare perusal of impugned order passed by the learned District Judge clearly suggests that it has virtually set aside the judgment passed by the trial court and as such, same being contrary to the material available on record deserves to be set aside.

8. Mr. Karan Sharma, learned counsel representing the respondents refuted the aforesaid contentions put forth on behalf of the petitioners and stated that this Court vide judgment dated 15.5.2017 passed in RSA No. 205 of 2004, specifically remanded the matter back to the learned District Judge to decide the objections having been filed by the respondents against the report of the local commissioner and as such, there is no force in the arguments of the learned counsel representing the petitioners that since local commissioner was appointed with the consent of the parties, learned District Judge could not entertain objections, if any, against the report submitted by the local commissioner. Mr. Sharma, further contended that it is admitted case of the parties that the suit property was partitioned amongst cosharers through decree passed by the learned Sub Judge, Chamba, on 7.6.1977 in Civil Suit No. 172 and thereafter, parties were put to their respective possession as per their entitlements. Learned counsel further contended that the judgment and decree passed by Senior Sub Judge, Chamba were not assailed in any competent Court of law and as such, same have attained finality and are binding upon the parties. Lastly Mr. Sharma, contended that since allotment of suit property to Hiru, predecessor-in-interest of the plaintiffs, was not assailed by the defendants by filing appeal and no challenge was laid to the delivery of possession to the plaintiffs in execution proceedings, there was no need to get the suit property demarcated afresh from local commissioner so as to report about shares and possession thereof. While inviting attention of this Court to the findings returned by this Court qua aforesaid aspect of the matter in RSA No. 205 of 2004 decided on 15.5.2017, learned counsel for the respondents contended that once learned District Judge

himself had visited the spot and had perused record of execution petition No. 13/79 filed in Civil Suit No. 172 decided on 7.6.1977, there was no occasion for him to appoint local commissioner to ascertain the factual position on the spot.

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

10. Having heard the parties and perused record, it is undisputed that suit property was partitioned amongst the cosharers through decree passed by Senior Sub Judge, Chamba on 7.6.1977 in civil suit No. 172. Similarly, perusal of copy of judgment passed by Senior Sub Judge dated 7.6.1977 clearly suggests that suit, filed by one Shri Hiru, predecessor-in-interest of the respondents, was decreed by the Court on the basis of admission made by the defendants, whereafter execution petition was filed by Hiru for implementation of the aforesaid judgment and decree passed by civil court. It also stands proved on record that in the execution petition, Khasra Nos. 559 and 560 alongwith other property were partitioned and Hiru was delivered possession of 1/3rd share in the suit property. In partition, Khasra No. 560/1 was allotted to Hiru and during execution petition, he was given the same, whereas Khasra No. 560/2 was allotted to the defendants/petitioners.

11. Prem Lal PW-2 retired Kanungo has categorically stated that suit property comprising of one room in ground floor of building denoted by Khasra No. 560/1 was allotted to the plaintiffs in partition proceedings and its possession was taken by them during execution petition. Aforesaid witness also made available on record, report Exhibit PW-2/A, prepared by Bhagwan Chand, Naib Tehsildar. It is quite apparent from the deposition of the aforesaid witness that he had gone to the spot where parties were delivered their respective possession. Report, Exhibit PW-2/B further reveals that suit property comprising of Khasra Nos. 559, 560 and 561 was partitioned on the spot and Khasra No. 560/1 measuring 36-1 square yards was allotted to Hiru, predecessor-in-interest of the plaintiffs, while property comprised in Khasra No. 560/2 measuring 72-1 square yards was allotted to Moti, predecessor-in-interest of the defendants. Similarly, entries made in Ext. P3 also suggest that property comprising of Khasra Nos. 558 and 560 was partitioned and Khasra No. 560/1 was allotted to Hiru, predecessor-in-interest of the petitioners during partition proceedings.

12. PW-6 Bhagwant, Bailiff of the Court has categorically stated that he had gone the spot and submitted report regarding delivery of the suit property to the plaintiffs, copy of which is on record as Exhibit PW-6/A.

13. After having carefully perused the material available on record, it is quite apparent that possession of 1/3rd share of building denoted by Khasra No. 560/1 i.e. one room was delivered to the respondents/plaintiffs namely Anirudh and others. Once respondents/plaintiffs were able to prove on record by leading cogent and convincing evidence that suit property consisting of one room had fallen to the share of Hiru i.e. their predecessor-in-interest, in partition proceedings, there was no occasion for the learned court below to get the suit property demarcated afresh through local commissioner. Since allotment of suit property to Hiru, predecessor-in-interest of the plaintiffs by way of judgment and decree passed by trial Court remained unchallenged, there was no necessity at all for the trial court to get the property demarcated through local commissioner to identify the property which was admittedly identified and delivered to the respective parties in the execution proceedings initiated at the behest of predecessor-in-interest of the respondents/plaintiffs.

14. After having perused the record and law on the point, this court finds no illegality in the findings returned by the learned District Judge to the effect that question of possession can only be determined by a court and same cannot be left with the local commissioner and as such, this Court sees no reason to differ with the findings returned by the learned District Judge, which are upheld.

15. In view of above, the present petition is dismissed. Pending applications, if any, are also disposed of. However, it is made clear that the observations made herein above shall

remain confined to the validity of order dated 22.8.2017 passed by learned District Judge, Chamba and same shall not have any bearing on the merits of the appeal pending before the aforesaid court, which shall be decided on its own merit, on the basis of material placed before the learned Court below.

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

Bhupinder Singh ...Appellant.
Versus
Gola Devi & Ors. ...Respondents.

RSA No.444 of 2005.
Reserved on: 27.2.2018.
Date of Decision : 13.3.2018.

Code of Civil Procedure, 1908- Order XXII Rule 6- Death of party after hearing arguments but before judgment- Held- Death of party in such circumstances is inconsequential – Judgment will have same effect as if it was passed before death. (Para-8)

Specific Relief Act, 1963- Section 34- Suit for declaration- Plaintiff claiming ownership in land to extent of 1/3rd share on basis of Will dated 16.12.1976 executed by her husband in her favour as well as in favour of his two sons from first wife- Also disputing unregistered Will dated 17.11.1991 purportedly executed by her husband in favour of two sons only to her exclusion and mutations attested thereon- Trail Court setting aside both Wills – However, suit decreed granting ownership to plaintiff by way of natural succession – Plaintiff not filing any appeal against findings returned qua Will dated 16.12.1976 – Defendants appeal dismissed by District Judge- Regular Second Appeal by defendants before High Court- On facts, unregistered Will relied upon by defendants purportedly executed by testator just three days before death – Defendants not producing this unregistered Will before revenue authority for mutation – Rather, producing earlier registered Will dated 16.12.1976, which was in favour of plaintiff as well as defendants - No reason mentioned in unregistered Will dated 17.11.1991 for cancelling earlier registered Will- Plaintiff found residing with testator till his death and served him – No explanation in later Will as why she was excluded from inheritance- Held- Execution of later unregistered Will dated 17.11.1991 is surrounded by mystery- Appeal dismissed- Judgments and decrees of lower courts upheld. (Para-11)

For the appellant Mr. Sanjeev Kuthiala, Advocate.
For the respondents Mr. Ajay Sharma, Advocate, for respondent No.1.
Respondent No.2 stands deleted.
Mr. Karan Singh Kanwar, Advocate, for respondents No.3 to 6.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

By way of the present appeal, the appellant has challenged the judgment passed by the Court of learned District Judge, Kullu, in Civil Appeal No.60 of 2004, dated 18.6.2005, vide which, the learned lower Appellate Court, has affirmed the judgment and decree passed by the learned Civil Judge (Senior Division), Lahaul & Spiti at Kullu, in Civil Suit No.20 of 1999, dated 3.6.2004.

2. Material facts necessary for adjudication of this Regular Second Appeal are that plaintiff/respondent (hereinafter referred to as 'plaintiff') maintained a suit for declaration against the defendant/appellant (hereinafter referred to as 'defendant') alleging that plaintiff-Shauni Devi, is owner-in-possession of land comprised in Khata No.671, Khatauni No.1258, Khasra Nos.1468, 1452, 1469, 1507, 1467, 1599 and 5096, kita 7, measuring 20-7-0 bighas and 1/6th share measuring 1-1-7 bighas, out of land comprised in Khata No.672, Khatauni No.1259, Khasra No.1466, measuring 6-10-0 bighas, situated in Phati Nathan, Kothi Naggar, Tehsil and District Kullu, (H.P) (hereinafter referred to as 'suit land') and on the basis of last Will dated 16.12.1976 executed by her husband, Chande Ram, as a result of which, mutation No.4194 and 4174 in favour of the defendants are illegal and void. As per the plaintiff, Shauni Devi, was legally wedded wife of Chande Ram and Gola Devi, was her daughter. At the very outset, the pedigree table of Chande Ram, is as under :

PEDIGREE TABLE

Chande Ram

|

Nanki Devi (1st wife dead) Shauni Devi (2nd wife now dead) (plaintiff)

| | Gola Devi

Mine Ram (defendant No.1 Mohar Singh (dead) Him Dassi (defendant No.2)

|

| | | |

Surinder Singh (defendant No.6) | Karan Singh (defendant No.3) | Virender Singh (defendant No.4) | Devender Singh (defendant No.5)

Defendant No.1-Mine Ram and Mohar Singh husband of defendant No.2 and father of defendants No.3 to 6, were sons of Chande Ram, from his earlier wife, namely, Nanki Devi, who had died long back before the marriage of Shauni Devi-plaintiff with Chande Ram. Gola Devi, was married during the life time of Chande Ram and after her marriage, she is residing in the house of her husband, Moti Ram. Chande Ram, during his life on 16.12.1976 executed Will in favour of Shauni Devi-plaintiff, defendant No.1 and Mohar Singh. Chande Ram, bequeathed all his cash in favour of defendant No.1 and Mohar Singh, in equal share and rest of the movable and immovable property including the suit land and *abadi* land etc. were bequeathed in favour of the plaintiff, defendant No.1 and Mohar Singh in equal share. After the death of Chande Ram, the suit property was inherited by the plaintiff-Shauni Devi, defendant No.1 and Mohar Singh in equal share, as a result of which, plaintiff became owner-in-possession of the suit land to the extent of 1/3rd share. Plaintiff-Shauni Devi being legally wedded wife of Chande Ram, had pre-existing right of maintenance out of the suit land and by virtue of the alleged Will 1/3rd share was bequeathed by Chande Ram in favour of the plaintiff-Shauni Devi in recognition of her pre-existing right of maintenance. Plaintiff-Shauni Devi was an illiterate, simpleton and rustic village lady and defendant No.1 and his brother Mohar Singh, after the death of Chande Ram, disclosed that mutation, has been attested and sanctioned on the basis of last Will dated 16.12.1976 in their names as well in the name of Shauni Devi. Mohar Singh, died on 26.6.1992 and has been succeeded by defendants No.2 to 6. Defendants No.1 to 6 in the first week of November, 1998 threatened to dispossess the plaintiff from her 1/3rd share in the suit land proclaimed that

plaintiff had no right, title or interest in the suit land. On the basis of said proclamation, she made enquiries from Patwari concerned and came to know that mutation has not been entered and attested on the basis of last Will dated 16.12.1976, but the same has been wrongly and illegally attested in favour of defendant No.1 and Mohar Singh to the exclusion of plaintiff-Shauni Devi, on the basis of unregistered Will, dated 17.11.1991, purportedly to have been executed by Chande Ram in favour of defendant No.1 and Mohar Singh. The alleged Will is a forged and fabricated document. The same has been fabricated by defendant No.1 and Mohar Singh, after the death of Chande Ram, in connivance with the scribe and marginal witnesses with an ulterior motive to grab her (plaintiff's) share in the suit land. Mutation No.4194, which has been sanctioned on the basis of alleged Will, is illegal and inoperative.

3. Defendants No.1 to 6 filed their joint written statement by raising preliminary objections qua limitation, estoppel, maintainability and valuation. On merits, plaintiff is admitted, as widow of late Chande Ram. The factum of execution of Will dated 16.12.1976 by Chande Ram, is also admitted. It is pleaded that plaintiff being second wife of Chande Ram and step mother of the defendants was not interested in the defendant to get their share out of estate left by their father Chande Ram. The Will dated 16.12.1976, is the result of undue influence. Chande Ram was not happy with the acts and conduct of plaintiff, as she used to forced him to deprive the defendants of his estate. Chande Ram, deposited Rs.76000/- in State Bank of India, Katrain Branch and an amount of Rs.14,000/- in Post Office Larankelo, in the name of plaintiff in lieu of her maintenance. Defendant No.1 Mine Ram and Mohar Singh, predecessor-in-interest of defendants No.2 to 6 used to serve their father Chande Ram and in lieu of such services rendered by them, Chande Ram, out of his free volition executed his last Will dated 17.11.1991 by revoking earlier Will dated 16.12.1976. Defendant No.1 Mine Ram and Mohar Singh were burdened with maintenance of Rs.200/- to the plaintiff. The mutation was rightly attested in their names, on the basis of last Will dated 17.11.1991 and as such, they are owner-in-possession of the suit land.

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

"1. Whether the Will dated 16.12.1976 executed by deceased Chande Ram in favour of parties is last and valid Will of the deceased ? OPP.

2. Whether the deceased Chande Ram had executed a last and valid Will dated 17.11.1991 in favour of defendant No.1 and Shri Mohar Singh, the predecessor-in-interest of defendants No.2 to 6 ? OPD.

3. Whether the suit is within limitation ? OPP.

4. Whether the plaintiff is estopped by her act and conduct from filing the present suit ? OPD.

5. Whether suit is not maintainable ? OPD.

6. Whether suit is not properly valued for the purpose of Court fee and jurisdiction ? OPD.

7. Relief".

5. The learned trial Court after deciding Issues No.1, 2 in negative, Issue No.3 in affirmative, Issues No.4 & 5 in negative, Issue No.6 not pressed, decreed the suit.

6. Feeling aggrieved thereby the defendants maintained first appeal before the learned District Judge, Kullu, assailing the findings of learned Trial Court below being against the law and without appreciating the evidence and pleading of the parties to its true perspective. The learned lower Appellate Court affirmed the findings of the learned Court below. Now, the appellant has maintained the present Regular Second Appeal, which was admitted for hearing on 27.4.2006 on the following substantial questions of law:

"1. Whether the suit was barred by time when instituted ?

2. Whether the "suspicious circumstances" noticed by the Courts below are real and, if so, do they make the execution of the Will, Ex.DW4/A, doubtful?"

7. Learned counsel appearing on behalf of the appellant has argued that the judgment and decree passed by the learned Trial Court on 3.6.2004 and defendant No.1-Mine Ram, died on 2.6.2004 and as per the Grounds of Appeal taken in the Regular Second Appeal, the appeal is required to be remanded back to the learned Trial Court to decide this question. On the other hand, learned counsel for the respondent has argued that there is no need to remand the present Regular Second Appeal.

8. I have considered the entire record carefully. The arguments before the learned Trial Court in the present case was heard on 29.5.2004 and thereafter, the judgment was reserved and it was listed for judgment on 1.6.2004, however the judgment could not be pronounced on 1.6.2004 and the same was pronounced on 3.6.2004. As far as the death of the party, during the pendency of case is concerned, the legal representatives are required to be brought on record, but there is a specific exception, provided under Order 22 Rule 6 of the Code of Civil Procedure, which is reproduced as under:

> "6. No abatement by reason of death after hearing- Notwithstanding anything contained in the foregoing rules, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment, but judgment may in such case be pronounced notwithstanding the death and shall have the same force and effect as if had been pronounced before the death took place."

The clear reading of this Rule shows that if the death took place in between the time, arguments were heard and judgment to be pronounced, the same will have the same force and effect, as if it had been pronounced before the death took place. In view of the clear provision, as contained in the Code of Civil Procedure, there is no need to go further, so this Court holds that death of Mine Ram-defendant No.1, on 2.6.2004 has no effect and it will be presumed that the judgment and decree passed by the learned Trial Court before the death of Mine Ram-defendant No.1 took place.

9. Learned counsel appearing on behalf of the appellant has now argued that the learned Trial Court has no occasion to discard the Will, as it was set out by the defendant, as the defendant has proved on record the Will in accordance with law, which was in their favour. He has further argued that the judgment and decree passed by the learned Trial Court and the findings so recorded by the learned lower Appellate Court against the appellant are required to be set aside. On the other hand, learned counsel appearing on behalf of the respondent has vehemently argued that there were two Wills and the earlier Will was a registered Will, which was executed in favour of three persons and the Will of defendants is unregistered Will, which infact has been prepared after the death of the executant, as it is unregistered Will replacing the registered Will. Therefore, after the death of the executant, it is the defendant, who has placed the registered Will before the Revenue authorities for its mutation. However, the learned Courts below have not relied upon any of the Will and so, the Will, which was earlier registered, has also been set aside, which was in favour of the plaintiff and the plaintiff has not assailed the same before the learned lower Appellate Court.

10. To appreciate the arguments of learned counsel appearing on behalf of the parties, I have gone through the record in detail.

11. At the very outset, the Will on which the defendants are relying is prepared, on a plain paper just few days before the death of executant because as per executant law has changed after the execution of the earlier Will and so, he is executing fresh Will. Now, this Will is required to be analyzed alongwith the facts. As far as the witnesses is concerned, the Will was handed over to the defendant and act of the defendant in not producing the Will, after the death of executant before the Revenue authorities and producing the earlier registered Will, which was in favour of the plaintiff shows that second Will was prepared by the defendants after the death of executant. Thereafter, the defendant producing unregistered Will, which was later in time, the Will in dispute prepared on a plain paper and the same is unregistered Will. Chande Ram was

having two wives and the plaintiff-Shauni Devi, is second wife and her daughter and the defendants are offerings his wife Nanki Devi. PW-2-Ved Parkash, proved on record Ex.PW2/A and Ex.PW2/B, copies of rapat No.466, dated 19.7.1992 and rapat No.150, dated 30.12.1991, respectively, which shows that both Will (s) were produced by the defendant before the Revenue authorities, earlier they produced the registered Will and thereafter unregistered Will, which was only in their favour, which creates a serious doubt regarding unregistered Will, which was later in time and so, the same seems to be prepared after the death of executant and the same Will is inexistence earlier, the defendant have produced the Will only before the Revenue authorities and not the registered Will, which was in their favour plaintiff 's also. Defendant No.1-Mine Ram, appeared as DW-7, deposed that Chande Ram was his father. The unregistered Will dated 17.11.1991 was executed by Chande Ram in the presence of marginal witnesses, namely, Bhawani Singh and Jai Chand. Such Will was scribed by Baldev Krishan, on the behest of Chande Ram. After writing the Will, the same was read over to the testator. Chande Ram admitted its contents to be correct and signed the same in the presence of witnesses, who signed the Will in the presence of executant. In his cross-examination, he has admitted that plaintiff-Shauni Devi and Chande Ram, lived together till the death of the latter. He denied that the Will Ex.DW4/A, has been prepared by them after the demise of Chande Ram. He does not know Mohar Singh had lodged a report with the Patwari with respect to the Will. Mine Ram (DW-7) produced the Will before the Patwari one week after the death of Chande Ram. He denied that the Will Ex.DW4/A has been fabricated by them with a view to usurp the share of the plaintiff. Ex.DW4/A, is the original unregistered Will dated 17.11.1991 allegedly executed by Chande Ram in favour of his sons. It was scribed by Baldev Krishan (DW-4) whereas Jai Chand (DW-5) is one of its marginal witnesses. DW-5, Jai Chand, after the Will was written, Chande Ram, handed over to his son Mohar Singh. He admitted that the plaintiff resided with Chande Ram till his end and served him. He admitted that the plaintiff and her daughter were not present at the time of attestation of mutation. The Will was written much earlier to the death of Chande Ram. DW-6, Chuni Singh, deposed that when the mutation on the basis of Will was sanctioned, the plaintiff and her daughter were present. However, they did not raise any objection in his presence. In his cross-examination, he has stated that the learned counsel of both the parties were also present at the time of mutation. There is no denial of the fact that a registered Will was executed way back in the year 1976 by Chande Ram in favour of his wife and sons i.e. defendant No.1 and Mohar Singh. The alleged Will came into existence just three days prior to the death of Chande Ram. There was no reason or occasion for the deceased to cancel a long standing registered earlier Will and execute an unregistered Will to supersede the same. It has come in evidence that Shauni Devi-plaintiff resided with Chande Ram and rendered the services till his end. Therefore, there was no reason for the deceased to ignore the plaintiff particularly when she was living with him and serving him. DW-4, Baldev Krishan, scribe of the alleged Will stated that Dambu Ram son of Mohar Singh, had come to call him for writing the Will. Further, DW-5-Jai Chand, during his cross-examination stated that after the Will Ex.DW4/A was written, it was handed over by Chande Ram to his son Mohar Singh. Ex.PW2/B, copy of rapat No.150, dated 30.12.1991, discloses that Mohar Singh went to the Halqua Patwari and produced registered Will dated 16.12.1976 before him for entering the mutation. Accordingly, mutation No.4194 was entered. This report was lodged by Mohar Singh after the alleged Will dated 17.11.1991 had seen the light of the day. If Chande Ram, infact executed the Will Ex.DW4/A and delivered it to his son Mohar Singh, then why the latter did not divulge the said fact before the Patwari at the time of lodging the report Ex.PW2/B. The Will Ex.DW4/A has been prepared by the defendants after his (Chande Ram's) death. DW-4 Baldev Krishan, scribe has admitted that spacing between signature of Chande Ram and words "*Basiyat Karta*" is larger, but refuted that the signature of deceased were already there on the paper. He has refuted that the signature of Chande Ram were obtained earlier than the writing of said paper. He has admitted that there is no vacant space between writing and signature of witness. If the Will Ex.DW4/A is perused, it definitely points out unnecessary and unexplained spacing between writing "*Basiyat Karta*" and signature of testator appended thereon, due to which, it could not be ruled out that signatures were obtained on a blank paper. The mutation No.4194, Ex.DA, came to be entered on the basis of Will dated

16.12.1976 and consequent rapat Ex.PW2/B, but the said mutation came to be attested and sanctioned on 10.12.1992 at place Laran Kelo, defendant No.1 produced unregistered Will dated 17.11.1991. The presence of Shauni Devi-plaintiff and her daughter Gola Devi has also been recorded. Chuni Lal, Numberdar, Jai Chand (DW-5) and Bhawani Dutt, have also been present. Mine Ram, produced unregistered Will dated 17.11.1991. Shauni Devi-plaintiff and Gola Devi raised objection and termed unregistered Will Ex.DW4/A, as illegal and forged one. DW-6 Chuni Lal, Numberdar, who was marked present in mutation Ex.DA, while appeared, as a witness has deposed that at the time of attestation of mutation on the basis of Will Shauni Devi and Gola Devi were present there, but they did not raise any objection. The said version of DW-6, is clearly against the recital made in mutation Ex.DA, which is relied upon by none else, but by the defendants and the recital made in the order Ex.DA by the learned Assistant Collector 2nd Grade, Kullu, renders the testimony of DW-6, as untruthful. Even, he has admitted that Chander Mohan Thakur, learned counsel, was present there on behalf of Shauni Devi-plaintiff. Similarly, DW-5 Jai Chand one of the attesting witness, who is also shown to be present at the time of attestation of mutation Ex.DA, in his cross-examination has stated that mutation was attested and sanctioned in his presence. He has admitted that Shauni Devi was also present at the time of attestation and sanction of mutation and also admitted that daughter of Shauni Devi was also present at the time of attestation and sanction of mutation, but they did not raise any objection to the attestation of mutation. In mutation Ex.DA, shows that DW-4 Baldev Krishan, was also present on the spot at the time of attestation of mutation, but when he appeared as DW-4, he has not testified as such. DW-7, in his cross-examination has refuted that Will Ex.DW4/A is forged one. He has stated that Will Ex.DW4/A was handed over by him to Patwari in the year 1991. The said fact is falsified by the entries made in rapat rojnamcha Ex.PW2/A and mutation Ex.DA. Had the said Will been produced by the defendant No.1 before Patwari in the year 1991, definitely rapat in rojnamcha would have been made in the same year, but rapat rojnamcha Ex.PW2/A was made on 19.7.1992 and on the basis of said rapat unregistered Will Ex.DW4/A was produced by defendant No.1 on 19.7.1992. The said facts leading to attestation and sanction of mutation and unexplained late production of Will Ex.DW4/A is one more suspicious circumstances, which shrouds the genuineness and due execution of Will and propounder of the Will i.e. defendants have failed to explain the same. The alleged Will Ex.DW4/A is stated to have been executed on 17.11.1991. Chande Ram, died on 20.11.1991 i.e. after short time from the date of execution of the alleged Will. DW-5, Jai Chand, has stated that Chande Ram was ill. The registered Will was executed on 16.12.1976. There is no evidence on record to show that his relation with Shauni Devi was strained, but to the contrary it has come in evidence that she was also maintaining deceased Chande Ram. The registered Will was not revoked by him for a period of about sixteen years and he never thought in terms of revoking the same till three days prior to his death. Shauni Devi, original plaintiff was the second wife of deceased Chande Ram and she resided with him. The said reason to debar her is not plausible and reasonable. As per condition of alleged Will Ex.DW4/A, the defendants were required to make payment of Rs.200/- each per month to Shauni Devi. The defendants have produced in evidence money order receipts Mark **A** to Mark **F** and money order form Ex.DW2/A to Ex.DW2/F. All money orders of Rs.600/- each are shown to have been sent on the same date i.e. on 15.6.1993 i.e. after the attestation of mutation Ex.DA and the dispute arose between the parties, which clearly shows malafide on behalf of the defendants that they wanted to pretend that were complying with the terms and conditions, as mentioned in Ex.DW4/A, but it cannot be ruled out in view of the said facts that the alleged Will Ex.DW4/A was manipulated by them after the death of Chande Ram and the said circumstances surrounds the due and proper execution of Will in question. The inheritance cannot be kept in abeyance. Neither due execution of Will Ex.PW3/A nor of Will Ex.DW4/A by Chande Ram has been proved, hence he would be deemed to have died intestate and the learned Trial Court has rightly held that his legal heirs would succeed to his estate in view of the intestate succession. Till the death of Chande Ram, he was owner-in- possession of the suit land and property. He died on 20.11.1991. The suit has been maintained on 6.1.1999. Nothing could be shown on behalf of the defendants, as to how the suit is barred by limitation. As far as the registered Will is concerned, original Will was not brought on record nor there was any secondary evidence led.

So, the findings recorded by the learned Trial Court regarding not believing the same cannot be said to be perverse. At the same point of time, the findings recorded by the learned Trial Court regarding the Will Ex.DW4/A, the same cannot be a genuine document and the same is forged one, as per the evidence, which has come on record. Accordingly, substantial question of law No.1, as framed by this Court, is answered holding that the Will was assailed at the earliest, as discussed hereinabove, when the defendants started asserting their exclusive right on the suit land and the plaintiff came to know about the forged act of the defendants immediately she maintained the suit, so the suit is within limitation and the suit cannot be termed as time barred. The suspicious circumstances noticed by the learned Courts below are real one and Will Ex.DW4/A, is a forged and fabricated document prepared after the death of executant and so, substantial question of law No.2, is answered accordingly. Both the learned Courts below have correctly appreciated the oral as well as documentary evidence led by the parties and there is no need to interfere with the well reasoned judgments and decrees passed by both the learned Courts below.

12. In view of the above discussion, the appeal of the appellant is without merit, deserves dismissal and is accordingly dismissed. In the peculiar facts and circumstances of the case, parties are left to bear their own costs. Pending application (s), if any, shall also stands disposed of.

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

Rattan Chand ....Appellant
Versus
Piar Singh ....Respondent

RSA No. 455 of 2007
Decided on: March 13, 2018

Registration Act, 1908- Sections 17 and 49- Plaintiff setting up title in abadi-deh land on basis of an unregistered exchange deed purported to have been executed in his favour in lieu of a share in ancestral house- Defendant denying exchange deed- Trial Court dismissed suit - In Appeal, District Judge decreed suit by setting aside judgment and decree of Trial Court – Regular Second Appeal - Held- An unregistered document which is mandatorily required to be registered under Section 17 of Act does not convey any title- Exchange deed purportedly created title in immovable property valuing more than Rs.100/- and required registration under Act- Being unregistered document, it could not have been looked in evidence by Appellate Court – Appeal allowed – Judgment and decree of District Judge reversed. (Para-15)

Cases referred:
Piar Chand & Others versus Sant Ram & Others, I L R 2017 (III) HP 251
Suraj Lamp and Industries Private Limited through Director vs. State of Haryana and another, (2009) 7 SCC 323
SMS Tea Estates Private Limited vs. Chandmari Tea Company Private Limited, (2011) 14 SCC 66
M/s. Kamakshi Builders vs. M/s. Ambedkar Educational Society & Ors., AIR 2007 SC 2191
Satyawan and others vs. Raghubir, AIR 2002 Punjab & Haryana 290

For the appellant: Mr. Ajay Sharma, Advocate.
For the respondent: Mr. Bhupender Gupta, Senior Advocate with Ms. Rinki Kashmiri, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

Respondent-plaintiff (hereinafter referred to as, 'plaintiff') namely Piar Singh filed a suit i.e. Civil Suit No. 549/95/94 for declaration to the effect that he has become owner of the land comprising of Khata No. 238, Khatauni No. 585, Khasra Nos. 1213 and 1215, measuring 0-40-40 H.M. situate in Village and Mauza Barot, Sub Tehsil Fatehpur, District Kangra, Himachal Pradesh (hereinafter, 'suit land'). Plaintiff further averred in the plaint that the parties are closely related to each other being real brothers and have their residential house and vacant land in Khasra No. 1988, within Lal Lakir *Abadi* at Village Barot. In the year 1983, appellant-defendant (hereinafter, 'defendant') exchanged the suit land with the plaintiff. Plaintiff relinquished his share in the ancestral house and vacant land adjoining to that ancestral house in the *Abadi Tika*. It is further averred in the plaint that the defendant became owner-in-possession of the land and ancestral house alongwith vacant land and plaintiff became owner of the land in dispute but the entries in the revenue record were not changed. It is also averred in the plaint that the defendant admitted before the Panchayat factum of exchange and executed a writing to this effect, which was duly signed by the parties and other witnesses on 6.2.1983 (Exhibit PW-2/A). Plaintiff also averred that the defendant under the garb of wrong entries in his favour in the revenue record is trying to interfere in the suit land and unlawfully claims himself to be owner of the suit land and has moved an application for partition of the land in dispute. Plaintiff also alleged that the defendant also threatened the plaintiff to dispossess him forcibly from the suit land qua which the defendant has no right. It is averred in the plaint that defendant threatened to alienate the suit land on the basis of wrong entries existing in his favour. Defendant was orally requested to desist from his unlawful deeds but since the defendant refused to admit the claim of the plaintiff, suit detailed herein above came to be filed by the plaintiff.

2. Resisting the suit of the plaintiff, defendant refuted the claim of the plaintiff by filing written statement, taking therein preliminary objections of maintainability, locus standi and cause of action. Defendant further claimed that he is owner-in-possession of ½ share of the suit land and he never exchanged his share with the plaintiff. Defendant though admitted averments contained in para Nos. 1 and 2 of the plaint, but denied rest of the paras. He categorically denied that exchange had taken place between the parties and sought dismissal of the suit.

3. Learned trial Court, on the basis of pleadings of the parties, framed following issues on 23.1.1998:

"1. Whether the plaintiff has become owner of ½ share in the suit land by way of exchange as alleged? – OPP

2. Whether the suit of the plaintiff is not legally maintainable, as alleged? – OP

3. Whether the plaintiff has no enforceable cause of action against defendant, as alleged? –OPD

4. Relief."

4. Subsequently, learned trial Court, vide judgment and decree dated 29.4.2005 dismissed the suit of the plaintiff and held that the defendant has every right to get his share by metes and bounds. Learned trial Court further held that the plaintiff can not claim his title over the suit land solely on the basis of document, exhibit PW-2/A. Being aggrieved and dissatisfied with the aforesaid judgment and decree passed by learned trial Court, plaintiff filed an appeal under Section 96 CPC before the learned District Judge, Kangra at Dharamshala, which came to be registered as Civil Appeal No. 94-J/XII-2005. Learned District Judge vide judgment and decree dated 29.8.2007, allowed the appeal having been preferred by the plaintiff and set aside the judgment and decree dated 29.4.2005 passed by Civil Judge (Senior Division), Jawali, District Kangra, HP in Civil Suit No. 549/95(1994), consequently decreeing the suit of the plaintiff. learned first appellate Court declared plaintiff to be sole owner-in-possession of the land

comprised in Khasra Nos. 1213 and 1215, measuring 0-40-40 H.M. and entry to the contrary showing defendant as owner to the extent of half share in the aforesaid land was declared illegal.

5. In the aforesaid background, defendant has approached this Court by way of present Regular Second Appeal, praying therein for restoration of judgment and decree dated 29.4.2005 passed by the learned Civil Judge (Senior Division), Jawali, after setting aside judgment and decree dated 29.8.2007 passed by learned District Judge, Kangra at Dharamshala, in the appeal having been filed by the plaintiff.

6. Appeal at hand came to be admitted on 24.6.2008, on the following substantial questions of law:

> "1. Whether the judgment of learned Appellate Court can be sustained when the document Ex. PW2/A has not been signed by both the parties?
>
> 2. Whether the judgment and decree of learned Appellate Court is the result of misreading of evidence particularly Ex. PW2/A and Ex. D4?"

7. Mr. Ajay Sharma, learned counsel representing the defendant, while referring to the impugned judgment and decree passed by the learned first appellate Court vehemently argued that the same 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, same can not be allowed to sustain. Mr. Sharma, further contended that bare perusal of evidence available on record clearly suggests that the learned first appellate Court failed to appreciate evidence as well as law on the point, in right perspective, as a result of which, erroneous findings to the detriment of the plaintiff have come on record. While referring to the replication having been filed by the plaintiff to the written statement filed by the defendant, Mr. Sharma, contended that there is no rebuttal to the averments contained in the written statement, as such, averments contained in written statement ought to have been taken to be true by the court below, in terms of the provisions contained in Order 8 Rule 5 CPC. Mr. Sharma, further contended that exchange of land having value more than Rs.100/-, could only be done by way of a registered document but in the case at hand, alleged exchange dated 6.2.1983 (exhibit PW-2/A) being unregistered document, ought not have been relied upon by the learned first appellate Court, while ascertaining correctness of the same, as such, findings qua the same being contrary to law deserve to be quashed and set aside. Lastly, Mr. Sharma contended that exchange deed, exhibit PW-2/A has not been proved in accordance with law, as such, same could not be taken into consideration by the learned first appellate Court. He further contended that there is no evidence available on record that exchange deed dated 6.2.1983 exhibit PW-2/A was ever produced by plaintiff before any revenue officer for effecting change in the revenue record, which itself suggests that no exchange deed was ever effected inter se parties. Mr. Sharma further contended that it is quite apparent from the record that in the year 1999, plaintiff had mortgaged half share of the suit land with the Bank for raising loan. Had whole of the land been with the plaintiff on the basis of exchange deed, there was no question of mortgaging his share only, which action of the plaintiff certainly suggests that exchange deed dated 6.2.1983, exhibit PW-2/A is a concocted document prepared by plaintiff in connivance with the marginal witnesses. He further contended that aforesaid aspect of the matter has been totally ignored by the learned first appellate Court and as such, judgment passed by it deserves to be set aside.

8. While placing reliance upon judgment rendered by this Court in **Piar Chand & Others** versus **Sant Ram & Others**, (RSA No. 23 of 2006) decided on 5.5.2017, Mr. Sharma contended that title of immovable property having value more than Rs.100/-, can only be transferred by way of a registered document, as per Section 17 of the Registration Act, 1908. He further contended that it has been held in the aforesaid judgment rendered by this Court that no document required by Section 17 to be registered shall, affect any immovable property comprised therein or received as evidence of any transaction affected such property, unless it has been registered. Lastly, Mr. Sharma contended that though there is no evidence available on record that exhibit PW-2/A was executed by defendant but even if it is presumed that it was executed *inter se* parties, it being an unregistered document, could not be looked into in evidence by the

learned first appellate Court, as such, judgment of the learned Court below being contrary to aforesaid law laid down by this Court, deserves to be set aside.

9. Mr. Bhupender Gupta, learned Senior Advocate duly assisted by Ms. Rinki Kashmiri supported the judgment and decree passed by the learned first appellate Court and contended that there is no illegality or infirmity in the same, rather, perusal of same suggests that each and every aspect of the matter has been dealt with meticulously, as such, there is no scope for interference by this Hon'ble Court. While refuting the contention put forth by the learned counsel representing the defendant that no evidence worth the name is available on record suggestive of the fact that exhibit PW-2/A was executed by defendant in favour of the plaintiff, learned senior counsel contended that bare perusal of evidence led on record by plaintiff proves it beyond reasonable doubt that on 6.2.1983, defendant exchanged suit land with the plaintiff by way of exchange deed and in lieu of same, plaintiff relinquished whole of share in the ancestral house and vacant land adjoining to the house in *Abadi Tika*. Mr. Gupta, learned senior counsel further contended that exhibit PW-2/A was not required to be registered since exchange of suit land between the parties was an oral exchange. While making this Court to travel through the statement of PW-2, Chain Singh son of Shri Chuha Ram, learned senior counsel contended that it stands duly proved on record that PW-2 had scribed exhibit PW-2/A, on the instructions of defendant. He also invited attention of this Court to the statement of PW-3 Babu Ram, who identified his signatures on exhibit PW-2/A. While refuting the contention of learned counsel representing the defendant that exchange was necessarily required to be registered, learned senior counsel contended that the writing exhibit PW-2/A dated 6.2.1983 was not pleaded or set up by plaintiff as exchange or relinquishment deed in the plaint, rather plaintiff by way of leading cogent and convincing evidence has successfully proved on record that parties mutually exchanged the land, whereafter arrangement arrived *inter se* parties was duly reduced into writing before the Gram Panchayat. Mr. Gupta, learned senior counsel pleaded that exhibit PW-2/A was admitted by defendant as exchange between the parties, which had already taken place between them. Learned senior counsel further contended that once factum with regard to exchange, wherein defendant agreed to exchange suit land with plaintiff, has been duly proved in accordance with law by the plaintiff by leading cogent and convincing evidence on record, there is no question of ignoring same being un-registered document, rather, same was rightly taken into consideration by the learned first appellate Court being oral exchange. While placing reliance upon the judgments relied upon by the learned District Judge, while reversing findings returned by learned trial Court, learned senior counsel reiterated that relinquishment of share in favour of a family member need not be evidenced by a document in writing, rather it can be inferred even from the circumstances.

10. With the aforesaid submissions, learned senior counsel sought dismissal of the appeal being devoid of any merit. However at this stage, it may be noticed that learned senior counsel was unable to dispute/distinguish the law laid down by this Court in **Piar Chand's** case (supra), wherein admittedly, this Court taking note of the judgments rendered by the Hon'ble Apex Court i.e. **Suraj Lamp and Industries Private Limited through Director** vs. **State of Haryana and another,** (2009) 7 SCC 323**, SMS Tea Estates Private Limited** vs. **Chandmari Tea Company Private Limited**, (2011) 14 SCC 66, **M/s. Kamakshi Builders** vs. **M/s. Ambedkar Educational Society & Ors.**, AIR 2007 SC 2191 and **Satyawan and others** vs. **Raghubir**, AIR 2002 Punjab & Haryana 290, has categorically held that title of an immovable property having value more than Rs.100/- can only be transferred by way of a registered document as provided under Section 17 of the Registration Act, 1908.

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

12. In nutshell, in the case at hand, plaintiff has asserted his title on the suit land merely on the basis of exchange effected between the parties by way of written document i.e. exhibit PW-2/A dated 6.2.1983. Defendant while denying execution of this document had sought assistance of this Court for getting his signatures compared with his admitted signatures but

record reveals that despite there being application filed by defendant, no steps were taken for getting signatures of defendant on document, exhibit PW-2/A compared from handwriting expert. Though, plaintiff with a view to prove execution of aforesaid document has adduced on record oral evidence but that may not be very crucial to ascertain validity and legality, if any, of the exchange deed dated 6.2.1983 allegedly executed between plaintiff and defendant in the given facts and circumstances of the case. Plaintiff placed on record copy of Jamabandi for the year 1992-93 pertaining to the suit land and *Abadi Deh* land (Ext. P2 and Ext. P3), copy of missal hakiyat for the year 1983 (Ext. P4), copy of allotment (Ext. P1), whereas, defendant has placed on record copy of Jamabandi for the year 1977-78 pertaining to suit land and *Abadi Deh* land (Ext. D1 and Ext. D3) and certificate from the Administrative Officer showing presence of defendant at his place of posting (Ext. D4) on 6.2.1983 i.e. date of execution of exchange exhibit PW-2/A. Apart from above, plaintiff has also led oral evidence to prove execution of exchange exhibit PW-2/A, whereas defendant, while placing reliance upon Ext. D4 i.e. letter allegedly issued by Administrative Officer, made a serious attempt to prove on record that he was present at the place of his posting on 6.2.1983, on which date allegedly the exchange deed exhibit PW-2/A was executed. After having carefully perused exhibit PW-2/A i.e. exchange deed, this Court finds considerable force in the arguments of learned counsel representing defendant that not much reliance, if any, could be placed upon the same by the learned first appellate Court, being an unregistered document.

13. Question, whether unregistered document, which purports or intends to create title, can be read in evidence, has been elaborately dealt with by this Court in **Piar Chand's** case (supra) and this Court drawing strength from the judgment passed by Hon'ble Apex Court has categorically held that title of an immovable property having value more than Rs.100/- can only be transferred by a registered document as provided under Section 17 of the Registration Act. It would be profitable to take note of following paras of aforesaid judgment:

> ***"21.*** *After having carefully perused the pleadings adduced on record by the defendants in shape of written statement as well as oral evidence in the shape of DW-1 to DW-4, it can safely be inferred that claim of the plaintiff as put forth in the plaint was never sought to be refuted by the defendants on the ground that they had acquired title to the extent of ½ share of the suit property by virtue of 'Azadinama' as referred in Missal haquiat Ex.P-1. It emerge from the statement of aforesaid defendants witnesses that A.D.M., Bilaspur had directed Gram Panchayat, Kuh Majhwar to effect partition of suit land and houses situated therein between Munshi Ram and the defendants, but this Court was unable to lay its hands to any document adduced on record by either of the parties from where it could be inferred that how matter with regard to partition of the suit land landed up before A.D.M. Bilaspur. Defendants by way of partition deed Ex.DW-3/A made an endeavour to prove that on 15.5.1994 Gram Panchayat had effected partition interse parties qua suit land as well as houses existing thereon. But, this Court was unable to find mention, if any, with regard to order passed by A.D.M., Bilaspur. In the alleged partition deed Ex.DW-3/A, it was only mentioned that Gram Panchayat on 15.5.1994 visited the site to effect partition in terms of orders passed by A.D.M., Bilaspur. After carefully perusing the pleadings as well as evidence on record, be it ocular or documentary led on record by the defendants, this Court sees substantial force in the arguments made by learned counsel representing the plaintiff that since no plea of 'Azadinama'/relinquishment having been made by the plaintiff in favour of defendants was raised, learned trial Court rightly not framed issue qua the same and proceeded to decide the case on the basis of pleadings as well as evidence adduced on record by the respective parties. As clearly emerged from the evidence of defendant witnesses, as have been discussed hereinabove, defendants have not been able to specifically prove that on what basis they became owners to the extent of ½ share in the suit land. DW-1, defendant Sant Ram himself admitted that entire suit land was granted as a Nautor to Munish Ram in the year 1947 by erstwhile Ruler of Bilaspur Estate and since then it is coming in the possession of Munshi Ram. Defendant No.1 also admitted that Munshi Ram had not alienated the suit land. If the aforesaid version of*

defendant is accepted, there is no explanation worth the name, if any, rendered on record by the defendants that in what manner they came to be owners to the extent of ½ share of the suit land. Though it is well settled that Courts below while adjudicating claim of the parties cannot go beyond the pleadings, but, in the instant case learned first appellate Court while holding the defendants to be owners to the extent of ½ share of the suit land heavily placed reliance on Ex.P-1. True, it is, that perusal of Ex.P-1 i.e. Misslahaquiat suggests that the plaintiff Munshi Ram had relinquished his ½ share of suit land by way of 'Azadinama' in favour of defendants vide mutation No.148, dated 12.7.1968. The aforesaid factum of having effected mutation in favour of the defendants further gets corroborated by Ex.DX, which was subsequently placed on record by the defendants during the pendency of first appeal, perusal of which suggests that on 12.7.1968 mutation Ex.DX was attested in favour of defendants on the basis of 'Azadinama'/relinquishment qua the immovable property. Now, question which requires to be considered by this Court is that, whether mutation could be attested in favour of defendants on the basis of oral 'Azadinama' or statement having been made by the plaintiff at the time of alleged mutation. In the instant case, there is no document led on record by either of the parties suggestive of the fact that the plaintiff, while relinquishing his ½ share in the suit property, had executed registered relinquishment deed, if any.

22. *At this stage, this Court deems it fit to take note of Sections 17 and 49 of the Registration Act, 1908, which is reproduced hereinbelow:-*

"17. Documents of which registration is compulsory.—

(l) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:—

(a) instruments of gift of immovable property;

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and

(d) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent;

[1][(e) non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property:]

Provided that the [2][State Government] may, by order published in the [3][Official Gazette], exempt from the operation of this sub-section any lease executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees.

[4] [(1A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of section 53A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and Other Related laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said section 53A.]

(2) Nothing in clauses (b) and (c) of sub-section (l) applies to—

(i) any composition deed; or

(ii) any instrument relating to shares in a joint stock Company, notwithstanding that the assets of such Company consist in whole or in part of immovable property; or

(iii) any debenture issued by any such Company and not creating, declaring, assigning, limiting or extinguishing any right, title or interest, to or in immovable property except in so far as it entitles the holder to the security afforded by a registered instrument whereby the Company has mortgaged, conveyed or otherwise transferred the whole or part of its immovable property or any interest therein to trustees upon trust for the benefit of the holders of such debentures; or

(iv) any endorsement upon or transfer of any debenture issued by any such Company; or

(v) [5][any document other than the documents specified in sub-section (1A)] not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immovable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest; or

(vi) any decree or order of a Court [1] [except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding]; or

(vii) any grant of immovable property by [2][Government]; or

(viii) any instrument of partition made by a Revenue-Officer; or

(ix) any order granting a loan or instrument of collateral security granted under the Land Improvement Act, 1871, or the Land Improvement Loans Act, 1883; or

(x) any order granting a loan under the Agriculturists, Loans Act, 1884, or instrument for securing the repayment of a loan made under that Act; or

[3][(xa) any order made under the Charitable Endowments Act, 1890, (6 of 1890) vesting any property in a Treasurer of Charitable Endowments or divesting any such Treasurer of any property; or]

(xi) any endorsement on a mortgage-deed acknowledging the payment of the whole or any part of the mortgage-money, and any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage; or

(xii) any certificate of sale granted to the purchaser of any property sold by public auction by a Civil or Revenue-Officer. [4][Explanation.—A document purporting or operating to effect a contract for the sale of immovable property shall not be deemed to require or ever to have required registration by reason only of the fact that such document contains a recital of the payment of any earnest money or of the whole or any part of the purchase money.]

(3) Authorities to adopt a son, executed after the 1st day of January, 1872, and not conferred by a will, shall also be registered. … … … … …"

Section 49 of the Registration Act, 1908 reads as under:-

"49. Effect of non-registration of documents required to be registered.—No document required by section 17 [1][or by any provision of the Transfer of Property Act, 1882 (4 of 1882)], to be registered shall—

(a) *affect any immovable property comprised therein, or*

(b) *confer any power to adopt, or*

(c) *be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered: [1][Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3 of 1877) [2,3] [***] or as evidence of any collateral transaction not required to be effected by registered instrument.]… … … …"*

23. *Perusal of aforesaid Section 17 clearly suggests that document/instrument, which intends/purports to create right/title to an immovable property having value of Rs.100/- should be registered. Similarly, perusal of Section 49 of the Act suggests that documents, which are required to be registered under Section 17 shall not affect any immovable property; comprised therein or confer any power to adopt or to receive any evidence to any transaction affecting the said property or conferring power unless it has been registered.*

24. *After having carefully perused aforesaid provisions of law, this Court is of the view that Ex.P-1 as well as Ex.DX, which were admittedly not registered documents, as prescribed/defined under Section 17 of the Act, could not be read in evidence by learned first appellate Court, especially, in the absence of any registered relinquishment deed made by the plaintiff in favour of defendant No.1.*

25. *As per Section 17 of the aforesaid Act, any document or instrument, which purports or intends to create title should be registered and in case same is not registered, it would not affect any immovable property comprised therein or moreover it could not be allowed as evidence of any transaction affecting such property.*

26. *In this regard, this Court deems it fit to rely upon the judgment passed by Hon'ble Apex Court in* ***Suraj Lamp and Industries Private Limited Through Director vs. State of Haryana and Another, (2009)7 SCC 363,*** *wherein the Hon'ble Apex Court has held as under:-*

"15. The Registration Act, 1908, was enacted with the intention of providing orderliness, discipline and public notice in regard to transactions relating to immovable property and protection from fraud and forgery of documents of transfer. This is achieved by requiring compulsory registration of certain types of documents and providing for consequences of non-registration.

16. Section 17 of the Registration Act clearly provides that any document (other than testamentary instruments) which purports or operates to create, declare, assign, limit or extinguish whether in present or in future "any right, title or interest" whether vested or contingent of the value of Rs.100 and upwards to or in immovable property.

17. Section 49 of the said Act provides that no document required by Section 17 to be registered shall, affect any immovable property comprised therein or received as evidence of any transaction affected such property, unless it has been registered. Registration of a document gives notice to the world that such a document has been executed.

18. Registration provides safety and security to transactions relating to immovable property, even if the document is lost or destroyed. It gives publicity and public exposure to documents thereby preventing forgeries and frauds in regard to transactions and execution of documents. Registration provides information to people who may deal with a property, as to the nature and extent of the rights which persons may have, affecting that property. In other words, it enables people to find out whether any

particular property with which they are concerned, has been subjected to any legal obligation or liability and who is or are the person/s presently having right, title, and interest in the property. It gives solemnity of form and perpetuate documents which are of legal importance or relevance by recording them, where people may see the record and enquire and ascertain what the particulars are and as far as land is concerned what obligations exist with regard to them. It ensures that every person dealing with immovable property can rely with confidence upon the statements contained in the registers (maintained under the said Act) as a full and complete account of all transactions by which the title to the property may be affected and secure extracts/copies duly certified. (pp.367-368)

27. *Perusal of aforesaid law, having been laid by Hon'ble Apex Court, clearly suggests that title of immovable property, having value of more than Rs.100/-, can only be transferred by registered documents, as provided under Section 17 of the Registration Act, 1908. Similarly, it also emerge from the aforesaid judgment that no document as required by Section 17 to be registered shall, affect any immovable property comprised therein or received as evidence of any transaction affected such property unless it is registered.*

28. *Reliance is also placed upon* ***SMS Tea Estates Private Limited vs. Chandmari Tea Company Private Limited, (2011)14 SCC 66****, wherein the Hon'ble Apex Court has held as under:*

> *"11. Section 49 makes it clear that a document which is compulsorily registrable, if not registered, will not affect the immovable property comprised therein in any manner. It will also not be received as evidence of any transaction affecting such property, except for two limited purposes. First is as evidence of a contract in a suit for specific performance. Second is as evidence of any collateral transaction which by itself is not required to be effected by registered instrument. A collateral transaction is not the transaction affecting the immovable property, but a transaction which is incidentally connected with that transaction. The question is whether a provision for arbitration in an unregistered document (which is compulsorily registrable) is a collateral transaction, in respect of which such unregistered document can be received as evidence under the proviso to section 49 of the Registration Act. (p.71)*

29. *In* ***M/s.Kamakshi Builders vs. M/s. Ambedkar Educational Society & Ors., AIR 2007 SC 2191****, the Hon'ble Apex Court has held:*

> *"24. Acquiescence on the part of Respondent No.3, as has been noticed by the High Court, did not confer any title on Respondent No.1. Conduct may be a relevant fact, so as to apply the procedural law like estoppel, waiver or acquiescence, but thereby no title can be conferred.*
>
> *25. It is now well-settled that time creates title.*
>
> *26. Acquisition of a title is an inference of law arising out of certain set of facts. If in law, a person does not acquire title, the same cannot be vested only by reason of acquiescence or estoppel on the part of other.*
>
> *27. It may be true that Respondent No.1 had constructed some buildings; but it did so at its own risk. If it thought that despite its status of a tenant, it would raise certain constructions, it must have taken a grave risk. There is nothing on record to show that such permission was granted. Although Respondent No.1 claimed its right, it did not produce any document in that behalf. No application for seeking such permission having been filed, an adverse inference in that behalf must be drawn."(p.2196)*

30. *In* ***Satyawan and others vs. Raghubir, AIR 2002 Punjab and Haryana, 290,*** *the Hon'ble Court has held as under:-*

"18. It was submitted that there is no difference between exchange and sale. Except that, in sale, title is transferred from the vendor to the vendee in consideration for price paid or promised to be paid. In exchange, the property of 'X' is exchanged by "A" with property "Y" belonging to "B". In this manner, the property is received in exchange of property. There is transfer of ownership of one property for the ownership of the other. It was submitted that prior to when decree dated 20.10.1992 was not passed, there was no title of "A" in property "Y" and there was no title of "B" in property "X". It was submitted that for the first time, the right was created in immovable property by decree and, therefore, that decree required registration. It was submitted that if there was no pre-existing right in the property worth more than Rs.100/- and the right was created in the immovable property for the first time by virtue of decree, that decree would require registration. In my opinion, oral exchange was not permissible in view of the amendment of Section 49 of the Registration Act brought about by Act No. 21 of 1929, which by inserting in Section 49 of the Registration Act the words "or by any provision of the Transfer of Property Act, 1882" has made it clear that the documents of which registration is necessary under the Transfer of Property Act but not under the Registration Act falls within the scope of Section 49 of the Registration Act and if not registered are not admissible as evidence of any transaction affecting any immovable property comprised therein, and do not affect any such immovable property. Transaction by exchange which required to be affected through registered instrument if it was to affect any immovable property worth Rs.100 or more."(p.297)

14. It is quite apparent from the aforesaid exposition of law that exchange deed exhibit PW-2/A being an unregistered document could not be looked in evidence by the learned first appellate Court, while ascertaining correctness of the claim put forth by the plaintiff in his plaint. Even if findings returned by the learned first appellate Court qua entitlement of plaintiff to suit property on the basis of aforesaid document is examined and tested on the touchstone of Section 17 of the Act *ibid*, by no stretch of imagination same can be held to be valid and in accordance with law. There is no valid exchange deed adduced on record by the plaintiff to prove his claim with regard to his having acquired share in the suit property and as such, learned first appellate Court has gravely erred in placing undue reliance upon Exhibit PW-2/A. Moreover, there appears to be considerable force in the arguments of Mr. Ajay Sharma, learned counsel representing the defendant that exchange deed dated 6.2.1982 exhibit PW-2/A was never placed before the revenue authorities for effecting change in the revenue record and in this regard there is no explanation rendered on record by the plaintiff, which certainly creates doubt with regard to genuineness and correctness of the aforesaid document.

15. Consequently, in view of detailed discussion made hereinabove as well as law laid down by this Court in **Piar Chand'**s case (supra), it is reiterated that no immovable property having value more than Rs.100/- can be relinquished/exchanged without there being a registered document, as such, findings returned by the learned first appellate Court being contrary to the provisions of law as contained under Sections 17 and 49 of the Registration Act, 1908 and judgment rendered by this Court in **Piar Chand**'s case (supra), can not be allowed to sustain. Since this Court has categorically held that exhibit PW-2/A being an unregistered document could not be seen in evidence, this court sees no reason to refer to oral evidence led on record by the plaintiff in support of his claim. Otherwise, this court having perused material available on record has no hesitation to conclude that learned first appellate Court has not only misread the evidence particularly Exhibit PW-2/A and Exhibit D4, rather has failed to take cognizance of provisions contained in Sections 17 and 49 of Registration Act, 1908, as a consequence of which erroneous findings to the detriment of the defendant have come on record. Substantial questions of law are answered accordingly.

16. In view of detailed discussion made herein above, present appeal is allowed. Judgment and decree dated 29.8.2007 passed by the learned District Judge, Kangra at Dharamshala in Civil Appeal No. 94-J/XIII-2005 are set aside. Judgment and decree dated 29.4.2005 passed by learned Civil Judge (Senior Division), Jawali, District Kangra, Himachal Pradesh in Civil Suit No. 549/95/94 are restored. Suit of the plaintiff is dismissed.

Pending applications, if any, are disposed of.

****

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

Court on its own motion ....Petitioner
Versus
State of H.P. & Others ....Respondents

CWPIL No.65 of 2017
Date of decision: 14.03.2018

Constitution of India, 1950- Article 226- **Drugs and Cosmetics Act, 1940 (D & C Act)-** Public Interest Litigation- High Court taking suo moto cognizance on news item regarding filing of charge-sheets in just three out of two hundred cases registered under D & C Act in District Kangra - Police taking plea that after registration of cases, charge-sheet could be filed for offences under D & C Act by Drug Inspectors only – Only three Drug Inspectors were posted in district Kangra- Himachal Pradesh Drugs and Cosmetics Amendment Bill, 2016 conferring more powers to police to deal with cases under Act pending before Central Government for approval- Petition disposed of with directions to State Government to pursue follow up action with Government of India, so that amendments in the Act are carried at the earliest. (Para-30)

Cases referred:
Bachpan Bachao Andolan vs. Union of India & Others, (2017)1 SCC 653
State of Gujarat vs. Kishanb hai and others, (2014)5 SCC 108

For the Petitioners: Mr.Satyen Vaidya, Senior Advocate as Amicus Curiae with Mr.Vivek Sharma, Advocate.
For Respondents-State: Mr.Ashok Sharma, Advocate General with Mr.Adarsh K.Sharma, Additional Advocate General and Mr.J.K. Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

Per Sandeep Sharma, J.

The news item captioned as ***"Charge sheet filed in just 3 out of 200 cases"***, published in daily English News Paper 'The Tribune' on 26.5.2017, wherein it is/was reported that in last one year Kangra Police had launched a campaign against drug peddlers and psychotropic drug sellers and in this process about 200 cases were registered by the police under the Drugs and Cosmetics Act against those selling of psychotropic drugs in Kangra District; huge quantities of psychotropic drugs were also seized, but despite registration of sizeable number of cases, charge sheet against erring persons came to be filed in three cases only, prompted this Court to take the sue motu cognizance of the matter and accordingly present Public Interest Litigation came to be registered.

2. Delay in filing charge sheet in such cases definitely lower the morale of police officials, who despite their being constant threat to their lives from drug mafia active in the State, not only raided/searched shops/establishments indulging in illegal Trade of psychotropic substances, but also initiated mass campaign to educate children and other possible victims of this Trade. Shockingly, as per news item, though approximately 200 cases were registered by the police in District Kangra under the Drugs and Cosmetics Act, 1940 (for short *'D&C Act'),* but unfortunately no much substantial was done by the Authorities prescribed in *'D&C Act'* to take such cases to its logical ends. As per *'D&C Act'*, it is only Drug Inspectors, who can file charge-sheet in the Court because the police after arresting the accused under the *'D&C Act'* is required to handover the cases to the Drug Inspector concerned within twenty four hours.

3. This Court cannot lose site of the fact that as of today drug menace is one of the serious problem in the Society. Needless to say that drug abuse and the drug menace is the illicit, non-medical use of limited number of substance, most of drugs which have the properties of altering the mental state of a being in ways that are considered by social norms and defined by statute to be inappropriate, undesirable, harmful threatening to the life of the user and to the society at large. Alcohol, heroin, cocaine, opium, marijuana, are some of the drugs abused.

4. "Curiosity" it is said "Kills the Cat". Young generation of today's era is very inquisitive and curious. They would like to test the efficacy of whatever they see and hear of. But, unfortunately, this curiosity at times becomes fatal even to the point of death. Merely by their curiosity, as has been referred above, some of the young children go in to deal with drugs and become addicts. Today, a lot of youth are involved in this drug trade. Poverty, therefore, becomes a prime cause for this drug menace coupled with the negative attitude of the youth. The drug trade has become a multi billion dollar business gradually engulfing the globe. Unfortunately, people across the globe, who have been given/interested with duty/task to take decision, make policies and take firm action to deal with such menace, have not sat down seriously to talk of the effects of this trade. We all know that the situation is quite alarming, but, still drug menace, as a social canker, can be prevented and curbed, provided thee is will to do the same. In this regard, we need to put concerted efforts to curb this menace. Police and other authorities responsible for curbing this menace need to sit/come together and take effective decision for total eradication of this drug menace.

5. Hon'ble Apex Court, taking note of excessive use of drugs, alcohol and other psychotropic substance by young children, more particularly school going children, directed the Government of India to complete a national survey and generate national data base formulate and adopt a comprehensive national plan, which will, among other things, also address the areas of immediate concern noted earlier; and adopt specific content in the school curriculum under the aegis of NEP.

6. Hon'ble Apex Court in ***Bachpan Bachao Andolan vs. Union of India & Others, (2017)1 SCC 653,*** had an occasion to take note of the fact that nationwide survey was carried out on the basis of a representative household sample across the country as the National Family Health Survey, 2005-06, which revealed the nature and extent of substance abuse in children, but, Research Study by National Commission on Protection of Child Rights (August 2013), as taken note by Hon'ble Apex Court in the judgment referred hereinabove, has made certain recommendations which can be definitely taken note by policy maker in State of Himachal Pradesh for curbing drug menace amongst School, College going children.

7. In the aforesaid judgment, Hon'ble Apex Court, while directing Union of India to expeditiously conclude the national survey on drug abuse, also considered counter affidavit, wherein Union Government stated that a national policy on drug demand reduction is being finalized and the priority areas of intervention would include capacity building and training of service providers with a view to build up skilled manpower, education and awareness building at all levels and inter-sectoral collaboration. It would be apt to take note of following paras of the judgment:-

"13 Generation of reliable data is an essential requirement of a policy aimed at curbing substance abuse. In the absence of accurate data at a national, state and sectoral level, policy interventions can at best remain ad hoc. For, in the absence of data there will be no realistic assessment of the nature and extent of policy interventions required having regard to (i) vulnerable States and regions; (ii) high risk populations; (iii) requirement of infrastructure, including de-addiction centres across the States; (iv) requirement of trained manpower; and (v) requirement of rehabilitation, treatment and counselling services.

14 This is a basic deficiency which the Union government must redress at the earliest. We direct that the Union Government shall expeditiously conclude the national survey on drug abuse within a period of six months from today.

Immediate concerns

15. The immediate areas requiring remedial attention have been summarized below :

(i) Formulation of a national action plan for children;

(ii) Creation of a module containing an appropriate curriculum for children of all age groups in order to keep them away from drugs, alcohol and tobacco;

(iii) Setting up of de-addiction centres;

(iv) Establishing a standard operating procedure on enforcing the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 particularly Sections 77 and 78; and

(v) Implementing the action plan with the national policy on narcotic drugs and psychotropic substance which has been approved by the Union Cabinet.

16. The counter affidavit addresses the steps taken by MSJE thus :

> "The Ministry implements Central Sector Scheme of Assistance for Prevention of Alcoholism and Substance (Drugs) Abuse under which financial assistance is provided to NGOs/Voluntary organizations for running Integrated Rehabilitation Centres for Addicts (IRCAs), organizing de-addiction camps and conducting awareness programmes, about the ill effects of Alcoholism and Substance (Drugs) Abuse on the individual, family, workplace and the society at large. At present the Ministry gives financial assistance to approximately 400 Integrated Rehabilitation Centres for Addicts (IRCAs), which are spread, all over the country, These IRCAs aim at enabling the addict to achieve total assistance and improve their quality of life. The IRCAs provide the whole range of community based services for the identification, motivation, counselling, de-addiction, after case and rehabilitation for whole person recovery (WPR) of addicts to make a person drug free, crime free and gainfully employed."

The real need is to ensure the formulation of a National Plan so that all interventions are in accordance with a properly formulated national policy framework.

17. The Union Government has stated that a national policy on drug demand reduction is being finalized. The priority areas of intervention would include capacity building and training of service providers with a view to build up skilled manpower, education and awareness building at all levels and inter-sectoral collaboration. The policy also proposes to adopt a system of accreditation of de-addiction centres. The policy must in our view address the need for setting up de-addiction centres in every district and address specific vulnerabilities particularly in the context of high risk populations including children. We direct that this

exercise be completed and that a national policy be formulated within a period of six months from today.

18 As regards the formulation of a curriculum incorporating appropriate aspects of generating awareness and sensitisation, an affidavit has been filed on behalf of the Department of Higher Education in the Union Ministry of Human Resource Development. On 4 December 2015 directions were issued in the present case in pursuance of which inclusion of issues relating to eradication of alcohol and drug abuse in the New Education Policy was taken up. A consultative process has been initiated by the Union Government. A committee was constituted on 31 October 2015 for the evolution of a New Education Policy (NEP). Out of 33 themes identified, 2 themes of school education are titled : (i) comprehensive education – ethics, physical education, arts and crafts; life skills; and (ii) focus on child health. This, it has been stated, would cover "the implied importance of the inclusion of issues pertaining to eradication of alcohol and drug abuse in the NEP." MSJE has recommended tobacco and education on drug abuse within two of the above themes. This has been placed before the Committee. The court is informed that the Committee indicated on 30 December 2015 that the theme relating to eradication of alcohol and drug abuse will be included in its recommendations.

19 The importance of adopting a holistic solution to deal with issues pertaining to alcohol, tobacco and drug abuse in the school curriculum has to be adequately emphasized. We are of the view that since the entire issue is pending consideration before the government, it would be appropriate to await the ultimate formulation. However, we may indicate that rather than resting on an "implied inclusion" of such an important subject within an extant head or topic, it would be appropriate if the competent authorities consider how children should be protected from the dangers of substance abuse. These are matters which should not be brushed under the carpet. The authorities should consider how children should be sensitised (having due regard to the age and stage of the child) of the dangers of drug use, the necessity to report drug use and the need to develop resistance to prevailing peer and social pressures.

20. The enormity of the problem makes it impractical for the judicial process to address all issues in one proceeding. We have addressed three systemic issues mentioned above. We have done so on the basis of the existing policy framework of the Union government, as evidenced by the material to which we have adverted in the prefatory part of this judgment. We have not laid down policy in exercise of judicial review. We have issued directions to enforce obligations under the existing legislative and administrative framework.

21. We proceed to summarise, our directions to the Union government, as indicated earlier. The Union government shall:

21.1 Complete a national survey and generate a national data base within a period of six months;

21.2 Formulate and adopt a comprehensive national plan within four months, which will among other things also address the areas of immediate concern noted earlier; and

21.3 Adopt specific content in the school curriculum under the aegis of NEP.

22 We dispose of the writ petition with the aforesaid directions. However, we grant liberty to the petitioner to move the court in separate proceedings when it becomes necessary to do so including on various aspects which have been the subject matter of these proceedings."

8. Pursuant to the directions issued by this Court, respondent-State (respondents No.1 to 3) filed their response through Superintendent of Police, Kangra at Dharamshala, who, while fairly admitting that situation is alarming and there is growing drugs abuse in the society, submitted before this Court that police has launched special campaign against the drug peddlers, psychotropic drugs sellers in the District, especially the bordering areas of Punjab State and has been quite successful in seizing various ND&PS substances and also Medicines falling under the *'D&C Act'*. He also stated that though charge sheet stands filed in most of the cases constituting offences under the ND&PS Act, but such action could not be taken by them as regards the offences under the *'D&C Act'* because of provisions contained in Chapter-IV, Section 32 of *'D&C Act'*, which provides that, for taking of cognizance of offences, no prosecution under the Chapter shall be instituted except on the complaint of an Inspector (i.e. an officer appointed under Section 3(e) of the Act), any Gazetted Officer authorized by Central or State Government by general or special order, any person aggrieved or by recognized consumers association.

9. Superintendent of Police in his affidavit further stated that whenever an offence falling under the *'D&C Act'* is detected by the police, it cannot investigate the case like other cognizable cases and it is incumbent for the Investigating Officer to forward the drugs so recovered to the Drugs Inspector for taking necessary action in accordance with the *'D&C Act'* and as such, all the cases registered under *'D&C Act'* are forwarded to the concerned Drug Inspector for launching prosecution under the said Act.

10. Superintendent of Police further highlighted the difficulties expressed by the police and stated that on account of special provisions regarding launching of prosecution under the *'D&C Act'*, the police cannot investigate and launch prosecution against those offences and have been facing difficulties in the cases where drugs constituting offence under the *'D&C Act'* are recovered side by side with substances constituting offence under the Narcotic Drugs and Psychotropic Substances Act (for short *'NDPS Act')*. It appears that Superintendent of Police, Kangra at Dharamshala, with a view to stop the practice of person selling drugs without licence in every nook and corner of the District without compliance of the provisions of the *'D&C Act'*, *'NDPS Act'* and Rules there-under, had taken up the matter with the Government for making offences under *'D&C Act'* cognizable within the State of Himachal Pradesh because admittedly Police Department has larger resources and better information network for determination of crime vis-a-vis Drug Inspector for whom it may not be possible to have information of selling of drugs without licence. Approximately, 200 cases came to be registered under *'D&C Act'* by police between the year 2015 to 2017 in District Kangra alone, but only in three cases charge-sheets came to be filed in competent Court of law because subsequent action, if any, pursuant to registration of the case is/was to be taken by Drug Inspector by resorting to the provisions of *'D&C Act'*.

11. Taking note of the aforesaid submissions/averments contained in the affidavit of Superintendent of Police, Kangra at Dharamshala, this Court called upon Secretary(Health) to the Government of Himachal Pradesh to file his personal affidavit, who submitted before this Court that every best possible effort is always taken and being taken to check any menace through its regulatory mechanisms, in order to secure the Constitutionally provided ***"Right to Healthy Life"*** to its citizens as also to curb the said evil, if any, from the Society. Secretary(Health) further stated that a special drive against the menace of drugs being misused as intoxicants has been launched in the State for last more than two years through its concerned functionary i.e. the State Drugs Controller, Himahal Pradesh, respondent No.6. With a view to curb the drug menace more effectively, every possible effort has been made at administrative and legislative level in the State of Himachal Pradesh and in this regard State Legislative Assembly has passed State amendments to the Drugs and Cosmetics Act, 1940 through the Drugs and Cosmetics (Himachal Pradesh Amendment) Bill, 2016 making it more stringent with proposed provisions as under:

> "Every offence relating to clause (C) of Section 18 and punishable under sub clause (ii) of clause (b) of Section 27 shall be cognizable and non-bailable, and any Police Officer in uniform not below the rank of Assistant Sub-Inspector of

> Police may arrest without warrant any person against whom a reasonable complaint has been made or credible information has been received of his having been concerned in any of the offences relating to section 18(C) and punishable under sub-clause (ii) of clause (b) of Section 27, with the provision that such police officer may take assistance of the Drug Inspector, as he may considers necessary. It is added that the amendment further provides provision for sealing any premises wherein any drug or cosmetics is being manufactures, sold, or stocked or exhibited or offered for sale or distributed in contravention of the provisions of Section 18 of the Act, with provisions of burden of proof on the person from whose possession such drugs or cosmetics are seized in such contraventions."

12. Secretary(Health) to the Government of Himachal Pradesh further disclosed to this Court by way of affidavit that above referred Drugs & Cosmetics (Himachal Pradesh Amendment) Bill, 2016 was sent to the Government of India for according approval, whereafter some clarifications were sought for by the Government of India, which have also been sent with justification including the references of the State amendments as made by the States of West Bengal and Uttar Pradesh, but the matter is still pending with the Government of India.

13. Lastly, it also emerge from the affidavit of Secretary(Health) to the Government of Himachal Pradesh that with a view to further tighten the noose, necessary directions were issued to the State Drugs Controller, Himachal Pradesh to cancel the licenses of a retailer who contravenes the provisions of the *'D&C Act'* in respect of the drugs being misused as intoxicants, or of a wholesaler who contravenes the provisions of the Act or sells these drugs to unauthorized persons or of a manufacturer who diverts these drugs for clandestine use or sells these drugs to unauthorized persons. Taking note of the fact that some drugs had its more reported misuse than its medicinal use, the State Government has directed to suspend the product formulations of the manufactures in the State of Himachal Pradesh in respect of drugs like Pseudoephedrine, Ephedrine, Diphenoxylate and Buprenorphine, till furthers orders in public interest.

14. Though Secretary(Health) to the Government of Himachal Pradesh by way of aforesaid affidavit made a serious endeavour to make this Court believe that persons responsible for taking decision in this regard are seized of the matter and all possible steps are being taken towards eradication of this social evil, but this Court, after having noticed ground reality, which itself is visible from the respective affidavits filed by the respondents, be it Superintendent of Police, Kangra at Dharamshala or Authorities responsible for enforcing provisions contained in *'D&C Act'* in the State of Himachal Pradesh, is of the view that steps taken or proposed to be taken for total eradication of illegal trade of drugs are not sufficient, rather much is required to be done in this direction on the ground level.

15. Noticeably, it has come in the affidavit having been filed on behalf of respondent No.4 i.e. Drug Inspector, Dharamshala, District Kangra that there are only three Drug Inspectors posted in the entire District Kangra, which is the biggest District of the State having 15 Legislative Assembly Constituencies. Apart from above, boarder of this District touches State of Punjab. As per affidavit filed by Drug Inspector, consolidated office records of all the three Drug Inspectors of District Kangra suggests that till 23.10.2017 they received 180 cases from the police and out of 180 cases, prosecution/complaint came to be instituted in 86 cases, whereas no further action could be taken by the Authorities concerned for want of concluded documents/report of tests and analyses.

16. As per affidavit dated 25.10.2017 filed by Drug Inspector, Dharamshala, institution of prosecutions are pending in 79 cases constituting offences under *'D&C Act'*, which were handed over to the Drug Inspectors, Dharamshala, Palampur and Nurpur of District Kangra by the police. Though Authorities, as have been named hereinabove, by way of aforesaid affidavit made an attempt to justify the delay in filing the cases in competent Court of law, but excuses/explanations offered/rendered on that count cannot be said to be plausible, rather same suggests lackadaisical approach of authorities responsible to deal with such matters. Though we

have only been provided with data with regard to Kangra District, wherein only three Drug Inspectors have been posted by the State for looking after 15 Legislative Assembly Constituencies, but we actually do not know what is the total strength of Drug Inspectors posted in the entire State to deal with this problem. We fully appreciate and understand the difficulties faced by drug inspectors in covering such a huge area in District Kangra. By no stretch of imagination, it can be said that only three Drug Inspectors are sufficient to keep vigil in the District having 15 Legislative Assembly Constituencies.

17. Recently, this Bench had an occasion to deal with another Public Interest Litigation i.e. CWPIL No.27 of 2017 wherein this Court, taking cognizance of affidavits dated 17.4.2017 and 24.4.2017 filed by Zonal Director, Narcotics Control Bureau, Chandigarh *(for short 'Director, NCB')* in Cr.Appeal No.259 of 2013, wherein detail with regard to cases registered through Narcotics Control Bureau, Chandigarh *(for short 'NCB')*, in respect of jurisdiction of Himachal Pradesh for the last five years was made available, called for replies from Zonal Director, NCB Chandigarh, Director General of Police, State of Himachal Pradesh and Chief Secretary to the Government of Himachal Pradesh.

18. From the perusal of affidavit, having been filed by Director, NCB, it transpires that in the last five years, only 16 cases under the provisions of *'NDPS Act'* came to be registered by *'NCB'* in the State of Himachal Pradesh and out of the same only 11 successful trials, only in three cases the accused were convicted, whereas in other cases appeals are pending consideration before various Courts. Since, the Court was not satisfied with the explanation rendered by Director, NCB, as far as necessary steps taken by *'NCB'* with regard to implementation of directions issued by Apex Court in ***State of Gujarat vs. Kishanb hai and others, (2014)5 SCC 108,*** this Court was compelled to issue certain directions.

19. Interestingly, in that case also authorities responsible to deal with this drug menace made an endeavour to impress upon this Court that sizeable contrabands, be it charas or other Psychotropic Substances, were recovered from various parts of the State, but, figures/detail furnished by above-mentioned authority in its report Annexure D-1 is/was alarming. As per report, in the year 2012, 282.370 kgs. charas came to be recovered from Himachal Pradesh, whereas in the year 2013, it increased to 314.962 kgs. As per own information of *'NCB',* 356.963 kgs. charas was recovered in the year 2014. Though opium seizures have not been more than 10 kgs., but in the year 2015, 283.446 kgs. charas came to be recovered from Himachal Pradesh.

20. Apart from aforesaid contraband, *'NCB'/other agencies,* responsible for ensuring compliance of provisions contained under Narcotic Control Act, also recovered smack, ganja, brown-sugar and cocaine of substantial quantity from the State of Himachal Pradesh.

21. Though Director General of Police, State of Himachal Pradesh in its reply-affidavit in CWPIL No.27/2017 claimed that State and Police Department are seized of the menace and has a zero tolerance for the drug abuse, but as has been noticed above, factual position on ground is altogether different, rather very disturbing.

22. Since this Court is separately dealing with illegal trade of Psychotropic Substances as defined under *'NDPS Act'* in the State of Himachal Pradesh, more particularly, in Kullu Valley, we, at this stage, deem it not necessary to deal with the same in the present petition. Reference to various affidavits filed by NCB/Police in CWPIL 27/2017 has only been made in the present petition to highlight the fact that though concerned authorities are rhetoric in claiming that they are seized of the menace and have a zero tolerance on the drug abuse but factual position on ground is altogether different.

23. We, on taking note of gravity of the matter and realizing the consequences of illegal drug trafficking, its effects on social and economic condition of society, need to take concerted measures to strengthen the agencies so that effective steps are taken for countering such menace.

24. Mr.Satyen Vaidya, learned Amicus Curiae, after having perused various affidavits filed by respondents, raised very relevant issues, which are as follow, which may be helpful in dealing with the situation:-

> "8(1) Apparently, the provisions of Section 32 of Drugs and Cosmetics Act, 1940 has not been able to achieve the purpose of its incorporation. The menace of drug abuse has increased beyond proportions and its evident tentacles have embraced the consumer base, which in majority of cases in the youth of the nation. As submitted by Superintendent of Police, Kangra in his affidavit the police needs to be conferred jurisdiction and powers to cope with the aforesaid menace by suitable action against violators of the provisions of Drugs and Cosmetics Act, 1940. In its application to the State of West Bengal the provision of Section 32 of Drugs and Cosmetics Act, 1940 has been substituted. All offences punishable under the Act supra have been made cognizable and non-bailable. Police officers above the rank of Sub-Inspector of police have been given power to arrest a person without warrant against whom reasonable complaint has been made or credible information has been received of his having been concerned in any of the offences punishable under the said Act. The State of Himachal Pradesh is also not far behind as far as the menace of drug abuse is concerned, therefore, the suitable amendment is necessitated in law to make the provisions of Section 32 of the Drugs and Cosmetics Act, 1940 more effective."

25. Latest affidavit filed by Secretary(Home) to the Government of Himachal Pradesh suggests that State Government has proposed some amendments in the Drugs and Cosmetic Act, 1940 vis-à-vis Sections 19, 22, 23 and 36. By proposed amendment, Section 36(A-E) is proposed to be inserted vide which offences under Sections 18 and 27 are to be made cognizable and non-bailable and further Police Officer not below the rank of the Sub Inspector has been proposed to possess the power to arrest without warrant on receiving reasonable complaint. The amendment bill was approved by Vidhan Sabha on 27.8.2016 and at present the same is under active consideration of Government of India. Secretary has further stated in the affidavit that suggestion put forth by learned Amicus Curiae requires deliberations and consultations in order to bring out the necessary amendments in Section 32 of *'D&C Act',* which is definitely a central legislation and further steps in this regard can only be taken after detailed discussions.

26. Though in the present case, we are only concerned with delay in registration of cases for violation of provisions contained in *'D&C Act'* in launching of prosecution by Drug Inspectors in terms of various provisions of the Act after registration of cases by police officials, but as has been noticed above that police has been prompt in registering the cases under *'D&C Act'* after noticing violation of provisions contained under the Act but since it has no power to register/institute the case against erring person under *'D&C Act',* matters are being referred to Drug Inspectors, who either due to lack of sufficient staff or lack of expertise, have not been able to deliver desirable results.

27. During proceedings of the case, this Court had an occasion to deliberate upon the issue of amendment in *'D&C Act'* having been raised by Superintendent of Police, Kangra and in this process certain suggestions were also made by Amicus Curiae. State of Himachal Pradesh, with a view to curb the drug menace, has already passed State amendments to the Drugs and Cosmetics Act, 1940 through the Drugs and Cosmetics (Himachal Pradesh Amendment) Bill, 2016, wherein every offence relating to clause (C) of Section 18 and punishable under sub clause (ii) of clause (b) of Section 27 would be cognizable and non-bailable, and any Police Officer in uniform not below the rank of Assistant Sub-Inspector of Police may arrest without warrant any person against whom a reasonable complaint has been made or credible information has been received of his having been concerned in any of the offences relating to Section 18(C) and punishable under sub-clause (ii) of clause (b) of Section 27, with the provision that such police officer may take assistance of the Drug Inspector. But, such amendment bill is pending before the Government of India. Though efforts have been made by the respondent-State

to bring certain reforms in *'D&C Act'* by approving Drugs and Cosmetics (Himachal Pradesh Amendment) Bill, 2016, but still much is required to be done. State Government has also proposed certain amendments in *'D&C Act'* vis-à-vis Sections 19, 22, 23 and 36, whereby offences under Sections 18 and 27 are proposed to be made cognizable and non-bailable with the further powers to Police Officers not below the rank of the Sub Inspector to arrest without warrant on receiving reasonable complaint. But, since *'D&C Act'* is a Central Act, necessary call in this regard can only be taken after the prior approval of Government of India. Government of Himachal Pradesh is seized of the matter as has been stated by Secretary(Home) to the Government of Himachal Pradesh and as such, this Court sees no occasion to keep the present petition alive, especially in view of pendency of CWPIL No.27 of 2017, wherein similar issue with regard to drug menace is being dealt with by this Court. However, before parting, we wish to notice that National Legal Service Authority at the time of launch of Legal Service Scheme of "NALSA" and "WORKSHOP ON ACTUALIZATION OF THE NALSA SCHEME" held serious deliberations with regard to rendering of legal services to the victims of drug abuse and eradication of drug menace, which particular session came to be chaired by Hon'ble Mr.Justice T.S. Thakur, Former Chief Justice of India, who at that relevant time was Executive Chairman of "NALSA". In the aforesaid workshop Scheme; namely; NALSA (Legal Services to the Victims of Drug Abuse and Eradication of Drug Menace) Scheme, 2015) came to be launched by National Legal Services Authority (NALSA). It would be appropriate to take look at background in which aforesaid Scheme came to be launched:

> "1. The phenomenal rise in drug trafficking and drug abuse amongst the youth, children and adolescents has serious implications, adversely affecting national health and economy. Curbing it is the highest priority for the State as well as the society.
>
> 2. It is an open secret that drugs have spread their dreaded tentacles on innocent children, adolescents, youth and women. The horrible dimension, which this menace has acquired, can be gauged from the average age of initiation of drugs which is as low as nine-ten years. Recent empirical studies reveal that about 7 crore people in India are involved in substance abuse, out of whom about 17% are addicts.
>
> 3. The illicit cultivation of plants wherefrom the substances/drugs are derived is an area of major concern. Generally, people are unaware of the ill effects of such cultivation. In order to prevent illicit cultivation of substances, participation of Panchayati Raj Institutions and Local Bodies is necessarily required.
>
> 4. Although many agencies of the State as well as Non-Governmental Organizations are working in the field for eradication of drug trafficking and drug abuse, there is lack of coordination amongst them. Individual efforts of different functionaries and agencies have not achieved the desired results. Experience shows that the victims of drug abuse have no idea how to tackle the issues of treatment and rehabilitation.
>
> 5. Considering the fact that Legal Services Institutions can contribute a lot to curb this menace, a resolution was passed in the 13th All India Meet of State Legal Services Authorities held at Ranchi (Jharkhand), concluding that Drug Addiction and Drug Abuse should be a major area of concern for all Legal Services Institutions and a necessity was felt to examine the issue therein."

28. Though the aforesaid Scheme, which is quite exhaustive, also contains details with regard to existing legal provisions available in Statutes to deal with menace of narcotic drugs and trafficking, but since, such provisions of law are known to all agencies including police, NCB, it is not necessary to reproduce the same, rather this court deems it profitable to take note of the objectives of Scheme given in para-5 of the Scheme, so that very object of the scheme is known to

all stakeholders including Judiciary, Prosecution, Members Of Bar, Police, Excise, Forensic Laboratory, De-Addiction Centres, Corrective Homes, Rehabilitation Centres, School College And University Administration, Children Homes, Old Age Homes, Nari Niketans, Schools For Special Children, Ministerial Staff Of Courts etc. so that necessary directions /guidelines are issued to the concerned agencies to combat the menace of narcotic drugs. Para-5 of the scheme is reproduced herein below:-

> "5.1 To disseminate awareness amongst the general masses regarding the Legal Provisions, various Policies, Programmes and Schemes, in respect of Narcotic Drugs and Psychotropic Substances as well as to create awareness about the ill effects of drug abuse amongst the children in schools and colleges, street children, urban slum children, injective drug user(s), families, prisoners, workers in unorganized Sector, Chemists, drug pedlars, sex workers and general masses etc.
>
> 5.2 Organizing literacy camps for sensitizing the farmers who are carrying out permissible cultivation of various substances/source plants about the adverse health and life threatening effects of consumption of such drugs and substances.
>
> 5.3 To spread awareness amongst the parents, teachers and students about the ill effects of the substance abuse.
>
> 5.4 To sensitize the various stakeholders viz; Judiciary, Prosecution, Members of Bar, Police, Forensic Laboratories, De-addiction Centres, Corrective Homes, Rehabilitation Centres, School, College and University administration, Children Homes, Old-age Homes, Nari Niketans, Schools for Special Children, Ministerial Staff of Courts, etc. about the drug menace and effective measures to curb it.
>
> 55 To mobilize the available infrastructure in identifying the victims of drug abuse, their treatment and post detoxification rehabilitation.
>
> 5.6 To tap the potential of the Panchayati Raj Institutions/Local Bodies at grass root level for intervention and prevention of drug abuse and destruction of illicit cultivation of plants used to derive the drugs/ substances.
>
> 5.7 To maintain effective coordination with the Drug De-Addiction Centres. and Rehabilitation Centres etc. for better facilities and respect for the rights of the victims and to intervene, if any, breach is noticed.
>
> 5.8 To coordinate the activities of various stakeholders working in the field.
>
> 5.9 To ensure essential legal services to the victims of drug trafficking and drug abuse."

29. Since Scheme is quite comprehensive and exhaustive, it may not be possible to reproduce the same, but definitely concerned quarters can take great help from the same, while drawing action plan to deal with the menace.

30. Consequently, in view of detailed discussion made hereinabove, present petition is closed with the direction to the Secretary(Home) to the Government of Himachal Pradesh to take follow up action with the Government of India, wherein Amendment Bill as approved by Vidhan Sabha on 27.8.2016 is lying pending so that necessary amendments are made at the earliest to enable Police Authorities to institute prosecution against earring person under Drugs and Cosmetic Act, 1940. This Court also hopes and trust that valueable suggestions rendered by learned Amicus Curiae to bring necessary amendments in Section 36 of the *'D&C Act'* shall also be expedited and decision in this regard shall be taken with utmost promptitude, preferably within a period of two months from today, whereafter affidavit of compliance shall be filed by Secretary(Home) to the Government of Himachal Pradesh in the Registry of this Court.

31. We also wish to place on record appreciation qua the efforts put in by Mr.Satyen Vaidya, Senior Advocate, Amicus Curiae, who, on the instructions of this Court, regularly provided the feed back.

32. Copy of instant order shall be made available to the Secretary(Health)/ Secretary(Home) to the Government of Himachal Pradesh, Director General of Police, Himachal Pradesh and the State Drugs Controller, Himachal Pradesh including Amicus Curiae.

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

Dhale Ram ...Petitioner
Versus
Pushpa Devi ...Respondent

CrMMO No. 416 of 2017
Decided on: March 14, 2018

Code Of Criminal Procedure, 1973- Section 482- **Protection of Women from Domestic Violence Act, 2005**- Section 12- **Hindu Marriage Act, 1955-** Section 13-B- Trial Court granting protection, residence and maintenance orders in favour of wife – Appeal of husband, dismissed by Additional Sessions Judge- Petition against – During proceedings before High Court, parties filing petition before District Judge for divorce by mutual consent- Parties residing separately since long- Marriage broken down beyond repair- Re-approachment not possible – Petition allowed and orders of lower courts set aside- District Judge directed to dispose of petition under Section 13-B of Hindu Marriage Act expeditiously without waiting cooling off period to expire. (Paras-9 to 11)

Cases referred:
Veena vs. State (Government of NCT of Delhi) and another, (2011) 14 SCC 614
Priyanka Khanna v. Amit Khanna, (2011) 15 SCC 612

For the petitioner: Mr. Maan Singh, Advocate.
For the respondent: Ms. Meghna Kashav, legal aid counsel.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Being aggrieved and dissatisfied with the judgment dated 16.5.2017 passed by the learned Additional Sessions Judge, Kullu, HP in Criminal Appeal No. 29 of 2016, affirming order dated 24.9.2015 passed by the learned Chief Judicial Magistrate, Kullu, Himachal Pradesh in Petition No. 30-I of 2014, under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter, 'Act'), whereby application filed by respondent No. 1 under Section 12 of the Act was allowed and protection, residence and maintenance orders came to be passed in favour of respondent No. 1, petitioner has approached this Court by way of instant proceedings under Section 482 CrPC.

2. For having bird's eye view, necessary facts shorn of unnecessary details are that marriage between petitioner and respondent No. 1 was solemnized in the year 2011 and one child was born out of their wedlock. Allegedly the petitioner started abusing and beating respondent No. 1 at the instance of his parents, who were insisting upon him to give divorce to respondent No. 1 and marry some other girl. It is also alleged that petitioner compelled respondent No. 1 to leave her matrimonial home. Subsequently, respondent filed an application/complaint under Section 12 of the Act averring therein that she wanted to live with her husband but since she apprehends danger to her life, protection, residence and maintenance orders may be passed in her favour. Learned Chief Judicial Magistrate, taking note of the material adduced on record by the respective parties, allowed the application filed by respondent No. 1 and prohibited petitioner

and respondent No. 2 from committing any act of domestic violence and directed petitioner to provide accommodation to respondent No. 1, consisting of one room with kitchen, bath room and toilet. Learned trial Court also reserved liberty to respondent No. 1 to hire alternative accommodation in the event of failure on the part of petitioner to provide accommodation, rent and electricity bills whereof were to be paid by the petitioner. Learned Chief Judicial Magistrate further directed the petitioner to give monthly maintenance of Rs.2,000/- to respondent No. 1 and Rs.1,000/- to her minor child.

3. Being aggrieved and dissatisfied with the aforesaid order passed by learned Chief Judicial Magistrate, petitioner preferred a criminal appeal under Section 29 of the Act before Additional Sessions Judge, Kullu, Himachal Pradesh. However, the fact remains that the said appeal was dismissed, as a result of which order dated 24.9.2015 passed by Chief Judicial Magistrate, Kullu, came to be upheld. In the aforesaid background, petitioner has approached this Court by way of instant petition praying therein to set aside impugned judgment passed by Additional Sessions Judge, Kullu and order passed by Chief Judicial Magistrate.

4. During proceedings of the case, this Court solely with a view to explore possibility of amicable settlement inter se parties, directed both the parties to remain present in the Court. On 1.1.2018, Ms. Meghna Kashav, learned legal aid counsel appearing for respondent No. 1, on instructions of her client, stated before this Court that her client is ready and willing to give divorce to the petitioner provided she is offered sufficient amount of money to maintain herself and her child.

5. Today, learned counsel representing the petitioner filed an application under Section 482 CrPC, seeking therein permission to place on record compromise arrived at inter se parties and copy of petition filed under Section 13B of Hindu Marriage Act in the competent Court of law for dissolution of marriage by way of mutual consent. While referring to the averments contained in the application, learned counsel representing the parties stated before this Court that both the parties have compromised the matter inter se them amicably and in this regard, they have reduced into writing the compromise (Annexure A-1). Learned counsel representing the parties also invited attention of this Court to the petition having been filed by them jointly under Section 13B of Hindu Marriage Act for dissolution of marriage by way of decree of divorce by mutual consent in the court of learned District Judge, Kullu.

6. This Court with a view to ascertain the correctness of the aforesaid submissions having been made by the learned counsel representing the parties also recorded statements of petitioner and respondent No. 1, who stated on oath before this Court that they have compromised the matter inter se them, whereby petitioner has agreed to pay a sum of Rs. 1.00 Lakh to the respondent No.1 for her and her minor child's maintenance. Respondent No. 1 also stated before this Court that she has received Rs.50,000/- in cash from the petitioner on 12.3.2018, whereas, remaining amount shall be paid by the petitioner at the time of recording of her statement in petition under Section 13B of Hindu Marriage Act. Petitioner also stated before this Court that apart from aforesaid money, he has agreed to transfer his share of the landed property in favour of his minor son on or before 12.4.2018. In terms of aforesaid agreement, respondent No.1 Pushpa Devi also undertook to withdraw the petition filed by her under Section 125 (3) CrPC arising out of order passed in application under Section 12 of the Act. Their statements have been taken on record.

7. In view of aforesaid development, learned counsel for the parties prayed that present petition having been filed by the petitioner may be disposed of with a direction to the learned District Judge, Kullu to pass appropriate orders in the petition having been filed by them jointly, under Section 13B of Hindu Marriage Act for dissolution of marriage by way of decree of divorce by mutual consent.

8. After having carefully gone through the averments contained in the compromise as well as statements of petitioner and respondent No. 1 recorded on oath, this court sees no impediment in accepting aforesaid prayer having been made on behalf of the parties to the *lis*.

9. This court is of the view that there is no possibility of reproachment between the parties and marriage has broken beyond repair, as such, statutory period of six months as envisaged under Section 13B of the Hindu Marriage Act for grant of divorce by mutual consent can be waived of.

10. In this regard, it would be apt to take note of the judgment rendered by the Hon'ble Apex Court in **Veena** vs. **State** (**Government of NCT of Delhi) and another**, (2011) 14 SCC 614, wherein the Hon'ble Apex Court has held as under:

> "We have heard the learned counsel for the parties and talked to the parties. The appellant has filed a divorce petition under Section 13(1)(ia) of the Hindu Marriage Act, 1955, being HMA No.397/2008 which is pending before the Court of Sanjeev Mattu, Additional District Judge, Karkardooma Courts, Delhi. In the peculiar facts and circumstances of this case, we deem it appropriate to transfer the said divorce petition to this Court and take the same on Board. The said divorce petition is converted into one under Section 13B of the Hindu Marriage Act and we grant divorce to the parties by mutual consent."

11. Otherwise also, it is quite apparent from the record that the parties are not living together for a considerable time and petition under Section 12 of the Act came to be instituted in the competent Court of law in the year 2014 i.e. on 12.5.2014.

12. This court after having interacted with the parties, sees no possibility of reconciliation inter se them and as such, no fruitful purpose will be served in case matter is kept pending for another six months before passing decree of divorce by mutual consent.

13. Hon'ble Apex Court in **Priyanka Khanna** v. **Amit Khanna**, (2011) 15 SCC 612, has further held as under:

> "7. We also see from the trend of the litigations pending between the parties that the relationship between the couple has broken down in a very nasty manner and there is absolutely no possibility of a rapprochement between them even if the matter was to be adjourned for a period of six months as stipulated under Section 13B of the Hindu Marriage Act. 8. We also see from the record that the first litigation had been fled by the respondent husband on 2-6-2006 and a petition for divorce had also been filed by him in the year 2007. We therefore, feel that it would be in the interest of justice that the period of six months should be waived in view of the above facts."

14. Accordingly, in view of aforesaid law laid down by the Hon'ble Apex Court, statutory period of six months deserves to be waived of taking note of the fact that marriage between the parties has broken beyond repair and there is no possibility of parties living together.

15. Consequently, in view of detailed discussion made herein above, present petition is allowed. Judgment dated 16.5.2017 passed by Additional Sessions Judge, Kullu, HP in Criminal Appeal No. 29 of 2016 and order dated 24.9.2015 passed by the learned Chief Judicial Magistrate, Kullu, Himachal Pradesh in Petition No. 30-1 of 2014, are quashed and set aside. District Judge Kullu is directed to expeditiously decide the petition under Section 13B of Hindu Marriage Act without waiting for statutory period of six months to expire.

Pending applications, if any, are disposed of.

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

Smt. Runa Devi ....Appellant.

Versus

Sh. Singhu Ram and another ...Respondent.

CMP(M) No.: 1613 of 2017
Decided on: 15.03.2018.

Limitation Act, 1963- Section 5- Condonation of delay- Applicant sought condonation of 2376 days delay in filing appeal against judgment and decree of District Judge – Plea being that whenever she visited her counsel, he told her that matter was pending in Court and only 6 months back from date of filing said application, Counsel informed her that case stood dismissed- Held- With efflux of time, rights accrue upon party and cannot be taken away arbitrarily –Plea of applicant is nothing but a routine excuse usually made in applications for condonation of delay- Application dismissed. (Paras- 2 and 3)

For the petitioner: Mr. Vinod K. Sharma, Advocate vice Mr. B.N. Mehta, Advocate.
For the respondents Mr. Raj Kumar Negi, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this application, a prayer has been made by the applicant/appellant for condonation of 2376 days' delay in filing appeal against the judgment passed by the Court of learned District Judge, Kinnaur, Civil Division at Rampur Bushahr, in HMA Petition No. 3 of 2007, decided on 22.12.2010. A perusal of the judgment demonstrates that the present applicant was duly represented before the learned Court below.

2. In the application, the grounds which have been taken to justify the delay in filing the appeal are that when the applicant used to visit her Counsel, her Counsel used to inform her that the matter is pending and it was only 6 months back as from the date of filing this application that she was informed by her Counsel that her case stood dismissed and thereafter she was handed over copy of the judgment, from which she came to know that her case stood decided on 22.12.2010. Prima-facie this Court is not convinced with the explanation given in the application, because, in my view, these are the routine excuses which are made in the applications for condonation of delay. It is well settled principle of law that by efflux of time, rights accrue upon a party and such rights cannot be taken away in an arbitrary manner. Principle of limitation envisages that in case a person is not diligent in pursuing his/her legal remedy, then after the limitation period, though the right survives but remedy goes. This Court is not oblivious of the fact that Section 5 of the Limitation Act does confer power upon the Court to condone delay, however, this power is not to be exercised in a mechanical manner and is only to be exercised if Court is convinced that the applicant was not negligent in pursuing his/her legal remedy and proceedings could not be initiated for the reasons beyond the control of the party concerned.

3. Now coming to the facts of this case, as already mentioned above, the averments made in the application do not satisfy the judicial conscious of this Court that delay in filing the appeal is bonafide. In fact the explanation given in the application for delay does not inspires any confidence.

In view of above, as I do not find any merit in the present application, the same is dismissed.

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

Smt. Besaru alias Balsaru ....Appellant.
Versus
Bhago Devi ... Respondent.

RSA No. 65 of 2007.
Reserved on : 01.03.2018
Decided on: 16.03.2018.

Specific Relief Act, 1963- Section 34- Plaintiff filing suit for declaration that defendant 'B' was wife of 'G' and had one daughter 'K' from him – Thus, defendant not being widow of 'P', not entitled to succeed him – Also alleging that revenue entries showing 'B' as co-sharer in suit land as widow of 'P' are wrong- Further claiming that 'P' died issueless and his estate devolved upon his mother Sainu Devi ('S') – Plaintiff claiming succession to estate of 'S' on basis of Will dated 21.12.1987- Defendant however claiming succession as widow of 'P' – Suit decreed by Trial Court- Appeal of defendant, however, allowed by District Judge and suit dismissed- Regular Second Appeal- On facts, defendant clearly admitted her marriage with 'G' and birth of daughter 'K' from his loins in pleadings – But denying those very facts in evidence- In parivar register of 'G', 'B' is recorded as his wife and 'K' as daughter - In parivar register of 'P' no entry of wife found recorded – Mere fact that 'B' recorded as wife of 'P' in voter list does not prove her to be wife of 'P'- Appeal allowed – Judgment and decree of District Judge set aside and that of trial court restored. (Para-20 to 22)

For the appellant : Mr. G.R. Palsra, Advocate.
For the respondent : Ex parte.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge.

By way of this appeal, the appellant/plaintiff has challenged the judgment and decree passed by the Court of learned District Judge, Mandi, in Civil Appeal No. 4 of 2006, dated 04.01.2007, whereby, learned Appellate Court while allowing the appeal filed by the present respondent, set aside the judgment and decree passed by the Court of learned Civil Judge (Sr. Divn.), Mandi, in Civil Suit No. 41 of 2003, dated 01.12.2005, vide which learned trial Court had decreed the suit so filed by the present appellant in the following terms:-

> *"As per my above discussion and reasons, therefore, the suit of the plaintiff succeeds and is hereby decreed to the effect that the defendant Bhago Devi is the wife of Ganga Ram and is not widow of late Sh. Phulgi Ram s/o Het Ram r/o Village Nagwain and she has no right, title and interest in the suit land which is comprised in Khewat No. 69, khatauni No. 88, khasra Nos. 1457/431, 432, 433, Kitta-3, measuring 2-2-8 bighas, situated in mauza Nagwain/509 Illaqua Balindhi Sanor Sub Tehsil Aut, Tehsil Sadar, District Mandi, H.P. and the revenue entries showing the defendant as joint owner in possession with the plaintiff are also wrong, illegal, null and void. The defendant is further restrained from interfering in the possession of the plaintiff with respect to the suit land in any manner whatsoever. A decree-sheet be prepared accordingly. Keeping in view the facts and circumstances of the case, parties are directed to bear their own costs. The file after due completion be consigned to records."*

2. This appeal was admitted on 14.06.2007 on the following substantial questions of law:-

> *"a) Whether the 1st Appellate Court has misread, misconstrued and misinterpreted the oral as well as documentary evidence of the parties, especially statement of*

DW-1, Documents Ex. DB, and Ex.DW-1/C, which has resulted into failure and miscarriage of justice to the appellant?

b) Whether the 1st Appellate Court has admitted and relied upon the inadmissible evidence while reversing the Judgment & Decree of Trial Court, which has also resulted into grab failure and miscarriage of justice to the appellant.?

c) Whether there is variance in the pleadings and proof on the part of respondent, which fact has been totally ignored by the 1st Appellate Court, which has materially prejudiced the case of appellant?"

3. As the respondent did not enter appearance despite service, she was accordingly ordered to be proceeded against *ex parte*.

4. Brief facts necessary for adjudication of this appeal are as under:-

Appellant/plaintiff (hereinafter referred to as 'plaintiff') filed a suit for declaration and injunction and in the alternative for possession on the grounds that the land comprised in Khewat No. 69, khatauni No. 88, bearing Khasra Nos. 1457/431, 432, 433, Kittas-3, measuring 2-2-8 bighas, situated in mauza Nagwain/509, Illaqua Balindhi Sanor, Sub-Tehsil Aut, Tehsil Sadar, District Mandi, H.P. (hereinafter referred to as 'suit land') was in the joint ownership and possession of the plaintiff and defendant and that the said entries in revenue records wherein defendant was reflected as joint owner in possession of the suit land alongwith the plaintiff were wrong, illegal, null and void. According to the plaintiff, defendant was wife of one Shri Ganga Ram, son of Shri Uttam, resident of Village Maasna, Tehsil and District Kullu and was residing in the house of Shri Ganga Ram prior to the year 1973. Defendant was also having one issue, namely, Krishna Devi, who born out of wedlock of defendant and Ganga Ram on 18.08.1972. Further as per the plaintiff, the defendant was not the widow of late Shri Phulgi Ram, son of Shri Het Ram, resident of Nagwain, Sub-Tehsil Aut, District Mandi and the entries reflecting defendant as joint owner in possession in the suit land as widow of late Shri Phulgi Ram are wrong, illegal, null and void. According to the plaintiff, the suit land was earlier owned and possessed by Phulgi Ram who died issue-less on 01.08.1980, leaving behind his mother late Smt. Sainu Devi who succeeded to the property of Phulgi Ram after his death. Phulgi Ram was the mother-in-law of plaintiff and she bequeathed her right, title and interest in the suit land in favour of the plaintiff by way of a registered Will dated 21.12.1987. Further as per the plaintiff, she had succeeded to the said property after the death of Sainu Devi on the basis of the said Will. It was in this background that the plaintiff prayed for the following reliefs:-

"It is, therefore, prayed that keeping in view the reasons and circumstances enumerated above, a decree for declaration to the effect that the defendant is the wife of Sh. Ganga Ram S/o Sh. Uttam Ram, R/o Muhal Phati Maasna, Tehsil and District Kullu, H.P. and is not the widow of late Sh. Phulgi Ram S/o Sh. Het Ram, R/o Village Nagwain, Illaqua Balindhi-Sanor, Sub-tehsil Aut, Tehsil Sadar, District Mandi, H.P., and she has no right, title or interest in the suit land and the Revenue entries showing the defendant as joint owner in possession with the plaintiff are wrong, illegal, null and void, and not binding upon the right of the plaintiff, who is the exclusive owner in possession of the suit land and is liable to declared as such. The defendant may also kindly be restrained through a decree of permanent prohibitory injunction not to proclaim herself to be the widow of late Sh. Phulgi Ram aforesaid and also not to cause any sort of unlawful interference in the peaceful possession and enjoyment of the plaintiff over the suit land as a consequential relief. In case the defendant succeeds in occupying the suit land during the pendency of the suit in that eventuality a decree for possession in the alternative be passed in favour of the plaintiff and against the defendant, with costs of the suit. And/or any other relief which the plaintiff may be found entitled to under the facts and circumstances of the case under consideration may also be awarded/granted in favour of the plaintiff and against the defendant, and justice be done for which the plaintiff shall ever pray."

5. By way of written statement, defendant denied the claim of the plaintiff. In para 2 of the written statement, it was mentioned by the defendant that she was now the wife of Shri Ganga Ram and one daughter was born out of this wedlock. In the same breath, in the same paragraph, defendant however denied that she was residing in the house of Ganga Ram as his wife and that a daughter was born out of said wedlock on 18.8.1972. Defendant denied that she was not widow of late Shri Phulgi Ram. As per defendant, after the death of Phulgi Ram, she inherited the suit land being his widow alongwith mother of Phulgi Ram. She also denied that Smt. Sairu Devi had bequeathed her share in favour of plaintiff. She reiterated that she was joint owner in possession of the suit land to the extent of half share alongwith the plaintiff.

6. By way of replication, the plaintiff reiterated and reaffirmed the stand made in the plaint.

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

"1. Whether the defendant is the wife of one Sh. Ganga Ram s/o Uttam and not the widow of Phulgi Ram as alleged? OPP.

2. Whether the revenue entries showing the defendant as joint owner in possession as widow of late Sh. Phulgi Ram are wrong and illegal ? OPP

3. Whether the plaintiff is exclusive owner in possession of the suit land as alleged ? OPP

4. Whether the plaintiff is entitled for the relief of permanent prohibitory injunction ? OPP

5. Whether in the alternative the plaintiff is entitled for the relief of possession as claimed ? OPP

6. Whether the suit is not maintainable ? OPD

7. Whether the plaintiff has no locus standi to file the suit ?

OPD

8. Whether the plaintiff has no locus standi to file the suit ? OPD

9. Relief."

8. 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 : Yes.

Issue No. 2 : Yes.

Issue No. 3 : Yes.

Issue No.4 : Yes.

Issue No. 5 : In view of findings on issue No. 3 this issue has become redundant.

Issue No. 6 : No.

Issue No. 7 :No.

Issue No. 8 :No.

Relief : Suit decreed as per operative part of the judgment."

9. Learned trial Court vide its judgment and decree dated 01.12.2005 decreed the suit of the plaintiff. It was held by the learned trial Court that plaintiff had placed on record copy of parivar register of Ganga Ram Ext. PW2/A pertaining to the year 1978 in which Bhago Devi was reflected as wife of Ganga Ram. It further held that plaintiff had also placed on record death certificate of Phulgi Ram which demonstrated that Phulgi Ram had died on 01.07.1980. It further held that plaintiff had also placed reliance on copy of parivar register of Phulgi Ram Ext. PW6/A

in which there was no entry of wife of Phulgi Ram. Learned trial Court further held that Ext. P-2, copy of parivar register of Ganga Ram, demonstrated that Bhago Devi was reflected as wife of Ganga Ram and Krishna Devi as daughter of Ganga Ram. It further held that the statement of PW4 Somlata Sharma, who had produced record of Zonal Hospital, Kullu proved that out of wedlock of Ganga Ram and Bhago Devi, second child was born on 18.08.1972 which was so recorded at serial No. 40 in Ext. PW4/A. It further held that factum of defendant being wife of Ganga Ram also stood admitted by defendant in para 2 of the written statement. Learned trial Court also held that though defendant claimed herself to be the wife of Phulgi Ram, but no evidence was led to substantiate the same as is required under Section 50 of the Evidence Act. It further held that as defendant had failed to prove on record that she was wife of Phulgi Ram and after his death, she became his widow and thus inherited the estate of Phulgi Ram and as such, revenue entries reflecting her to be co-owner alongwith plaintiff were wrong, illegal, null and void. On these bases, learned trial Court decreed the suit of plaintiff in terms of reliefs already quoted above.

10. In appeal, judgment and decree so passed by the learned trial Court stands reversed. Learned Appellate Court held that defendant Bhago Devi as DW1 had deposed in the Court that she was married to Phulgi Ram and three sons were born out of the said marriage. It further held that the defendant also deposed that the estate of her husband was inherited by her alongwith her mother-in-law. But as Mohan Singh, younger brother of her husband Phulgi Ram started torturing her, she was forced to leave matrimonial house. Learned Appellate Court also held that she had never contracted any marriage with Ganga Ram and Krishna Devi was not her daughter. Learned Appellate Court held that no doubt defendant went to tell lie that she had no daughter named Krishna but this statement of her would not divest her of her right in the estate of her previous husband Phulgi Ram. Learned Appellate Court thereafter held that unchastity of a widow or her re-marriage during the lifetime of her husband would not result in forfeiture of her right in the estate of her husband. It also held that as far as marriage of defendant with Ganga Ram was concerned it was neither in doubt nor in dispute but Phulgi Ram had not divorced his wife in accordance with law or for the purpose, if his wife had started leading unchaste life or settled in the house of some other person, the same would not divest such a wife of the right in the estate of her husband. Learned Appellate Court also held that in a previous litigation, plaintiff had claimed adverse possession qua the suit land against the defendant which was indicative of the fact that the plaintiff also admitted the proprietary title of the defendant qua the suit land. It was thus held by learned Appellate Court that though Bhago Devi was subsequently living as wife of Ganga Ram, yet same would not result in forfeiture of the right of the defendant to inherit estate of her previous husband Phulgi Ram as Phulgi Ram had died after Hindu Succession Act 1956 came into force. On these bases, it set aside the judgment and decree passed by the learned trial Court.

11. Feeling aggrieved, plaintiff filed the present appeal.

12. I have heard learned counsel for the appellant and also gone through the records of the case as well as the judgments passed by both the learned Courts below.

13. I will deal with all the substantial questions of law, on which this appeal stands admitted, together. The genesis of the judgment and decree passed by the learned Appellate Court whereby it set aside the judgment and decree passed by learned Trial Court is that the defendant was the wife of late Phulgi Ram. A perusal of the records of the case demonstrates that the factum of marriage of defendant with Ganga Ram was not disputed by the defendant and in para 2 of the written statement, she also stated that out of this wedlock, one daughter was born. However, she clearly denied in the written statement that she was residing in the house of Ganga Ram before the year 1973 and that a daughter was born out of this wedlock on 18.08.1972. Para 2 of the written statement is quoted herein-below:-

> *"2. Para No.2 of the plaint is admitted only to the extent that the defendant is now the wife of Shri Ganga Ram and one daughter has been born out of this wedlock of the plaintiff and said Ganga Ram but rest of the contents of this para are wrong*

and denied to be correct. It is wrong and denied that the defendant is residing in the house of Ganga Ram as his wife prior to year 1973 and said daughter has been born on 18.8.1972 as alleged. The documents as mentioned in this para are concocted one and denied to be correct."

14. Ext. PW3/A is the death certificate of Phulgi Ram which demonstrates that Phulgi Ram died on 01.07.1980. Ext. PW4/A is the copy of birth certificate which demonstrates that a female child was born on 18.8.1972 at Maasna and name of father as mentioned therein is Ganga Ram. Ext. P-2 is the copy of parivar register of Ganga Ram, in which, Bhago Devi is reflected as his wife and Krishna Devi is reflected as his daughter and the age of Krishna Devi is shown as 30 years and this certificate is issued on 30.07.2004. Similarly, Ext. P-3 is the copy of parivar register of Mohan Singh, which demonstrates that plaintiff Besaru Devi was the widow of Mohan Singh. In her statement in the Court as DW1, in the examination-in-chief, defendant had stated that she never married Ganga Ram and no daughter named Krishna Devi was born out of said wedlock. Smt. Som Lata Sharma, official from Zonal Hospital, Kullu, who entered the witness box as PW4 produced in the Court the relevant record, which as per her statement in the Court pertained to birth of a girl child on 18.8.1972 to Ganga Ram s/o Uttam Ram, resident of village Maasna, Tehsil and District Kullu and Bhago Devi which entry was at serial No. 40.

15. From the above, at least one thing is very clear and categoric that there is a contradiction between the averments made in the written statement by the defendant with her deposition made in the Court. Whereas in the written statement, the defendant has mentioned that Ganga Ram was her husband, however, while deposing in the Court as DW1 she has completely denied that she was ever married to Ganga Ram. Similarly, the factum of any girl child having been born out of her alleged wedlock with Ganga Ram has been denied in totality in the statement made in the Court. Similarly, Ext. PW2/A, the copy of parivar register of Ganga Ram demonstrates that name of Bhago Devi is mentioned therein as his wife and Krishna Devi is entered as his daughter. Incidentally, this parivar register pertained to the year 1978. That being so, it is but obvious that it was Krishna Devi who was born somewhere in the year 1972 and Bhago Devi stood married to Ganga Ram as at the time of birth of Krishna Devi. Ext. P-2, which is again a copy of parivar register of Ganga Ram, which was issued in the year 2004 again reflects Bhago Devi to be his wife and Krishna Devi to be his daughter, aged 30 years. All these documents as well as the statement of defendant were taken into consideration by the learned trial Court while holding that plaintiff had successfully proved Bhago Devi to be the wife of Ganga Ram and that a girl child was born out of said wedlock as far back as in the year 1972.

16. There is no doubt that there is a variance in the pleadings and statement which was made by the defendant in the Court. Whereas in pleadings defendant admitted to be wife of Ganga Ram and mother of daughter born out of her wedlock with Ganga Ram but she denied the factum of her residing with Ganga Ram as his wife before the year 1973 or that any girl child was born to her from Ganga Ram on 18.8.1972, but while deposing in the Court, she completely refused being married to Ganga Ram or having given birth to Krishna Devi out of said marriage. This variation in the pleadings and the statement, in my considered view, has not been dealt with by the learned Appellate Court correctly.

17. Learned Appellate Court just in one sententence held that no doubt the defendant went to tell lie that she had no daughter with the name Krishna and thereafter also held that this statement of her would not divest defendant of her right in the estate of her previous husband Phulgi Ram. Learned Appellate Court neither took note of the fact nor returned findings on the fact that in her statement she deposed that she was never married to Ganga Ram, yet learned Appellate Court has reversed the judgment and decree passed by the learned trial Court. Records demonstrate that during the pendency of the appeal before the learned First Appellate Court, an application was filed by the present respondent under Order 41, Rule 27 of CPC to place on record a certificate issued by Gram Panchayat, Nagwain Ext. DA, wherein it is mentioned that date of death of Phulgi Ram was not recorded in parivar register, Ext. DB copy of electoral list, Ext. DC, copy of birth certificate of one male child born on 20.01.1961, whose father

name was Phulgi Ram. This application was allowed on 26.6.2006 when these three documents were ordered to be taken on record as Ext. DA, DB and DC.

18. Before learned trial Court only three documents were exhibited on behalf of the defendant i.e. Ext. DW1/C copy of mutation, Ext. DW1/A again a copy of mutation, DW1/B, copy of an order.

19. I will first deal with documents which were exhibited by the defendant before the learned Trial Court. Ext. DW1/A and Ext. DW1/C were the copies of mutation, which were attested on 22.1.1986. Entries in these mutations were assailed by way of suit so filed by the plaintiff. In order to demonstrate that defendant was not wife of Phulgi Ram, plaintiff placed on record Ext. PW2/A, copy of parivar register pertaining to the family of Ganga Ram of the year 1978 in which defendant was reflected as wife of Ganga Ram. Similarly, death certificate of Phulgi Ram has also been placed on record by the plaintiff, as per which, Phulgi Ram died on 01.07.1980. In the parivar register of Phulgi Ram, copy of which is Ext. PW6/A, also there was no entry of wife of Phulgi Ram. Besides parivar register Ext. P-2 reflects defendant to be wife of Ganga Ram and Krishna to be daughter of Ganga Ram. As far as Ext. PW1/B is concerned which is an order passed by Sub Divisional Collector, Sadar, Mandi, though memo of parties mention Bhago Devi to be wife of Phulgi Ram, but then it is not as if the plaintiff was party to the said proceedings and this decision is also dated 5.12.2004. Thus, there was no evidence worth its name placed on record by the defendant before the learned trial Court from which it could be adduced or inferred that Bhago Devi was married to Phulgi Ram. The findings to the contrary returned by learned Appellate Court incidentally are based upon those documents which were filed by the defendant before the learned Appellate Court. In these circumstances, it is not clear that as to how learned Appellate Court concluded that there was complete misreading of the evidence on record by the learned trial Court while decreeing the suit of the plaintiff. In my considered view, findings returned by the learned Appellate Court in this regard are completely perverse as learned trial Court had correctly held that the defendant had not placed on record any evidence to prove that defendant was the wife of Phulgi Ram.

20. Now I will refer to documents which were exhibited before the learned Appellate Court. As observed above, on 26.6.2006 when an application under Order 41 Rule 27 CPC was allowed, three documents were exhibited i.e. Ext. DA, Ext. DB and Ext. DC. Thereafter on 30.08.2006, a voter list Ext. P-x placed on record by the present appellant was also taken on record.

21. Ext. DA is a certificate issued by Secretary, Gram Panchayat, Nagwain, dated 31.12.2005 wherein it is mentioned that date of death of Phulgi Ram was not recorded in the death register. Ext. DB is a copy of electoral list in which Bhago Devi is stated to be wife of Phulgi Ram. Her age therein is recorded as 28 years as on 01.01.1965. Ext. DC is the birth certificate of a male child born to Phulgi Ram on 20.01.1961. Ext. DW3/A is the death certificate of Phulgi Ram issued by the competent authority in which his date of death is recorded as 01.07.1980. In view of this, document Ext. DA, in my considered view, is totally insignificant. As far as Ext. DB is concerned, the same has been read by the learned Appellate Court in isolation and not in conjunction with other documents on record which were placed on record by the plaintiff before the learned trial Court, which proved beyond doubt that defendant was married to Ganga Ram and out of this wedlock, a girl child was also born in the year 1972. Ext. DC in no way furthers the cause of the defendant as it cannot be inferred from this document that as to who was the mother of the child who was so born.

22. In fact, learned Appellate Court while reversing the judgment and decree passed of the learned trial Court has failed to appreciate evidence placed on record by the plaintiff and has, in fact, completely misread and mis-construed the same including Ext. PW6/A. It has also misread, misconstrued and misinterpreted the documents of the parties including the statement of the defendant as well as Ext. DB and DW1/C. Learned Appellate Court has also erred in not appreciating the variance in the pleadings and statement of the defendant in its correct perspective and the appreciation of the documents placed on record by the defendant in appeal

by way of application under Order 41, Rule 27 CPC by the learned Appellate Court has also been misdirected. The substantial questions of law are answered accordingly.

23. In view of above discussion, this appeal is allowed with costs. Consequently, judgment and decree passed by the learned Appellate Court in Civil Appeal No. 4 of 2006, dated 04.01.2007 are set aside and further judgment and decree passed by learned Civil Judge (Sr. Divn.), Mandi, in Civil Suit No. 41 of 2003, dated 01.12.2005, are upheld.

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

Sunder Lal ...Petitioner
Versus
Urmila Thakur ...Respondent

Cr. Revision No. 313 of 2017
Decided on: March 16, 2018

Code of Criminal Procedure, 1973- Section 311- Accused sought recall of complainant for further cross-examination as to source of money allegedly lent and also qua her signature on ground that he could not properly conduct cross-examination earlier – Application dismissed by Trial Court- Petition against- Held- Object of powers emanating from Section 311 is to find out truth and render a just decision – On facts, counsel representing accused was found not to have cross-examined complainant on material facts- Petition allowed and order of Trial Court set aside. (Para-14)

Cases referred:
Zahira Habibullah Sheikh (5) and another vs. State of Gujarat and others (2006)3 SCC 374
Raja Ram Prasad Yadav vs. State of Bihar and another, (2013)14 SCC 461
Mannan SK and others vs. State of West Bengal and another AIR 2014 SC 2950

For the petitioner: Mr. Rajnish Maniktala, Advocate.
For the respondent: Mr. Naveen K. Bhardwaj, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant petition is directed against order dated 18.8.2017, passed by the learned Judicial magistrate First Class, Manali in Cr. Case No. 69/188/2015, whereby an application having been filed by the petitioner-accused (hereinafter, 'accused') under Section 311 CrPC has been dismissed.

2. Facts, shorn of unnecessary details, necessary for the adjudication of the present case are that respondent-complainant (hereinafter, 'complainant') filed a complaint under Section 138 of the Negotiable Instruments Act against the accused, alleging therein that the accused had borrowed a sum of Rs.7.00 Lakh from her and with a view to discharge his aforesaid liability, issued a cheque. Since cheque allegedly issued in favour of the complainant came to be dishonoured owing to "insufficiency of funds", complainant was compelled to initiate proceedings under Section 138 of the Act *ibid* in the competent court of law. Complainant, by way of an affidavit tendered her evidence in support of her claim put forth in the complaint. Accused also cross-examined the complainant, as is evident from Annexure P-3.

3. After conclusion of evidence of complainant, an application came to be filed on behalf of the accused under Section 311 CrPC, praying therein to recall the complainant for

cross-examination. Accused averred in the application that complainant needs to be cross-examined on the point that the cheque was never issued by the accused and complainant had failed to prove that it was in discharge of a legally enforceable debt. Accused also stated in the application that factum with regard to signatures on the cheque could not be put to the complainant as such, she needs to be cross-examined qua aforesaid aspect of the matter. By way of application referred herein above, accused also sought cross-examination of the complainant on the question as to what was the source of money allegedly lent by her to the accused. Since at the time of cross-examination, learned counsel representing accused had received a message that his mother was unwell, he hurriedly concluded the cross-examination and in this process inadvertently omitted to put aforesaid suggestions to the complainant.

4. Aforesaid prayer having been made by accused was vehemently opposed by the complainant by way of reply (Annexure P-6). Complainant alleged that the application has been filed with a view to fill up lacuna in the defence and with a view to linger on the proceedings. Complainant further claimed that she was cross-examined at length on all the aspects averred in the application as such, application deserves to be dismissed. Learned Court below vide order dated 18.8.2017 dismissed the application filed by the accused and listed the matter for recording statement of accused under Section 313 CrPC on 15.9.2017, whereafter, instant petition came to be filed before this court.

5. Mr. Rajnish Maniktala, learned counsel representing the accused, while terming impugned order passed by court below to be illegal and contrary to the law laid down by the Hon'ble Apex Court as well as this Court, strenuously argued that there is no application of mind by the court below while passing impugned order, as such, same deserves to be quashed and set aside. While referring to the provisions contained in Section 311 CrPC, Mr. Maniktala contended that court enjoys vast power to summon, re-examine or recall a witness at any stage of proceedings, provided that the same is necessary for proper adjudication of the case. Learned counsel further contended that while exercising power under Section 311 CrPC, paramount consideration of the court is to do justice to the case and court can examine a witness at any stage, even if same results in filling up lacuna or loop holes. While placing reliance upon judgment rendered by this Court in CrMMO No. 209 of 2017 titled **Sardar Singh** vs. **State of Himachal Pradesh**, learned counsel contended that it has been categorically held by this Court as well as Hon'ble Apex Court that Section 311 CrPC casts a duty upon the Court to summon, re-examine or recall a witness at any stage, if his/her evidence appears to be essential for just decision of the case. While inviting attention of this Court to the reasoning rendered by court below while passing impugned order, learned counsel stated that the same has been passed in a slipshod manner and as such, same being cryptic and contrary to provisions of law contained in Section 311 CrPC and judgment rendered by this Court, deserves to be quashed and set aside.

6. Mr. Naveen K. Bhardwaj, learned counsel appearing for the complainant supported impugned judgment and contended that there is no illegality and infirmity in the same and as such, same deserves to be upheld. While fairly stating that in terms of Section 311, court enjoys vast power to summon/ re-examine or recall a witness at any stage of proceedings, learned counsel contended that such power can not be exercised by a court to permit the applicant to fill up lacuna. He further contended that explanation rendered in the application for re-examination of complainant is not at all plausible because all the questions sought to be put to complainant in the event of her re-examination have been already asked in the cross-examination held earlier. Mr. Bhardwaj further contended that change of counsel or his inability to ask material question during cross-examination can not be a ground to recall a witness. Lastly, Mr. Bhardwaj contended that omission on the part of accused to put suggestions, which are sought to be put by way of recalling the witness, has necessarily weakened the case of accused to the benefit of complainant and as such, aforesaid omission which is/was not bonafide can not be allowed to be corrected/ rectified by learned court below by way of re-examination of the aforesaid witness.

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

8. Before ascertaining correctness of aforesaid submissions having been made by the learned counsel for the parties vis-a-vis impugned order passed by the learned court below, this Court deems it proper to take note of the provisions of law contained under Section 311 CrPC:

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

9. Careful perusal of aforesaid provision clearly suggests that court enjoys vast power to summon any person as a witness or recall and re-examine a witness provided same is essentially required for just decision of the case. Moreover, such exercise of power can be at any stage of inquiry, trial or proceedings under the Code, meaning thereby applicant can file an application at any time before conclusion of trial. Very object of Section 311 is to bring on record evidence not only from the point of view of accused and prosecution but also from the point of view of the orderly society. Otherwise also, it is well established principle of criminal jurisprudence that discovery, vindication and establishment of truth are main purposes of underlying object of courts of justice. It is also well settled that wider the power, greater the responsibility upon court, which exercises such power and exercise of such power cannot be untrammeled and arbitrary, rather same must be guided by object of arriving at a just decision of case. Close scrutiny of aforesaid provision of law further suggests that Section 311 has two parts; first part reserves a right to the parties to move an appropriate application for re-examination of a witness at any stage; but definitely the second part is mandatory that casts a duty upon court to re-examine or recall or summon a witness at any stage if his/her evidence appears to be essential for just decision of case because, definitely the underlying object of aforesaid provision of law is to ensure that there is no failure of justice on account of mistake on the part of either of parties in bringing valuable piece of evidence or leaving an ambiguity in the statements of witnesses examined from either side.

10. Hon’ble Apex Court in **Zahira Habibullah Sheikh** (5) **and another** vs. **State of Gujarat and others** (2006)3 SCC 374 has held as under:-

> “27. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the Court to summon a witness under the Section merely because the evidence supports the case for the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the Court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind.
>
> 28. As indicated above, the Section is wholly discretionary. The second part of it imposes upon the Magistrate an obligation: it is, that the Court shall summon and examine all persons whose evidence appears to be essential to the just decision of the case. It is a cardinal rule in the law of evidence that the best

available evidence should be brought before the Court. Sections 60, 64 and 91 of the Indian Evidence Act, 1872 (in short, 'Evidence Act') are based on this rule. The Court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the evidence, the Court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The Court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the Court has to act under the second part of the section. Sometimes the examination of witnesses as directed by the Court may result in what is thought to be "filling of loopholes". That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not must of course depend on the facts of each case, and has to be determined by the Presiding Judge.

29. The object of the Section 311 is to bring on record evidence not only from the point of view of the accused and the prosecution but also from the point of view of the orderly society. If a witness called by Court gives evidence against the complainant he should be allowed an opportunity to cross- examine. The right to cross-examine a witness who is called by a Court arises not under the provision of Section 311, but under the Evidence Act which gives a party the right to cross-examine a witness who is not his own witness. Since a witness summoned by the Court could not be termed a witness of any particular party, the Court should give the right of cross- examination to the complainant. These aspects were highlighted in Jamat Raj Kewalji Govani v. State of Maharashtra, (AIR 1968 SC 178).

30. Right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying existence of Courts of justice. The operative principles for a fair trial permeate the common law in both civil and criminal contexts. Application of these principles involves a delicate judicial balancing of competing interests in a criminal trial, the interests of the accused and the public and to a great extent that of the victim have to be weighed not losing sight of the public interest involved in the prosecution of persons who commit offences.

11. Hon'ble Apex Court in **Raja Ram Prasad Yadav** vs. **State of Bihar and another**, (2013)14 SCC 461, has held that power under Section 311 Cr.P.C. to summon any person or witness or examine any person already examined can be exercised at any stage provided the same is required for just decision of the case. It may be profitable to take note of the following paras of the judgment:-

"14. A conspicuous reading of Section 311 Cr.P.C. would show that widest of the powers have been invested with the Courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression "any" has been used as a pre-fix to "court", "inquiry", "trial", "other proceeding", "person as a witness", "person in attendance though not summoned as a witness", and "person already examined". By using the said expression "any" as a pre-fix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the Court was only in relation to such evidence that appears to the Court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the Court. Order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 Cr.P.C. and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to

necessarily be in consonance with the prescription contained in Section 311 Cr.P.C. It is, therefore, imperative that the invocation of Section 311 Cr.P.C. and its application in a particular case can be ordered by the Court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any Court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined, the Court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the Court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the Court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution.

15. In this context, we also wish to make a reference to certain decisions rendered by this Court on the interpretation of Section 311 Cr.P.C. where, this Court highlighted as to the basic principles which are to be borne in mind, while dealing with an application under Section 311 Cr.P.C.

15.1 In the decision reported in Jamatraj Kewalji Govani vs. State of Maharashtra - AIR 1968 SC 178, this Court held as under in paragraph 14:-

> "14. It would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of the trial to summon a witness or examine one present in court or to recall a witness already examined, and makes this the duty and obligation of the Court provided the just decision of the case demands it. In other words, where the court exercises the power under the second part, the inquiry cannot be whether the accused has brought anything suddenly or unexpectedly but whether the court is right in thinking that the new evidence is needed by it for a just decision of the case. If the court has acted without the requirements of a just decision, the action is open to criticism but if the court's action is supportable as being in aid of a just decision the action cannot be regarded as exceeding the jurisdiction." (Emphasis added)

15.2 In the decision reported in Mohanlal Shamji Soni vs. Union of India and another - 1991 Suppl.(1) SCC 271, this Court again highlighted the importance of the power to be exercised under Section 311 Cr.P.C. as under in paragraph 10:-

> "10....In order to enable the court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the new Code) are enacted whereunder any court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re- examine any person in attendance though not summoned as a witness or recall and reexamine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated."

15.3 In the decision in Raj Deo Sharma (II) vs. State of Bihar - 1999 (7) SCC 604, the proposition has been reiterated as under in paragraph 9:-

> "9. We may observe that the power of the court as envisaged in Section 311 of the Code of Criminal Procedure has not been curtailed by this Court. Neither in the decision of the five-Judge Bench in A.R. Antulay case nor in Kartar Singh case such power has been restricted for achieving speedy trial. In other words, even if the prosecution evidence is closed in compliance with the directions contained in the main judgment it is still open to the prosecution to invoke the powers of the court under Section 311 of the Code. We make it clear that if evidence of any witness appears to the court to be essential to the just decision of the case it is the duty of the court to summon and examine or recall and re-examine any such person." (Emphasis added)

15.4 In U.T. of Dadra and Nagar Haveli and Anr. vs. Fatehsinh Mohansinh Chauhan - 2006 (7) SCC 529, the decision has been further elucidated as under in paragraph 15:-

> "15. A conspectus of authorities referred to above would show that the principle is well settled that the exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof of such facts which lead to a just and correct decision of the case, this being the primary duty of a criminal court. Calling a witness or re-examining a witness already examined for the purpose of finding out the truth in order to enable the court to arrive at a just decision of the case cannot be dubbed as "filling in a lacuna in the 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." (Emphasis supplied)

15.5 In Iddar & Ors. vs. Aabida & Anr. - AIR 2007 SC 3029, the object underlying under Section 311 Cr.P.C., has been stated as under in paragraph 9:-

> "9...27. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the court to summon a witness under the section merely because the evidence supports the case for the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is 'at any stage of inquiry or trial or other proceeding under this Code'. It is, however, to be borne in mind that whereas the section confers a very wide power on the court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind." (Emphasis added)

15.6 In P. Sanjeeva Rao vs. State of A.P.- AIR 2012 SC 2242, the scope of Section 311 Cr.P.C. has been highlighted by making reference to an earlier decision of this Court and also with particular reference to the case, which was dealt with in that decision in paragraphs 20 and 23, which are as under:-

> "20. Grant of fairest opportunity to the accused to prove his innocence was the object of every fair trial, observed this Court in Hoffman Andreas v. Inspector of Customs, Amritsar (2000) 10 SCC 430. The following passage is in this regard apposite:
>
> > "6. ...In such circumstances, if the new counsel thought to have the material witnesses further examined, the Court could adopt latitude and a liberal view in the interest of justice, particularly when the court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible."
>
> 23. We are conscious of the fact that recall of the witnesses is being directed nearly four years after they were examined-in-chief about an incident that is nearly seven years old. Delay takes a heavy toll on the human memory apart from breeding cynicism about the efficacy of the judicial system to decide cases within a reasonably foreseeable time period. To that extent the apprehension expressed by Mr. Rawal, that the prosecution may suffer prejudice on account of a belated recall, may not be wholly without any basis. Having said that, we are of the opinion that on a parity of reasoning and looking to the consequences of denial of opportunity to cross-examine the witnesses, we would prefer to err in favour of the appellant getting an opportunity rather than protecting the prosecution against a possible prejudice at his cost. Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself." (Emphasis in original)

15.7 In a recent decision of this Court in Sheikh Jumman vs. State of Maharashtra - (2012) 9 SCALE 18, the above referred to decisions were followed.

> 16. Again in an unreported decision rendered by this Court dated 08.05.2013 in Natasha Singh vs. CBI (State) – Criminal Appeal No.709 of 2013, where one of us was a party, various other decisions of this Court were referred to and the position has been stated as under in paragraphs 15 and 16:
>
> > "15. The scope and object of the provision is to enable the Court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 Cr.P.C. must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal, however, must be given to the other party.
> >
> > The power conferred 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 great caution and circumspection.

The very use of words such as 'any Court', 'at any stage', or 'or any enquiry', trial or other proceedings', 'any person' and 'any such person' clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the Court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should, therefore, be whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case.

16. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized. Adducing evidence in support of the defence is a valuable right. Denial of such right would amount to the denial of a fair trial. Thus, it is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court must be zealous in ensuring that there is no breach of the same. (Vide Talab Haji Hussain v. Madhukar Purshottam Mondkar & Anr., AIR 1958 SC 376; Zahira Habibulla H. Sheikh & Anr. v. State of Gujarat & Ors. AIR 2004 SC 3114; Zahira Habibullah Sheikh & Anr. v. State of Gujarat & Ors., AIR 2006 SC 1367; Kalyani Baskar (Mrs.) v. M.S. Sampoornam (Mrs.) (2007) 2 SCC 258; Vijay Kumar v. State of U.P. & Anr., (2011) 8 SCC 136; and Sudevanand v. State through C.B.I. (2012) 3 SCC 387.)"

17. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr.P.C. read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

a) 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?

b) 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 and speculative presentation of facts, as thereby the ends of justice would be defeated.

c) 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 reexamine any such person.

d) 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.

e) 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.

f) The wide discretionary power should be exercised judiciously and not arbitrarily.

g) 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.

h) 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.

i) 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.

j) 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.

k) 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.

l) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

m) 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.

n) 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."

12. At this stage, this Court deems it proper to place reliance upon judgment rendered by Hon'ble Apex Court in **Mannan SK and others** vs. **State of West Bengal and another** AIR 2014 SC 2950, wherein the Hon'ble Court has held as under:-

"10. The aim of every court is to discover truth. Section 311 of the Code is one of many such provisions of the Code which strengthen the arms of a court in its effort to ferret out the truth by procedure sanctioned by law. It is couched in very wide terms. It empowers the court at any stage of any inquiry, trial or other proceedings under the Code to summon any person as a witness or examine any person in attendance, though not summoned as witness or recall and re-examine already examined witness. The second part of the Section uses the word 'shall'. It says that the court shall summon and examine or recall or re-examine any such person if his evidence appears to it to be essential to the just decision of the case. The words 'essential to the just decision of the case' are the key words. The court must form an opinion that for the just decision of the case recall or reexamination of the witness is necessary. Since the power is wide it's exercise has to be done with circumspection. It is trite that wider the power greater is the responsibility on the courts which exercise it. The exercise of this power cannot

> be untrammeled and arbitrary but must be only guided by the object of arriving at a just decision of the case. It should not cause prejudice to the accused. It should not permit the prosecution to fill-up the lacuna. Whether recall of a witness is for filling-up of a lacuna or it is for just decision of a case depends on facts and circumstances of each case. In all cases it is likely to be argued that the prosecution is trying to fill-up a lacuna because the line of demarcation is thin. It is for the court to consider all the circumstances and decide whether the prayer for recall is genuine."

13. Aforesaid exposition of law clearly suggests that a fair trial is main object of criminal jurisprudence and it is duty of court to ensure such fairness is not hampered or threatened in any manner. It has been further held in the aforesaid judgments that fair trial entails interests of accused, victim and society and therefore, grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right. Hon'ble Apex Court has categorically held in the aforesaid judgment that adducing evidence in support of the defence is a valuable right and denial of such right would amount to denial of a fair trial.

14. Hon'ble Apex Court in **Raja Ram Prasad Yadav** vs. **State of Bihar and another**, (2013)14 SCC 461, while culling out certain principles required to be borne in mind by the courts while considering applications under Section 311 has held that exercise of widest discretionary powers under Section 311 should ensure that judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts. Hon'ble Apex Court has further held that if evidence of any witness appears to be essential for the just decision of the case, it is the duty of the court to summon and examine or recall and re-examine any such person because very object of exercising power under Section 311 is to find out truth and render a just decision. Most importantly, in the judgment referred to herein above, Hon'ble Apex Court has held that court should bear in mind that no party in 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.

15. In the case at hand, there is no dispute that complainant was cross-examined by accused but perusal of Annexure P-3 i.e. cross-examination, conducted upon complainant clearly suggests that counsel representing accused failed to cross-examine complainant on material points. Though, accused by way of cross-examination of complainant has made an endeavour to prove that no cheque was issued by him but no suggestion qua the same was put by the counsel to the complainant. Similarly, suggestion was put to the complainant that accused had not signed the cheque but signatures on cheque were never put to complainant by accused.

16. Similarly, this Court finds that question with regard to source of income was though put to the complainant, to which complainant replied that she had borrowed the money from somebody, but counsel representing accused failed to put supplementary question to the complainant that from whom she had borrowed that money.

17. Having carefully perused averments contained in the application filed under Section 311 CrPC and discrepancies in cross-examination of complainant pointed out by the learned counsel representing the accused, this Court is inclined to agree with the submissions having been made by learned counsel representing accused that relevant material could not be brought on record inadvertently by the learned counsel representing the accused before court below.

18. Having examined impugned order, this Court has no hesitation to conclude that learned court below miserably failed to look into/consider the averments contained in the application vis-à-vis cross-examination of complainant already conducted by accused. As has been observed words, "essential to the just decision of case", are the key words and in this regard court may form opinion that for just decision of case, whether it is necessary to recall or re-examine a witness or not? Interestingly, in the case at hand, impugned order passed by court

below, nowhere reveals attempt, if any, on the part of court below to form an opinion that re-examination /recall of complainant is necessary for just decision of case. Rather, court below merely after having recorded submissions of the parties, proceeded to reject the prayer having been made by accused. Court below has simply observed in the order that there are no valid reasons to allow application at hand.

19. This Court is of the considered view that the impugned order is definitely not in consonance with the provisions of law reiterated in CrMMO No. 209 of 2017 titled **Sardar Singh** vs. **State of Himachal Pradesh**. Argument advanced by learned counsel representing the complainant that re-examination of complainant would amount to filling up of lacuna therein, is also without any merit and deserves to be rejected.

20. Hon'ble Apex Court in **Rajendra Prasad** vs **Narcotic Cell**, has categorically held that a lacuna in prosecution is not to be equated with the fallout of an oversight committed by a public prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. Corollary of such lapses or mistakes during trial/case can not be understood to be lacuna, which a court can not fill up.

21. It is quite apparent from aforesaid exposition of law that lacuna in prosecution must be understood as 'inherent weakness' or 'latent wedge' in the matrix of the prosecution. It has been further categorically held that if proper evidence was not adduced or relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified.

22. Suggestions proposed to be put to complainant in the event of her recall, certainly relate to questions already put to her in cross-examination as such, it can not be said that anything new is sought to be put to the complainant to her disadvantage.

23. Consequently, in view of detailed discussion made herein above as well as law laid down by Hon'ble Apex Court and this Court, impugned order being unsustainable in the eye of law is quashed and set aside. Application filed by accused under Section 311 CrPC is allowed. He is permitted to re-examine the complainant. Let the matter be listed before the court below on **3.4.2018** for re-examination of complainant. Learned counsel appearing for the parties undertake to cause presence of parties on the aforesaid date. It is made clear that in case accused fails to cross-examine complainant on the given date, no further opportunity shall be granted and his right to cross-examine the complainant shall be deemed to have been closed. Registry to send back the record of the case alongwith a copy of this judgment forthwith, so as to enable court below to do needful in terms of the present order.

Pending applications, if any, are disposed of.

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

Jaswant Singh & Others ....Appellants-Defendants

Versus

Iqbal Singh ....Respondent-Plaintiff

Regular Second Appeal No.231 of 2006.
Judgment Reserved on: 12.03.2018
Date of decision: 17.03.2018

Specific Relief Act, 1963- Sections 6 and 37- Suit for injunction and possession- Plaintiff seeking decree of permanent prohibitory injunction on allegation of interference in his possession- Also praying for possession of part of suit land specifically shown in site plan allegedly encroached by defendants- However, defendants claiming adverse possession on such

land, since, time of ancestors – Trial court decreeing suit for injunction as well as possession by removal of superstructures – Additional District Judge dismissing appeal of defendants – Regular Second Appeal against – Defendants entries qua possession over part of land came to be recorded in revenue records for first time during settlement on orders of Naib Tehsildar (Settlement) – Settlement took place in 1988-89 – Suit filed in 1993- Copy of order of Naib Tehsildar (Settlement) not produced in evidence – Held- Plea of adverse possession not proved- Regular Second Appeal dismissed- Judgments and decrees of lower courts upheld. (Paras-11, 12 and 18)

Cases referred:

Hemaji Waghaji Jat vs. Bhikhabhai Khengarbhai Harijan & Ors., AIR 2009 SC 103
Nasgabhushanammal (D) By LRs. Vs. C.Chandikeswaralingam, AIR 2016 SC 1134
Bangalore Development Authority vs. N.Jayamma, AIR 2016 SC 1294
Prem Nath Khanna and others vs. Narinder Nath Kapoor (Dead) Through L.Rs. and others, AIR 2016 SC 1433
Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264

For the Appellants: Mr.Bhupender Gupta, Senior Advocate with Mr.Ajeet Jaswal, Advocate.
For the Respondents: Mr.N.K. Thakur, Senior Advocate with Mr.Divya Raj Singh, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

Instant Regular Second Appeal is directed against the judgment and decree passed by the learned Additional District Judge, Una, H.P. in Civil Appeal No.59/2002, dated 23.2.2006, affirming the judgment and decree passed by learned Sub Judge Ist Class, Court No.2, Amb, District Una, H.P. in Civil Suit No.196 of 1993, dated 25.6.2002, praying therein to dismiss the suit having been filed by the plaintiff-respondent after setting aside the judgment and decree passed by both the Courts below.

2. Necessary facts, as emerged from the record, are that the respondent-plaintiff *(hereinafter referred to as the 'plaintiff')* filed a Civil Suit praying therein for decree of permanent prohibitory injunction and possession in the Court of learned Sub Judge Ist Class, Court No.2, Amb, District Una, restraining the defendants-appellants *(hereinafter referred to as the 'defendants')* from interfering in any manner, in the suit land owned and possessed by them. Plaintiff averred in the plaint that he is owner in possession of the land measuring 0-02-70 hectares, bearing Khewat No.21 min, Khatauni No.60 min, Khasra Nos.642, 643 and 642/1 as entered in the Missalhaquiat for the year 1988-89, situate in village Mubarikpur, Tehsil Amb, District Una, H.P. *(hereinafter referred to as the 'suit land')*. Plaintiff averred that the defendants, who are head strong persons, threatened him to take forcible possession of the suit land by raising construction and in this regard have already collected material. During the pendency of case, plaint came to be amended, whereby the plaintiff further averred that during the pendency of the suit, defendants have encroached upon the portion marked with letters ABCDEFGHIJ as shown in the site plan filed by the plaintiff in Khasra Nos.642, 642/1 and have also raised *Khadposh Tapri* over the portion marked with letters EFGH and have encroached upon the whole portion marked with letters A to J without the consent of the plaintiff. Plaintiff further claimed that possession of the defendants over this portion is that of a trespasser and as such they are liable to be ejected from this land. In this background, the plaintiff sought a decree for possession and injunction against the defendants.

3. Defendants, by way of filing their joint written statement, refuted the claim of the plaintiffs on the ground of maintainability, estoppel and limitation. On merits, defendants refuted the claim put forth by the plaintiff and claimed that the land denoted by letters KBCD, out of the land comprised of Khasra No.643, is in their possession since the time of their

ancestors and they are using the same for storing fuel wood and also to go to answer the call of nature as a matter of right. Defendants also claimed that they have become owners by way of adverse possession. Defendants further averred that there exists an old cattle shed over Khasra No.642, which was reconstructed by their father in the month of June, 1960 over the same place and land of Khasra No.642 denoted by letters EFGJ is situated in between the cattle shed, *Abadi* and court-yard of defendants. Defendants also claimed that apart from constructing cattle shed over Khasra No.642/1, their father also constructed a 'KUP' and also installed chaff cutting machine over Khasra No.642 in the month of June 1960 in the presence of plaintiff. Apart from above, defendants claimed that vacant area of Khasra No.642 is also used by them for tethering cattle since the time of their father. According to defendants, they are coming in open, continuous and peaceful possession of the suit land to the knowledge of plaintiff and they are in hostile and adverse possession of the same and as such have become owners with the passage of time. In the aforesaid background, the defendants prayed for dismissal of the suit.

4. By way of replication, the plaintiff, while denying the allegations made in the written statement reaffirmed the averments made in the plaint and controverted the contrary averments made in the written statement.

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

> ***"1. Whether the plaintiff is entitled to the relief of injunction as prayed for? OPP.***
>
> ***2. Whether the defendants have become owners of the suit land by way of adverse possession? OPD.***
>
> ***3. Whether the entries in the revenue record in favour of plaintiff as owner in possession are wrong and illegal as alleged? OPD.***
>
> ***4. Whether the suit is not maintainable in its present form? OPD.***
>
> ***5. Whether the plaintiff is estopped by his act and conduct to file this suit? OPD.***
>
> ***6. Whether the suit is within time? OPP.***
>
> ***7. Relief."***

6. Learned trial Court, subsequently, vide judgment dated 25.6.2002 decreed the suit of the plaintiff and held them entitled for decree of permanent injunction against the defendants restraining them from interfering in any manner, taking forcible possession and raising construction of suit land. Learned Court below also decreed the suit of the plaintiff for possession by removal of encroachment and demolition of super-structure raised over the portion marked as letters A to Z as reflected in site plan Ex.PW-1/A.

7. Being aggrieved and dis-satisfied with the aforesaid judgment and decree passed by learned trial Court, defendants preferred an appeal before the learned Additional District Judge, Una, which also came to be dismissed vide judgment dated 23.2.2006.

8. Being still aggrieved and dissatisfied with the aforesaid judgment passed by learned Additional District Judge, Una, defendants have approached this Court by way of instant proceedings, seeking therein dismissal of the suit having been filed by the respondent-plaintiff after setting aside judgments and decrees passed in their favour by the Courts below.

9. This Court vide order dated 11.08.2006, admitted the appeal on the following substantial questions of law:-

> ***"1. Whether the appellants-defendants were in possession of a portion of Khasra No.642 even at the time of the settlement, which concluded in the year 1988-89, and had their coop and cattle-shed on a portion thereof? If so, its effect."***

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

11. Since during the proceedings of the case, this Court was made to peruse entire evidence, be it ocular or documentary, adduced on record by the learned counsel representing the parties, this Court is not persuaded to agree with the contention raised by Mr.Bhupender Gupta, learned Senior counsel, representing the appellants that Courts below have not appreciated the evidence in its right perspective and there is complete mis-reading, mis-appreciation and mis-construction of evidence, rather this Court having closely perused evidence available on record has no hesitation to conclude that the defendants have miserably failed to prove on record by leading cogent and convincing evidence, if any, that they are in adverse possession of the suit land as claimed by them in the written statement. Though the defendants have claimed that they are coming in possession of the suit land from the time of their ancestors, but such claim is not corroborated by evidence, be it documentary or ocular, if any, adduced on record by the defendants. To the contrary, it is quiet apparent from the material adduced on record by the plaintiff that they are coming in possession of the suit land in the capacity of absolute owners up to the year 1988-89, whereafter possession of the defendants over some part of the suit land came to be recorded in terms of order passed by Settlement Naib Tehsildar, Gagret *(for short 'SNT')* on 17.12.1988. Though learned Senior Counsel placed much reliance upon aforesaid entry came to be reflected in favour of the defendants, pursuant to orders passed by *'SNT',* but this Court is unable to lay its hands on the copy of aforesaid order, if any, passed by *'SNT'*, Gagret. Similarly, no evidence has been led on record by the defendants to show that *'SNT'*, Gagret had power, if any, to record defendants as *'Kabzan'* and whether while effecting such entry plaintiff was afforded opportunity of being heard or not. Needless to say that detailed procedure has been provided under the H.P. Land Revenue Act to effect entry in the revenue records. Plaintiff has also placed on record documentary evidence i.e. Ex.P-1, perusal whereof suggests that he has been shown as owner in possession of the suit land and it nowhere reflects possession, if any, of the defendants over the suit land, as claimed by them in their written statement. Though perusal of copy of Missalhaquiat for the year 1988-89 Ex.P-2 suggests that the defendants came to be recorded as *'Kabzan'* of land comprised in Khasra No.642/1 the order of *'SNT'*, Gagret in case No.222/88 dated 17.12.1988, but, as has been observed hereinabove, order of *'SNT'*, Gagret has not been placed on record. Similarly, perusal of Ex.P-3 i.e. copy of Jamabandi for the year 1983-84 as well as Ex.P-4 copy of Missalhaquiat for the year 1964-65 placed on record by the plaintiff clearly substantiates his claim that he has been coming in possession over the suit land continuously without any interference. Plaintiff has also placed on record Jamabandi for the year 1953-54 Ex.PX which further suggests that predecessors-in-interest of the plaintiff and others have been coming as owners in possession of different Khasra numbers.

12. On the other hand, defendants have only produced copy of site plan Ex.DW-1/A to suggest that cattle shed constructed by their father exists over Khasra No.642/1. Defendants have also not led any evidence on record to prove that they were in possession of portion of Khasra No.642 even at the time of settlement which concluded in the year 1988-89. As has been noticed above, defendants in support of their claim have not placed on record any documentary evidence, save and except, site plan Ex.DW-1/A, whereas there is ample evidence led on record by the plaintiff suggestive of the fact that he is owner in possession of the suit land and as such there is no force in the arguments of Mr.Gupta, learned Senior Counsel representing the appellants, that learned Court below, while decreeing the civil suit of the plaintiff failed to take note of the fact that the appellants-defendants were in possession of portion of Khasra No.642 at the time of settlement, which was admittedly concluded in the year 1988-89. Leaving everything aside, defendants have not bothered to place on record, if any, of settlement proceedings held in 1988-89 to substantiate their aforesaid claim. Stray entry, if any, reflected in revenue record, on the basis of order, if any, passed by *'SNT'*, Gagret is of no consequence and has rightly been discarded by Courts below, especially when no evidence has been led on record by the defendants to prove the proceedings initiated by *'SNT'*, Gagret, which ultimately culminated into order dated 17.12.1988. Documentary evidence available on record totally belies the stand taken by the

defendants in their written statement and, as such, there appears to be no illegality and infirmity in the judgments and decrees passed by the learned Courts below. As has been noticed hereinabove, defence of adverse possession has been taken by the defendants just for the sake of opposition because no specific evidence has been led on record to prove adverse possession, if any, of defendants qua the suit land by the defendants.

13. It is well settled law that plea of adverse possession is not a pure question of law but a blended one of fact and law. As such, a person who claims adverse possession should prove; (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. The Hon'ble Apex Court in ***Hemaji Waghaji Jat vs. Bhikhabhai Khengarbhai Harijan & Ors., AIR 2009 SC 103,*** has held that since a person claiming adverse possession intends to defeat the rights of the true owner, onus is heavily upon him to clearly plead and establish all facts necessary to establish his adverse possession. Rather, in the case referred above, Hon'ble Apex Court termed the law of adverse possession as irrational, illogical and wholly disproportionate and recommended Union of India to seriously consider and make suitable changes in the law of adverse possession. The Hon'ble Apex Court has held:-

> ***"18. In Karnataka Board of Wakf v. Govt. of India (2004) 10 SCC 779 at para 11, this court observed as under:-***
>
> > ***"In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period."***
>
> ***The court further observed that plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession.***
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> ***19. In Saroop Singh v. Banto (2005) 8 SCC 330 this Court observed:***
>
> > ***"29. In terms of Article 65 the starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff but commences from the date the defendant's possession becomes adverse. (See Vasantiben Prahladji Nayak v. Somnath Muljibhai Nayak (2004) 3 SCC 376)***
> >
> > ***30. `Animus possidendi' is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence. As in the instant case, the appellant categorically states that his possession is not adverse as that of true owner, the logical corollary is that he did not have the requisite animus.***

(See Md. Mohammad Ali (Dead) by LRs. v. Jagdish Kalita and Others (2004) 1 SCC 271)"

20. This principle has been reiterated later in the case of M. Durai v. Muthu and Others (2007) 3 SCC 114 para 7. This Court observed as under:

> *"...In terms of Articles 142 and 144 of the old Limitation Act, the plaintiff was bound to prove his title as also possession within twelve years preceding the date of institution of the suit under the Limitation Act, 1963, once the plaintiff proves his title, the burden shifts to the defendant to establish that he has perfected his title by adverse possession."*

21. This court had an occasion to examine the concept of adverse possession in T. Anjanappa & Others v. Somalingappa & Another [(2006) 7 SCC 570]. The court observed that a person who bases his title on adverse possession must show by clear and unequivocal evidence that his title was hostile to the real owner and amounted to denial of his title to the property claimed. The court further observed that the classical requirements of acquisition of title by adverse possession are that such possession in denial of the true owner's title must be peaceful, open and continuous. The possession must be open and hostile enough to be capable of being known by the parties interested in the property, though it is not necessary that there should be evidence of the adverse possessor actually informing the real owner of the former's hostile action.

22. In a relatively recent case in P. T. Munichikkanna Reddy & Others v. Revamma & Others (2007) 6 SCC 59] this court again had an occasion to deal with the concept of adverse possession in detail. The court also examined the legal position in various countries particularly in English and American system. We deem it appropriate to reproduce relevant passages in extenso. The court dealing with adverse possession in paras 5 and 6 observed as under:-

> *"5. Adverse possession in one sense is based on the theory or presumption that the owner has abandoned the property to the adverse possessor on the acquiescence of the owner to the hostile acts and claims of the person in possession. It follows that sound qualities of a typical adverse possession lie in it being open, continuous and hostile. [See Downing v. Bird 100 So. 2d 57 (Fla. 1958), Arkansas Commemorative Commission v. City of Little Rock 227 Ark. 1085 : 303 S.W.2d 569 (1957); Monnot v. Murphy 207 N.Y. 240, 100 N.E. 742 (1913); City of Rock Springs v. Sturm 39 Wyo. 494, 273 P. 908, 97 A.L.R. 1 (1929).]*
>
> *6. Efficacy of adverse possession law in most jurisdictions depend on strong limitation statutes by operation of which right to access the court expires through effluxion of time. As against rights of the paper-owner, in the context of adverse possession, there evolves a set of competing rights in favour of the adverse possessor who has, for a long period of time, cared for the land, developed it, as against the owner of the property who has ignored the property. Modern statutes of limitation operate, as a rule, not only to cut off one's right to bring an action for the recovery of property that has been in the adverse possession of another for a specified time, but also to vest the possessor with title. The intention of such statutes is not to punish one who neglects to assert rights, but to protect those who have maintained the possession of property for the time specified by the statute under claim of right or color of title. (See American Jurisprudence, Vol. 3, 2d, Page 81). It is important to keep in mind while studying the American notion of Adverse Possession, especially in the backdrop of Limitation Statutes, that the intention to dispossess can not*

be given a complete go by. Simple application of Limitation shall not be enough by itself for the success of an adverse possession claim."

34. Before parting with this case, we deem it appropriate to observe that the law of adverse possession which ousts an owner on the basis of inaction within limitation is irrational, illogical and wholly disproportionate. The law as it exists is extremely harsh for the true owner and a windfall for a dishonest person who had illegally taken possession of the property of the true owner. The law ought not to benefit a person who in a clandestine manner takes possession of the property of the owner in contravention of law. This in substance would mean that the law gives seal of approval to the illegal action or activities of a rank trespasser or who had wrongfully taken possession of the property of the true owner.

36. In our considered view, there is an urgent need of fresh look regarding the law on adverse possession. We recommend the Union of India to seriously consider and make suitable changes in the law of adverse possession. A copy of this judgment be sent to the Secretary, Ministry of Law and Justice, Department of Legal Affairs, Government of India for taking appropriate steps in accordance with law."

14. Reliance is also placed upon the judgments of Hon'ble Apex Court in ***Nasgabhushanammal (D) By LRs. Vs. C.Chandikeswaralingam, AIR 2016 SC 1134, Bangalore Development Authority vs. N.Jayamma, AIR 2016 SC 1294*** and ***Prem Nath Khanna and others vs. Narinder Nath Kapoor (Dead) Through L.Rs. and others, AIR 2016 SC 1433.***

15. After bestowing my thoughtful consideration to the pleadings as well as evidence led on record by respective parties, I see no reason to interfere in the well reasoned findings returned by learned Courts below. Rather, after carefully examining the material evidence led on record by the respective parties, this Court is compelled to observe that both the learned Courts below have carefully considered and appreciated the evidence made available on record by respective parties, perusal whereof certainly suggests that defendants were not able to prove on record by leading cogent and convincing evidence that they have become owners by way of adverse possession qua the suit land.

16. After having carefully perused material available on record, especially evidence led on record by the respondent-plaintiff, this Court finds no error in judgment and decrees passed by the Courts below and as such there is no occasion for this Court to interfere in the well reasoned judgment passed by Courts below, otherwise also both the Courts below have returned concurrent findings on facts and law and as such same cannot be interfered unless the same are shown to be wholly perverse. Substantial question of law is answered accordingly.

17. Shri N.K. Thakur, learned Senior Counsel appearing for the respondent-plaintiff, supported the judgments passed by both the Courts below and vehemently argued that no interference, whatsoever, is warranted in the present facts and circumstances of the case, especially in view of the fact that both the Courts below have very meticulously dealt with each and every aspect of the matter. He also urged that scope of interference by this Court is very limited especially when two Courts have recorded concurrent findings on the facts as well as law. In this regard, to substantiate the aforesaid plea, he placed reliance upon the judgment passed by Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,*** **(2015)4 SCC 264,** wherein the Hon'ble Apex Court has held as under:-

"16. Based on oral and documentary evidence, both the courts below have recorded concurrent findings of fact that the plaintiffs have established their right in A schedule property. In the light of the concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for reappreciation of evidence. While so, the High Court proceeded to observe that the first plaintiff has earmarked the

A schedule property for road and that she could not have full-fledged right and on that premise proceeded to hold that declaration to the plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. In our considered view, the High Court did not keep in view that the concurrent findings recorded by the courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained." (p.269)

18. In the facts and circumstances discussed above, this Court is of the view that findings returned by the trial Court below, which were further upheld by the first appellate Court, do not warrant any interference of this Court as findings given on the issues framed by the trial Court below as well as specifically taken up by this Court to reach the root of the controversy, appears to be based upon correct appreciation of oral as well as documentary evidence. Hence, the present appeal fails and is dismissed, accordingly. There shall be no order as to costs.

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

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

Jai Krishan … Petitioner
Versus
State of Himachal Pradesh … Respondent

CrMP(M) No. 159 of 2018
Decided on March 19, 2018

Code of Criminal Procedure, 1973- Section 438- Pre-arrest Bail - Grant of- Held- Freedom of an individual is of utmost importance and cannot be curtailed on mere suspicion of his involvement in an offence –Object of bail is to secure presence of accused during trial – On facts, accused was found cooperating with police in investigation – Enlarged on pre-arrest bail subject to suitable conditions. (Para-4 and 8)

Cases referred:
Sanjay Chandra versus Central Bureau of Investigation (2012)1 Supreme Court Cases 49
Siddharam Satlingappa Mhetre versus State of Maharashtra and others, (2011) 1 SCC 694
Gurbaksh Singh Sibbia vs. State of Punjab, (1980) 2 SCC 565
Prasanta Kumar Sarkar versus Ashis Chatterjee and another (2010) 14 SCC 496

For the petitioner : Mr. Peeyush Verma, Advocate.
For the respondent : Mr. Dinesh Thakur, Additional Advocate General with Mr. Vikrant Chandel, Deputy Advocate General.
ASI Chaman Lal Negi, Police Station Nankhari, District Shimla, Himachal Pradesh.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Bail petitioner apprehending his arrest in FIR No. 09/18 dated 17.02.2018 under Section 379 IPC and Sections 32 and 33 of Indian Forest Act, registered at Police Station,

Nankhari, District Shimla, Himachal Pradesh, has approached this Court by way of instant petition under Section 438 CrPC, praying therein for grant of pre-arrest bail.

2. Sequel to order dated 26.2.2018, whereby bail petitioner was ordered to be enlarged on interim bail in the event of his arrest, ASI Chaman Lal has come present with the record. Learned Additional Advocate General has also placed on record status report prepared on the basis of investigation carried out by the investigating agency. Mr. Dinesh Thakur, learned Additional Advocate General, on the instructions of the Investigating Officer, who is present in the Court, fairly stated that pursuant to previous order passed by this Court, bail petitioner has joined the investigation and is fully cooperating. Mr. Dinesh Thakur, learned Additional Advocate General, further contended that at this stage, nothing is required to be recovered from the bail petitioner, however, bail petitioner is not disclosing names of other co-accused.

3. Mr. Peeyush Verma, learned counsel representing the petitioner, while refuting aforesaid contention of the learned Additional Advocate General contended that the petitioner is fully cooperating in the investigation and has disclosed all the facts known to him. He further contended that in the event of petitioner's being enlarged on bail, he shall cooperate in the investigation and as such, bail petitioner may be enlarged on bail.

4. It has been repeatedly held by the Hon'ble Apex Court that an individual is deemed to be innocent until proved guilty. It has been further held by the Constitutional Courts that freedom of an individual is of utmost importance and it can not be curtailed merely on the basis of suspicion. In the case at hand, guilt of the accused is yet to be proved in accordance with law by the prosecution and as such, it may not be in the interest of justice to curtail the freedom of the petitioner for indefinite period, especially when he has joined the investigation and has been fully cooperating with the investigating agency, as has been fairly admitted by the learned Additional Advocate General.

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

> "2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.
>
> 3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.
>
> 4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence

witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons."

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

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

7. Law with regard to grant of bail is now well settled. The Apex Court in **Siddharam Satlingappa Mhetre** versus **State of Maharashtra and others**, (2011) 1 SCC 694,

while relying upon its decision rendered by its Constitution Bench in **Gurbaksh Singh Sibbia** vs. **State of Punjab**, (1980) 2 SCC 565, laid down the following parameters for grant of bail:-

> "111. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. We are clearly of the view that no attempt should be made to provide rigid and inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualized for the grant or refusal of anticipatory bail. In consonance with the legislative intention the grant or refusal of anticipatory bail should necessarily depend on facts and circumstances of each case. As aptly observed in the Constitution Bench decision in Sibbia's case (supra) that the High Court or the Court of Sessions to exercise their jurisdiction under section 438 Cr.P.C. by a wise and careful use of their discretion which by their long training and experience they are ideally suited to do. In any event, this is the legislative mandate which we are bound to respect and honour.
>
> 112. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:
>
> (i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;
>
> (ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;
>
> (iii) The possibility of the applicant to flee from justice;
>
> (iv) The possibility of the accused's likelihood to repeat similar or the other offences.
>
> (v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.
>
> (vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.
>
> (vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;
>
> (viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;
>
> (ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;
>
> (x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail." (Emphasis supplied)

8. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be

granted or refused is whether it is probable that the party will appear to take his trial. Otherwise also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

9. The Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496**,** has laid down the following principles to be kept in mind, while deciding petition for bail:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail.

10. In view of above, bail petition has carved out a case for grant of bail and as such, interim order dated 26.2.2018, is made absolute, subject to the petitioner's furnishing fresh bail bonds in the sum of Rs.50,000/- (Rs. Fifty Thousand) with a local surety in the like amount, to the satisfaction of the Investigating Officer concerned, besides following conditions:

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

(b) He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

(c) He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and

(d) He shall not leave the territory of India without the prior permission of the Court.

(e) He shall surrender passport, if any, held by him.

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

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

The petition stands accordingly disposed of.

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

Court on its own motion ...Petitioner.
Versus
State of H.P. & others ...Respondents.

CWPIL No. 49 of 2018
Date of Decision: March 20, 2018

Constitution of India, 1950- Articles 21 and 226- Letter petitioner highlighting grievances of residents of Salapar and adjoining villages of Tehsil Sundernagar District Mandi due to pollution caused by mining of lime stone and production of cement by ACC factory- Status report of Deputy Commissioners, Mandi and Bilaspur found contradictory to each other- D.C. Mandi reporting about adverse impact on flora and fauna due to pollution in said villages- Aerial distance of Salapar is just 4-500 meters from ACC factory- Matter regarding blasting and resultant sound pollution already pending before National Green Tribunal- Petition disposed of with direction to authorities to examine grievances of letter petitioner. (Para-6 to 11)

For the Petitioner: Mr.Aman Sood, Advocate as Amicus Curiae.
For the Respondents: Mr. Ashok Sharma, Advocate General with M/s Ajay Vaidya, Sr. Additional Advocate General, Mr.Adarsh K. Sharma, Ms. Rita Goswami, Additional Advocate Generals & Mr.J.K.Verma, Deputy Advocate General, for the respondents-State.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice

On the basis of a letter petition, addressed to this Court, taking *suo motu* cognizance, petition was registered, in which notices were issued to the respondents.

2. Letter petitioner, Jitender Verma, who is a resident of Salapar, Tehsil Sundernagar, District Mandi, H.P., alleges discrimination on the part of the Government as also the management of the ACC Cement Factory, Barmana, in taking measures for checking pollution, rehabilitation and resettlement of aggrieved persons. Plight of the residents of village Salapar and the adjoining villages, falling within District Mandi, stands highlighted. Even though the aerial distance of Salapar is far less than the villages of District Bilaspur, yet measures of rehabilitation/resettlement and checking pollution for the villages of District Mandi, which in fact, are in close proximity, stand ignored by the authorities concerned. Accordingly, prayer is made for issuance of direction to the management of ACC Factory to provide financial assistance for development of the village.

3. Deputy Commissioner, Bilaspur, in his affidavit dated 18.03.2018, has pointed out that cement plant stands established by M/s ACC Limited. The project proponent has established two units, one in the year, 1984 and another in the year, 1994 with the carrying capacity of 4.64 Crores for both the plants. The entire process involves mining of lime stones and packaging of cement, in which 1750 persons are engaged. The industrial unit has obtained mandatory consents to operate under the provisions of the Water (Prevention & Control of Pollution) Act, 1974; Air (Prevention & Control of Pollution) Act, 1981; and authorization under Hazardous (Waste Management & Handling) Rules, 2008.

4. Crucially, it stands admitted that Gram Panchayat Salapar starts from just at a distance of 3 kms from the cement factory with an aerial distance of 400-500 meters. According to this deponent, no pollution is caused, in any of the Panchayats, falling in his District, for the project proponent has installed requisite machinery so required to meet the conditions imposed

by the Himachal Pradesh State Pollution Control Board and the one envisaged under the environmental laws of the land.

5. Insofar as the issue of social corporate responsibility is concerned, it stands admitted that in three Panchayats of Barmana falling in District Bilaspur, endeavour has been taken by the project proponent.

6. But what is crucial in his affidavit, is constant grievances vented out by the general public with regard to pollution caused by the project proponent on account of blasting, which even according to the deponent requires elaborate study. Also it stands pointed out that the National Green Tribunal is seized of such matter.

7. When we peruse the affidavit dated 13.03.2018, filed by the Deputy Commissioner, Mandi, we find the position to be totally different. With the establishment of the cement plant, flora and fauna stands adversely affected so also the health of the people leading to peculiar problems/diseases of Tuberculosis, Asthma and Malaria. Also issue of sound pollution stands raised by the natives.

8. In the affidavit dated 17.03.2018, filed by the Senior Environmental Engineer, H.P. State Pollution Control Board, Shimla, the Board has simply reiterated the view taken by the Deputy Commissioner, Bilaspur, H.P.

9. We find that M/s ACC limited is not a party in the present proceedings. Also the matter of pollution is pending consideration with the National Green Tribunal. But insofar as the duty of the State and the Regulator for enforcement of environmental law is concerned, we are of the considered view that the grievances of the residents of village Salapar, must be examined and if found true addressed, more so in the light of the affidavit filed by the Deputy Commissioner, Mandi.

10. Well we could have ourselves impleaded the project proponent as a party and passed appropriate directions, but are persuaded by the learned Advocate General to close the present proceedings with the assurance that an in depth study shall be got conducted through the experts and the grievances of the residents of Salapar Panchayat, be it of the nature of health or ecology, examined expeditiously.

11. Under these circumstances, we close the present proceedings with the following directions:-

(i) The grievances of village Salapar, as pointed out in the letter petition and in the affidavit dated 13.02.2018 of Deputy Commissioner, Mandi, shall be got examined by the State in a time bound manner. Chief Secretary to the Government of H.P. shall form a Committee for such purpose.

(ii) Committee shall constitute Experts, including officers of the Department of Health; Department of Environment, Science and Technology; Himachal Pradesh State Pollution Control Board; as also the Department of Industries. After associating all concerned, including the residents of the area, as also the project proponent, appropriate decision shall be taken;

(iii) Also study of adverse impact, if any, on the health or environment in and around the areas, where mining operations as also processing of minerals in the plant, are taking place, shall be got conducted within a time bound period;

(iv) Action plan on the basis of remedial measures suggested by the Committee be got prepared and implemented within a time bound period; and

(v) Affidavit of compliance shall be filed by the Additional Chief Secretary to the Government of Himachal Pradesh, who incidently is also the Chairman of the H.P. State Pollution Control Board, within a period of three months from today, for which purpose, matter be listed before the Registrar (Judicial), on 12.07.2018.

12. Before parting, we wish to place on record appreciation qua the efforts put in by Mr.Aman Sood, learned Amicus Curiae, who, on the instructions of this Court, obtained necessary feedback.

13. Learned Amicus Curiae undertakes to communicate the outcome of the present petition to the letter petitioner.

14. Registry is directed to send copies of this judgment to the Chief Secretary to the Government of H.P., H.P. State Pollution Control Board (respondent No.2), the Deputy Commissioner, Bilaspur, H.P. (respondent No.3) and the Deputy Commissioner, Mandi, H.P. (respondent No.4) as well as to the letter petitioner to enable him to take follow up action with the concerned authorities.

With the aforesaid observations, present petition stands disposed of.

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

Court on its own motion ...Petitioner.

Versus

State of H.P. and others ...Respondents.

CWPIL No.42 of 2017
Date of Decision: March 20, 2018

Constitution of India, 1950- Articles 21 and 226- Letter Petitioners opposing construction of sewerage treatment plant inside their villages on health issue and nuisance- However, matter regarding its construction settled with intervention of amicus curiae and local administration- Thereafter, villagers demanding that water emerging after treatment be channelized for irrigation of their fields- Such water could be used by lift irrigation scheme only, cost thereof quite high – petition disposed of with directions. (Para-6, 12 and 13)

For the Petitioner : Ms Devyani Sharma, Advocate.

For the Respondents : Mr. Ashok Sharma, Advocate General with Mr. Ranjan Sharma, Mr. Adarsh Sharma, Additional Advocate Generals with Mr. J.K. Verma, Deputy Advocate General, for the appellant/State.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice

On the basis of a Letter Petition, addressed by the residents of Villages Bela, Abhipur, Thanthewal, Ganguwal, Mandiarpur and other surrounding villages, Tehsil Nalagarh, District Solan, Himachal Pradesh, this Court, taking suo moto cognizance, issued notice.

2. On 28.8.2017, this Court passed the following order:

"Letter written to the Chief Justice of this Court by the villagers of villages Bela, Abhipur, Thanthewal, Gaguwal and Mandiarpur, Tehsil Nalagarh, in public interest was treated as a writ petition. The grievance being that the State has decided to construct a Sewerage and Sullage Master Tank inside the village, which site is perhaps the most inadequate and unsuitable from every aspect of the matter. From the construction of the proposed sewerage and sullage tank,

the basic character of the town is likely to be destroyed, apart from adverse effect, including health, it would have on the local population."

3. Certain intervening developments took place and the scope of the present petition was narrowed down. All this stands recorded in our order dated 11.9.2017, which is reproduced as under:

> "On a Letter Petition, this Court took suo motu cognizance and asked the State to respond to the grievances vented out by the residents of villages Bela, Mandiarpur, Abhipur, Thanthewal and Gaguwal, Pargana and Tehsil Nalagarh, District Solan, H.P.
>
> This Court appointed an Amicus Curiae to communicate with the villagers as also the authorities and assist the Court.
>
> The issue primarily pertains to the establishment of Sewage Treatment Plant in the heart of the village. Apprehending that the authorities may not be able to effectively establish and run the Plant, which may be a source of nuisance, villagers approached this Court.
>
> Pursuant to series of meetings, so held by the S.D.M., Nalagarh with the villagers and with the efforts put in by the learned Amicus Curiae, quite apparently to a large extent, the matter stands amicably resolved, which fact is evident from the affidavit filed by the S.D.M., Nalagarh, annexing a Deed of Compromise-cum-Settlement Deed, dated 8th September, 2017, in that regard, which is taken on record. The Sewage Treatment Plant is now to be established at the designated place with full mechanism, as also man and machinery in place.
>
> The only surviving grievance, which has emerged during the course of discussions, is as to whether the water, after treatment, so discharged from Sewage Treatment Plant, can be channelized so as to irrigate the fields of the residents of the area. The Sub-Divisional Magistrate, Nalagarh, in his affidavit, states that indeed such proposal shall be to the advantage and benefit of the farmers. However, the issue is only with regard to the funds being made available. He is not an expert to analyse and evaluate the mechanism, which should be put in place for channelizing the Sewage Treatment Plant. We are informed that the Executive Engineer, I & PH of the area has suggested a Lift Irrigation Scheme, which may solve the problem, but there are no estimates before us in that regard.
>
> As such, we direct the Chief Secretary, Government of Himachal Pradesh, to explore the possibility of having such machinery in place and the feasibility of providing funds for Lift Irrigation Scheme or any other mechanism, which may be suitable and advisable for channelizing the water from the Sewage Treatment Plant, to be utilized for the purpose of irrigating the fields of the villagers of the affected areas.
>
> Needful be positively done within a period of two weeks.
>
> It shall be open for the learned Amicus Curiae to file response to the affidavit filed by the S.D.M., Nalagarh.
>
> List on 23rd October, 2017." (Emphasis supplied)

4. On 23.10.2017, we recorded the efforts put in by the learned Amicus in making all the residents of villages Bela, Mandiarpur, Abhipur, Thanthewal and Gaguwal, Pargana and Tehsil Nalagarh, District Solan, Himachal Pradesh, aware of the importance and significance of having the sewerage plant established at the site identified by the State. Thankfully, this issue stands resolved.

5. However, learned Amicus invited our attention to the fact that the villagers were desirous of having the water flowing from the said plant, after treatment, channelized and utilized for irrigation purpose. This we find to be of far greater public importance and interest, for it would be for the first time that such an endeavour would be adopted and experimented within the State of Himachal Pradesh. Accordingly, we directed the Superintending Engineer, IPH, Solan to prepare estimate of the work and forward the same to the State for according necessary sanction.

6. On 23.10.2017, we were informed by the learned Advocate General that in principle, proposal stood accepted and in this regard communication dated 21.10.2017 was also placed on record, which reads as under:

> "In compliance to the orders passed by the Hon'ble High Court Himachal Pradesh on 11-09-2017 in the subject cited CWPIL, it is stated that the designed capacity of the Sewerage Treatment Plant (STP) to Nalagarh Town is 3.62 MLD for the year 2048. However, total availability of treated effluent on commissioning of plant in the year 2018 shall be about 2.6 MLD (30 LPS) provided all the households and establishments taken as per scope of the estimate are connected with the STP through sewer network. Thus considering dependable availability of treated effluent to the tune of 75%, only 30 Hectares of nearest situated culturable land of village Bela/ Thanthewal can be irrigated by constructing a lift irrigation scheme from the outlet of STP. It is pertinent to mention here that villages of Bela, Mandiarpur, Thanthewal, Abhipur and Gaguwal of Pargana and Tehsil Nalagarh District Solan (HP) have a total 197.76 Hectares of culturable land out of which only 30 Hectares nearest situated land can be irrigated using the treated effluent that would be available at the outlet of the STP subject to availability of funds.
>
> Accordingly a preliminary estimate for providing Lift Irrigation Scheme has been prepared by the Executive Engineer, IPH Division, Nalagarh amounting to Rs. 138.91 Lakh. However it is submitted that the cost per hectare of the proposed lift irrigation scheme, as per the preliminary estimate, is above the prevalent cost norms adopted by the department. Detailed estimate is also being prepared simultaneously for submission to the Chief Engineer (S/Z) IPH Department U.S. Club Shimla-1 for further transmission to the Government for its approval/accord of A/A & E/S." (Emphasis supplied)

7. Accordingly, we had directed the Chief Secretary to the Government of Himachal Pradesh to lend favourable consideration to the proposal.

8. On 26.12.2017, we also recorded that estimates for providing irrigation facility stood forwarded to the Irrigation and Public Health Department, vide communication dated 12.12.2017. Technical scrutiny of the same was to be carried out, as also opinion of the Pollution Control Board and clearance of the Irrigation and Public Health Department was to be obtained.

9. The Superintending Engineer, IPH Circle, Solan, has filed his affidavit dated 19.3.2018, clarifying that the proposal required amendment and, as such, needful was done. Further, it stood forwarded to the office of the Engineer-in-Chief, IPH Department, vide communication dated 13.3.2018, for further scrutiny and transmission to the Government of Himachal Pradesh.

10. We must place on record our appreciation for the efforts put in not only by the learned Amicus, but also the Sub Divisional Officer (Civil), Nalagarh, who in fact made an extra endeavour in having the residents of the concerned villages agree to the proposal of setting up of sewerage treatment plant, as originally proposed, and in relation thereto, getting the deed of compromise/ settlement, dated 8.8.2017, entered into.

11. We have already taken note of communications, dated 21.10.2017 and 23.12.2017, addressed by the Superintending Engineer, IPH Circle, Solan to the learned Advocate General, State of Himachal Pradesh.

12. In this backdrop, we are persuaded by the learned Advocate General to close the present proceedings, with the assurance that the possibility of having the water, discharged from the treatment plant, to be used for the purpose of irrigating the fields, shall be considered expeditiously and perhaps favourably.

13. Under these circumstances, we dispose of the present petition with the following directions:

(a) The sewerage plant be established and make functional at the earliest.

(b) Concern of residents of Villages Bela, Abhipur, Thanthewal, Ganguwal, Mandiarpur and other surrounding villages, Tehsil Nalagarh, District Solan, Himachal Pradesh, be redressed, in accordance with law.

(c) Proposal for use of water, likely to be discharged from the sewerage treatment plant, for irrigation purpose, be considered and decided expeditiously and not later than six months from today.

(d) Liberty is reserved to the residents to take recourse to such remedies as may be so advised, if so, required and desired, subsequently. Also, it shall be open for the residents to approach this Court again for redressal of the surviving grievances.

(e) Status report be filed on the affidavit of the Principal Secretary, IPH, Government of Himachal Pradesh, as also the Engineer-in-Chief, IPH Department, U.S. Club, Shimla, within a period of four weeks from today, for which purpose the matter be listed before the Additional Registrar (Judicial) of this Court on 24.4.2018.

In view of the above we close the present proceedings. Pending application(s), if any, also stand disposed of.

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

Parun Chandel ....Petitioner.

Versus

State of Himachal Pradesh and others ...Respondents.

CWP No. : 2531 of 2012
Decided on: 23.03.2018

Constitution of India, 1950- Articles 14 and 16- Appointment to post of PTI as Parents Teacher Association Appointee – Dispute interse petitioner and private respondent – On complaint of petitioner, Inquiry Committee set aside selection of private respondent and recommended appointment of petitioner - In appeal, Appellate Authority (Deputy Commissioner) upset recommendations of Inquiry Committee and found selection of private respondent in consonance with norms- Petition against - Private respondent was appointed as per prevalent norms fixed vide notification dated 29.6.2006 - Inquiry Committee didn't hold nor it is shown to High Court that this appointment was in contravention of notification dated 29.6.2006 – Held - Inquiry Committee could not have recommended appointment of petitioner without first holding either earlier norms as unreasonable or selection of private respondent in violation thereof – petition dismissed. (Para-7 and 8)

For the petitioner Mr. S.D. Sharma, Advocate.
For the respondents Mr. Desh Raj Thakur, Addl. AG with Mr. Kamal Kant Chandel, Dy. AG respondents No. 1 to 3 and 5.
Mr. D.S. Kaith, Advocate for respondent No. 4.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

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

"It is, therefore, most respectfully prayed that the writ petition may kindly be allowed and the order passed by respondent No. 2, Annexure P-1, dt July six two though ten, may kindly be set aside and the Respondent No. I may kindly be directed to appoint the petitioner to the post of PTI in Government Middle School Marthu, Kotkhai, District Shimla (HP) as a PTA appointee, by issuing appropriate writ, order or direction to respondent Nos I & 3;

Any other relief deemed fit in the facts and circumstances of the case, may kindly be granted in favour of petitioner, in the interests of justice."

2. Undisputed facts necessary for adjudication of the present petition are as under:-

On the recommendation of the Parents Teacher Association, respondent No. 4 was appointed against the post of PTI in Government Middle School, Marthu, Kotkhai, District Shimla, on 10.09.2007. Petitioner had also unsuccessfully participated in the process for selection against the said post. The appointment of the private respondent was assailed by the present petitioner by way of filing a complaint before the Enquiry Committee which was constituted by the State vide notifications dated 19.04.2008 and 27.05.2008 (Annexures P-4 and P-5 respectively). The Committee which inquired the matter pursuant to the complaint filed by the present petitioner concluded that petitioner deserved to be appointed and the appointment of respondent No. 4 was liable to be rejected. This conclusion was arrived at by the Enquiry Committee after re-evaluating the merit of the petitioner as also the private respondent as per annexure appended alongwith the notification dated 27.05.2008.

3. The decision of the Committee was assailed by the private respondent before the appellate authority, i.e. Deputy Commissioner, Shimla, who vide decision dated 06.07.2010, allowed the appeal and set aside the order passed by the Enquiry Committee. Said Appellate Authority allowed the appeal of the private respondent by returning the following findings:

"I have gone through the record as well as the recommendation of the Enquiry Committee under the Chairmanship of the SDM, Theog and considered the arguments advanced by the Ld. Counsel for the appellant. The perusal of recommendation made by the enquiry committee shows that the selection of the appellant was cancelled on the basis of merit list prepared as per norms fixed by the Govt. in the new notification but the perusal of the result sheet prepared at the time of interviews shows that the appellant stood on top of all the contesting candidates and he possessed all the basic requirements and qualifications for the selection of the post. Since the appointment of the appellant was made according to the norms fixed vide notification dated 29.6.2006 the criteria under new notification cannot be applied with retrospective effect. In view of above I find no reason to hold that the selection of appellant was made in contravention of the norms fixed for the purpose. Therefore, the appeal is allowed the recommendations of the Enquiry Committee under the Chairmanship of the SDM, Theog vide its order dated 4.11.2008 are set-aside."

4. Feeling aggrieved, the petitioner has filed present petition.

5. I have heard learned Counsel for the parties and gone through the impugned order as well as pleadings placed on record by the parties.

6. There is a supplementary affidavit of Director of Elementary Education, Himachal Pradesh, dated 07.09.2017 alongwith which the merit list of the petitioner and the private respondent as was arrived at by the selection committee which interviewed them on 05.09.2007 is appended. The contents of the same are quoted herein-below:-

Interview information/Merit List in R/o PET Interview on dt. 5/9/2007 GMS Marathu, Teh. Kotkhai, Shimla, H.P.														
Sr. No.	Name of the candidate	Fathers name	Address	Academic Qualification from essential to Higher						Viva-Voce				
				Matric	10+2	BA/MA	Qualification			PTA	Subject	PTA	Remarks	
				20%	10 %	5%	30%	10 %	10 %	President 5%	Specialist 5%	Secretary 5%	Total	
1	Surinder Bhardwaj	Sh. Sant Ram	Vill. Baghi Tehkki,											Absent
2.	Anil Kumar	Sh. Mathu Ram	Vill. Lashta											Absent
3.	Suraj Chauhan	Sh. J.R. Chauhan	Vill. Kotkhai	9.80	5.68	-	21.56	-	-	5.0	4.5	5.0	51.54	
4.	Reena Sharma	Sh. Krishna Chauhan	C/o GMS Golardal	-	-									Absent
5.	Amit Chauhan	Sh. Prem Chauhan	Vill Dhalli Kiari, Teh. Kotkhai	7.94	4.43		18.54			3.5	2.5	3.0	39.91	
6.	Manoj Kumar	Sh. Roshan Lal												Absent
7.	Amit Chauhan	Sh. Gian Singh	Vill. & PO Purag Teh. Kotkhai	7.71	5.52		14.03			4.0	3.0	4.5	38.76	

8.	Karan	Sh. Narayan Dass	Vill. Manjholi Panog	10.00	6.12		17.10			4.5	4.0	3.5	45.22	
9.	Sunil Kumar	Sh. Gian Singh	Vill. Jhanddi Korkha											Absent
10.	Vikram Verma	Sh. Chet Ram Verma	Vil. Dasbar, Kotkhai											Absent
11.	Amit Verma	Sh. Shyam a Nand	-do-	8.68	4.50		21..31	6.65		2.5	2.5	3.0	49.14	
12.	Varun Chauhan	Sh. Rajinder Chauhan	Vill. Dhalli Kiari,	9.56	4.12	2.01	18.22	6.95		3.0	3.0	2.5	49.36	
13.	Anuj chauhan	Sh. Pratap Chauhan	Vill. Badi Kiari	9.28	5.86	-	15.97			4.0	3.5	3.5	42.11	
14.	Puran Chandel	Sh. Jagdish Chandel	Vill Bailot, Kotkhai	9.00	4.07	2.41	22.25			3.0	3.5	3.0	47.23	

7. A perusal of the same demonstrates that whereas petitioner Puran Chandel was awarded 47.23 marks, respondent No. 4 was awarded 51.54 marks by the committee. The criteria which was so adopted by the selection committee when the interviews were conducted on 05.09.2007 is not the subject matter of dispute in the present petition. Be that as it may, it is a matter of record and not disputed during the course of arguments that when the appointment of the private respondent was assailed by the petitioner before a Committee so constituted vide notification dated 27.05.2008, said committee simply re-assessed the merit of the petitioner and private respondent on the basis of the criteria so appended with the said notification and concluded that petitioner was more meritorious than respondent No. 4.

8. Learned Appellate Authority, while setting aside the recommendations of the Inquiry Committee held that as the appointment of the appellant was made according to the norms fixed vide notification dated 29.6.2006, the criteria under new notification could not have been applied with retrospective effect. There is merit in the findings so returned by the learned Appellate Authority. This is for the reason that it is not in dispute that the appointment of the private respondent was made as per norms fixed vide notification dated 29.6.2006. Enquiry Committee did not conclude that the appointment of respondent No. 4 was in violation of the norms fixed vide notification dated 29.6.2006, nor during the course of arguments, learned Counsel for the petitioner could demonstrate that appointment of respondent No. 4 was in violation of the norms so prescribed under notification dated 29.6.2006. In this view of the

matter, when the petitioner had participated in a process so initiated as per the norms fixed vide notification dated 29.6.2006, on his Complaint the appointment of respondent No. 4 could not have been set aside without returning the finding that the said appointment was in violation of norms fixed vide notification dated 29.6.2006. The Enquiry Committee erred in not appreciating this very important aspect of the matter. The Enquiry Committee could not have had recommended the appointment of the petitioner without first holding that either the earlier norms were unreasonable or that appointment of respondent No. 4 was made in violation of the said norms. In this view of the matter, I do not find any infirmity with the impugned order so passed by the appellate authority which is under challenge before this Court.

9. Accordingly, as there is no merit in the present petition, the same is dismissed. Pending miscellaneous application(s), if any, also stand disposed of.

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

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

Cr. Appeal No. 364 of 2008
Decided on: March 23, 2018

Indian Penal Code, 1860- Sections 294, 504 and 506**- Indian Evidence Act, 1872-** Section 3- **Appreciation of Evidence-** Held- Evidence in criminal cases needs to be evaluated on touch stone of consistency –Court should be conscious in dealing with situation where there are multiple testimonies and equally large number of witnesses testifying before it- On facts, statements of witnesses were found inconsistent and contradictory – No explanation given as why no attempt was made for filing an FIR with police – Acquittal recorded by Trial Court upheld.

(Paras-12 and 14)

For the appellant: Mr. Dinesh Thakur, Additional Advocate General.
For the respondent: Mr. Nitin Thakur, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (oral)

In nutshell, case of prosecution is that on 1.8.2006, at about 7.30 pm, complainant alongwith her sister Vipna Devi and mother Nirmala Devi was sitting in her courtyard. Respondent-accused (hereinafter, 'accused') came on the spot and started hurling abuses at the complainant and her family members. When complainant inquired about the reason for hurling abuses, accused allegedly assaulted complainant and tried to pull the *Salwar* worn by the complainant and touched her with the intention to outrage her modesty. Accused also threatened the complainant and her sister Vipna Devi to outrage their modesty and to do away with their lives. Complainant, her mother and sister raised hue and cry, however the neighbourers closed their doors. Accused fled from the spot advancing threats to the complainant and her family. On the basis of aforesaid complaint (exhibit PW-1/A), formal FIR (exhibit PW-1/B) came to be registered against accused. After completion of investigation, police presented Challan in the competent Court of law i.e. Judicial Magistrate 1st Class, Court No.2, Ghumarwin, District Bilaspur, Himachal Pradesh. Learned trial Court on being satisfied that prima facie case exists against accused, charged him for commission of offences punishable under Sections 294, 504 and 506 IPC, to which accused pleaded not guilty and claimed trial. However, fact remains that

the learned trial Court subsequently vide judgment dated 29.12.2007, found accused not guilty of having committed offences punishable under aforesaid provision and accordingly acquitted him. In the aforesaid background, State has approached this Court in the instant proceedings, seeking therein conviction of the accused after setting aside judgment of acquittal recorded by the learned trial Court.

2. Mr. Dinesh Thakur, learned Additional Advocate General, while inviting attention of this court to the evidence led on record by the prosecution vis-à-vis impugned judgment of acquittal recorded by the learned trial Court, vehemently argued that the learned Court below has miserably failed to appreciate the evidence in its right perspective, as a consequence of which, erroneous findings have come on record and accused has been let off on very flimsy grounds. While specifically inviting attention of this Court to the statements of PW-1 (complainant), PW-2 Smt. Nirmala Devi (mother of complainant) and PW-3 Kumari Vipna Devi (sister of complainant), learned Additional Advocate General contended that all the material prosecution witnesses categorically stated that on 1.8.2006, accused forcibly and unauthorisedly entered into courtyard of the house of the complainant and thereafter he made an attempt to outrage her modesty and as such, there was no occasion for the court below to acquit the accused. Mr. Thakur, learned Additional Advocate General further contended that the court below, while acquitting accused placed undue reliance upon the agreement Mark "X", suggestive of the fact that on 2.8.2006, some quarrel had taken place between mother of the complainant and mother of the accused, whereafter, on the intervention of the members of Gram Panchayat, matter was compromised. Mr. Thakur, learned Additional Advocate General contended that even otherwise, compromise is dated 2.8.2006, whereas, incident pertains to 1.8.2006. With the aforesaid submissions, learned Additional Advocate General contended that the impugned judgment of acquittal being contrary to evidence available on record is not sustainable and accused deserves to be convicted for having committed offence punishable under Sections 294, 504 and 506 IPC.

3. Mr. Nitin Thakur, learned counsel representing the accused, while refuting aforesaid contentions having been made by the learned Additional Advocate General, vehemently argued that no case is made out against the accused, whose presence on the spot at the time of alleged offence itself is doubtful. Mr. Nitin Thakur further contended that even otherwise, bare perusal of depositions made by PW-1, PW-2 and PW-3 clearly suggests that there are material contradictions with regard to time of incident, as such, learned Court below rightly ignored the same, while acquitting the accused. Lastly, Mr. Nitin Thakur contended that there is no explanation available on record that what prevented the complainant from lodging report with the police at the first instance, because admittedly, complaint under Section 156(3) CrPC came to be filed on the next day.

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

5. Close scrutiny of evidence led on record by respective parties compels this Court to conclude that prosecution has not been able to prove its case beyond reasonable doubt because no reliance, if any, could be placed upon the version of PW-1, PW-2 and PW-3, since there are material contradictions in their statements with regard to time of the incident. As per PW-1 complainant, on 1.8.2006 at about 7.30 pm, accused came in their courtyard and started hurling abuses. She further stated that accused threatened that he will make them naked in public. When mother of the complainant asked accused why he was threatening and abusing them, accused assaulted complainant, touched her and tried to pull her *Salwar*. However, if the contents of exhibit PW-1/A (complaint) lodged by complainant are examined juxtaposing the deposition made by her in the Court, there are material contradictions in the same, since there is no mention with regard to pulling her clothes by accused.

6. PW-2 also corroborated version put forth by PW-1 that on 1.8.2006, accused came in their courtyard and started threatening and abusing complainant. She also stated that accused assaulted complainant and tried to outrage her modesty, but interestingly, this witness

stated that the accused assaulted complainant and tried to outrage her modesty when Vipna Devi, i.e. sister of the complainant tried to rescue her. As has been noticed above, PW-1 stated in her statement that when her mother intervened, accused assaulted her and made an attempt to outrage her modesty. Nirmala Devi also stated that she rescued her daughters and locked them inside room but nothing of this sort has come in the statement of PW-1. PW-3, Vipna Devi while stating that house of accused is adjacent to their house, averred that accused was working inside his plot and at once he started abusing and threatening them. When mother of complainant inquired reason for the same, accused assaulted complainant and pulled her *Salwar*. This witness categorically stated that incident occurred at 6.30 pm whereas PW-1 (complainant) stated that incident occurred at 7.30 pm.

7. Conjoint reading of the versions put forth by these material prosecution witnesses creates suspicion with regard to correctness of the prosecution case. Certainly, there are material contradictions with regard to time of alleged incident and accused having pulled clothes of complainant. Interestingly, in the case at hand, though it has come in the statements of prosecution witnesses that there are number of houses adjacent to the house of complainant but there appears to be no attempt on the part of investigating agency to associate independent witnesses. Only eye-witness associated by the investigating agency i.e. PW-4 Bhagat Ram nowhere supported the case of prosecution and as such, he was declared hostile. In his cross-examination, prosecution was not able to elicit anything contrary to what he stated in his examination-in-chief.

8. On the other hand, accused, while claiming himself to be innocent, produced agreement, mark "X" in his defence and also examined three witnesses from his side. Accused claimed that no incident had taken place on 1.8.2006, however, a quarrel had taken place between his mother and mother of complainant on 2.8.2006, whereafter, with the intervention of the Gram Panchayat, compromise, mark "X" was arrived at inter se them.

9. DW-1, Desh Raj also supported the aforesaid version of accused. He categorically stated that there was some quarrel between mother of accused and mother of complainant, relating to some land. He categorically stated that mother and father of accused were on the spot at the time of incident and accused was not present. He further stated that incident actually happened on 2.8.2006, whereafter, Panchayat was called on the spot and an agreement was entered into between the parties. He specifically denied that quarrel had taken place between complainant and accused.

10. Similarly, DW-2 Sher Singh and DW-3 Inder Singh also supported the version put forth by DW-1, Desh Raj. Both these witnesses categorically stated that there was some quarrel between mother of the complainant and mother of the accused, whereafter, Panchayat was called at the spot and an agreement was entered into between them. DW-2 specifically stated that at the time of agreement between the parties before Panchayat, Nirmala Devi (mother of complainant) had threatened mother of accused. DW-3 Inder Singh stated that at the time of incident, accused was not present, rather, incident occurred on 2.8.2006, when accused was not present.

11. Having carefully perused evidence available on record, this Court finds substantial force in the argument of Mr. Nitin Thakur, learned counsel representing the accused that presence of accused on the date of alleged incident is doubtful, rather it stands duly proved on record that accused was not present on the date of alleged incident, which had actually taken place on 2.8.2006, and not on 1.8.2006, as has been claimed by the complainant and her family members. Though, there is no bar as such to place reliance upon the testimony of close relatives of complainant, but in the case at hand, all the material prosecution witnesses have categorically admitted in their cross-examination that they had previous litigation with the accused. Prosecution ought to have cited independent witnesses to strengthen its story more so when independent witnesses were available.

12. Even if, for the sake of arguments, it is accepted that alleged incident occurred on 1.8.2006, there is no explanation available on record that what prevented complainant from lodging complaint with the police on the same day or very next day. In the case at hand, complainant instead of lodging complaint with police, chose to file a private complaint before Magistrate under Section 156(3) CrPC. There is no document available on record from where it can be inferred that police was reluctant to register case/FIR.

13. Having carefully perused the evidence available on record, this Court has no hesitation to conclude that no reliance could be placed upon the version put forth by these witnesses since there are material inconsistencies and contradictions in their statements.

14. By now it is well settled that in a criminal trial evidence of eyewitness requires careful assessment and needs to be evaluated for its creditability. Hon'ble Apex Court has repeatedly held that since fundamental aspect of criminal jurisprudence rests upon well established principle that "no man is guilty until proved so", utmost caution is required to be exercised in dealing with the situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. Most importantly, Hon'ble Apex Court has held that there must be a string that should join the evidence of all the witnesses thereby satisfying the test of consistency in evidence amongst all the witnesses. In nutshell, it can be said that evidence in criminal cases needs to be evaluated on touchstone of consistency. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in **C. Magesh and others** versus **State of Karnataka** (2010) 5 Supreme Court Cases 645, wherein it has been held as under:-

> "45. It may be mentioned herein that in criminal jurisprudence, evidence has to be evaluated on the touchstone of consistency. Needless to emphasis, consistency is the keyword for upholding the conviction of an accused. In this regard it is to be noted that this Court in the case titled Surja Singh v. State of U.P. (2008)16 SCC 686: 2008(11) SCR 286 has held:-(SCC p.704, para 14)
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> > "14. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witness is held to be creditworthy; ..the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."
>
> In a criminal trial, evidence of the eye witness requires a careful assessment and must be evaluated for its creditability. Since the fundamental aspect of criminal jurisprudence rests upon the stated principle that " no man is guilty until proven so," hence utmost caution is required to be exercised in dealing with situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. There must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistence in evidence amongst all the witnesses."

15. Having sifted entire evidence, this Court finds no illegality or infirmity in the judgment of acquittal recorded by the learned Court below especially when there are material contradictions in the statements of the material prosecution witnesses, rendering the whole story put forth by them improbable.

16. In view of above, this Court finds no reason to interfere with judgment dated 29.12.2007 passed by learned Judicial Magistrate 1st Class, Court No.2, Ghumarwin, District Bilaspur, Himachal Pradesh in Case No. 70/2 of 2006, which is accordingly upheld. In result, appeal fails and is accordingly dismissed. Bail bonds furnished by accused are discharged. Pending applications, if any, are disposed of.

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

Shriram General insurance Company Limited ..Appellant
Versus
Anita Kumari and others ..Respondents

FAO No. 9 of 2018
Decided on: March 26, 2018

Motor Vehicles Act, 1988- Section 166- Tribunal saddling insurer with liability of Rs.46,77,000/- payable with interest- Insurer filing appeal and contending that compensation was wrongly assessed towards loss of future income and also, payment under conventional heads was on higher side- Held- On facts, Tribunal was right in giving 30% increase on established income towards loss of future income and in applying multiplier of 14 since deceased was 45 years old and in permanent employment. (Para-8)

Motor Vehicles Act, 1988- Section 166- Compensation under conventional heads – Entitlement - Principles laid in National Insurance Company Limited v. Pranay Sethi and Ors., AIR 2017 SC 5157 relied upon – Since, compensation under conventional heads was on higher side vis-à-vis Prnay Sethi case- Award of Tribunal modified in appeal. (Para-10)

Cases referred:
National Insurance Company Limited v. Pranay Sethi and Ors., AIR 2017 SC 5157
Sarala Verma & Ors. v. Delhi Transport Corporation and Anr., AIR 2009 SC 3104

For the Appellant : Mr. Jagdish Thakur, Advocate.
For the Respondents : Mr. G.R. Palsra, Advocate, for respondents No.1 to 3.
Mr. Surender Verma, Advocate, for respondents No.4 and 5.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

Instant appeal is directed against Award dated 31.12.2016 passed by the learned Motor Accident Claims Tribunal (II), Mandi, District Mandi, Himachal Pradesh, in Claim Petition No. 88/13/2011, whereby claim petition filed by respondents No.1 to 3 (hereinafter, 'claimants') has been allowed and appellant-Insurance Company has been saddled with liability to pay compensation amount of Rs. 46,77,000/- alongwith interest at the rate of 7.5% per annum from the date of filing of petition till its realization. Learned Tribunal below has further ordered that in the event of failure to deposit award amount within two months, appellant-Insurance Company shall be liable to pay an interest at the rate of 9% per annum from the date of award.

2. Necessary facts, as emerge from record are that the claimants approached learned Tribunal below by way of petition under Section 166 of Motor Vehicles Act, seeking therein compensation to the extent of Rs.30.00 Lakh, on account of death of Shri Ashok Kumar, i.e. husband of claimant No.1 and father of claimants No.2 and 3. On 17.6.2011, at about 6.35 pm, deceased Ashok Kumar, who at the relevant time was working as a Plumber in RE/DPH Slapper (Power Wing) BBMB Slapper, Tehsil Sundernagar, District Mandi, Himachal Pradesh, was driving his motor cycle bearing registration No. HP-31A-2575. At about 6.35 pm, when above named Ashok Kumar was going from Slapper to Chandigarh, a truck bearing registration No. HP-65-1922 came from opposite side in a rash and negligent manner and hit his motor cycle, as a result of which, he suffered injuries and ultimately succumbed to his injuries on 18.6.2011. Offending truck was owned by present respondent No.5 and insured with the appellant-Insurance Company. Claimants further averred in the claim petition that deceased was earning Rs.29,662/-

as salary from service and was left with thirteen years service. Apart from above, claimants also claimed that deceased was earning Rs. 10,000/- from landed property situate at Jammu and as such, his total income was Rs.39,662/- per month. Claimants also claimed that claimants No.2 and 3 were pursuing their studies and after the death of Ashok Kumar, they lost support of their father. Besides above, claimant No.2 was claimed to be handicapped and under treatment.

3. Respondents No.4 and 5 by way of a joint reply, denied rash and negligent driving on the part of respondent No. 4, who was driving the truck at the relevant time. Above named respondents further claimed that deceased Ashok Kumar himself was rash and negligent at the time of alleged accident and it was he, who struck his motor cycle with the truck. Respondents No.4 and 5 further claimed that compensation being demanded was on higher side and they specifically denied that deceased was earning Rs.39,662/- per month. Respondent No.4 specifically claimed that he was having a valid and effective driving licence to drive the offending truck. In the alternative, respondents No.4 and 5 claimed that liability, if any, was of the appellant-Insurance Company.

4. Appellant-Insurance Company also resisted the claim petition by raising preliminary objections of maintainability and offending truck being plied in violation of terms and conditions of the insurance policy. Appellant-Insurance Company further claimed before the learned Tribunal below that respondent No.5 being insured was liable to supply details of policy, date, time and place of accident, particulars of deceased and name of driver and particulars of driving licence, but he failed to do so. Appellant-Insurance Company further averred that the police of Police Station Sundernagar failed to forward the relevant documents to the insurer within 30 days. Appellant-Insurance Company categorically denied that deceased was 45 years old and was earning Rs. 29,662/- per month. It was also denied that an amount of Rs.50,000/- was spent on funeeral of the deceased.

5. learned Motor Accident Claims Tribunal below, on the basis of aforesaid pleadings adduced on record by the respective parties, allowed the claim petition and held claimants entitled to compensation to the tune of Rs.46,77,000/- alongwith interest at the rate of 7.5% per annum, as has been taken note in the opening para above. In the aforesaid background, appellant has approached this Court by way of instant proceedings, praying therein for setting aside the impugned award.

6. Mr. Jagdish Thakur, learned counsel representing the appellant-Insurance Company, vehemently argued that the impugned award is against law and facts and as such, is liable to be set aside. He further stated that bare perusal of impugned award clearly suggests that the learned Tribunal below has not appreciated the evidence in its right perspective, as a result of which, erroneous findings have come on record. Learned counsel representing the appellant-Insurance Company further contended that the learned Tribunal below has erred while taking income of the deceased as Rs.39,662/-. He further contended that the learned Tribunal below has further committed error by granting 30% addition on account of future prospects, because addition has been made on the salary of the deceased i.e. Rs.29,662/-, whereas amount deducted on account of income tax was to be excluded from the said salary. He further contended that multiplier of 14 has been wrongly applied. While referring to the age of deceased, learned counsel representing the appellant-Insurance Company contended that multiplier of 13 ought to have been applied instead of 14, as such impugned award being contrary to basic provisions of law can not be allowed to sustain. While placing reliance upon judgment rendered in **National Insurance Company Limited** v. **Pranay Sethi and Ors.**, AIR 2017 SC 5157, Mr. Thakur, contended that learned Tribunal has erred in awarding Rs. 25,000/- on account of funeral expenses. He further contended that no amount could be awarded under the head of love and affection. While inviting attention of this Court to the impugned award, wherein an amount of Rs.1,00,000/-, has been awarded on account of loss of consortium, Mr. Thakur contended that as per latest judgment passed by the Hon'ble Apex Court supra, only Rs.40,000/- could be awarded under this head. Lastly, Mr. Thakur, contended that Tribunal below has awarded 7.5% interest on the award amount, whereas same could not be more than 6%. In this regard, he placed reliance upon

judgment passed by the Hon'ble Apex Court in **Laxmidhar Nayak and Ors.** v. **Jugal Kishore Behera and Ors.**, in Civil Appeal No. 19856 of 2017 (arising out of SLP (C) No. 31405 of 2016).

7. Mr. G.R. Palsra, learned counsel representing claimants while refuting aforesaid submissions having been made by the learned counsel representing the appellant, contended that there is no illegality and infirmity in the impugned award passed by the learned Tribunal below and as such, same deserves to be upheld. Mr. Palsra, while inviting attention of this Court to the evidence led on record by the respective parties, contended that the appellant-Insurance Company has miserably failed to prove its case. While referring to the evidence available on record, Mr. Palsra contended that it stands proved on record that deceased died due to rash and negligent driving of the driver of offending vehicle, which was admittedly insured with the appellant-Insurance Company at that relevant time. While referring to the quantum of compensation, Mr. G.R. Palsra further contended that it stands duly proved on record that deceased was drawing salary of Rs. 29,662/- per month and as such, there is no force in the argument of learned counsel representing the appellant-company that learned MACT below wrongly took Rs. 29,662/- as salary while determining the monthly income of the deceased. Mr. G.R. Palsra while referring to the judgment passed by the Hon'ble Apex Court in **National Insurance Company Limited** v. **Pranay Sethi and Ors** (supra) fairly conceded that the claimants are entitled to Rs. 15,000/- on account of funeral expenses and Rs. 40,000/- on account of loss of consortium, however he categorically disputed the contention put forth by Mr. Jagdish Thakur, Advocate, that no amount could be awarded in favour of the claimants under the head of "loss of love and affection".

8. Having heard the learned counsel representing the parties and perused the record, this Court is not inclined to agree with aforesaid submissions having been made by the learned counsel representing the Insurance company because it stands duly proved on record that deceased Ashok Kumar died in an accident due to rash and negligent driving of respondent No.4 i.e. driver of the truck. Similarly, this Court finds from the evidence led on record by the respective parties that onus to prove that respondent No. 4 i.e. driver of the offending vehicle, was not having valid and effective licence to drive the vehicle in question, was upon appellant-Insurance Company, who has not been able to discharge the aforesaid onus, rather it stands duly proved on record that at that relevant time, respondent No. 4 was having a valid driving licence to drive the offending vehicle. Record further reveals that claimants with a view to substantiate income of the deceased placed on record cogent and convincing evidence that monthly income of the deceased was Rs.29,662/- at the time of unfortunate incident. Claimants also proved on record salary slip (Exhibit P-3) and as such, learned Tribunal below, while placing reliance upon judgment rendered by Hon'ble Apex Court in **Sarala Verma & Ors.** v. **Delhi Transport Corporation and Anr.**, AIR 2009 SC 3104, rightly added 30% of actual income to the income of the deceased towards the future prospects as deceased was admittedly 45 years old at the time of the accident. This Court also sees no illegality in applying the multiplier of "14", because deceased was 45 years of age at the time of the accident. As per the Second Schedule to the Motor Vehicles Act, 1988, for the age groups 40 to 45 years, multiplier is "15". As per **Sarla Verma**'s case supra, for the age groups, 40-45 years, multiplier to be adopted is "14", but in the case at hand, as has been noticed above, age of deceased at the time of accident was 45 years. Recently Hon'ble Apex Court in **Pranay Sethi'**s case supra has reiterated that while determining the income, an addition of 30% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was between age of 40-50 years, should be made. In the case at hand, there is no dispute that age of the deceased at the time of accident was 45 years and as such, learned Tribunal below has rightly made an addition of 30% of actual salary of deceased towards future prospects.

9. After having perused judgment rendered by Hon'ble Apex Court in **Pranay Sethi**'s case (supra), this Court is persuaded to agree with the contention of Mr. Jagdish Thakur, learned counsel representing the appellant-Insurance Company that no money could be awarded under the head, "loss of love and affection". Hon'ble Apex Court has categorically held that head relating to loss of care and guidance for the minor children does not exist. There are only three

conventional heads i.e. loss of estate, loss of consortium and funeral expenses. Hon'ble Apex Court has further quantified the amount to be paid under the aforesaid conventional heads. Relevant paras of aforesaid judgment are reproduced here in below:-

> "47. In our considered opinion, if the same is followed, it shall subserve the cause of justice and the unnecessary contest before the tribunals and the courts would be avoided. 48. Another aspect which has created confusion pertains to grant of loss of estate, loss of consortium and funeral expenses. In Santosh Devi (supra), the two-Judge Bench followed the traditional method and granted Rs. 5,000/- for transportation of the body, Rs. 10,000/- as funeral expenses and Rs. 10,000/- as regards the loss of consortium. In Sarla Verma, the Court granted Rs. 5,000/- under the head of loss of estate, Rs. 5,000/- towards funeral expenses and Rs. 10,000/- towards loss of Consortium. In Rajesh, the Court granted Rs. 1,00,000/- towards loss of consortium and Rs. 25,000/- towards funeral expenses. It also granted Rs. 1,00,000/- towards loss of care and guidance for minor children. The Court enhanced the same on the principle that a formula framed to achieve uniformity and consistency on a socioeconomic issue has to be contrasted from a legal principle and ought to be periodically revisited as has been held in Santosh Devi (supra). On the principle of revisit, it fixed different amount on conventional heads. What weighed with the Court is factum of inflation and the price index. It has also been moved by the concept of loss of consortium. We are inclined to think so, for what it states in that regard. We quote:-
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> "17. … In legal parlance, "consortium" is the right of the spouse to the company, care, help, comfort, guidance, society, solace, affection and sexual relations with his or her mate. That non-pecuniary head of damages has not been properly understood by our courts. The loss of companionship, love, care and protection, etc., the spouse is entitled to get, has to be compensated appropriately. The concept of non pecuniary damage for loss of consortium is one of the major heads of award of compensation in other parts of the world more particularly in the United States of America, Australia, etc. English courts have also recognised the right of a spouse to get compensation even during the period of temporary disablement. By loss of consortium, the courts have made an attempt to compensate the loss of spouse's affection, comfort, solace, companionship, society, assistance, protection, care and sexual relations during the future years. Unlike the compensation awarded in other countries and other jurisdictions, since the legal heirs are otherwise adequately compensated for the pecuniary loss, it would not be proper to award a major amount under this head. Hence, we are of the view that it would only be just and reasonable that the courts award at least rupees one lakh for loss of consortium."
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> 49. Be it noted, Munna Lal Jain (2015 AIR SCW 3105) (supra) did not deal with the same as the notice was confined to the issue of application of correct multiplier and deduction of the amount.
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> 50. This aspect needs to be clarified and appositely stated. The conventional sum has been provided in the Second Schedule of the Act. The said Schedule has been found to be defective as stated by the Court in Trilok Chandra (supra). Recently in Puttamma and others v. K.L. Narayana Reddy and another it has been reiterated by stating:-
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> "…we hold that the Second Schedule as was enacted in 1994 has now become redundant, irrational and unworkable due to changed scenario including the present cost of living and current rate of inflation and increased life expectancy."

51. As far as multiplier or multiplicand is concerned, the same has been put to rest by the judgments of this Court. Para 3 of the Second Schedule also provides for General Damages in case of death. It is as follows:-

"3. General Damages (in case of death):

The following General Damages shall be payable in addition to compensation outlined above:-

(i) Funeral expenses- Rs.2,000/-.

(ii) Loss of Consortium, if beneficiary is the spouse- Rs.5,000/-

(iii) Loss of Estate - Rs. 2,500/-

(iv) Medical Expenses – actual expenses incurred before death supported by bills/vouchers but not exceeding – Rs. 15,000/-"

52. On a perusal of various decisions of this Court, it is manifest that the Second Schedule has not been followed starting from the decision in Trilok Chandra (supra) and there has been no amendment to the same. The conventional damage amount needs to be appositely determined. As we notice, in different cases different amounts have been granted. A sum of Rs. 1,00,000/- was granted towards consortium in Rajesh. The justification for grant of consortium, as we find from Rajesh, is founded on the observation as we have reproduced hereinbefore.

53. On the aforesaid basis, the Court has revisited the practice of awarding compensation under conventional heads.

54. As far as the conventional heads are concerned, we find it difficult to agree with the view expressed in Rajesh. It has granted Rs. 25,000/- towards funeral expenses, Rs. 1,00,000/- loss of consortium and Rs. 1,00,000/- towards loss of care and guidance for minor children. The head relating to loss of care and minor children does not exist. Though Rajesh refers to Santosh Devi, it does not seem to follow the same. The conventional and traditional heads, needless to say, cannot be determined on percentage basis because that would not be an acceptable criterion. Unlike determination of income, the said heads have to be quantified. Any quantification must have a reasonable foundation. There can be no dispute over the fact that price index, fall in bank interest, escalation of rates in many a field have to be noticed. The court cannot remain oblivious to the same. There has been a thumb rule in this aspect. Otherwise, there will be extreme difficulty in determination of the same and unless the thumb rule is applied, there will be immense variation lacking any kind of consistency as a consequence of which, the orders passed by the tribunals and courts are likely to be unguided. Therefore, we think it seemly to fix reasonable sums. It seems to us that reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The principle of revisiting the said heads is an acceptable principle. But the revisit should not be fact-centric or quantum-centric. We think that it would be condign that the amount that we have quantified should be enhanced on percentage basis in every three years and the enhancement should be at the rate of 10% in a span of three years. We are disposed to hold so because that will bring in consistency in respect of those heads.

55. Presently, we come to the issue of addition of future prospects to determine the multiplicand.

56. In Santosh Devi the Court has not accepted as a principle that a self-employed person remains on a fixed salary throughout his life. It has taken note of the rise in the cost of living which affects everyone without making any distinction between the rich and the poor. Emphasis has been laid on the extra efforts made

by this category of persons to generate additional income. That apart, judicial notice has been taken of the fact that the salaries of those who are employed in private sectors also with the passage of time increase manifold. In Rajesh's case, the Court had added 15% in the case where the victim is between the age group of 15 to 60 years so as to make the compensation just, equitable, fair and reasonable. This addition has been made in respect of self employed or engaged on fixed wages.

57. Section 168 of the Act deals with the concept of "just compensation" and the same has to be determined on the foundation of fairness, reasonableness and equitability on acceptable legal standard because such determination can never be in arithmetical exactitude. It can never be perfect. The aim is to achieve an acceptable degree of proximity to arithmetical precision on the basis of materials brought on record in an individual case. The conception of "just compensation" has to be viewed through the prism of fairness, reasonableness and non violation of the principle of equitability. In a case of death, the legal heirs of the claimants cannot expect a windfall. Simultaneously, the compensation granted cannot be an apology for compensation. It cannot be a pittance. Though the discretion vested in the tribunal is quite wide, yet it is obligatory on the part of the tribunal to be guided by the expression, that is, "just compensation". The determination has to be on the foundation of evidence brought on record as regards the age and income of the deceased and thereafter the opposite multiplier to be applied. The formula relating to multiplier has been clearly stated in Sarla Verma (supra) and it has been approved in Reshma Kumari (supra). The age and income, as stated earlier, have to be established by adducing evidence. The tribunal and the Courts have to bear in mind that the basic principle lies in pragmatic computation which is in proximity to reality. It is a well accepted norm that money cannot substitute a life lost but an effort has to be made for grant of just compensation having uniformity of approach. There has to be a balance between the two extremes, that is, a windfall and the pittance, a bonanza and the modicum. In such an adjudication, the duty of the tribunal and the Courts is difficult and hence, an endeavour has been made by this Court for standardization which in its ambit includes addition of future prospects on the proven income at present. As far as future prospects are concerned, there has been standardization keeping in view the principle of certainty, stability and consistency. We approve the principle of "standardization" so that a specific and certain multiplicand is determined for applying the multiplier on the basis of age.

58. The seminal issue is the fixation of future prospects in cases of deceased who is self-employed or on a fixed salary. Sarla Verma (supra) has carved out an exception permitting the claimants to bring materials on record to get the benefit of addition of future prospects. It has not, per se, allowed any future prospects in respect of the said category.

59. Having bestowed our anxious consideration, we are disposed to think when we accept the principle of standardization, there is really no rationale not to apply the said principle to the self employed or a person who is on a fixed salary. To follow the doctrine of actual income at the time of death and not to add any amount with regard to future prospects to the income for the purpose of determination of multiplicand would be unjust. The determination of income while computing compensation has to include future prospects so that the method will come within the ambit and sweep of just compensation as postulated under Section 168 of the Act. In case of a deceased who had held a permanent job with inbuilt grant of annual increment, there is an acceptable certainty. But to state that the legal representatives of a deceased who was on a fixed salary would not be entitled to the benefit of future prospects for the purpose of

computation of compensation would be inapposite. It is because the criterion of distinction between the two in that event would be certainty on the one hand and staticness on the other. One may perceive that the comparative measure is certainty on the one hand and uncertainty on the other but such a perception is fallacious. It is because the price rise does affect a self-employed person; and that apart there is always an incessant effort to enhance one's income for sustenance. The purchasing capacity of a salaried person on permanent job when increases because of grant of increments and pay revision or for some other change in service conditions, there is always a competing attitude in the private sector to enhance the salary to get better efficiency from the employees. Similarly, a person who is self-employed is bound to garner his resources and raise his charges/fees so that he can live with same facilities. To have the perception that he is likely to remain static and his income to remain stagnant is contrary to the fundamental concept of human attitude which always intends to live with dynamism and move and change with the time. Though it may seem appropriate that there cannot be certainty in addition of future prospects to the existing income unlike in the case of a person having a permanent job, yet the said perception does not really deserve acceptance. We are inclined to think that there can be some degree of difference as regards the percentage that is meant for or applied to in respect of the legal representatives who claim on behalf of the deceased who had a permanent job than a person who is self-employed or on a fixed salary. But not to apply the principle of standardization on the foundation of perceived lack of certainty would tantamount to remaining oblivious to the marrows of ground reality. And, therefore, degree-test is imperative. Unless the degree-test is applied and left to the parties to adduce evidence to establish, it would be unfair and inequitable. The degree-test has to have the inbuilt concept of percentage. Taking into consideration the cumulative factors, namely, passage of time, the changing society, escalation of price, the change in price index, the human attitude to follow a particular pattern of life, etc., an addition of 40% of the established income of the deceased towards future prospects and where the deceased was below 40 years an addition of 25% where the deceased was between the age of 40 to 50 years would be reasonable.

60. The controversy does not end here. The question still remains whether there should be no addition where the age of the deceased is more than 50 years. Sarla Verma thinks it appropriate not to add any amount and the same has been approved in Reshma Kumari. Judicial notice can be taken of the fact that salary does not remain the same. When a person is in a permanent job, there is always an enhancement due to one reason or the other. To lay down as a thumb rule that there will be no addition after 50 years will be an unacceptable concept. We are disposed to think, there should be an addition of 15% if the deceased is between the age of 50 to 60 years and there should be no addition thereafter. Similarly, in case of selfemployed or person on fixed salary, the addition should be 10% between the age of 50 to 60 years. The aforesaid yardstick has been fixed so that there can be consistency in the approach by the tribunals and the courts.

61. In view of the aforesaid analysis, we proceed to record our conclusions:-

(i) The two-Judge Bench in Santosh Devi should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in Sarla Verma, a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.

(ii) As Rajesh has not taken note of the decision in Reshma Kumari, which was delivered at earlier point of time, the decision in Rajesh is not a binding precedent.

(iii) While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.

(iv) In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.

(v) For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paragraphs 30 to 32 of Sarla Verma which we have reproduced hereinbefore.

(vi) The selection of multiplier shall be as indicated in the Table in Sarla Verma read with paragraph of that judgment.

(vii) The age of the deceased should be the basis for applying the multiplier.

(viii) Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years."

10. While applying ratio of aforesaid law laid down by the Hon'ble Apex Court in **Pranay Sethi**'s case, amounts awarded under various heads i.e. funeral expenses, loss of love and affection and loss of consortium, need reassessment. Accordingly, amount awarded qua funeral expenses and loss of consortium is modified to Rs. 15,000 and Rs. 40,000 instead of Rs. 25,000/- and Rs. 1,00,000/-, as awarded by the learned MACT below. It is quite apparent from the aforesaid law laid down by the Hon'ble Apex Court that no amount can be awarded under the head "loss of love and affection" and as such, award made qua the same is quashed and set aside. However, this Court while exercising power under Order XLI, Rule 33 CPC, wherein appellate Court enjoys power to pass any decree and make any order, which ought to have been passed or made as the case may be, deems it fit to grant an amount of Rs. 15,000/- on account of loss of estate. In view of the modifications made herein above, now the respondents-claimants shall be entitled to following amount:-

Compensation for dependency:	Rs. 44,52,000/-
(as determined by the court below)	
Funeral Expenses:	Rs. 15,000/-
Loss of consortium:	Rs. 40,000/-
Loss of estate:	Rs. 15,000/-
Total	Rs.45,22,**000/-**

11. This Court after having perused law relied upon by the learned counsel representing the appellant-Insurance Company in **Laxmidhar Nayak** (supra) in support of his contention that court below has fallen in grave error while awarding 7.5% rate of interest to the claimants, has no hesitation to conclude that there is no thumb rule/law that interest on the compensation/awarded amount cannot be 7.5% and as such, impugned award on the aspect of interest part is upheld..

12. Consequently, in view of the detailed discussion made herein above and law laid down by the Hon'ble Apex Court, present appeal is partly allowed and impugned award passed by the learned MACT below is modified to the aforesaid extent only. Present appeal is disposed of, so also pending applications if any.

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

State of Himachal Pradesh and another ...Appellants
Versus
Sh. Mohinder Singh and another ....Respondents

RSA No. 311 of 2009
Decided on: March 26, 2018

Code of Civil Procedure, 1908- Section 100- Second Appeal- Held- Concurrent findings of fact cannot be interfered in second appeal, when these are not perverse. (Para-16 and 17)

Suit for recovery- Plaintiff supplied plants and seeds on quotations called by defendants – In suit for recovery, one of defendant i.e. D-3 admitting calling of quotations and supply of goods by plaintiff- Remaining defendants (D-1 and D-2) however, contending that D-3 had no authority to call quotations – Suit decreed by trial court- Appeal of defendants dismissed by Additional District Judge- Second Appeal – Held- Findings of fact recorded by trial court are borne out from evidence on record – Defendants had released part amount to plaintiff – No explanation from side of defendants No.1 and 2 as how part money was released, if they had not asked for supply of goods- Regular Second Appeal dismissed. (Paras-18 and 19)

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 appellants Mr. Dinesh Thakur, Additional Advocate General.
For the respondents: Mr. Surinder Saklani, Advocate, for respondent No. 1.
Mr. I.S. Chandel, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

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

Instant Regular Second Appeal is directed against judgment and decree dated 9.1.2009 passed by learned Additional District Judge, Shimla, Himachal Pradesh in Civil Appeal No. 54-R/13 of 2007, affirming judgment and decree dated 3.9.2007 passed by learned Civil Judge (Senior Division), Shimla, Himachal Pradesh in Civil Suit RBT No. 83/1 of 05/2000, whereby suit for recovery having been filed by respondent No.1-plaintiff (hereinafter, 'plaintiff') came to be decreed.

2. Brief facts as emerge from the record are that plaintiff filed a suit for recovery of Rs.4,48,720.50/- in the court of Civil Judge (Senior Division), Shimla, averring therein that the appellants-defendants No.1 and 2 constituted a Zonal Level Committee headed by officials of the Agriculture Department at the level of Block under National Watershed Development Programme, vide notification No. Agr.F(9)-2/92-Loose dated 19.12.1994. Vide aforesaid notification, respondent No.2-defendant No.3 (hereinafter, 'defendant No.3') was declared Team Leader qua

aforesaid project by defendants No.1 and 2. Defendant No.3 Dr. P.C. Syota invited quotations for agave bulbs, apple plants, almond plants etc. Plaintiff furnished rates in terms of quotations invited by defendant No.3 and supplied 2,53,000 agave plants, 1915 apple plants (spur type), 982 apple plants (Palty) and 2180 almond plants at the rates of Rs.1/- Rs. 10, Rs. 3.50 and Rs.5.50, respectively. Plaintiff supplied 66 kg of Dedonia seeds at the rate of Rs.50/- per kg. Plaintiff claimed that aforesaid material was supplied by him pursuant to order placed by defendant No.3. Since defendants despite having received the material, failed to make payment, plaintiff was compelled to file the suit referred to herein above. Defendants No.1 and 2 by way of filing a joint written statement admitted entire factum with regard to appointment of defendant No.3 as Team Leader to execute the work. However, defendants claimed that no supply order was placed by defendants No.1 and 2. Defendants No.1 and 2 further claimed that defendant No.3 had no authority to invite quotations and place supply order, as such, no payment is liable to be made to the plaintiff on account of supply, if any, made by him. Defendants further claimed that on inquiries, it also transpired that work done on the spot was not satisfactory as such they are not liable to make any payment. Defendant No.3 by way of separate written statement admitted his appointment as Team Leader. He further admitted that he had placed the supply order. Defendant No.3 also admitted that he had received material from the plaintiff as has been mentioned in the plaint. Defendant No.3 further averred before the court below that plaintiff is entitled to payment as claimed by him in the suit save and except Rs.55,000/-, which stands already paid to him. Defendant No.3 further stated before the court below that similar work was executed in Watershed Zone Bharech in Tehsil Kotkhai of Jubbal Block where one Shri Kewal Ram was Team Leader. Defendant No.3 met him on 27.6.2004 and ascertained from him about the manner and finalization of the bills. He came to know that even in Bharech Zone, no tenders/ quotations were called for nor pressed by defendant No.2, while passing the bills in respect of the execution of the work in the area. Bills of Bharech were approved. Defendant No. 3 further pleaded that withholding of bills of the similar work in Balghar Zone is illegal, wrong and arbitrary.

3. On the basis of aforesaid claims and pleadings adduced on record by respective parties, learned trial Court framed following issues on 25.2.2004:

"1. Whether the plaintiff has supplied agave bulbs and Horticultural Plants to the defendants as per the allegations in the plaint? OPP

2. In case issue No.1 is proved in affirmative to what amount, if any, the plaintiff is entitled to against the defendants? OPP

3. Whether the suit is not maintainable? OPD

4. Whether the suit is bad for non joinder of necessary parties, as alleged? OPD

5. Whether the suit is barred by limitation as alleged? OPD

6. Whether there was no written agreement between the parties with regard to supply of plants by the plaintiff to the defendants No.1 and 2, if so, its effect? OPD

7. Relief"

4. Subsequently, learned trial Court, vide judgment and decree dated 3.9.2007, decreed the suit of the plaintiff against the defendants for recovery of Rs.2,36,377/- alongwith interest at the rate of 9% per annum from the date of supply of bills till filing of the suit and future interest at the rate of 6% per annum from the date of filing of the suit till realization of entire amount.

5. Being aggrieved and dissatisfied with aforesaid judgment and decree passed by learned trial Court, defendants filed an appeal before the learned Additional District Judge, Shimla, which subsequently came to be dismissed vide judgment and decree dated 9.1.2009, as a consequence of which, judgment and decree passed by learned trial Court came to be upheld. In the aforesaid background, defendants No. 1 and 2 approached this Court in the instant

proceedings, seeking therein dismissal of suit for recovery as filed by the plaintiff after setting aside judgments and decrees passed by both the learned Courts below.

6. This Court, on 11.11.2010, admitted the appeal on the following substantial questions of law:

> "1. Whether in absence of any express supply order, agreement and contract between the parties and on account of unilateral act of one party, the second party can be held responsible?
>
> 2. Whether the Ld. Appellant Court below has misread and misconstrued the oral as well as documentary evidence on record?
>
> 3. Whether the present respondent No.1 who had supplied the material without any supply order/ agreement can maintain the present suit for recovery?
>
> 4. Whether the present respondent No.1 who had not done the work as per enquiry report can maintain the present suit for recovery?"

7. Mr. Dinesh Thakur, learned Additional Advocate General, argued that the impugned judgments and decrees passed by both the learned Courts below are result of misappreciation and misreading of the evidence, be it ocular or documentary, as such, are not sustainable in the eye of law. He further argued that in the absence of any supply order or contract between the parties, the suit filed by the plaintiff was not maintainable. He further argued that when work done by plaintiff was not to the satisfaction of the defendants, suit filed by him ought to have been dismissed. With the aforesaid submissions, he prayed that present appeal be allowed and suit filed by the plaintiff may be dismissed, after setting aside impugned judgments and decrees.

8. Mr. Surinder Saklani, learned counsel representing plaintiff, while supporting the judgments and decrees passed by both the learned Courts below argued that both the learned Courts below have correctly read the evidence and rightly decreed the suit of the plaintiff. He further argued that most of the averments made in the plaint have been admitted by all the defendants and in such eventuality, learned Courts below have rightly accepted the claim of the plaintiff and decreed his suit. Mr. Saklani, further argued that in view of the concurrent findings of facts and law recorded by both the learned Courts below, there is no scope of interference, whatsoever, by this Court. Mr. Saklani also placed reliance upon judgment passed by Hon'ble Apex Court in **Laxmidevamma and Others** vs. **Ranganath and Others**, (2015)4 SCC 264, in order to buttress his aforesaid argument. With the aforesaid submissions, learned counsel representing plaintiff prayed that there are no substantial questions of law in the appeal and same deserves to be dismissed by this Hon'ble Court.

9. Having carefully read the text of the substantial questions of law framed at the time of admission of the appeal, this Court is of the view that except substantial question of law No.2, all other questions are pure questions of fact and same do not constitute any substantial question of law. Otherwise also, all the other substantial questions of law can be safely answered and dealt with by this court, while exploring answer to substantial question of law No.2 i.e. "Whether the Ld. Appellant Court below has misread and misconstrued the oral as well as documentary evidence on record?"

10. Having perused the pleadings and evidence led on record by the respective parties vis-à-vis impugned judgments and decrees passed by learned Courts below, this Court is not persuaded to agree with the contention of learned Additional Advocate General that learned Courts below have misread, misconstrued and misappreciated evidence, while decreeing the suit of the plaintiff for recovery. Bare perusal of evidence adduced on record by the plaintiff proves it beyond reasonable doubt that defendant No.3 was named as Team Leader to execute the work in question. It is also not in dispute that defendants No.1 and 2 with a view to execute the Watershed Project at Balghar, had authorized defendant No.3 to invite quotations and place supply order. Though defendants No.1 and 2 in their written statement, while fairly admitting that defendant No.3 was appointed as Team Leader to execute the work, have denied that

defendant No.3 had any authority to invite quotations or to place order, but there is no explanation rendered on record that in case defendant No.3 was not authorized to get the work executed, why payment of Rs.55,000/- was released in favour of the plaintiff. Similarly, the Department has not rendered any explanation on record why in similar circumstances, payment was made in connection with work got done by Team Leader in Bharech Zone, where admittedly no tenders/ quotations were called for such type of work. Defendant No.3 has categorically admitted that he had placed supply order and pursuant to same, he had received material from the plaintiff as mentioned in the plaint. He has also admitted that the plaintiff was paid Rs.55,000/- qua the supply made by him pursuant to supply order issued by him.

11. This Court finds from the record that though defendants No.1 and 2 have taken a stand that defendant No.3 was not authorized to place supply order but to substantiate their aforesaid claim, they have not placed on record any document suggestive of the fact that it was only defendants No. 1 and 2, who could place or issue supply orders. This Court finds considerable force in the argument of Mr. Surinder Saklani, learned counsel representing plaintiff that once it has been admitted by defendants No.1 and 2 that defendant No.3 was appointed as Team Leader to execute work, it does not lie in the mouth of defendants No.1 and 2 to say that defendant No.3 was not authorized to invite quotations and place orders.

12. Leaving everything aside, there is no explanation rendered on record why part payment of Rs.55,000/-was made to the plaintiff qua supply made by him, in case, he was not authorized by defendants No.1 and 2 to make such supplies.

13. Another argument having been raised by Mr. Dinesh Thakur, learned Additional Advocate General, that the work in question was not satisfactory, does not hold any ground because plaintiff had to only make supply in terms of supply/purchase order, whereafter execution, if any, on the spot was to be done either by defendants or any person authorized in this regard.

14. Now, it would be appropriate to deal with the specific objection raised by the learned counsel representing the plaintiff with regard to maintainability and jurisdiction of this Court, while examining the concurrent findings returned by both the Courts below. Mr. Surinder Saklani, invited the attention of this Court to the 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)***

15. 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.

16. 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)

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

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

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

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

19. This court after having carefully perused the evidence led on record by the respective parties sees substantial force in the arguments of Mr. Surinder Saklani, learned counsel representing the plaintiff that learned Courts below while decreeing the suit of the plaintiff dealt with each and every aspect of the matter meticulously and there is proper appreciation of the evidence by both the learned Courts below.

20. This court after having carefully gone through the evidence available on record, has no hesitation to conclude that both the learned Courts below have appreciated the evidence in its right perspective and there is no misappreciation of the evidence, as such, substantial question of law is answered accordingly.

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

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

Court on its own motion ...Petitioner.

Versus

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

CWPIL No. 301 of 2017
Date of Decision: March 27, 2018

Constitution of India, 1950- Article 21- Right to life- Held- For residents of hilly areas, access to road is access to life itself- On facts, residents of village Bhotan of Tehsil Dalhousie Distt. Chamba were found lacking a road to their village from main highway- Agitated villagers also didn't cast votes during Vidhan Sabha Election as a matter of protest - About 14 k.ms. road from Katori Bangla on Pathankot-Bharmour National Highway to village Bhotan was required to be constructed- Directions issued to all stake-holders to ensure that residents of village Bhotan have proper access. (Paras-10 and 11)

Constitution of India, 1950- Basic structure- Free and fair elections are part of basic structure of Constitution- It is essential that best available persons are elected as people's representatives - This can best be achieved through persons of high moral and ethical values who win election on

positive vote- Members Secretary, State Legal Services Authority directed to hold sensitization drive apprising people of area of significance of participating in electoral process. (Para-8 and 12)

Cases referred:
People's Union for Civil Liberties and another vs. Union of India and another, (2013) 10 SCC 1
State of Himachal Pradesh and another vs. Umed Ram Sharma and others, (1986) 2 SCC 68

For the Petitioner:	Ms.Sheetal Vyas, Advocate as Amicus Curiae.
For the Respondents:	Mr.Ashok Sharma, Advocate General, with Mr. Ranjan Sharma, Ms.Rita Goswami, Mr.Adarsh K. Sharma, Additional Advocate Generals & Mr.J.K.Verma, Deputy Advocate General, for the respondents-State.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice

On the basis of a letter petition, addressed to this Court, taking *suo motu* cognizance, petition was registered, in which notices were issued to the respondents.

2. Grievance made out in the letter petition by letter petitioner, Sansar Chand son of Sh.Hoshiar Ram, resident of Village Nada, P.O. Nanikhad, Tehsil Matiyal, District Chamba, H.P., stands recorded by us vide order dated 02.01.2018, in the following terms:-

> "This Court has taken suo motu cognizance on a letter petition which stands addressed by Sansar Chand S/O Sh.Hoshiyar Ram R/O Vill. Nadal, PO Nanikhad, Tehsil Matiyal, District Chamba, HP., wherein it is stated that there is a village, i.e. village Moran which is abutting to his village Nadal and which is situated at a distance of five kilometers from the main link road. Further as per the letter petitioner, though this village has a population of about 250 people but the residents of the said village do not have proper access as neither there is any bridge nor any proper path which connects the said village with the mainland. Accordingly, a prayer has been made that appropriate direction may be issued to the authorities concerned for the purpose of construction of path or road, so that the concerned village is connected with the mainland and main road."

3. The District Judge, Chamba, who is also Chairman of the District Legal Services Authority, as directed by us, personally visited the village to make an independent inquiry. We have perused the report filed by him as also affidavit dated 23.01.2018, filed by the Deputy Commissioner, Chamba.

4. As per the report of District & Sessions Judge, Chamba, village in question never gets waterlogged and disconnected from the main line and there is no requirement of construction of any bridge, for people do not get stranded due to waterlogging in the Reservoir of Ranjeet Sagar Dam. We notice that this report was based on the exact situation prevalent as on January, 2018, when the water is at a lowest level.

5. However, when we peruse the affidavit dated 23.01.2018 that of the Deputy Commissioner, Chamba, we find the position to be contrary.

6. According to him, there is no bus/jeepable road to village Bhotan and the distance from the said village to the nearest main road is 10 kms. Road can be constructed. At the time of spot inspection, carried out by Naib Tehsildar-cum-Assistant Collector, 2nd Grade, Dalhousie, it was so revealed that in the recent elections to the general Assembly of the State of Himachal Pradesh, in protest, majority of the voters had not cast their votes. According to the Deputy Commissioner, 14 kms of the road is required to be constructed from a place known as

Dwala Danga (Katori Bangla) on National Highway Pathankot-Bharmour No.154-A. It is so suggested that the said road can be constructed by the proponent of Ranjeet Sagar Dam.

7. Faced with the aforesaid situation, issue which arises, is as to what directions can be issued in the present matter.

8. Free and fair elections are part of the basic structure of the Constitution. The word "fair" has been explained by the Hon'ble Apex Court in *People's Union for Civil Liberties and another vs. Union of India and another,* (2013) 10 SCC 1, to denote equal opportunity to all people. Further, universal adult suffrage conferred on the citizens of India by the Constitution has made it possible for these millions of individual voters to go to the polls and thus participate in the governance of our country. For democracy to survive, it is essential that the best available persons should be chosen as people's representatives for proper governance of the country. This can be best achieved through persons of high moral and ethical values, who win the elections on a positive vote.

9. Now if people of a particular area in principle decide to boycott the elections and not to vote, it is not a healthy sign for any democracy to grow and flush.

10. The Apex Court in *State of Himachal Pradesh and another vs. Umed Ram Sharma and others,* (1986) 2 SCC 68, has held as under:-

> "It appears to us that in the facts of this case, the controversy lies within a short compass. It is well settled that the persons who have applied to the High Court by the letter are persons affected by the absence of usable road because they are poor Harijan residents of the area, their access by communication, indeed to life outside is obstructed and/or prevented by the absence of road. The entire State of Himachal Pradesh is in hills and without workable roads, no communication is possible. Every person is entitled to life as enjoined in Article 21 of the Constitution and in the facts of this case read in conjunction with Article 19(1) (*d*)of the Constitution and in the background of Article 38(2) of the Constitution every person has right under Article 19(1) (*d*) to move freely throughout the territory of India and he has also the right under Article 21 to his life and that right under Article 21 embraces not only physical existence of life but the quality of life and for residents of hilly areas, access to road is access to life itself. These propositions are well settled. We accept the proposition that there should be road for communication in reasonable conditions in view of our constitutional imperatives and denial of that right would be denial of the life as understood in its richness and fullness by the ambit of the Constitution. To the residents of the hilly areas as far as feasible and possible society has constitutional obligation to provide roads for communications."

11. Keeping in view the aforesaid principles, we direct the Chief Secretary to the Government of Himachal Pradesh, to forthwith convene a meeting of all the stakeholders, including the villagers and the proponent of Ranjeet Sagar Dam Project for ensuring that residents of village Bhotan, P.O. Mail, Tehsil Dalhousie, have proper access from the mainland to their houses.

12. Member Secretary, Himachal Pradesh State Legal Services Authority, shall hold a special drive in sensitizing the people of the area, apprising them of their valuable rights, importance and significance of participating in the electoral process, necessary for sustenance and development of Indian Democracy.

13. Under these circumstances, we are persuaded by the learned Advocate General to close the present proceedings, which we do so.

14. Before parting, we wish to place on record appreciation qua the efforts put in by Ms.Sheetal Vyas, learned Amicus Curiae, who, on the instructions of this Court, obtained necessary feedback.

15. Learned Amicus Curiae undertakes to communicate the outcome of the present petition to the letter petitioner.

16. Registry is directed to send copies of this judgment to the Chief Secretary to the Government of Himachal Pradesh, Member Secretary, Himachal Pradesh State Legal Services Authority to enable them to take follow up action.

With the aforesaid observations, present petition stands disposed of.

****

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

Sarvinder Singh .....Appellant.
Versus
Sukhbir Singh .....Respondent.

Cr. Appeal No. 525 of 2008
Decided on : 28.3.2018

Code Of Criminal Procedure, 1973- Sections 256 and 378- De facto complainant/victim filing an appeal against judgment of acquittal- Died during pendency of appeal- Offence was committed with respect to de facto complainant alone- Held- Appeal cannot be continued by his legal representatives. (Para - 4 and 5)

For the Appellant: Nemo.
For the Respondent: Mr. Rahul Kumar, Advocate, vice counsel.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

Mr. Ashok Sood, hitherto counsel appearing for the appellant submits that the, appellant, has died during the pendency of the instant appeal before this Court.

2. The proper legal course to be adopted on occurrence, of demise of the appellant, is comprised in Section 256 Cr.P.C, provisions whereof are 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. There is no wrangle with the proposition, qua, where compensation is assessed vis-à-vis the complainant either in proceedings' drawn under Section 138 of Negotiable Instrument Act or under other provisions borne in the apposite penal laws, thereupon on demise of the deceased complainant/appellant, the latters' legal representatives, being enabled to secure their substitution in his place.

4. However, when the deceased appellant/complainant, lodges, a complaint or an FIR in respect of a penal misdemeanor, singularly appertaining vis-à-vis him alone, (i) thereupon, unless further material, discloses, that other members, of, his family especially in a case constituted under Sections 451,506 readwith Section 34 IPC, are, also besides the complainant hence aggrieved by the purported penal misdemeanors, of the accused, (ii) thereupon in absence thereof, hence, the continuation , of, proceedings by the deceased complainant's LRs, would be, grossly improper.

5. Since the records of the case, do not, disclose that apart, from, the aggrieved appellant, other members of his family, were also present, in contemporanity vis-à-vis the occurrence or also hence were aggrieved, (i) thereupon on his demise, the effect, of, offences hereat constituted, under the Indian Penal Code, are, construable to stand entailed singularly vis-à-vis him, also, penal injury spurring therefrom, is also hence rendered to accrue only vis-à-vis the deceased complainant. Consequently, on demise of the deceased appellant, the present appeal, cannot, be continued by his LRs, and, hence, is dismissed as abated. Pending applications also stand disposed of accordingly.

****

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

Baldev Dass & Ors .....Appellants/plaintiffs.

Versus

Krishan Dayal & Ors. .....Respondents/defendants.

RSA No. 71 of 2006.
Reserved on : 23rd March, 2018.
Decided on : 29th March, 2018.

Hindu Succession Act, 1956- Section 14(1) or 14(2)- Applicability - Land was given to widow 'J' for life in lieu of maintenance pursuant to compromise decree dated 14.8.1959- Later on, 'J' transferred property to one 'T' through gift - However, she and others filed a suit before Senior Sub Judge, Bilaspur on 26.10.1970 challenging gift deed purportedly executed by her in favour of 'T' on ground of her being limited owner of suit property - Suit decreed by Senior Sub Judge, Bilaspur vide decree dated 2.11.1972- And held 'J' as 'limited owner' of suit land- 'J' filed another suit on 1.9.1977 before Sub Judge, Ghumarwin seeking declaration that she had become full-fledged owner of suit land as it was given to her in lieu of maintenance - Suit was dismissed vide judgment dated 10.9.1979- Thereafter, 'J' executed a Will in favour of her son 'K' (D-1) and mutation of inheritance was also attested in favour of 'K' – 'K' executing a sale deed of part of said land in favour of defendant No.2- Plaintiff, another son of 'J' filed suit - Challenging Will of 'J' in favour of 'K' on ground that she was only limited owner of disputed land- Suit decreed by Trial Court - However, appeal of defendant was allowed by District Judge and suit was dismissed after setting aside judgment and decree of Trial Court- Regular Second Appeal- Held- Land in suit was given to 'J' under compromise decree dated 14.8.1959 in recognition of her right to maintenance and she had become its full-fledged owner under Section 14(1) of the Act notwithstanding contrary findings recorded in judgment dated 10.9.1979 by Sub Judge, Ghumarwin. (Para-8 & 9)

Code of Civil Procedure, 1908- Section 11- Res-judicata- Judgment per incuriam- Held- It will not operate as res-judicata in subsequent litigation- Decree dated 10.9.1979 of Sub Judge, Ghumarwin dismissing suit of 'J' and denying her full ownership of land having been decided subsequent to Vaddeboyina Tulasamma and others v. Vaddeboyina Sesha Reddi (dead) by LR's, AIR 1977 SC 1944, was per incuriam and would not operate as res-judicata. (Para-10)

Cases referred:

State of West Bengal vs. Heman Kumar Bhattacharjee, AIR 1966 SC 1061

Vaddeboyina Tulasamma and others v. Vaddeboyina Sesha Reddi (dead) by LR's, AIR 1977 (3) SC 1944

State of M.P. vs. Mulamchand, AIR 1973 MP 293

For the Appellants:	Mr. Anand Sharma, Advocate.
For Respondent No.1:	Mr. Rajiv Jiwan, Advocate.
For Respondent No.2:	Mr. Pushpinder Verma, Advocate vice to Mr. K.B. Khajuria, Advocate.
	Respondent No.3 already ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiffs' suit for rendition of a decree, for permanent prohibitory injunction besides for rendition of a decree, for declaration, stood partly decreed by the learned trial Court. In an appeal carried therefrom, before the learned First Appellate Court, by the defendants, the latter Court allowed his appeal besides obviously reversed the trial Court's judgment and decree.

2. Briefly stated the facts of the case are that the plaintiffs had instituted the suit for declaration and injunction to the effect that the plaintiffs and defendants No.1 to 3 were joint owners in possession of the land measuring 7.19 bighas, comprising Khata/Khatoni No123/156, situated in village Gehrwin, which was restricted estate of late Smt. Janki and that mutation No.1262 dated 13.6.1991 attested in favour of defendant No.1 as per registered Will dated 7.1.1977 was wrong and illegal as Smt. Janki was not competent to execute the Will nor she had executed the same and that the subsequent sale deed dated 19.6.1991 executed by defendant No.1 in favour of defendant No.2 of land measuring 0-10 bighas, comprising Khasra No.290/1 and sale deed dated 19.6.1991executed by defendant No.1 in favour of defendant No.3 of land measuring 1.4 bighas, bearing Khasra No.291/1 are illegal, null and void and that the defendants be restrained from interfering exceeding their share and on the share of the plaintiffs in the suit land. The case of the plaintiffs was that Rama Ram was owner of the suit land. Smt. Janki was widow of Rama Ram. The plaintiffs No.1 and 2 and defendants No.1 to 3 and late Chaman Lal were sons of Rama Ram. Plaintiffs No.3 to 5 are legal representative of late Chaman Lal. On the death of Rama Ram, the suit land was inherited by plaintiffs No.1 and 2, defendants No.1 to 3 and Chaman Lal. After the death of Rama Ram, his widow Smt. Janki had filed a suit on 14.5.1959 pertaining to the suit land against plaintiffs No.1 and 2, defendants No.1 to 3 and late Chaman Lal. The said civil suit was compromised and a compromise decree dated 14.8.1959 was passed, whereby, Smt. Janki was declared limited owner of the suit land till her life. However, plaintiffs No.1 and 2, defendants No.1 to 3 and Chaman Lal were held to be entitled to retain possession of suit land till her life time. Lateron Smt. Janki had transferred the suit land in favour of Thakur Dass son of plaintiff No.1, by way of a gift deed. Smt. Janki and defendants No.1 to 3 had filed a civil suit on 26.10.1970 before Senior Sub Judge, Bilaspur for declaration that Smt. Janki was limited owner of the suit land which was in possession of plaintiffs NO.1 and 2, defendants No.1 to 3 and Chaman Lal and a permanent injunction was also sought agianst Thakur Dass. The civil suit was decree vide judgment dated 2.11.1972, whereby, Smt. Janki was declared limited owner of suit land till her life and the plaintiffs No.1 and 2, defendants No.1 to 3 and Chaman Lal were held to be in possession of the same and a decree for permanent injunction was also passed against Thakur Dass for restraining him with their possession over the suit land. Thereafter on 1.9.1977 Smt. Janki filed another civil suit against plaintiffs NO.1 and 2, defendants Nos. 1 to 3 and Chaman Lal for declaration that she was absolute owner of the suit land but that civil suit was dismissed by the learned Sub Judge, 1st Class, Ghumarwin, vide

judgment of 20.9.1979. It has been averred that Smt. Janki was looked after and maintained by the plaintiffs as well as by the defendants till her death on 15.5.1991. The plaintiffs and defendants shared the expenses on the death ritual ceremonies of Smt. Janki, after death of Smt. Janki the suit land was inherited by plaintiffs Nos. 1 and 2, defendants No.1 to 3 and legal heirs of deceased Chaman Lal. But defendant No.1 got mutation No.1262 of 13.6.1991 attested in his favour on the basis of a forged Will of 7.1.1977 of Smt. Janki, which was not executed by Smt. Janki at all nor she was competent to execute the same. Smt. Janki was also not competent to execute the said Will as she was having only life interest in the suit land. It has been averred that defendant No.1 executed a registered sale deed of 19.6.1991 of land measuring 0.10 biswas, bearing Khasra No.290/a, in favour of defendant No.2 and also executed registered sale deed of 19.6.1991 of land measuring 1.4 bighas, bearing Khasra No.291/1, in favour of defendant No.3. Both the registered sale deeds dated 19.6.1991 in favour of defendants No.2 and 3 are also illegal an without jurisdiction. The suit land was coming in possession of the plaintiffs No.1 and 2, defendants No.1 to 3 and legal representative of Chaman Lal. On 10.6.1992, the defendants had threatened to dispossess the plaintiffs from the suit land. Hence the suit.

3. The defendants contested the suit and filed written statement, wherein, they have taken preliminary objections of maintainability, limitation, non joinder of necessary parties, cause of action and valuation. It was admitted that the plaintiffs No.1 and 2 and defendants No.1 to 3 and Chaman Lal were sons of Rama Ram and Smt. Janki Devi their mother was widow of Rama Ram. Previously Rama Ram was owner of the suit land which was inherited by six sons of Rama Ram. After death of Rama Ram, Smt. Janki had filed civil suit in the court of Senior Sub Judge, Bialspur, which was compromised and a comprise decree was passed. It is denied that the suit land was given to Smt. Janki Devi as a limited owner. Smt. Janki was already having pre-existing right of maintenance in the property of her husband Rama Ram. The suit land was given to her in lieu of her maintenance, therefore, she had become absolute owner of the same under Section 14(1) of the Hindu Succession Act. Smt. Janki being absolute owner of the suit land was competent to alienate the same. Smt. Janki had executed a valid Will of 4.1.1977 in favour of defendant No.1. After death of Smt. Janki mutation was attested on the basis of said Will by Assistant Collector, 2nd Grade, Ghumarwin, on 13.6.1991 in favour of defendant No.1. The appeal preferred by the plaintiffs against the order of Assistant Collector 2nd Grade, was pending before the Sub Divisional Ghumarwin. It is also alleged that Smt. Janki and the defendants had filed civil suit before the learned Senior Sub Judge, Bialspur. But it is denied that Smt. Janki Devi was declared as limited owner of the suit land. The subsequent transfer of a portion of the suit land by defendant No.1 in favour of defendants No.2 and 3 are legal and valid. In nutshell the defendants refuted the case of the plaintiffs as a whole and they prayed for dismissal of the suit with costs.

4. The plaintiffs filed replication to the written statement of the defendant(s), wherein, they denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether Smt. Janki was limited owner of the suit land?OPP.
2. Whether the plaintiffs are joint owners in possession of suit land? OPP.
3. Whether the said deeds dated 19.6.19991 executed by defendant No.1 in favour of defendant NO.2 are wrong and illegal?OPP.
4. Whether Smt. Janki Devi executed a valid will dated 4.1.1977 in favour of defendants Nos. 1 to 3, if so to what effect?OPP.
5. Whether the suit is not within time?OPD
6. Whether the suit is not properly valued for the purpose of court fee and jurisdiction? OPD.

7. Whether the plaintiffs entitled to the relief of permanent injunction? OPD.

8. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court partly decreed the suit of the plaintiffs/appellants herein. In an appeal, preferred therefrom, by the defendants/respondents herein before the learned First Appellate Court, the latter Court allowed the appeal and reversed the findings recorded by the learned trial Court.

7. Now the plaintiffs/appellants herein, have instituted the instant Regular Second Appeal before this Court, wherein they assail the findings recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, on 30.06.2006, 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 question of law:-

> b) Whether the finding of the first appellate Court that the decree of 1972 passed in a suit instituted by testatrix Janki Devi and defendant No.3 Kishan Dayal was passed on wrong interpretation of the provision of Section 14 of the Hindu Succession Act, is illegal?

Substantial question of Law No.1:

8. The learned counsel appearing for the appellant has contended with vigour, (i) that, the verdicts respectively borne in Ex. P2, Ex. P-3, and, in Ex.P-4, rendered in lis' inter se the predecessors-in-interest of the plaintiffs, one Janki Devi, and, the predecessors-in-interest of the defendants, and, vis-a-vis subject matter(s) holding analogity with the lis at hand, (ii) thereupon, the verdicts borne in the aforesaid exhibits, when stand rendered inter partes, the respective predecessors-in-interest of the parties at lis hereat, (iii) also theirs being recorded vis-a-vis a lis holding analogity with the lis at hand, (iv) thereupon, with the aforesaid verdicts, making, a declaration vis-a-vis one Janki Devi, and, other co-plaintiffs, namely, Krishan Dayal, Sukh Devi and Nand Lal, arrayed as defendants in the extant suit, qua thereunder the accrual of rights vis-a-vis the suit land, of, one Janki Devi,being in lieu of maintenance, and, surviving upto her life time, (v) hence, when vis-a-vis the suit land, a restrictive estate vested in her, (vi) thereupon, conclusivity of declarations pronounced thereunder vis-a-vis Janki Devi, qua hence hers, holding a restrictive estate in the suit property, restrictive estate whereof surviving only upto her life time, and, pointedly in lieu of maintenance, (vi) thereupon, the verdicts aforesaid operate as *res judicata*, (vii) hence, estopping the successors-in-interest of Janki Devi, to make any espousal of hers, during, her life time holding an indefeasible enlarged estate vis-a-vis the suit property nor theirs being empowered to canvass of hers, being capacitated to make any valid alienation(s) vis-a-vis the suit property. The merit of the aforesaid submission is to be gauged, by making an allusion to the provisions, borne in Section 14 of the Hindu Succession Act (hereinafter referred to as the Act), provisions whereof stand extracted hereinafter:-

> **"14. Property of a female Hindu to be her absolute property.**—(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.
>
> ***Explanation.***—In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act.
>
> (2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a

civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property."

The learned counsel appearing for the appellants, submits with much vigour, that the mandate of sub-section (2) of Section 14 of the Act, is squarely attractable vis-a-vis the previously recorded conclusive binding verdicts, embodied respectively in Exts. P-2, P-3 and P-4, (i) thereupon, with the aforesaid verdicts restricting the estate of Janaki Devi vis-a-vis the suit property, pointedly, qua hers holding only a life interest therein, hence, with the operation, of, sub-section (1) of Section 14 of the Act being effaced, by the statutory injunction cast under sub-section (2) of Section 14, of the Act, (ii) thereupon, even if, deceased Janki Devi has possessed the suit property, in pursuance to hers acquiring it, before or after the commencement of the Act, and, though the explanation appended to sub-section (1), of Section 14 of the Act, ascribes vis-a-vis the statutory phrase "property in lieu of maintenance or arrears of maintenance", also the connotation of "property", (iii) and, though the aforesaid manner of holding of the suit property by deceased Janki Devi, renders her capacitated, to, as enshrined in sub-section (1) of Section 14 of the Act, hence espouse of hers, being vested with an unrestricted absolute estate therein, (iv) yet, all the effect(s) aforesaid of sub-section (1) of Section 14 of the Act or of the explanation thereto, reiteratedly stand obliterated, by judgment(s) and decree(s) aforesaid, whereunder rather a restricted estate is bestowed vis-a-vis deceased Janki Devi, (v) especially when sub section (2) of Section 14 of the Act, undermines, the clout of sub-section (1) of Section 14, of the Act. The learned counsel for the appellants while arguing with vigour qua the attractability vis-a-vis the judgments, borne, in Exts. P-2, P-3 and P-4, of, the principle of *res judicata,* has placed reliance upon a verdict rendered in ***State of West Bengal*** vs. ***Heman Kumar Bhattacharjee***, by the Hon'ble Apex Court, reported in ***AIR 1966 SC 1061***, the relevant paragraph No.14 whereof is stated extracted hereinafter:

"14. Before proceeding with these arguments in detail, we can dispose of second contention very shortly. This argument proceeds on a fundamental misconception, as it seeks to equate an incorrect decision with a decision rendered without jurisdiction. A wrong decision by a court having jurisdiction is as much binding between the parties as a right one and may be superseded only by appeals to higher tribunals or other procedure like review which the law provides. The learned Judges of the High Court who rendered the decision on 4.4.1952 had ample jurisdiction to decide the case and the fact that their decision was on the merits erroneous as seen from the latter judgment of this Court, does not render it any the less final and binding between the parties before the Court. There is, thus, no substance in this contention. The decision of the High Court dated 4.4.1952 bound the parties and its legal effect remained the same whether the reasons for the decision be sound or not."

(p.1066)

(a) wherein it is expostulated, that, even any erroneous decision by a Court of law, holding jurisdiction, being binding between the parties, unless it is set aside, (b) thereupon, he contends that the purported conclusivity acquired by the verdicts, respectively borne in Ex. P-2, P-3 and P-4, attracting vis-a-vis them, the principle of *res judicata*, (c) whereupon, the respondents are pointedly barred to stake any claim vis-a-vis the suit property, even by relying upon a judgment of the Hon'ble Apex Court delivered in a case titled as ***Vaddeboyina Tulasamma and others*** v. ***Vaddeboyina Sesha Reddi (dead) by LR's***, reported in ***AIR 1977 (3) SC 1944,*** relevant paragraphs No.69 to 72 whereof stand extracted hereinafter:-

"69. Indeed, if the contrary view is accepted, it will, in my opinion set at naught the legislative process of a part of Hindu Law' of the intestate succession and curb the social urges and aspirations of the Hindu women, particularly in the International Year of Women, by reviving a highly detestable legacy which was sought to be buried by the Parliament after independence so. that the new legislation may march with the times.

70. We would now like to summarise the legal conclusions which we have reached after an exhaustive considerations of the authorities mentioned above; on the question of law involved in this appeal as to the interpretation of s. 14(1) and (2) of the Act of 1956. These conclusions may be stated thus:

(1) The Hindu female's right to maintenance is not an empty formality or an illusory claim being conceded as a matter of grace and generosity, but is a tangible right against property which flows from the spiritual relationship between the husband and the wife and is recognised and enjoined by pure Shastric Hindu Law and has been strongly stressed even by the earlier Hindu jurists starting from Yajnavalkya to Manu. Such a right may not be a right to property but it is a right against property and the husband has a personal obligation to maintain his wife and if he or the family has property, the female has the legal right to be maintained therefrom. If a charge is created for the maintenance of a female, the said right becomes a legally enforceable one. At any rate, even without a charge the claim for maintenance is doubtless a pre-existing right so that any transfer declaring or recognising such a right does not confer any new title but merely endorses or confirms the pre-existing rights.

(2) Section 14(1) and the Explanation thereto have been. couched in the widest possible terms. and must be liberally construed in favour of the females so as to advance the object of the 1956 Act and promote the socio-economic ends, sought to be achieved by this long needed legislation.

(3) Sub-section (2) of s. 14 is in the nature of a proviso and has a field of its own without interfering with the operation of s. 14(1) materially. The proviso. should not be construed in a manner so as to destroy the effect of the main provision or the protection granted by s. 14(1) or in a way so as to become totally inconsistent with the main provision.

(4) Sub-section (2) of s. 14 applies to instruments, decrees, awards, gifts etc. which create independent and new titles in favour of the females for the first time and has no application where the instrument concerned merely seeks to confirm, endorse, declare or recognise preexisting rights. In such cases a restricted estate in favour of a female is legally permissible and s. 14(1) will not operate in this sphere. Where, however, an instrument merely declares or recognises a pre-existing right, such as a claim to maintenance or partition or share to which the female is entitled, the sub-section has absolutely no application and the female's limited interest would automatically be enlarged into. an absolute one by force of s. 14(1) and the restrictions placed, if any, under the document would have to be ignored. Thus where a property is allotted or transferred to a female in lieu of maintenance or a share at partition, the instrument is taken out of the ambit of sub- s. (2) and would be governed by s. 14(1) despite any restrictions placed on the powers of the transferee.

(5) The use of express terms like "property acquired by a female Hindu at a partition", "or in lieu of maintenance" "or arrears of maintenance" etc. in the Explanation to s. 14(1) clearly makes sub-s. (2) inapplicable to these categories which have been expressly excepted from the operation of sub-s. (2).

(6) The words "possessed by" used by the Legislature in s. 14(1) are of the widest possible amplitude and include the state of owning a property even though the owner is not in actual or physical possession of the same: Thus, where a widow gets a share in the property under a preliminary decree before or at the time when the 1956 Act had been passed but had not been given actual possession under a final decree, the property would be deemed to be possessed by her and by force of s. 14(1) she would get absolute interest. in the property. It is equally well settled that the possession of the widow, however, must be under some vestige of a claim, right or title, because the section does not contemplate the possession of any rank trespasser with- out any right or title.

(7) That the words "restricted estate" used in s. 4(2) are wider than limited interest as indicated in s. 14(1) and they include not only limited interest, but also. any other kind of limitation that may be placed on the transferee.

71. Applying the principles enunciated above to the facts of the present case, we find--

(i) that the properties in suit were allotted to the appellant Tulasumma on July 30, 1949 under a compromise certified by the. Court;

(ii) that the appellant had taken only a life interest in the properties and there was a clear restriction prohib iting her from alienating the properties;

(iii) that despite these restrictions, she continued to be in possession of the properties till 1956 when the Act of 1956 came into. force; and

(iv) that the alienations which she had made in 1960 and 1961 were after she had acquired an absolute interest in the properties.

72. It is, therefore, clear that the compromise by which the properties were allotted to the appellant Tulasamma in lieu of her maintenance were merely in recognition of her right to maintenance which was a pre-existing right and, there- fore, the case of the appellant would be taken out of the ambit of s. 14(2) and would fail squarely within s. 14 (1) read with the Explanation thereto. Thus the appellant would acquire an absolute interest when she was in possession of the properties at the time when the 1956. Act came into force and any restrictions placed under the compromise would have to be completely ignored. This being the position, the High Court was in error in holding that the appellant Tula- samma would have only a limited interest in setting aside the alienations made by her. We are satisfied that the High Court decreed the suit of the plaintiffs on an erroneous view of the law."

(1977-1979)

He also for fortifying the aforesaid submission, has relied upon a decision of the Hon'ble High Court of Madhya Pradesh, rendered in a case titled as ***State of M.P. vs. Mulamchand,*** reported in AIR 1973 MP 293, the relevant paragraphs No. 15, 16 and 17 whereof stand extracted hereinafter:-

"15. I have given anxious consideration to the above debate. In my view, the decision in Letters Patent Appeal (1960) MP LJ 195 = (AIR 1960 Madh Pra 152) operates as res judicata. The question in the present suit is whether the defendant-State can recover the outstanding balance of Rs. 58,500/- from the plaintiff on the basis of the Indentures executed by the Deputy Commissioner. In the Letters Patent Appeal it was held that the indentures were executed by the Deputy Commissioner in exercise of the authority vested in him by the rules made by the Governor and, therefore, there was no breach of Article 299(1) of the Constitution. It was further held that 'if however there be any lacuna in the form of these documents', since the contracts were ratified by the State Government, which had authorised the Deputy Commissioner to dispose of the forest produce and also allowed the plaintiff to

exploit the forests according to the terms of the sales, there was no bar to the right of the State Government to realise due from the plaintiff. It was, also, held that the dues could be recovered as arrears of land revenue. When, in the present suit, the plaintiff again contends that the outstanding balance of Rs. 58,500/- could not be recovered on the ground that the indentures were not executed in compliance with the provisions of Article 299(1) of the Constitution, it must be said that the matter directly and substantially in issue in the present (subsequent) suit is the same which was directly and substantially in issue in the former writ proceeding. The question was heard and finally decided between the same parties by this Court in the Letters Patent Appeal.

16. The issue in the present suit as also in the writ proceeding was the same. A decision on a question of law is res judicata in a subsequent proceeding between the same parties, where the cause of action is the same. The words "matter in issue" as employed in Section 11, Civil P. C., mean the right litigated between the parties. It has reference not only to the facts on which the right is claimed or denied, but also to the applicability or non-applicability of a rule of law to the given set of circumstances.

17. Where a decision on a question of law in relation to a given set of facts attains finality, it operates as res judicata in a later suit or proceeding between the same parties. This will be so even if it was erroneous. In Bindeswari v. Bageshwari, AIR 1936 PC 46 it was held that "where the decision of the Court in a previous suit determined that the section had never applied to a transaction, a Court in a new suit between the same parties with regard to the same transaction cannot try anew the issue as to its applicability in face of the express prohibition in Section 11 of the Code." In Mohanlal v. Benoy Kishna, AIR 1953 SC 65 their Lordships have laid down thus :--

> "There is ample authority for the proposition that even an erroneous decision on a question of law operates as 'res judicata' between the parties to it. The correctness or otherwise of a judicial decision has no bearing upon the question whether or not it operates as res judicata." (Para 23) It follows from this that even if in the earlier case an issue of law was wrongly interpreted in ignorance of a binding precedent, or if in a subsequent binding precedent the law has been interpreted otherwise, the earlier decision on the question of law, which has attained finality, will operate as res judicata between the parties in a subsequent suit or proceeding.
>
> This rule admits of certain exceptions. One is that where the decision relates to the jurisdiction of the Court to try the earlier proceeding, it will not operate as res judicata, if in the subsequent case it is found to be erroneous because the question of jurisdiction of the Court is unrelated to the rights claimed by one party and denied by the other. Another exception is where the law is altered since the earlier decision, the earlier decision will not operate as res judicata between the same parties. Here, it is nobody's case that there has been a subsequent legislation by which the law has been altered. Shri Verma's contention in this regard is that since every decision of the Supreme Court is "law" by virtue of Article 141 of the Constitution, it should be said that when the Supreme Court decided AIR 1968 SC 1218, it tantamounted to alteration in the law, since the earlier decision which was rendered by this Court in L. P. A. (1960 MPLJ 195) = (AIR 1960 Madh Pra 152). This argument is not well-founded. Article 141 of the Constitution enacts that the law declared by the Supreme Court "shall be binding on all Courts" within the territory of India. This means that when the Supreme Court expresses its view on any particular point of law, such expression of view shall be considered as overriding a

> contrary view expressed on the point in an earlier decision of any Court, Even obiter dicta of the Supreme Court if deliberately made upon a question with the intention of settling the law, are binding on all Courts. However, Article 141 does not confer on the Supreme Court any legislative function. The Supreme Court only interprets the law as it stands, but does not amend the law. Their Lordships' decision declared the existing law but did not purport to enact any fresh law." (p.296-297)

(a) wherein it is expostulated, that, the expression "matter in issue" embodied in Section 11 of the CPC, encompassing also all questions of law applicable vis-a-vis the apposite lis, and, pronouncement vis-a-vis all questions of law, rendered in an earlier lis *inter partes*, acquiring conclusivity, and, also finality, (b) thereupon, the renditions, on all apposite questions of law, by the Courts concerned, in an earlier lis inter se analogous parties therein vis-a-vis analogous parties herein, rather holding absolute sway or clout, hence, the restrictive estate conferred, upon, one Janki Devi under earlier verdicts, respectively comprised in Ex.P-2 to P-4, (c) rather empowering, sub-section(2) of Section 14 of the Act, to hold the fullest might, and, neither sub section (1) of Section 14 of the Act nor the explanation appended thereto, being available, for espousal by the defendants.

9. All the aforesaid submissions addressed by the learned counsel appearing for the appellants before this Court, are, highly misplaced, and, warrant(s) rejection, for the reasons, (i) that the judgment relied upon by the learned counsel for the appellant, reported both in AIR 1966 SC 1061 and AIR 1973 MP 293, only attracting vigour herewith, only when the earlier rendered interpretation qua the question of law apposite to the lis hereat, remained undisturbed or unsettled, by a subsequent dis-concurring interpretation, rendered thereupon, by the Hon'ble Apex Court, (ii) sequelly and effectively, hence, any verdict rendered by the Hon'ble Apex Court, displaying, a dis-concurrent interpretation vis-a-vis the mandate of the apposite questions of law hereat, would obviously supersede, the earlier interpretation meted thereon besides would also hold clout. Nowat, it is to be determined qua whether, Ex.P-2, and Ex. P-3, whereunder one Janki Devi was declared to be holding vis-a-vis the suit property onlya right in lieu of maintenance, hence in consonance therewith, was, also under Ex. P-4 conferred a restrictive estate therein, (ii) and, was hence concomitantly non suited vis-a-vis her claim, for, conferment of an unrestricted, and, an absolute estate vis-a-vis the suit property, rather hence standing annulled or superseded, by an apposite declaration of law, emanating from the Hon'ble Apex Court, at the time contemporaneous, to the rendition borne in Ex.P-4. For determining the aforesaid factum, the date of rendition, of, Ex. P-4, is important. Apparently, the verdict borne in Ex.P-4 was rendered on 10.09.1979, whereas, in an earlier therewith judgment rendered by the Hon'ble Apex Court in a case titled as ***Vaddeboyina Tulasamma and others*** v. ***Vaddeboyina Sesha Reddi (dead) by LR's***, reported in ***AIR 1977 (3) SC 1944***, the Hon'ble Apex Court, had made an interpretation, of, the scope and plenitude, of sub-section (2) of Section 14 of the Act, and, had also emphatically recorded a candid pronouncement, that where a female Hindu acquires, as evidently hereat one Janki Devi, also acquired, any property in lieu of her right of maintenance, thereupon, it being in recognition of her pre-existing right, and, any acquisition thereof, rather falling outside, the scope of sub-section (2) of Section 14, of the Act, dehors any decree, and, order investing or allotting a restricted estate vis-a-vis her, in the property concerned. The verdict rendered in the aforesaid case, by the Hon'ble Apex Court, was hence clearly prior, to, the rendition borne in Ex.P-4, hence, the verdict rendered in Ex.P-4 is squarely *per incuriam* vis-a-vis the earlier therewith, apt applicable verdict rendered by the Hon'ble Apex Court in V. Tulasamma's *case* ***(supra)***, (a) thereupon, the principle of estoppel constituted in Section 11, of, the CPC against the non raising, of, the issue with respect, to, one Janki Devi, as enunciated in Ex.P-4, holding only a life time interest, in the suit property, cannot naturally, be attracted vis-a-vis the plaintiff, (b) nor hence, it can be construed to be either binding or conclusive, (c) nor it can be concluded, of it operating as *res judicata,* (d) rather the verdict borne in Ex.P-4, when, is clearly militative of the earlier therewith rendition, of, the Hon'ble Apex Court in V. Tulasamma's *case* ***(supra)***, thereupon, it warrants it being usurped, and, set aside.

Further vigour to the aforesaid view is lent by the factum, of the verdict rendered in V. Tulasamma's *case **(supra)***, being prospective in nature. In sequel when the benefit of the verdict rendered by the Hon'ble Apex court, in V. Tulasamma's *case **(supra)***, was, accruable vis-a-vis Janki Devi, given hers being alive thereat, thereupon, hence, with hers in consonance therewith rather becoming an unrestricted owner of the suit property, hence, she was concomitantly vested with all rights to make valid alienations, of her estate. Predominantly, all purported nullifcatory effects, of, Ex.P-2, Ex.P-3 and Ex. P-4 vis-a-vis her estate are, hence effaced.

10. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court being 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. Substantial questions of law No.1 answered in favour of the respondent and against the appellant.

11. In view of above discussion, there is no merit in the instant appeal and it is dismissed accordingly. Consequently, the judgment and decree rendered by the learned First Appellate Court in Civil Appeal No. 127/13 of 2004/1999 is affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

Smt. Kamlesh Kumari ..Appellant/defendant.

Versus

Rumal Singh (since deceased) through his legal representative(s).

..Respondent/Plaintiff.

RSA No. 100 of 2007.
Reserved on : 20th March, 2018.
Decided on :29th March, 2018.

Code of Civil Procedure, 1908- Section 100- **Indian Succession Act, 1925-** Section 63- Will- Plaintiff claiming inheritance to estate of deceased being his nephew – Defendant setting up Will and claiming succession- Plaintiff alleging Will to be result of fraud etc. – Suit decreed by trial court and Appeal of defendant dismissed by Appellate court- Regular Second Appeal, On facts, defendant found to have rendered services to deceased- Recitals of Will also corroborate this fact- Defendant performed last rites of deceased – Due execution of Will proved from statements of marginal witnesses – Will was registered before Sub-Registrar and bears his endorsement – Held- Execution of valid Will stands proved on record- Defendant entitled to succeed on its basis- Regular Second Appeal allowed and judgments and decrees of lower courts set aside.

(Para-8 to 13)

For the Appellant: Mr. Rajnish K. Lall, Advocate.
For Respondent: Mr. Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal is directed, against, the concurrently recorded verdicts by both the learned Courts below, whereby, the plaintiff's suit for rendition, of, a decree for

declaration, as well as for, rendition of a decree for possession qua the suit khasra number(s), was, hence decreed.

2. Briefly stated the facts of the case are that the plaintiff had filed the suit for declaration and possession against the defendant on the averments that the land comprised in Khata No.19 min, Khatauni No.41 min., Khasra Nos. 135 and 136, kita 2, measuring 0-09-65 HM, Khata No.20 min, Khatauni No.42 min, khasra No.233, measuring 0-00-87 HM, Khata No.21 min, Khatauni Nos. 43, 44, 45, Khasra Nos. 276, 272, 273, 288, kita 4, measuring 0-63-76 HM, 1/8th share in Khata No.22, Khatauni Nos. 46, 47, Khasra Nos. 249, 215, kita 2, measuring 0-65-49 HM, 54/74 share, situated in Mohal and Mauza Galore, Tehsil Nurpur, District Kangra, H.P. (hereinafter referred to as the suit land), as per jamabandi for the year 1993-94 was previously owned and possessed by deceased Ratnu, who had inherited the suit property vide mutation No.40. It is averred that deceased Ratnu was old and illiterate person and not conversant with the affairs of the world and she was unmarried and due to illness died on 1.2.1997, leaving behind the plaintiff, his nephew as only legal heir. The plaintiff is said to be deceased Ratnu's sister's son. It is averred that the plaintiff has brought up the deceased from the very beginning, as the parents of the plaintiff had expired when he was five years old and plaintiff used to look after Ratnu. It is further averred that the plaintiff being the only legal representative of deceased Ratnu is entitled to inherit his entire estate. It is submitted that the defendant has no concern with the suit land as she is not related to deceased Ratnu. It is alleged that at the time of death, the plaintiff was not at home and on coming to know about the death of deeased Ratnu, plaintiff immediately come to his home to perform the last rites. It is avered that at the time of death, Ratnu was ill for long time and lost all strength of body and mind and was unfit to give detail of property and was not of sound disposing state of mind and he never executed any Will. It is alleged that after some days from the death of deceased Ratnu, defendant proclaimed that she has got the Will from deceased Ratnu in her favour just one day before his death and she will inherit the entire estate of deceased Ratnu. It is alleged that, the defendant has forged Will which was got executed in connivance with the marginal witnesses and the same is null and void and in effective on the rights of the plaintiff and is surrounded by suspicious circumstances and there was no occasion for Ratnu to execute the Will in favour of the defendant, who never resided with him nor rendered services during his life time. Hence the suit.

3. The defendant contested the suit and filed written statement, wherein, he has taken preliminary objections inter alia maintainability, locus standi, cause of action, non joinder of necessary parties and concealment of material facts. On merits, the ownership and possession of Ratnu till death has been admitted. It is admitted that Ratnu was illiterate and bachelor and the rest facts have been denied. It is alleged that deceased Ratnu during his life time on 31.1.1997 executed a Will in favour of the defendant before the Sub Registrar, Nurpur in presence of Jai Chand, Namberdar and Man Singh, which was scribed by Shri Mangat Ram, Petition Writer. It is denied that the respondent was brought up by the defendant. It is further denied that the plaintiff looked after Ratnu and rendered services to him, during his life time. It is further alleged that the deceased was being looked after by the defendant, who happens to be his cousin and out of love and affection and services rendered, the deceased executed a valid Will in favour of the defendant. It is further denied that the plaintiff is the legal heir of Ratnu. It is alleged that the plaintiff was in the village, when Ratnu died and the plaintiff never rendered services to the deceased. It is further alleged that after the death of Ratnu, defendant perform all the rituals of deceased and went to Haridwar. It is further alleged that at the time of execution of the Will, deceased was in senses, without any fear and pressure. It is alleged that the suit land was earlier being cultivated by her husband and they rendered services towards deceased during his life time. It is denied that the will is a forged document, executed in connivance with the witnesses. It is further denied that the property of the deceased was predominantly agriculturist and governed by the Kangra customary law. It is denied that the power of alienation of ancestral property was restricted. It is alleged that the suit land was not joint Hindu ancestral property. It

is alleged that the possession of the suit property was already with the defendant during the life time of deceased and mutation has now been attested on the basis of registered Will.

4. The plaintiff filed replication to the written statement of the defendant(s), wherein, he denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the plaintiff is the only legal heir of deceased Ratnu and is entitled to inherit his estate, as alleged? OPP.
2. Whether the Will dated 31.1.1997 alleged to have been executed by the deceased Ratnu in favour of the defendant is forged and fraudulent document, as alleged? OPP.
3. Whether the suit is not maintainable? OPD.
4. Whether deceased Ratnu executed a legal and genuine Will in a sound state of mind on 31.1.1997, in favour of the defendant? OPD.

4(a). Whether the parties are governed by the Kangra Customary law, if so, its effect? ODP.

5. Whether the plaintiff has no cause of action to file the present suit? OPD.
6. 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 latter Court dismissed the appeal and affirmed the findings recorded by the learned trial Court.

7. Now the defendant/appellant herein, has instituted the instant Regular Second Appeal, before, this Court, wherein he assails the findings, recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, this Court, on 11.7.2007, 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 findings of the Court below that the execution of the Will was shrouded with suspicious circumstances, which has not been explained or there existed suspicious circumstances are sustainable in law when good reasons have been given to prove on record that the plaintiff never resided with the uncle and never served him. Services were rendered by the defendant, the will had been executed in her favour which was duly registered?

b) Whether the alleged suspicious circumstances, the execution of the Will stood explained and the due execution of the Will in accordance with section 59 of the Indian Succession Act stood proved in the facts and circumstances of the case?

Substantial questions of Law No.1 to 2:

8. Deceased testator one Ratnu, under, a testamentary disposition borne in Ex. DW5/A, bequeathed his properties vis-a-vis the legatee named therein. For Ex.DW5/A, to acquire a pervasive aura of validity, the legatee constituted thereunder also the propounder thereof, was hence, enjoined to adduce cogent proof, in satiation of the ingredients borne in Section 63 of the Indian Succession Act, provisions whereof stand extracted hereinafter:-

> "63 Execution of unprivileged Wills. —Every testator, not being a soldier employed in an expedition or engaged in actual warfare, [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."

Whereupon alone the Will, can be constituted to be validly and duly executed by the deceased testator. The plaintiff does not contest, the validity of the thumb impression, of the deceased testator, occurring on Ex.DW5/A. He contends through his counsel that there is evident, want, of satiation(s) of the statutory ingredients, encapsulated in Section 63 of the Indian Succession Act, (I) and, for erecting the aforesaid submission, he has alluded to the testification, occurring in the examination-in-chief, of one of the marginal witness to Ex.DW5/A, wherein, he discloses of deceased Ratnu, not, appending his signatures/thumb impressions in his presence, (ii) thereupon, he makes a further submission of all the statutory requirement(s), borne in Section 63 of the Indian Succession Act, of the deceased testator, thumb marking or appending his signatures on Ex.DW5/A in the presence of marginal witnesses thereof, and, thereafter the marginal witness thereto, doing also likewise, is grossly amiss. (iii) Thereupon, with the testimony of DW-2, a marginal witness hence not carrying the innate nuance, of, his thumb marking or appending his signatures on Ex.DW5/A, carrying the requisite *animus attestandi,* hence, renders it to be ridden with an evidentiary infirmity. However, aforesaid submission is anvilled upon, a fragment reading, of, the testimony of DW-2, occurring, in the fag end of his examination-in-chief, (iv) whereas, it would enjoy vigour, only, when it is read in conjunction with the testification prior thereto, rendered, by DW-2 also when it is read in conjunction, with, the testification of another marginal witness, to Ex.DW5/A, who testified as DW-3, (v) besides upon its being read in conjunction with the testification of scribe, of Ex.DW5/A, who testified as DW-5. In other words, a combined reading, of the testifications, of the aforesaid witness, would, be imperative, for concluding, whether, the afore referred fragmentary deposition occurring in fag end of the examination-in-chief of DW-2, is, hence imbued with any probative vigour or not.

9. Initially, the reading of the testification, of, DW-2 occurring in his examination-in-chief, especially, the echoings, made by DW-2 prior to, his, at the fag end, of his, examination-in-chief, making, the aforesaid voicing, does make a display of deceased testator Ratnu, thumb marking Ex.DW5/A, in the presence of DW-2, whereafter, the latter also proceeded, to, in the presence of the deceased testator, hence append his signature(s) thereon. The afore referred testification rendered by DW-2, pointedly prior to, his, at the fag end of his examination-in-chief, making, an articulation of deceased testator Ratanu, not thumb marking Ex.DW5/A, in his presence, rather does enhance an inference of DW-2, proving his carrying the requisite necessary *animus attestandi* or his proving the statutory mandatory ingredients of Section 63, of, the Indian Succession Act, (i) of his seeing the deceased testator thumb marking Ex.DW5/A, and, thereafter his doing likewise in the presence of the deceased testator, (ii) importantly when thereafter he continues to testify of the Will, being presented, for, registration before the registrar concerned, who after ascertaining, from deceased testator Ratnu, the trite factum of his comprehending the contents of Ex.DW5/A, his making an endorsement to this effect thereon, (iii) hence when subsequent thereto at the fag end, of his examination-in-chief, DW-2 testifies of the deceased testator in his presence not thumb marking Ex.DW5/A, his testification, is construable to be not appertaining to the pre-registration stage or to the stage when, after, the deceased testator in the presence of DW-2, as voiced by DW-2, appending his thumb impression(s) on Ex.DW5/A, in his presence, DW-2 subsequent thereto also appending his signature(s) thereon, (iv) testification

whereof when necessarily satiate(s) the indispensable statutory requirement qua at the time contemporaneous to, the execution of Ex.DW5/A, rather DW-2 seeing the deceased testator, thumb marking Ex.DW5/A, and, thereafter, the latter also proceeding to append his signature(s) thereon. In other words, if, at the stage subsequent, to the proven completed valid execution of Ex.DW5/A, and, at the stage of its presentation for registration, hence, DW-2, is reticent qua the deceased testator thumb marking Ex.DW5/A, in his presence, no conclusion can be galvanized, of DW-2, not carrying the requisite *animus attestandi* nor any conclusion can be erected, that, the requisite indispensable statutory tenets enjoining satiation, only at the stage of execution of Ex.DW5/A, hence, not begetting their apposite satiation (a) conspicuously, when at the stage of Ex.PW5/A being presented for registration, it being neither incumbent nor statutorily mandated, qua thereon the attesting witnesses being enjoined to also make evincings, of the deceased testator, in their presence thumb marking Ex.DW5/A or subsequent thereto, any marginal witness, in the presence of the deceased testator, making the relevant thumb markings or signatures thereon. More so, when the act, of, execution of Will, is distinguishable, from, the statutory act, of its registration, besides, when even an unregistered Will enjoys validity, if it is proven to be validly and duly, executed, upon its provenly satiating the ingredients borne in Section 63 of the Indian Succession Act, ingredients whereof stand hereat fully proven.

10. Be that as it may, the other marginal witness to Ex.DW5/A while testifying as DW-3, has, in his testification, made echoings of the deceased testator thumb marking the Will in his presence, and, thereafter his appending his signatures thereon. He has also in corroboration, to the testification of DW-2, made echoings, that, at the stage of execution of Ex.DW5/A by deceased testator, both DW-2 and he being present, thereupon, it is apt to conclude that at the pre registration stage qua Ex.DW5/A being proven to be validly and duly executed, conspicuously within the domain of Section 63 of the Indian Succession Act. Added momentum tot he aforesaid inference is garnered by the scribe, of Ex.DW5/A, who stepped into the witness box, as DW-4, making testification in corroboration, to the testification of DW-2 and DW-3, thereupon, it is apt to conclude of the isolated fragmentary deposition, of DW-2 solitarily appertaining, to the stage of presentation, of Ex.DW5/A, for its registration before the Sub Registrar concerned, not being either read nor being construable, to invalidate the consistent testimonies, of, DW-2, DW-3, and, of DW-5, qua thereat, it standing proven to be duly and validly executed, and, whereat both the marginal witnesses thereto, evidently, held the requisite *animus attestandi.*

11. Furthermore, a close reading, of, the cross-examinations of DW-2, DW-3 and DW-5, underscores of no suggestions being put to them of the beneficiary or witnesses thereto, exerting undue influence upon the deceased testator nor any affirmative echoings in respect thereto, hence emanated from the aforesaid witnesses nor the plaintiff has endeavoured to rebut the authenticity, of, the thumb impression of deceased testator occurring on Ex.DW5/A, hence rendering them to enjoy conclusive authenticity.

12. The deceased testator died, a day subsequent tot he execution and registration of Ex.DW5/A, thereupon, it is contended of the deceased testator, being not, possessed of enlivened cognitive faculties, rather his being not in a sound disposing state of mind. However, the endorsement of the Sub Registrar concerned, occurring on Ex.DW5/A and its making echoings of, after the Sub Registrar concerned, ascertaining the comprehensibility of the deceased testator vis-a-vis the contents borne in Ex.DW5/A, his thereafter proceeding to make the apposite endorsement thereon, hence negates besides blunts any inference of the deceased testator, not being possessed of a sound disposing state of mind, dehors, the fact that on the day subsequent to the execution and registration of Ex.DW5/A, his leaving for his heavenly abode. Though, the plaintiff, had, the opportunity to bely the authenticity of the endorsement made by the Sub Registrar concerned, upon Ex.DW5/A, yet he omitted to make any concert to this effect, (a) omissions to make the relevant concert(s), for belying the authenticity, of endorsement, occurring on Ex.DW5/A, rather constrains a conclusion of an aura of authenticity acquired by the endorsement borne in Ex.DW5/A, rather getting enhanced, (b) besides its acquiring conclusivity, hence rendering open a firm conclusion of the deceased testator, being possessed of a sound disposing state of mind.

13. Since, the beneficiary of Ex.DW5/A, is apparently not related to the deceased testator, hence, when Ex.DW5/A, is hence an *inofficious Will* or the legatee thereunder is a *haeres extraneous*, thereupon, the deceased testator constituting the defendant, as legatee thereunder, and, his excluding his natural heirs, the plaintiff herein, does arouse a grave suspicion, about the validity of the Will borne in Ex.DW5/A, dehors the aforestated inference(s) drawn by this Court. Even if, Ex.DW5/A is an *inofficious Will*, yet with Ex.DW5/A making a disclosure, of, one Kamlesh Kumari, rendering services to the deceased testator, hence, his ingratiating the latter does prima facie, unfold of thereupon the deceased testator being inclined vis-a-vis the defendant, and, his excluding the plaintiff, from inheritance. However, even evidence in support of the aforesaid recitals, ought to emanate. A reading of the testification of DW4, underscores, the factum of the defendant, cultivating the suit land, and, of hers serving the deceased testator besides he has testified of the last rites of the deceased testator being performed by the defendant. The efficacy(ies) of the aforesaid echoings occurring in the testification of DW-4, though, stood concerted to be shred apart, by the counsel, for the plaintiff, while holding him to cross-examination, yet no evincings spurred, for, hence belying the testification occurring in the examination-in-chief, of DW-2. Also with the plaintiff not adducing any cogent affirmative proof, other than his self serving testimony, for repelling the testification of DW-4, and, most emphatically the omission of the plaintiff, to bely the testification of DW-4, of, the last rites of the deceased testator being performed by Kamlesh Kumari, by, his producing the relevant record maintained, at the ghats concerned, does garner, an inference of the defendant performing the last rites of deceased testator, wherefrom, it is apt to conclude of the plaintiff, not serving nor attending upon the deceased testator rather of the defendant serving or attending upon the deceased testator, hence, ingratiating the deceased testator to make a testamentary disposition in her favour. Consequently, any suspicious circumstance surrounding the execution of Ex.DW5/A engendered by the deceased constituting the defendant, who is not related to him, as his legatee and, his excluding the plaintiff, his real nephew, hence come to be sufficiently dispelled.

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

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

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

Kanta Devi & Ors. .....Appellants/defendants.

Versus

Tripta Devi & Ors. ....Respondents/plaintiffs.

RSA No. 222 of 2004.
Reserved on : 24th March, 2018.
Decided on : 29th March, 2018.

Himachal Pradesh Tenancy and Land Reforms Act, 1972- Sections 104 & 112- Conferment of proprietary rights- Jurisdiction of Civil Courts- On facts, entries of non-occupancy tenant existing in favour of defendant were without any basis – Conferment of proprietary rights only on basis of such revenue entries held to be illegal- Declaratory suit- Maintainable as jurisdiction of civil

Court is not barred – Exceptions laid down in ***Chuhniya Devi vs. Jindu Ram 1991(1) Sim. L.C. 223*** reiterated. (Para-8 to 10)

Case referred:
Chuhniya Devi vs. Jindu Ram reported in 1991(1) Sim. L.C. 223

For the Appellants:	Mr. Ajay Sharma, Advocate.
For the Respondents:	Mr. K.D. Sood, Senior Advocate with Mr. Rajneesh K. Lal, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiffs' suit for rendition of a decree, for permanent prohibitory injunction besides for rendition of a decree, for declaration, stood dismissed by the learned trial Court. In an appeal carried therefrom, before the learned First Appellate Court, by the plaintiffs, the latter Court allowed his appeal besides obviously reversed the trial Court's judgment and decree.

2. Briefly stated the facts of the case are that the plaintiffs have filed a suit against the defendant(s) for declaration with consequential relief of permanent injunction, with assertions that the land comprised in Khewat No.58, Khatauni No.108, Khasra No.685, 686, measuring 0-05-56 hects, situated in mohal Thear, Mouza Khaniara, Tehsil Dharamshala, District Kangra, H.P. is owned and possessed by them and mutation No.316, attested on 9.6.1999 regarding the suit land in favour of the defendant is illegal, null and void and the plaintiffs are not bound by the same and in the alternative the plaintiffs have sought a decree for possession, if the plaintiff are not found to be in possession of the suit land and they are dispossessed from the suit land or any part thereof during the pendency of the suit. The plaintiffs have pleaded that they are owners of the suit land. During the settlement operation in the year 1973 to 1976, the suit land was described as Khasra No.369 and the plaintiffs were recorded as owners as is evident from the jamabandi for the year 1965-66 and 1960-61. The defendant in collusion with the revenue staff got themselves recorded in possession over the suit land without knowledge and consent of the plaintiffs as tenant at will, in fact the latest revenue entries qua the possession of the defendant is a mere paper entry as the defendant was never inducted as tenant over the suit land. The entry qua the possession of the suit land during the settlement operation or earlier was recorded behind the back of the plaintiffs. The prescribed procedure has been laid down under the law, for the change of the revenue entry and the same has not been followed. On the basis of mutation and other revenue entries, the defendant started threatening to take forcible possession of the suit land and therefore, the plaintiff are left with no alternative but to institute the present suit.

3. The defendants contested the suit and filed written statement, wherein, they have taken preliminary objections of maintainability, limitation, cause of action, jurisdiction, estoppel etc. On merits, the defendants pleaded that the plaintiffs are not entered as owner in the revenue record for the year 1991-92, as per remarks column in red ink in the jamabandi for the year 1991-92, the defendant has been conferred with the ownership rights vide mutation No.316 under the provisions of H.P. Tenancy and Land Reforms Act, 1972 and therefore, the defendant after acquiring the proprietary rights under the law is a lawful owner in possession of the suit land. The plaintiffs have not challenged the mutation before the competent Appellate Court as provided under the law. The defendant also pleaded that during the settlement operation which took place in the year 1973 to 1976, the suit land was shown as Khasra No.369 and the plaintiffs were not shown as owner in possession of the suit land in the jamabandi for the year 1965-66 and 1960-61 and at that time Shri Chhaju Ram, the predecessor-in-interest of the plaintiffs has been shown as owner of the suit land and the defendant in possession as Gair Marushi tenant on payment of Gala Batai. The defendant was inducted as tenant by deceased Chhaju Ram, in the

year 1961-62 on payment of Gala Batai. The defendant was paying Galla Batai to Sh. Chhaju Ram till his death. The defendant was rightly entered as tenant under the landowner in the revenue papers during the settlement operation and the subsequent entries in the revenue record continued as per the factual position on the spot and therefore, the suit filed by the appellants is not maintainable.

4. The plaintiffs filed replication to the written statement of the defendant(s), wherein, they denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the plaintiffs are owners-in-possession of the suit land?OPP.
2. Whether the plaintiffs are entitled to consequential relief of permanent injunction,a s prayed for?OPP.
3. Whether the suit of the plaintiff is within time?OPP.
4. Whether the mutation No.316 sanctioned on 9.2.1999 regarding the khasra Nos. 685, 686 in favour of the defendants illegal, null and void? OPD.
5. Whether the plaintiff has no locus standi to file the present suit? OPD
6. Whether the plaintiff is estopped from suing the defendant by is act and conduct? OPD.
7. Whether the suit is bad for non joinder of necessary parties?OPD.
8. Whether this court has no jurisdiction to entertain the present suit?OPD.
9. 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 herein before the learned First Appellate Court, the latter 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, wherein they assail the findings recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, on 11.3.2005, 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 question of law:-

a) Whether the judgment and decree as passed by ADJ below is without jurisdiction in view of full Court judgment of this Hon'ble Court in Chunia's case?

Substantial question of Law No.1:

8. Mutation regarding conferment of proprietary rights vis-a-vis the suit property, was attested, on 9.2.1999. Exhibit pronouncing the aforesaid fact is borne in Ex.P-4. The plaintiffs assailed, the recording of mutation, borne in Ex.P-4, on the ground (a) of the Collector concerned, who attested the mutation rather making a decision without summoning the plaintiffs; (b) his hence sanctioning it behind the back of the plaintiffs; (c) Collector concerned, who attested the apposite mutation borne in Ex.P-4, omitting, to make deep discernments from the apt revenue entries vis-a-vis theirs divulging existence of a valid consensual bilateral relation of giar morisi inter se the predecessor-in-interest of the plaintiffs, one Chajju Ram, and, the defendant; (d) his omitting to also gauge, from, Ex. D-1, whether, it stood preceded by any valid order made by the revenue authority concerned, whereupon, alone it would acquire sanctity besides thereupon alone, the revenue entries, occurring in the subsequent thereto revenue records, reflecting the defendant to be gair morusi, under, the predecessor-in-interest of the plaintiffs, one Chhaju Ram, hence would also likewise attain sanctity. In case (i) disaffirmative

evidence, qua the aforesaid facet(s), rather emerges, upon, a deep circumspect study of the evidence on record, (ii) thereupon, alone the clout of the exception carved by the Hon'ble Full Bench, of, this Court in case titled as ***Chuhniya Devi vs. Jindu Ram*** reported in ***1991(1) Sim. L.C. 223***, would rather beget arousal, apt exception (b) whereof stands extracted hereinafter:-

> "(b) the civil court has no jurisdiction to go into any question connected with the conferment of proprietary rights under Section 104 of the H.P. Tenancy and Land Reforms Act, 1972, except in case where it is found that the statutory authorities envisaged by that Act had not acted in conformity with the fundamental principles of judicial procedure or where the provisions of the Act had not been complied with."

(iii) whereas in absence thereof, the statutory bar against Civil Courts testing the validity of orders made by the competent authority, exercising powers, under the H.P. H.P. Tenancy and Land Reforms Act, 1972, (hereinafter referred to as the Act), would rather hence beget attraction, and, concomitantly Civil Courts, would stand divested, of, jurisdiction, to test validities thereof.

9. Initially, it is to be gauged, whether the predecessor-in-interest of the plaintiff, namely, one Chhaju Ram in the year 1961-62, had validly inducted, the defendant, as a gair a morusi vis-a-vis the suit land, and, whether the inception of entries in respect thereto, occurring, in Ex. D-1, are well founded besides are anchored, upon, a valid order made by the Revenue Officer concerned. The defendant omitted to place on record any evidence, for underscoring the trite factum, qua preceding the making of Ex D-1, any valid order being recorded by the Revenue Officer concerned. However, the learned counsel appearing, for, the appellant has contended with vigour, that, it was rather incumbent upon the plaintiffs, to sustain their espousal of the entries borne in Ex. D-1, being ill founded nor theirs being preceded by any valid orders, being recorded by the Revenue Officer concerned, (i) and, their relevant omission(s) rather imputing conclusive sanctity vis-a-vis them, given theirs carrying a presumption of truth, and, given no evidence hence being adduced to rebut the presumption of truth carried by them. However, the aforesaid submission is squarely blunted by the trite factum, of, dehors the plaintiff, omitting to adduce cogent evidence qua the facet aforesaid, his omission being inconsequential, (ii) especially when rather it being incumbent upon the defendant, who intends to sustain and validate the inception, of the apposite entries, to hence adduce evidence for validating them, (iii) and, Court(s) being under a solemn duty for satisfying its judicial conscience, to ask for adduction, of, best evidence, for, hence sustaining the apt entry(ies). Reiteratedly, hence when the apposite evidence, comprised in valid orders, preceding the making of the entries, being evidently recorded, for hence sustaining the inception of the entries occurring in Ex. D-1, rather is grossly amiss, (iv) thereupon, the inception of the entries borne in Ex.D-1, reflecting the defendant(s)(to be gair morusi, upon, the suit land, rather gets capsized also thereupon, they are rendered bereft of credence. Moreover, the testification rendered by the defendant, while deposing as DW-1, especially the one borne, in his cross-examination, is extremely nebulous and fragile, (v) conspicuously, when he is unable, to, with precision make any echoing vis-a-vis the time, whereat, he was inducted as gair morisi vis-a-vis the suit land, by the predecessor-in-interest of the plaintiff, namely, one Chhaju Ram. (vi) Moreover, he has continued to testify, of, no writing being prepared, at the apposite stage of his being inducted by the predecessor-in-interest of the plaintiff, as gair morusi vis-a-vis the suit land. He further testifies that in respect of his espousing, of his purportedly being validly displayed, in the revenue records, as gair morusi vis-a-vis the suit land, his omitting to appear, before the revenue officer concerned nor his statement being recorded thereat, also with his continuing to testify, qua his not preferring any apposite application, qua the facet aforesaid, before, the Revenue Officer concerned. Naturally, thereupon, the effect(s) of the aforesaid rendered testifications, of DW-1, (a) are that the aforesaid articulations occurring, in his cross-examination, rather making, a clear candid display, of, the inception of the entries borne in Ex. D-1, and, theirs displaying, the defendant being inducted, as a gair morusi vis-a-vis the suit land, by the predecessor-in-interest of the plaintiffs, hence not being founded, upon, any valid order, standing pronounced by the Revenue Officer concerned, (b) rather it being construable to be a stray entry or a fictitious entry. The further omission of the defendant, to, place on record the apt khasra girdawaris, maintained with respect to the suit

land, despite, his voicing his awareness qua biannual preparation of khasra girdawaris, (c) does also boost an inference of all entries, carrying the apt reflection, and, borne in the revenue records, prepared subsequent to the making of Ex. D-1, also hence gathering an alike stain of suspicion besides a stain of fictitiousness. Reiteratedly, when the inception of the apposite entries, borne in Ex. D-1, are, for the reasons aforestated, rather invalid, hence, the entries carried in the subsequent thereto jamabandis prepared vis-a-vis the suit land, also hence acquire an alike stain of vitiation. Corollary of the aforesaid inference, is of hence, with the defendant failing to establish, the trite factum, of a valid subsisting consensual bilateral relation, of landlord and tenant, rather coming into existence inter se him, and, the predecessor-in-interest of the plaintiffs, (ii) thereupon, the Collector, who attested the mutation conferring proprietary rights, upon the defendant, by recording an order borne in Ex.P-4, has visibly contravened, the salient cardinal principle, of, the apposite statutory tenets, borne in the H.P. Tenancy and Land Reforms Act, 1972, (iii) provisions whereof contemplate qua unless evidence clinches, the eruption of an undisputed valid status, of landlord, and, tenant inter se the litigating parties, (iv) thereupon, alone the Collector concerned exercising, jurisdiction under the Act, hence validly proceeding to attest the relevant mutation(s), for hence conferring proprietary rights, upon, the purported gair morusi, whereas, in absence thereof , his refraining to render the relevant orders. Apparently, for the reasons aforestated, when the inception of the apposite revenue entry(ies), borne, in Ex. D-1, is rather rendered vulnerable to skepticism, (v) besides with this Court concluding of the entries borne therein, being vitiated, conspicuously, hence for want of any valid order preceding therewith, being recorded by the Revenue Officer concerned, (v) whereupon, this Court concludes, that with hereat, the imperative rubric, of, there imperatively existing an evident valid bilateral consensual relation of landlord and tenant inter se the defendant, and, the predecessor-in-interest of the plaintiff, being rather grossly amiss, (vi) thereupon the apposite order is illegitimized, (vii) also hence with the Collector concerned, omitting to, discern from the record(s) concerned, whether it sustains the aforesaid trite factum, re-emphasisingly, hence renders his official act, of, attesting mutation(s) qua the apt conferment of proprietary rights, through, an order borne in Ex.P-4, to be in gross infraction, of, the apt statutory provisions. Consequently, with the apposite exception, carved in Chuhniya Devi's case **(supra),** against, Civil Courts being estopped to entertain any suit, wherein a challenge is made upon any order recorded by the Collector, hence, exercising jurisdiction under the Act, (i) rather making a display of its evidently holding play, (ii) upon evident display, of, the apt statutory provisions rather being infracted, infraction whereof, for all the reasons aforestated, has hereat hence evidently occurred, thereupon, the Civil Court, held jurisdiction, to entertain the suit, for testing the validity of the order, rendered by the Revenue Officer concerned, whereby proprietary rights, stood conferred upon the defendant.

10. Be that as it may, the plaintiffs rather averred, as also, testified (i) of Ex.P-4, being recorded behind their back, hence, its rendition being militative vis-a-vis the salient principle of *audi alteram partem*. A reading of Ex.P-4, the apposite order, whereby, proprietary rights stood conferred, upon the defendant, does display of the plaintiffs recording their presence, at the time contemporaneous to the Collector concerned, hence, attesting the mutation concerned, (ii) nonetheless, when there is an evident acerbic contest vis-a-vis the presence of the plaintiffs thereat, hence it was incumbent upon the defendant(s), to produce the record, appertaining to issuance of summons by the collector concerned, upon the plaintiffs, (iii) whereupon, alone it would be discernable, qua whether there were apposite refusal(s), to accept service of summons by the plaintiffs or whether they accepted service, (iv) whereafter, upon discerning the apposite disclosures borne therein, it would be apt to conclude qua the recitals borne in Ex.P-4, of, the plaintiffs recording their presence, at the time contemporaneous vis-a-vis its attestation, hence, acquiring an aura of validity besides being truthful. However, neither the summons issued by the Collector concerned, for eliciting the presence, of the plaintiffs before him, stood adduced, nor when the signatured statement of the plaintiffs, in personification of theirs recording their presence before the Collector concerned, stood adduced into evidence, thereupon, it appears that the occurrence of recital(s) in Ex.P-4, of the plaintiff(s) in contemporaneity thereof, rather recording their presence before him, hence, is a sheer falsity, (i)

whereupon, no credence or validity can be imputed to Ex.P-4, rather it is to be concluded to be rendered in infraction of the salient principle(s) of *audi alteram partem*, hence, rearing, of, a challenge vis-a-vis Ex. P-4, before a Civil Court, rather falls, within the ambit, of, the exception carved in Chuhniya Devi's case ***(supra)***.

11. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court being 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. Substantial questions of law No.1 answered in favour of the respondent(s) and against the appellant(s).

12. In view of above discussion, there is no merit in the instant appeal and it is dismissed accordingly. Consequently, the judgment and decree rendered by the learned First Appellate Court in Civil Appeal No. 31-D/2002 is affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

Kashmiri Lal .....Appellant.
Versus
Jitu and another .....Respondents.

FAO No. 102 of 2012
Reserved on : 26th March, 2018
Decided on : 29th March, 2018

Motor Vehicles Act, 1988- Section 166- Claim for compensation for personal injuries suffered because of rash driving of tractor by respondent No.2- Application dismissed by Tribunal- Appeal against- On facts, FIR regarding accident was found belatedly filed – Further in criminal case arising out of same accident, claimant feigning ignorance as to cause of accident as well as regarding involvement of offending tractor in it - Held- Claim application rightly dismissed by Tribunal. (Para-5)

For the Appellant: Mr. T.S. Chauhan, Advocate.
For Respondents No. 2: Mr. Shanti Swaroop, Advocate.
For Respondents No.1: Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal stands directed against the award pronounced by the Learned Motor Accident Claim Tribunal, Fast Track Court, Una, District Una, H.P. in MAC Petition No. 11/2006, whereby, the relief of compensation was declined vis-a-vis the petitioner/claimant.

2. The petitioner/appellant herein, had, averred in the claim petition, of, his sustaining injuries on his person, in sequel to occurrence of a collision, inter se the motorcycle whereon he was atop, with, the tractor driven by respondent No.2. He also espoused in the claim petition, that the occurrence of a collision inter se the motorcycle, whereon he was atop vis-a-vis the tractor, driven by respondent No.2, being a sequel of rash and negligent driving of the tractor, by respondent No.2. Since, the learned Tribunal has declined relief to the petitioner, significantly, upon, its rendering disaffirmative findings upon the apposite issue appertaining to the aforesaid

espousal, hence, it is to be determined, whether, the findings rendered upon apposite issue No.1, hence withstanding, the scrutiny of the evidence germane thereto.

3. The petitioner/appellant herein had vis-a-vis the alleged accident lodged a FIR, borne in Ex.PW3/A. The aforesaid FIR was lodged belatedly, since, the accident. Since therein, the petitioner/appellant herein assigns, the reason for the apposite collision, to, the rash and negligent manner of driving, of tractor by respondent No.2, hence, per se the belated lodging of the FIR, and, incriminatory ascriptions therein, against respondent No.2, (i) though, may spur an inference of concoction and per-meditation, whereupon, the relevant incriminatory ascriptions borne therein vis-a-vis respondent No.2, are, prima facie vitiated, (ii) nonetheless, since Ex.PW3/A does not constitute a substantive piece of evidence, and, when in proof, of, apposite issue No.1, the petitioner was yet enabled to adduce ocular evidence, (iii) thereupon, if the apposite, ocular evidence, is credible, besides carries evidentiary vigour, hence, the effect, if any, of the belated lodging of the FIR, by, the petitioner/appellant herein vis-a-vis the relevant occurrence, would stand obviously blunted.

4. However, the petitioner in support of the averments, cast in the claim petition, has apart, from, his solitarily testifying a version in consonance with the apposite averments cast, in the claim petition, appertaining to the apposite issue No.1, rather has not led any corroborative evidence, comprised in an ocular witness, to the relevant occurrence, also testifying before the learned tribunal concerned. Even the bald testimony, of, the petitioner/appellant herein, would be credible, and, would also enjoy vigour, yet vigour, if any, of the self serving testimony, of the petitioner/appellant herein, rendered upon apposite issue No.1, when stands rendered on 4.5.2011, (I) whereas, prior thereto the petitioner/appellant herein recorded his statement, in criminal case No. 160-1/2006/52-II/2006, titled as State vs. Sarabjit, statement whereof is borne in Ex.RW1/A, (ii) wherein he feigns ignorance vis-a-vis the cause of accident, besides in his cross-examination, he omits to make a clear and graphic ascription vis-a-vis the involvement of the tractor in the relevant collision, thereupon, the effects, if any, of the testimony, of, the petitioner/appellant, is, in its entirety, hence negated.

5. The upshot of the above discussion, is that, with the petitioner being unable to lead cogent proof vis-a-vis the apposite issue No.1, appertaining, to his sustaining injuries, owing to rash and negligent driving of the tractor concerned by respondent No.2, (i) thereupon, the declining of the relief by the learned tribunal is merit-worthy, (ii) hence, the impugned awarded does not suffer from any gross perversity or absurdity of mis-appreciation, of, the relevant evidence on record. While rendering the findings, the learned tribunal has not excluded germane and apposite material from consideration.

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

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

Mangat Rai ..Appellant/Plaintiff.
Versus
State of H.P. & Ors. ..Respondents/Defendants.

RSA No. 161 of 2005.
Reserved on : 21.03.2018.
Decided on : 29th March, 2018.

Land Acquisition Act, 1894- Section 30- Land in question acquired by Government for public purpose- Award pronounced by Land Acquisition Collector on 29.7.1972 and compensation paid

to person recorded its owner in revenue papers – Agreement to sell in respect of same land, however, stood executed by owner in favour of predecessor-in-interest of plaintiff prior to award of Collector- Plaintiff filing suit and claiming ownership by way of adverse possession over said land – Held - After acquisition of land by Government, plaintiff was not its owner- Remedy for him, if any, is to initiate proceedings under Section 30 of Act. (Para-9 and 10)

For the Appellant: Mr. P.S. Goverdhan, Advocate.
For Respondents No.1 to 3: Mr. Y.S. Thakur, Dy. A.G.,
For Respondents No. 4 to 7: Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

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

2. Briefly stated the facts of the case are that the Smt. Vidya Devi, the mother of the appellant and proforma respondents No. 4 to 7, hereinafter called plaintiff, filed a suit for declaration that she was owner in possession of 9 biswas of land bearing Khasra No.37, situate in village Deli, Tehsil Kasauli, District Solan, H.P. (hereinafter called the suit land) and by way of further relief, she prayed for issuance of permanent prohibitory injunction restraining the defendants from causing any interference in her possession over the suit land. The cause of action, pleaded by her, was like this. The husband of plaintiff late Sh. Teja Singh had been in occupation of suit land for the last 35 years. Initially, he was a tenant on the suit land and used to pay Rs.600/- per month to defendant No.4, Shri Badi Nath (now deceased). In the year 1972, the suit land was purchased by Teja Singh, husband of the plaintiff, for a sum of Rs.5000/- from defendant No.4 Badi Nath. Ever since the possession of suit land had been with the plaintiff and prior to her, her husband late Shri Teja Singh, in the capacity of owner. Defendants No.1,2 and 3 without any right, title or interest in the suit land, issued a notice to the plaintiff directing her to vacate the premises. Therefore, the plaintiff filed the suit for declaration and injunction as aforesaid. It may be noticed that during the pendency of suit Badri Nath, who was impleaded as defendant NO.4, expired and his LRs were brought ton record. However, they have not been made party to the present appeal.

3. The defendants contested the suit and filed separate written statements. In his written statement filed by Badrinath (now deceased), he has denied that he had sold the suit land to Teja Singh, the husband of plaintiff, though, he admitted that Teja Singh remained in occupation of suit land as tenant upto the year, 1972. He alleged that in the year 1972, the tenancy came to an end.

4. Defendants No.1, 2 and 3, in their written statement claimed themselves to be the owners of the suit land by alleging that in the year 1972, the suit property had been acquired by State of H.P. in the public interest, under the provisions of Land Acquisition Act and hence the state of H.P., impleaded defendant NO.1, was the owner of suit land. It is alleged that plaintiff had no cause of action nor did she have any locus standi to file the suit.

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

1. Whether the plaintiff is owner in possession of the suit premises? OPP.
2. Whether notice dated 3.2.1987 issued by defendant No.2 to the plaintiff to vacate the premises in seven days, is wrong, illegal, without jurisdiction?OPP.
3. Whether the plaintiff has no cause of action? OPD.

4. Whether the plaintiff has no locus standi? OPD.

5. Whether husband of the plaintiff was tenant under defendant NO.4 of the property in suit, if so, what 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 plaintiff/appellant(s) herein. In an appeal, preferred therefrom by the plaintiff/appellant(s) herein before the learned First Appellate Court, the latter Court dismissed the appeal and affirmed the findings recorded by the learned trial Court.

7. Now the plaintiff/appellant herein, has instituted the instant Regular Second Appeal, before, this Court, wherein he assails the findings, recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, this Court, on 14.03.2007 admitted the appeal instituted by the plaintiff/appellant against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether the learned Courts below were correct in negativing the claim of the appellant for adverse possession by misinterpreting Ex.PW3/A, the agreement to sell dated 29.4.1972 and relying upon the statement of DW3 and report Ex.DW3/A?

b) Whether the judgments and decrees of the learned Courts below can be sustained when they ignore the statements of PW-1 and PW-2 in their entirety?

c) Whether the learned Courts below have wrongly come to the conclusion that the predecessor-in-interest of the appellant as well as proforma defendants had not become owners by way of adverse possession, by not considering the judgment of this Court in Civil Revision No.74 of 1998 dated 2.7.1999, whereby the application for amendment filed by the predecessor-in-interest of the appellant and proforma respondents, namely, Smt. Vidya Devi, was allowed?

Substantial questions of Law No.1 to 3:

8. A notification under Section 4 of the Land Acquisition Act, (hereinafter referred to as the Act), borne in Ex. D-1, was issued in the year 1970, for hence bringing the suit land to acquisition. The acquisition proceedings launched in pursuance thereof, culminated in rendition of an award by the Land Acquisition Collector. The award rendered on 29.7.1972, by the Land Acquisition Collector, is, borne in Ex.D-3, in sequel thereto, compensation amount comprised in a sum of Rs.5,429.15 was received, on 28.7.1972 by one Badrinath. However, prior thereto, the plaintiff espouses of the suit land being sold under Ex.PW3/A, exhibit whereof stood purportedly executed inter se Badri Nath, and, her husband Teja Singh. On strength of agreement to sell, borne in Ex.PW3/A, the plaintiff has claimed rendition of a decree, for, permanent prohibitory injunction, for hence restraining the defendants, from, evicting the plaintiff, from, the suit land besides on anvil thereof, hence sought a declaratory decree qua hers being pronounced to be owner-in-possession of the suit property. Apparently, the agreement to sell, borne in Ex.PW3/A, was executed inter se one Badrinath, and, one Teja Singh, prior to the rendition of an award vis-a-vis the suit property, by the Land Acquisition Collector concerned. The plaintiff, who is the successor-in-interest of Teja Singh, though espoused of the acquisition proceedings, being launched besides pronounced behind the back of her husband, by the Land Acquisition Collector concerned, hence it being not binding upon her, nor thereupon Ex.PW3/A nor award borne in Ex.D-3, pronounced vis-a-vis the suit property, hence, affecting the right, title or interest of the plaintiff, in the suit land. Yet, the aforesaid simplicitor plea, is not carried forward by further averments, being cast, in the plaint of hence the award borne in Ex. D-3 being a sequel of fraud or misrepresentation, nor any apposite issue thereto stands struck besides no evidence stood adduced thereon, whereas, for rearing the aforesaid plea, it was important to rear the aforesaid pleas in the plaint besides striking of issue thereon was also important, also adduction of

evidence thereon was imperative. In aftermath, omission of the plaintiff, to, rear the aforesaid plea, cannot, render the simplicitor plea of the plaintiff of Ex. D-3, not, affecting her rights, title or interest in the suit property, title whereof was acquired by her predecessor-in-interest under Ex.PW3/A, to rather hence, hold any tenacity. Furthermore, even the report, of the Handwriting Expert, rendered with respect to the authenticity of signatures borne in Ex.PW3/A, of Badrinath, unfolds the trite factum of the purported signatures of Badrinath borne thereon, not being his authentic signatures. The report of the handwriting expert concerned vis-a-vis the aforesaid facet, borne in Ex.DW3/A, does rip apart, the effect of reliance, if any, upon Ex.PW3/A, for hers staking a claim qua the suit property, more so, when opinion comprised therein is not torn of its efficacy. Be that as it may, the plea of acquisition of title vis-a-vis the suit land by adverse possession, by the plaintiff, though is antithetical vis-a-vis her dependence upon Ex.PW3/A, yet the aforesaid plea is also not rearable against the State, whereon, title vis-a-vis the suit property, is vested under an award, borne in Ex.D-3, given a catena of judgments of the Courts of law, making, a clear pronouncement qua rearing, of, plea of acquisition of title, by prescription, ensuing from elapse of the statutorily mandatory period of time, rather being unavailable to the plaintiff.

9. As aforestated, the simplicitor plea of award, Ex. D-3 being not binding upon the right, title or interest of the plaintiff vis-a-vis the suit property, even if, garners any force in law, yet with the award vis-a-vis the suit property, being pronounced on 29.7.1972, hence, when the apposite entries in respect of the suit property, were subjected, to change, and, with no averment being cast in the plaint that since 1972 upto the revenue records, being corrected, in consonance with the award borne, in Ex. D-3, the plaintiff holding no knowledge with respect, to the pronouncement of the award, borne in Ex. D-3, vis-a-vis the suit property, (i) thereupon, it appears that the plaintiff despite, holding knowledge vis-a-vis the pronouncement of the award, borne in Ex. D-3, hers intentionally derelicted to, assumingly if, Ex. PW3/A, vested in her any right to receive compensation, to constitute a legal challenge thereto, by resorting to the provisions of Section 30 of the Act. The aforesaid remedy, was, the appropriate remedy vis-a-vis the plaintiff, yet it remaining unavailed besides unexercised, renders the belated claim reared, by the plaintiff vis-a-vis the suit property, to be not amenable to any credence.

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

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

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

Mast Ram .....Appellant.
Versus
State of H.P .....Respondent.

Cr. Appeal No. 406 of 2006
Reserved on : 21.3.2018.
Decided on : 29.3.2018

Code Of Criminal Procedure, 1973- Section 374- Appeal against conviction- **Indian Penal Code, 1860-** Section 363- Appellant was convicted and sentenced for offence under Section 363 by trial court- Appeal against- Age of prosecutrix - On facts, variance in name of prosecutrix as recorded in birth certificate and Parivar Register vis-à-vis name of victim as mentioned in MLC- Discrepancy not explained – Radiological age of victim found to be 15- ½ - 16 years – Held - By adding two years to the radiological age, prosecutrix could well be 18 years on date of alleged offence- Offence under Section 363 Indian Penal Code not proved- Appeal allowed – Conviction set aside. (Para-10 to 12)

Case referred:
Jaya Mala v. Home Secretary, Govt. of J & K (1982) SCC 1296

For the Appellant: Mr. Anand Sharma, Advocate.
For the Respondent: Mr. Yudhveer Singh Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed against the impugned judgment, of, 7.11.2006, rendered by the learned Presiding Officer, Fast Track Court, Mandi, District Mandi, H.P., in Sessions trial Nos. 10/2003, 31/2005, whereby he convicted the appellant herein, for his committing an offence punishable under Section 363 of Indian Penal Code (hereinafter referred to as "IPC") also sentenced him as follows:-

> ".....to undergo rigorous imprisonment for 4 (four) years and to pay a fine of Rs. 10,000/-. In case of default in the payment of fine, the accused/convict shall further undergo imprisonment for one year....."

2. Brief facts of the case are that on 11.1.2009 at about 11 a.m. the prosecutrix (PW-2) daughter of Chuhru Ram (PW-3) aged 15 years was going to knitting Centre Dhaneshwari from her house when on the way accused Mast Ram came in a van and asked her to sit in the van but when the prosecutrix refused to do so then she was forcibly taken inside the van by accused Mast Ram under assurance/allurement of marriage with her thereafter the prosecutrix was brought to Tarna Temple Mandi, where accused against her will garlanded the prosecutrix and told her that they have solemnized marriage. The prosecutrix was thereafter taken by accused Mast Ram to village Sharabain to the house of his maternal aunt namely Dharmi Devi and the prosecutrix was kept there during the night. On 12.1.2000 accused Tara Devi alongwith mother of accused Mast Ram came to the house of Dharmi Devi and they forced the prosecutrix to wear the dress of bride and asked the accused Mast Ram to take the prosecutrix to kullu for 4.5 days and thereafter to return to his house. Accused Mast Ram kept the prosecutrix with him for 3 to 4 days as his wife and on 16.1.2000 accused Mast Ram asked the prosecutrix to give telephonic call to her parents and told them that she has solemnized the marriage. Accused Mast Ram brought the prosecutrix back to her house on 21.1.2000 then the prosecutrix disclosed that accused Mast Ram has kidnapped her with intention to solemnize marriage with her and he also committed forcible sexual intercourse with her. The matter was thereafter reported to the police. After completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused persons, challan was prepared and filed in the Court of learned Additional Chief Judicial Magistrate, Sundernagar, who vide order of 28.1.2003 committed the case to the Court of learned Sessions Judge Mandi, H.P., who has assigned the same to the Court of learned Additional Sessions Judge, Mandi and ultimately received by the Court of the Presiding officer, Fast Track Court, Mandi, District Mandi, H.P.

3. The accused persons namely Punnu Ram, Bimla Devi, Raju and Tara Devi stood charged by the learned trial Court for theirs committing offences punishable under Sections 120-

B, 363, 366 of IPC, whereas accused Mast Ram stood charged by the learned trial Court, for his committing offences' punishable under Sections 120-B, 363, 366, 376 of IPC and under Section 5 of Child Marriage Restraint Act, 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 persons under Section 313 of the Code of Criminal Procedure were recorded, wherein, they pleaded innocence and claimed false implication. They chose not to lead any defence evidence.

5. On an appraisal of the evidence on record, the learned trial Court, acquitted accused Punnu Ram, Bimla Devi, Raju and Tara Devi for offence(s) punishable under Sections 120-B, 366/376 of IPC. The learned trial Court also acquitted accused/appellant herein for charges vis-à-vis offences charged, and, under Section 5 of Child Marriage Restraint Act. However, the learned trial Court convicted, the appellant herein for charge qua an offence punishable under Section 363 of IPC.

6. The learned counsel appearing for the appellant herein, has concertedly and vigorously contended qua the findings of conviction, rendered, for the offence punishable under Section 363 of IPC standing, not based, on a proper appreciation of evidence on record by it, 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 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 prosecution would succeed in sustaining charge against the accused/appellant herein, for, his committing an offence punishable under Section 363 of the IPC, upon its adducing requisite proof, qua, the trite factum (a) of the prosecutrix at the relevant time not holding the capacity to mete consent to the accused; and (b) in case she held the capacity, hers' not purveying her consent to the accused.

10. It is to be initially gauged, from, the evidence on record, qua the prosecutrix, at the relevant stage, holding or not holding the capacity to mete consent, to the accused. Obviously hence the apposite documentary evidence, revealing the age of the prosecutrix especially at the relevant time, enjoins allusion thereto (a) the best documentary evidence in proof of the age, of the prosecutrix, is, comprised in Ex. PW-5/B, Ex. whereof is the birth certificate of the prosecutrix, (b) AND, also is comprised in the abstract, of Pariwar Register, abstract whereof is borne in Ex. PW-5/A. In both the afore-stated exhibits, the name of one Himavati is occurring, yet in the apposite MLC borne in Ex. PW-4/B, the name of one Hema Devi occurs. The aforesaid incongruity(s) inter-se the reflections borne in Birth certificate, and, in the abstract of Pariwar register, respectively borne in Ex. PW-5/B, and, in Ex. PW-5/A, vis-à-vis the reflections' borne in the apposite MLC, and, in FIR, respectively borne in Ex. PW-4/B, and, in Ex. PW-10/A, conspicuously vis-à-vis the variant identity of Hema Devi, and, of Himavati, (c) and, more importantly with the aforesaid incongruity(s) remaining un-clarified, by the prosecution nor with the father of the prosecutrix, after, of the aforesaid documents being adduced in evidence, being assayed by the learned PP concerned, to, hence step into the witness box, for clarifying qua both Himavati and Hema Devi, pertaining to the same personality or qua the same person,(d) thereupon the aforesaid pervasive inexplicated incongruity(s) inter-se the identity or personality, of, Hema Devi as reflected in MLC, and, in FIR vis-à-vis the one reflected, in birth certificate, and, in abstract of pariwar register, does, enable an aura of doubt to seep into the identity of the prosecutrix. Consequently, the aforesaid apposite incongruity(s) inter-se the aforesaid exhibits, clearly and assuredly stems, an inference of the age of Himavati reflected in Pariwar Register,

and, in birth certificate being not truthful vis-à-vis one Hema Devi nor it is apt to conclude, of, the prosecutrix Hema Devi, not at the relevant time hence possessing the relevant capacity, to, mete her consent, if any, to the penal misdemeanor(s) of the accused.

11. Be that as it may, even though with the best documentary evidence afore-stated vis-à-vis the age of the prosecutrix, as exists on record, is for reasons aforesaid infirm, (a) thereupon the opinion rendered by the Radiologist concerned vis-à-vis the age of the prosecutrix when hence otherwise is inconsequential, rather assumes significance, thereupon it is apt to allude to the report, of the Radiologist, borne in Ex. PW-8/H. The Radiologist stepped into the witness box, as, PW-8, and, testified in proof of his report comprised in Ex. PW-8/H, wherein the radiological age of the prosecutrix is depicted to be ranging between 15½ to 16 years. Since it is mandated in ***Jaya Mala*** v. ***Home Secretary, Govt. of J & K (1982) SCC 1296*** (b) that an error of plus minus, two years, being reckonable vis-à-vis the radiological age of the victim concerned, and, it being also expostulated therein qua the benefit of margin, of two years either way in the apposite radiological age of the victim, being affordable vis-à-vis the accused. Consequently, when it is well settled that when two opinions upon the radiologist's report are possible, thereupon the one leaning vis-à-vis the accused, is, to be opted, whereupon with the radiologist pronouncing the radiological age of the victim, to range between 15 ½ years to 16 years, (c) hence in consonance with the apposite expostulations carried in the judgment supra, qua benefit of two years vis-à-vis the upper radiological age of the victim being afforded qua the accused. In sequel by adding 2 years in the upper radiological age of the prosecutrix, thereupon the age of the prosecutrix, is computed beyond 18 years, hence she at the relevant time, held, the capacity to mete consent vis-à-vis the accused. In aftermath, when she testifies in her cross-examination of the accused, not, exerting influences upon her, rather, when she echoes therein qua hers voluntarily joining the company of the accused, hence the charge under Section 363 of IPC rather founders.

12. For the foregoing reasons, appeal is allowed and the impugned judgment of conviction and sentence, passed by the learned trial Court is unsustainable and as such is set aside. The accused stands acquitted, and, 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 cancelled and discharged. Send down the records.

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

Parma Nand and Anr. ..Appellants/Plaintiffs.

Versus

Prem Chand & others ..Respondents/Defendants.

RSA No. 601 of 2005.
Reserved on : 23rd March, 2018.
Decided on : 29th March, 2018.

Specific Relief Act, 1963- Section 34- Suit for declaration- In previous litigation, plaintiff 'P' and her daughter 'N' challenged Will dated 27.2.1980 executed by Dhari, husband of plaintiff in favour of defendants – Previous suit decreed by trial court and appeal of defendants also dismissed by First Appellate Court- In Regular Second Appeal filed by defendants, compromise decree passed by High Court on 6.11.1990 pursuant to compromise of parties - Thereafter, plaintiff filing fresh suit and challenging compromise decree dated 6.11.1990 of High Court on grounds of fraud and misrepresentation – Plea of plaintiff being that during pendency of second appeal before High Court, defendant No.1 brought her to Mandi and got executed certain papers on pretext of withdrawing second appeal then pending before High court – Further, she never instructed her counsel to compromise in appeal - Suit dismissed by trial court and her appeal by

the First Appellate Court – Regular Second Appeal against - On facts, 'N' had accompanied 'P' to Mandi when requisite papers were prepared for compromise – Yet she didn't ask 'P' not to sign them – 'P' had also come to Shimla and met her counsel – Suit admittedly was filed by 'P' at instance of 'N'- Held – plea of fraud and misrepresentation while effecting compromise not established – Regular Second Appeal dismissed- Judgments and decrees of lower courts upheld. (Para-10)

For the Appellants: Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate.
For the Respondents: Mr. G.R. Palsra, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal is directed, against, the concurrently recorded verdicts by both the learned Courts below, whereby, the plaintiff's suit for rendition, of, a decree for declaration, was, hence dismissed.

2. Briefly stated the facts of the case are that Padmawati, predecessor-in-interest of the appellant filed a suit against the defendants before the learned trial Court seeking declaration to the effect that the affidavit of 11.10.1990 and compromise deed without date, as filed in RSA No.131/90, decided on 6.11.1990 by the High Court are the result of fraud, deception, undue influence and misrepresentation and therefore, the decree dated 6.11.1990 passed by the High Court is nullity and not executable and enforceable in the eyes of law and the decree passed by the lower Courts are still binding upon the parties. The case set up by the plaintiff was that she and her daughter Narbada Devi filed a suit against defendants No.1 to 3 in the Court of learned Sub Judge 1st Class, Court no.1, Mandi, challenging the Will dated 27.2.1990 alleged to have been executed by her husband Dhari in favour of defendants No.1 to 3, on the grounds of fraud, misrepresentation and undue influence etc, which was decreed on 16.9.1986 and the 1st appeal before the learned Addl. District Judge, Mandi was dismissed on 11.1.1990. Defendant No.1 to 3 dis-satisfied with the judgment and decree of the learned trial Court and the 1st Appellate Court, filed second appeal before the High Court of H.P. in terms of RSA No.131 of 1990. During the pendency of the appeal, defendant Prem Chand, who is closely related to Padmawati plaintiff represented to her that he would withdraw the appeal before the High Court and for that purpose affidavits of Padmawati and of the defendants were required for which purpose defendant No.1 brought the plaintiff to Mandi and got her thumb impression on a typed paper without explaining the contents to her. Smt. Padmawati affixed her thumb impression believing the representation of defendant No.1 to be correct. Defendant No.1 also got the thumb impression of Padmawati affixed on another typed paper which as per information received as the alleged compromise filed in RSA No.131 of 1990 in the High Court of H.P. Defendant No.1 on the basis of said compromise got the decree of the lower Appellate Court modified and reversed. Defendant No.1 never informed the plaintiff about the execution of the alleged compromise deed nor the plaintiff was consenting party to such deed as she has already won the case in the lower courts and there was no necessity for her to arrive at such a compromise and this compromise is the result of fraud, misrepresentation and undue influence. The plaintiff never sent any instruction to her counsel to compromise the appeal. Defendant No.4 Fagnu Ram, who is the son of the plaintiff from her previous husband prosecuted the suit in the trial Court and defended appeals in both Courts by engaging counsel. Defendant No.4 was bribed by defendant No.2, who misrepresented to Sh. B.K. Malhotra, Advocate about the genuineness of the compromise and thus the decree passed by the Hon'ble High Court in R.S.A. No. 131/90 of 6.11.1990 is a nullity. The total land in that suit was measuring 34 bighas and the plaintiff had already won the case in the lower courts and there was no reason for the plaintiff to compromise the case only for about 3 bighas of land.

3. The defendants contested the suit and filed separate written statements. Defendants No.1 to 3, in their written statement have taken preliminary objections inter alia

maintainability, estoppel, jurisdiction and valuation. It has been stated that the suit is barred under Order 23, Rule 3-A of the CPC. It has been averred that the plaintiff had come to Mandi with the help of her son and she executed compromise deed with her own free will after admitting it to be correct. Even before the High Court of H.P., where the plaintiff was duly represented by her counsel and compromise deed was readover and explained to the plaintiff and her counsel Sh. B.K. Malhotra and thereafter she signed the compromise ded, which is Ex. C1. The decree passed by the High Court of H.P. is stated to be legal and binding upon the parties. It is denied that the compromise is the result of fraud, misrepresentation and undue influence. It has been stated that the plaintiff is under the grip of her daughter Narbada Devi and her husband and the right of Smt. Narbada Devi has already been denied by the Civil Court and Narbada Devi had got executed the Will of the entire property of the plaintiff in her name and, therefore, the defendants No.1 to 3 have prayed for dismissal of the suit.

4. Defendant No.4 in his written statement averred that the compromise was arrived between the plaintiff and defendants No.1 to 3 and the plaintiff took defendant No.4 to the High Court of H.P. alongwith Hem Singh where she went to her counsel Sh. B.K. Malhotra and told him about the compromise with the defendants and subsequently compromise deed and the affidavits of the parties were prepared by her counsel and the same were duly readover and explained to the parties and both the parties have admitted the same to be correct and thereafter compromise and the affidavits were brought to Mandi where the same were attested after explaining the same in Hindi to both the parties which they admitted the same to be correct and then the affidavits were attested, and, therefore, after attestation the same were taken to the High Court of H.P. and were handedover to the counsel of the parties. It is denied that the compromise the result of fraud, misrepresentation and undue influence. It is also denied that defendant NO.4 was bribed by defendant No.1. The decree passed by the High Court of H.P. is stated to be legal.

5. The plaintiff filed replication to the written statements of the defendant(s), wherein, she denied the contents of the written statements and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the compromise deed and affidavit dated 11.10.1990, filed in R.S.A. No. 131 of 1990 in the Hon'ble High Court of Himachal Pradesh by the defendant No.1 was the result of fraud, misrepresentation and undue influence practised by the defendant No.1 over the plaintiff?OPP.
2. Whether the suit is not maintainable in the present form?OPD.
3. Whether the plaintiff is estopped by her own act and conduct? OPD.
4. Whether the declaratory suit is not maintainable?OPD.
5. Whether the suit is not properly valued for the purpose of court fee and jurisdiction?OPD.
6. Whether the suit is barred U/O 23, Rule 3-A of C.P.C.?OPD.

6-A. Whether compromise deed in R.S.A. No. 131/90 dated 6.11.1990 has been procured by defendant No.4 and is the result of fraud and misrepresentation?OPP

7. Relief.

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

8. Now the plaintiff/appellant(s) herein, have instituted the instant Regular Second Appeal, before, this Court, wherein they assail the findings, recorded in its impugned judgment

and decree, by the learned first Appellate Court. When the appeal came up for admission, this Court, on 30.11.2005 admitted the appeal instituted by the plaintiff/appellant(s) against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether the alleged compromise Ex.D-1 filed in this High Court is not genuine and valid, especially in view of the fact that the parties were not examined in support thereof in the Court and, therefore, no reliance could be placed thereon?

b) Whether the compromise Ex.D-1 is not part of the affidavits, which have been brought on record, as Ex.D-2, D-5, D-6 and D-7, because though these affidavits contain endorsement of attestation by the Oath Commissioner, yet these affidavits are not part of the alleged compromise Ex. D-1, which admittedly does not contain signatures of the Oath Commissioner?

c) Whether both the Courts below have taken a wrong view of the matter that invalidity of the compromise decree on the basis of compromise Ex.D-1 has not been proved by the plaintiffs, though in fact keeping in view the fat that she was old and illiterate lady, therefore, such a burden of proof was to be discharged by the defendants?

Substantial questions of Law No.1 to 3:

9. Co-plaintiffs' suit No.4 of 1982, for, declaration and possession of the suit land, was, decreed vis-a-vis co-plaintiff No.1, one Padmawati, also, thereunder Will, of 27.2.1980 hence was declared null and void vis-a-vis the rights, of inheritance of one Padamawati vis-a-vis the suit property. In an appeal carried therefrom, by the unsuccessful defendants, the learned First Appellate Court, affirmed, the judgment and decree, pronounced by the learned trial Court. However, during the pendency of RSA No.131 of 1990, as arose before this Court, against the concurrently recorded verdicts by both the learned Courts below, (i) compromise borne in Ex. C-1, accompanied by the affidavits of litigating parties concerned, hence, occurred inter se the parties at contest. Before, this Court hence accepting, the compromise, which had occurred inter se the litigating parties, (ii) it had upon CMP No. 541 of 1990, permitted, the deletion, from the array of co-respondents, of the name of co-respondent No.2 therein, one Narbada Devi, (iii) and, also had, upon CMP No.543 of 1990, rendered a verdict, for permitting, the appellant No.3, one Smt. Nirmu, to, on behalf of co-appellant No.2 Master Rajesh, the then minor, and, whose interests in the litigation were watched, by his mother and natural guardian, co-appellant No.2, to hence compromise the lis, on the minor's behalf. On anvil of Ex. C-1, and, upon the affidavits appended therewith of the litigating parties, this Court had allowed the appeal, and, rendered a decree in terms of compromise, borne in Ex. C-1.

10. Plaintiff one Padmawati, subsequent thereto instituted civil suit No. 210/92(91), whereby, she challenged, the, recording of a compromise, by this Court upon the subject matter, of, a lis borne in RSA No.131 of 1990. The trite grounds averred in the plaint, for hers making a challenge vis-a-vis the compromise deed, on anvil whereof, this Court had allowed RSA No.131 of 1990, and, also rendered a decree in terms of thereof, are, confined to it being (a), a sequel of fraud, misrepresentation besides undue influence practised by defendant No.1 upon the plaintiff, (b) there being no occasion, for the plaintiff, one, Padamawait to enter into a compromise with the defendants, especially, when she had succeeded uptill the First Appellate Court. In proof of the averments cast in the plaint, the plaintiff one Padamawati, hence stepped into the witness box as PW-1, and, testified in consonance with the averments cast in the plaint. In her cross-examination, she echoes, that immediately after a decision being pronounced upon RSA No.131 of 1990, her daughter taking her to reside along with her, at her home, (i) and, also rendered an answer in the affirmative, to a suggestion, of hers, instituting the extant suit No.210/92(91) only at the instance of her daughter. (ii) However, in her testification, she, omits to deny her signatures either, on Ex. C-1 or on her affidavit appended therewith. Since, plaintiff Padamawati casts, an averment in the plaint, of the , appending, of, her thumb impressions upon Ex. C-1,

and, upon her affidavit appended therewith, being a sequel of fraud and misrepresentation, (iii) thereupon, it is imperative, to from the evidence on record, hence make cullings, qua dehors, hers not belying the existence of her signatures/thumb impression thereon, qua hers, rather appending her thumb impression thereon, given hers being evidently illiterate, only as a sequel, of, fraud and misrepresentation being practised upon her. Of course, the aforesaid evidence has to also make telling echoings qua the defendants, under, guises or hence beguiling her by meteing false pretext(s) vis-a-vis her, hence, obtaining her thumb impression, upon Ex. C-1, and, upon her affidavit appended therewith. For making the aforesaid unearthings, it is necessary, to allude, to the testification, of, her daughter, who testified, as PW-4, and, who has been testified, by the plaintiff, one Padamawati to puruse RSA No.131 of 1990, and, who has also been testified by her, to, motivate, her to institute, civil suit No.210/92(91). In her cross-examination she echoes, of hers, accompanying Padamawati to Mandi, whereat some papers were prepared. She also continued to testify, in her cross-examination, that, at the time of preparation, of affidavits, hers, remaining beside Padmawati. Moreover, in her cross-examination she acquiesces, to the suggestion put to her by counsel for the defendants, of, Padmawati being accompanied by Faganu, and, by Hem Singh, when the aforesaid visited Shimla, (iv) thereupon, she belies the testification rendered by Padamawati qua the latter never visiting Shimla. Contrarily, she corroborates the testification, of DW-6, Puran Chand , who rather testified, of Padamawati in September, 1990 along with Prem Chand, Fagnu and Hem Singh hence visiting the chambers of Shri Arun Goel, Advocate at Shimla, whereat, the requisite papers were prepared. The further effect, of the aforesaid testification of Narbada, of hers, remaining beside Padamawati, whereat, her affidavit was prepared, and, yet her failing to restrain Padmawati, from, appending her thumb impression on her affidavit, is, of, the further versions, of Padmawati, and, of Narbada, of the thumb marking(s) by Padamawti, upon, her affidavit, and, on compromise deed, Ex.C-1, being a sequel, of any fraud, undue influence or duress being exerted upon her, hence standing belied. The aforesaid inference garners strength, from the factum, of the counsel for Narbada, one Mr. B.K. Malhotra, Advocate, not making objection, to the prayer made in CMP No. 540 of 1990, of, the name of Narbada, being deleted, from, the array of co-respondents, (i) emphatically when the aforesaid orders rendered upon CMP No.540 of 1990, remained uncontested by Narbada, on the trite available ground, of hers not meteing the apposite instructions, to her counsel, and, when evident lack of her contest vis-a-vis their making, when stand considered with aforestated Padamawati, not, denying the existence of her thumb marking(s) upon Ex. C-1, and, upon her affidavit appended therewith, (ii) thereupon, constrains this Court, to draw an inference, of hers meteing the necessary instructions to her counsel, to seek her deletion, from, the array of respondents, (iii) besides with hers, accompanying her mother Padamawati, to Mandi, whereat the necessary requisite affidavits were prepared, hers rather not restraining Padamawati to append her thumb marks thereon, thereupon, it is to be concluded, of, hers being estopped to contend, of the preparation and execution of Ex.C-1, and, of her affidavit appended therewith, being beyond the volition of Padamawati, (iv) rather when Padamwati testifies, of, Narvada, motivating her to institute Civil Suit No.210/92(91), ttherefrom a prima facie inference, is marshalled, of one Narbada, for the reasons best known to her, motivating Padamawati, to invent a pretext, for impugning the compromise decree, recorded by this Court, in RSA No.131 of 1990.

11. The learned counsel appearing for the appellants, while relying upon the provisions, borne, in Order 23, Rule of the CPC, provisions whereof stand extracted hereinafter:-

> **"3. Compromise of suit.-** Where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith [so far as it relates to the parties to the suit, whether or not the subject matter of the agreement, compromise or satisfaction is the same as the subject matter of the suit]: -

> Provided that where it is alleged by one party and denied by the other than an adjustment or satisfaction has been arrived at, the court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the court, for reasons to be recorded, thinks fit to grant such adjournment.
>
> [Explanation : An agreement or compromise which is void or avoidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this rule.]"

and while laying much emphasis, upon, the phraseology "where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise" occurring therein, (I) espouses, that with evidently, the statements on oath of the parties at contest, being, not recorded, especially, at the time contemporaneous, to this Court rendering an order, of, RSA No. 131 of 1990, hence, being compromised, (ii) thereupon, when hence prima facie infraction of the mandate of the parlance borne, in the apt opening statutory words "where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise" rather is evident hence concomitantly, for evident want of imperative satisfaction,being drawn, by this Court while allowing RSA No.131 of 1990, and, its rendering a compromise decree thereon, rather hence renders the compromise decree to be vitiated. The learned counsel appearing for the appellants, has also contended with vigour, that the provisions borne in Order 19, Rule 1 of the CPC, provisions whereof stand extracted hereinafter:

> **"1. Power to Order any point to be proved by affidavit.-** Any court may at any time for sufficient reason Order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable:
>
> Provided that where it appears to the court that either party bona fide desires the production of a witness for cross examination, and that such witness can be produced, an Order shall not be made authorizing the evidence of such witness to be given by affidavit."

Appertaining, to, bestowment of a statutory empowerment, upon, Courts of law, to elicit proof through affidavit, vis-a-vis any particular fact or facts in issue, has also been infringed, given this Court not directing the presence therebefore, of, the deponents, of the affidavits appended with compromise deed Ex. C-1, nor its proceeding to record their statements on oath, despite, it being enjoined to do so. The learned counsel appearing, for the appellants proceeds, to submit that hence the decision rendered upon RSA No.131 of 1990, rather sparking suspicion, and, the suspicious circumstances, surrounding both the execution of Ex. C-1, and the execution of the apposite affidavits, of deponents concerned, appended therewith, when may beget effacement, by their examination in Court, (a) whereas, their presence neither being elicited, nor their depositions being recorded by this Court, per se, thereupon the averments cast in the plaint, qua Padamawati being beguiled to execute C-1, also, to execute her affidavit appended therewith, rather enjoying credence.

12. The submission aforestated, made, by the learned counsel appearing for the appellants, vis-a-vis the purported infringement(s) made by this Court, while recording a decision upon RSA No.131 of 1990, arising from, the factum of no valid satisfaction being drawn by this Court qua the valid execution of Ex. C-1, whereas, the availment, of, the aforesaid statutory mechanism may have stripped, Ex.C-1, of, all tainting elements of fraud, and misrepresentation, is not amenable to acceptance, by this Court, (a) given occurrence, of, signatures/thumb impressions, on compromise deed, borne in Ex. C-1, of executants thereof, standing not denied, nor, belied by any of the executants thereof, rather, when the affidavits, of the executants of Ex. C-1, stand appended therewith, and, with theirs, also, being presented along with compromise deed, borne in Ex. C-1, before this Court, (b) besides when the mandate of Order 19, Rule 1 of the CPC, bestows empowerment, upon Courts, to promote adduction of evidence, through affidavits, particularly vis-a-vis any particular fact or facts in issue, (c) nowat, with the apposite fact being

the valid execution of Ex. C-1, by excutants thereof, (d) whereas, hence, rather theirs appending their respective authentic thumb marks or signatures on the affidavits, appended with Ex. C-1, affidavits whereof prima facie reveal, of, theirs being in consonance, with the then prevalent rules, for attesting of affidavits, by the Oath Commissioner concerned, (e) thereupon, with permissibility under law, of affidavits being received in evidence vis-a-vis valid execution of Ex. C-1, (f) besides when existence, of signatures, or thumb marks thereon, of their, respective exeutants, and, also with the apposite signaturing, and thumb marking, of, affidavits remaining unbelied, (g) hence, per se, thereupon, the satisfaction recorded by this Court, on anvils thereof, for its hence making a conclusion, of, the litigating parties settling the lis inter se themselves, cannot render open any conclusion, of, this Court infringing the mandate of the opening lines, carried, in Order 23, Rule 3 of the CPC.

13. Be that as it may, the address before this Court by the learned counsel appearing for the appellant, that the receiving, of affidavits of the deponents concerned, by this Court, also necessitated this Court to make insistences, qua theirs recording their presence before it, at the time of its, accepting the proposals, borne in Ex. C-1, also cannot also be accepted, (a) given the mandate of the proviso, occurring underneath, the provisions of Order 19, Rule 1 of the CPC, proviso whereof carries a clear mandate, of, "unless the Court is satisfied that any party to the lis bonafide requires witness for cross-examination, (b) thereupon, alone it being vested with jurisdiction to summon the deponent(s) of the affidavit(s) concerned, for recording his/her presence before the Court concerned for producing as evidence the apposite affidavit(s)". An incisive reading of both the substantive Rule 1 of Order 19 of the CPC, and, the proviso appended there underneath, (c) makes a clear display of the power, vested in Courts, to receive evidence through affidavits, is a power confined to receiving affidavit(s), as evidence vis-a-vis the facts in issue, and, also obviously through witnesses concerned, yet the aforesaid power is neither construable to extend nor it holds any amplitude, for, making any construction that apart, from, the witnesses concerned, whose evidence on affidavits, may be received, on any particular fact or facts in issue, the Courts being omnibusly empowered, to also only receive affidavits "as evidence", only upon the presence before it, of the litigating parties, being also ensured, (d) nor the evidentiary worth, of, affidavits is stripped of tenacity merely for want of the deponents concerned testifying in Court, (e) especially, with their compromising the lis, hence, obviously do not through affidavits, hence adduce evidence qua any contentious particular fact or facts in issue, nor concomitantly any fact in issue or contentious fact, enjoins proof being adduced through deponents of affidavits also testifying in Court. (f) tritely also the mandate thereof is applicable to trial, of, issues, and not vis-a-vis the stage of receiving of a compromise deed, (g) predominantly, assumingly if, mandate thereof is also attracted vis-a-vis stage of compromise of suit, yet also with neither counsel, at the stage of, tendering of affidavits, not seeking cross-examination(s), of, the deponents concerned, whereas, the making(s) of the aforesaid endeavour was imperative, to invite play thereof, and, nor when vis-a-vis the relevant omission(s), apt collusion(s), is ascribed, vis-a-vis the counsel(s), (h) thereupon, hereat the rendering, of testifications, of the deponents concerned hence was not imperative. Conspicuously, with the compromise deed concerned, standing appended with their respectively affidavits, besides when the signatures or thumb impressions borne on the affidavits sworn, by the deponents concerned, are, not concerted to be belied, of their authenticity. Consequently, with this Court, making the aforesaid interpretation vis-a-vis the mandate of Order 19, Rule 1 of the CPC, and, when reads, it in conjunction, with, the opening lines of Order 23, Rule 3 of the CPC, besides when this Court, for further reasons, to be alluded hereinafter, makes, a conclusion of the affidavits being attested in accordance, with, the then prevalent rules, for attestation of affidavit(s), by the Oath Commissioner concerned, latter whereof has rendered his testification qua the validity, of, execution(s) of the apposite compromise, and, qua the valid execution, of, affidavits appended therewith, thereupon, the satisfaction recorded by this Court, cannot be faulted, on any score.

14. Making(s), of the aforesaid conclusion(s) also makes it imperative, for this Court, to allude, to the testification, of the Oath Commissioner concerned, who has stepped into the witness box as DW-3, and, has in his testification, voiced, of his maintaining, the relevant

register, and, his making entry(ies) at serial No.107, on, 11.10.1990, tritely with, respect to the attestation of the affidavit, of one Padamawati. He has also testified, of, the contents of affidavits, being readover and explained, to, the respective deponents, and, after his ascertaining, of, the deponents concerned, comprehending their contents, theirs in his presence respectively thumb marking, and, signaturing them, whereafter, his making the relevant attestation(s) marks upon them. He has also testified, of his, entering the compromise deed, at column No.7, of his register, besides also the deponents concerned, appending in his register their respective signatures or thumb marks. He has belied, the suggestion that the respective thumb marking(s), and, signature(s) of the deponents concerned, existing, upon the apposite affidavits, being pre-existing thereon, and, rather his merely putting his signatured attestation seals thereon. The testification aforesaid rendered by DW-3, the Oath Commissioner concerned, does enhance, an inference (a) of the apposite certificates existing thereon, even if they are signatured, by the counsel, for the adversary party(ies) concerned, rather not affording any leverage, to the appellants to contend, of per se, thereupon, there being any exertion of undue influence, or compulsion upon the deponents, of the affidavits concerned, (b) and, assumingly if the counsel, for the adversary litigants concerned, pre-signatured, the endorsement, qua the contents thereof being readover and explained, in vernacular by him vis-a-vis the litigants concerned, (c) yet, all effects thereof, stand obliterated, by DW-3, ensuring the deponents concerned, of, the apposite affidavits, being identified by their proper identifier(s) also his personally ensuring to read contents thereof and also explaining them vis-a-vis the deponents concerned, besides his obtaining, in his apposite register, their respective signatures or thumb marks. The thoroughness, of the exercise conducted by the Oath Commissioner concerned, preceding his putting his signatured seals, and, attestation marks, on, the affidavits concerned, does also galvanize a firm inference, of, the deponents concerned, only, after theirs comprehending contents thereof, hence, appending their respective thumb marks, and, signatures thereon, whereupon, hence any contention, of the deponents concerned, being rather compelled and influenced to append their signatures or thumb marks, on their respective affidavits, rather being bereft of any legal tenacity.

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

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

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

Ram Kumar Chug ....Petitioner.

Versus

Smt. Aruna Bansal & Anr. ....Respondents.

C.R. No. 69 of 2017.
Reserved on: 23.03.2018.
Decided on: 29th March, 2018.

Himachal Pradesh Urban Rent Control Act, 1987- Sections 14(3)(d) and 14(6)- Petitioner seeking eviction of tenant from non-residential premises on ground of self use as her son, an

architect wanted to open his office in it – Tenant filing an application for amendment of his reply and taking plea under Section 14(6) of Act that eviction petition not maintainable since landlady had acquired premises by way of gift and mutual settlement within five years of filing of petition- Application dismissed by Rent Controller- Petition against - Held- Eviction petition of petitioner is under Section 14(3)(d), whereas bar under Section 14(6) is applicable to eviction case filed under Section 14(3)(a)(i) only – Since, Section 14(6) is not attracted in petitioner's case, application for amendment was rightly dismissed- Order of rent controller upheld. (Para-3 and 4)

For the Petitioner: Mr. Deepak Kaushal, Advocate.
For the Respondent:: Mr. Suneet Goel, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The demised premises, occur, in Shop No.40 in a building, built upon Khasra No.480, 481, 482, situated at Ward No.8, Chhota Chowk, Nahan, H.P. The landlord(s) of the aforesaid premises is/are one Aruna Bansal, and, Smt. Usha Bansal, and, the petitioner herein, is tenant therein. The ground for eviction, reared, in the apposite petition for eviction instituted before the learned Rent Controller concerned is extracted hereinafter:

> "17(a)(1)..That the property consisting of two shops and stair case consisting of khasra numbers 482, 481 and 480, situated in Bazzar Chhota, Chowk, Nahan, District Sirmaur, H.P., Mohal Ranital, is the property of the petitioner and proforma respondent. The petitioner and proforma respondent have got the property from their husband, who are real brothers. The petitioner and proforma respondent through mutual settlement divided the property in two parts, whereby shop built over khasra No.481 is given to proforma respondent and the shop in question built over khasra No.482 is given to petitioner. The petitioner presently residing at Chandigarh, with her husband, therefore, she has authorised profroma respondent to receive rent from tenant-respondent No.1, and who is receiving the rent from respondent No.1 on behalf of petitioner.
>
> The premises is required by the petitioner bonafidely for the use as an office or consulting room by her son Shri Ankish Bansal, who intends to start practise as an Architect in the tenanted premises. The users would be the landlord for establishing business/offic of Architect for her son Shri Ankish Bansal.
>
> The son of the petitioner Shri Ankish Bansal is not occupying in the Urban Area of Nahan Town any other building for use as office consulting room.
>
> The son of the petitioner Shri Ankish Bansal has not vacated such a building without sufficient cause after the commencement of this At in the Urban Area of Nahan Town."

2. The demised premises, apparently, given its being designated as Shop No.40, is, hence a non residential premises. The afore extracted ground, of eviction, reared by the landlord vis-a-vis the petitioner herein, an occupant therein as a tenant, is visibly, in consonance, with the provisions cast under Section 14(3)(d), of, the Himachal Pradesh Urban Rent Control Act, 1987 (hereinafter referred to as the Act), provisions whereof are extracted hereinafter:-

> "(d) in the case of any [residential and non residential building], if he requires it for use as an office, or consulting room by his son who intends to start practice as a lawyer, an architect, a dentist, an engineer, a veterinary surgeon or a medical practitioner, including a practitioner of Ayurveduc, Unani or Homeopathic System of Medicine or for the residence of [his son or daughter] who is married, if-

> (i) his [son or daughter] as aforesaid is not occupying in the urban area concerned any other building for use as office, consulting room or residence, as the case may be; and
>
> (ii) his [son or daughter] as aforesaid has not vacated such a building without sufficient cause, after the commencement of this Act, in the urban area concerned :
>
> Provided that where the tenancy is for a specified period, agreed upon between the landlord and the tenant, the landlord shall not be entitled to apply under this sub-section before the expiry of such period :
>
> Provided further that where the landlord has obtained possession of any building or rented land under the provisions of clause (a) or clause (b), he shall not be entitled to apply again under the said clause for the possession of any other building of the same class or rented land:
>
> Provided further that where a landlord has obtained possession of any building under the provisions of clause (d), he shall not be entitled to apply again under the said clause for the use of, or for the residence of the same son, as the case may be."

It is also apt to extract the provisions sub section (6), to Section 14 of the Act:-

> "(6) Where a landlord has acquired any premises by transfer, no application for the recovery of possession of such premises shall be made under this section on the ground specified in sub-clause (i) of clause (a) of sub-section (3) unless a period of five years has elapsed from the date of such acquisition."

Since, at this stage no evidence has surged-forth qua the Bachelors degree of Architecture, obtained, by one Ankish Bansal, lacking in authenticity, thereupon, when hence Ankish Bansal is averred to be the landlord's/landlady's son, hence, the non residential demised premises concerned, when is espoused to be bonafide required, by the landlord/landlady for enabling, its being used, as an office, and, a consulting room by her son, for, his commencing practise therefrom, as an Architect, hence, the mandate, of, the provisions subsequent thereto comprised, in clause (i) and (ii) and proviso(s) thereof rather alone, enjoined evidentiary compliance therewith. However, during the pendency of the rent petition concerned, the tenant/petitioner herein instituted an application, before the Rent Controller concerned, application whereof was cast, under, the provisions of Order 6,Rule 17 of the CPC, wherein he sought leave of the Court, to, introduce in his reply to the rent petition, the hereinafter extracted amendments:-

> "That the petition is not maintainable as the petitioner/landlord/landlady has acquired the premises by transfer through Gift along with proforma respondent No.2 and further on mutual settlement within five years of such transfer."

However, the learned Rent Controller, declined, relief vis-a-vis the tenant/petitioner herein, and, proceeded to dismiss his application, hence, the petitioner/tenant being aggrieved therefrom, has instituted the instant Civil Revision before this Court.

3. The effort on the part of the tenant, to seek the leave of the Court to beget the aforesaid amendment, in his reply, has been aptly declined besides frustrated, by the learned Rent Controller concerned, given the amendment strived by the tenant, rather falling within the ambit of sub-section (3), and, of, sub section (6) of Section 14 of the Act, provisions besides proviso thereof, stand extracted hereinabove. However, the applicability or attraction, of the aforesaid provisions borne in the Act, is only upon the non residential demised premises concerned, (i) rather being pleaded to be bonafide required by the landlord, for his, own occupation, and, also with obviously the mandate, of, sub-section (6) of Section 14 of the Act, hence, made singularly applicable with specificity vis-a-vis sub section (3), (ii) thereupon, sub section (6) of Section 14 of the Act, is, obviously applicable, only, upon the ground of eviction reared, in the apposite petition, hence falling within the ambit of sub-section (3) of Section 14, of the Act. However, as aforestated, with the afore extracted ground, of, eviction reared in the eviction petition, hence not, falling within the domain of sub-section (3)(a) of Section 14 of Act, (iii) thereupon, the mandate of sub-section (6) of Section 14, of the Act, when begets attraction

singularly vis-a-vis sub section (3)(a) of Section 14 of the Act, and, rather is unattractable vis-a-vis, the ground of eviction reared, in the hereat apposite eviction petition, (iv) ground whereof contrarily comes, within the ambit of sub-section (3) (d) of Section 14 of the Act, vis-a-vis latter clause (ii), the mandate of sub-section (6) of Section 14 of the Act, is not made applicable, (v) thereupon, the amendment, strived, by the tenant/petitioner herein, by invoking the mandate of sub-section (6), of, Section 14 of the Act, when is palpably outside mandate thereof, thereupon, the declining, of, the apposite leave by the learned Rent Controller concerned, vis-a-vis the tenant, is both apt and just.

4. For the foregoing reasons, there is no merit in the instant petition, and, it is dismissed accordingly. In sequel, the impugned order is affirmed and maintained. The parties are directed to appear before the learned Rent Controller on 10th April, 2018. All pending applications also stand disposed of. Records, if any, received, be sent back forthwith to the concerned quarter.

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

Swami Shayam Bharti ..Appellant/plaintiff.

Versus

General Public and others. ..Respondents/defendants.

RSA No. 298 of 2006.
Reserved on : 21.03.2018.
Decided on : 29th March, 2018.

Specific Relief Act, **1963**- Section 34- Suit for declaration and injunction- Suit property owned by deceased under gift deed- Plaintiff claiming succession to his estate as his disciple (Shishaya) - Not pleading to which Hindu sect deceased belonged or what rituals were performed when plaintiff was made disciple by him- Held- No declaratory decree qua plaintiff's ownership with respect to suit property can be given. (Para-9)

Specific Relief Act, **1963**- Section 34- Suit for declaration and injunction- Grant of prohibitory Injunction – Plaintiff was found only having transitory abode in 'Kutiya' since 1971- Kuteshwar Mela Committee annually holding fair on Baishakhi on said land – And also performing 'puja' inside kutiya but on that day- Plaintiff's possession over 'Kutiya' established - Suit partly decreed restraining defendants from refusing plaintiff of maintaining his transitory abode in 'kutiya'. (Para-10)

For the Appellant: Mr. Bhupender Gupta, Senir Advocate with Ms. Poonam Gehlot, Advocate.

For Respondents No.2 and 3.: Mr. R.K. Bawa, Senior Advocate with Mr Prashant K. Sharma, Advocate.

For General Public: Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

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

2. Briefly stated the facts of the case are that one K.N. Rama Nand was the owner of the suit property. The property was gifted to him long back during the year 1929-30. He constructed a Kutia thereon . He died issueless. The plaintiff was his follower and disciple and was following the religious order to which K.N. Rama Nand belonged and as per the provisions of Hindu Law has succeeded to his estate. Entries even after the death of K.N. Rama Nand continued in his name. After the death of Rama Nand, plaintiff constructed flus latrine, soakage pit, water tank and a room on the suit land. He planted some fruit trees, near 'Samadhi' of K.N. Rama Nand. The langer is also held on Baishakhi day in the memory of said K.N. Rama Nand. The plantiff being the only disciple and in possession of the property of K.N. Rama Nand has succeeded to the same. The defendants tried to forcibly occupy the suit property. Hence, the suit for declaration of his title and injunction. In alternative plea of ownership by adverse possession was also raised.

3. None appeared for general public. However, defendants No.2 and 3 contested the suit and filed written statement, wherein, they have denied that the plaintiff was a disciple of K.N. Rama Nand. Existence of Kutia was admitted but it was stated that the same was constructed by people of Pajo, Ser and Patrar. It is pleaded that plaintiff never remained in possession of the suit property. In fact, after the death of K.N. Rama Nand, the suit property did not remain in possession of any specific person. Rather it remained in the management of Mela Committee. The defendants denied that the plaintiff was a 'Sanyasi. They pleaded that he was posing as Sanyasi only in order to grab the suit property.

4. The plaintiff filed replication to the written statement of the defendant(s), wherein, he denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the plaintiff is owner in possession of the suit land and the revenue entries contrary to it are illegal, null and void, as alleged?OPP.
2. Whether the plaintiff in the alternative has also become the owner of the suit land by way of adverse possession?OPP.
3. Whether the plaintiff has no locus standi to file the present suit?OPD.
4. Whether the suit is bad for non joinder of necessary parties?OPD.
5. Whether the plaintiff is estopped to file the present suit due to his own acts, conducts and admissions?OPD.
6. Whether the plaintiff is non agriculturist of Himachal Pradesh and not entitled to own and possess any land in H.P. ?OPD.
7. Whether the suit has been filed without any cause of action?OPD.
8. Relief.

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

7. Now the plaintiff/appellant herein, has instituted the instant Regular Second Appeal, before, this Court, wherein he assails the findings, recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, this Court, admitted the appeal instituted by the plaintiff/appellant against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether the two courts below have erred in presuming the suit property to be debutter property without there being any pleading or evidence to that effect?

b) Whether the plaintiff is entitled to decree of permanent prohibitory injunction?OPP.

Substantial question of Law No.1 and 2.

8. A perusal, of, the apposite order of mutation, borne in Ex.PC, apparently unfolds, qua the suit property being donated, by the donor vis-a-vis the donee, one K.N. Rama Nand. Consequently, the suit property, when rather dons the mantle of a gift, than, the mantle of a trust property or of dedication thereof vis-a-vis a diety, (I) hence, when the essential rubric, for the suit property being construable to be "debutter property", is rather comprised in its being donated for public worship or vis-a-vis a diety, and, bestowment thereof being *jus in divino,* than, *jus in personam*, (ii) whereas, with Ex. PC pronouncing, of it, being donated by the donor vis-a-vis the donee, one K.N. Rama Nand, hence, the suit property, cannot, be construed to be a debutter property.

9. The aforesaid K.N. Rama Nand, expired, in the year 1973. However, on his demise, the plaintiff claims himself to be his 'Shishya" or disciple, hence per se ipso facto, thereupon, he claims succession vis-a-vis the suit property. The plaintiff has not made any averments appertaining to the cult, whereto deceased K.N. Rama Nand belonged nor has averred the ordained prescribed manner, for succession vis-a-vis the donee's estate. He has simplictor testified, of his, being anointed by K.N. Rama Nand, as the latter's disciple. However, per se any anointment of the plaintiff, by K.N. Rama Nand, as the latter's disciple, is not testified by the plaintiff, to undergo any rigors, of any ceremony prescribed, for the aforesaid purpose. The omission of the plaintiff, (i) to plead the sect or the cult, whereto deceased K.N. Rama Nand belonged, besides his omission to plead or to prove the ceremonies pointedly applicable to the sect, whereto, the deceased Rama Nand belonged, especially vis-a-vis, the anointment, of, the plaintiff by late Sh. K.N. Rama Nand, as the latter's disciple, (ii) and, his further omission to plead, and, prove by adducing cogent evidence, of any purported anointment of the plaintiff, by deceased K.N. Rama Nand,as the latter's disciple, rather being sufficient to render him capacitated, to inherit his estate, thereupon this Court cannot be constrained, to, conclude, that, even if assumingly, the plaintiff was anointed as a disciple, by late Sh. K.N. Rama Nand, (iii) thereupon, the aforesaid manner of anointment not per se bespeaking of it constituting, the ordained manner, of succession, to the deceased donee's estate. Further corollary thereof, is, of, the claim to succession by the plaintiff vis-a-vis the deceased donee's estate, being frivolously raised, without it being anchored, upon, apposite pleadings nor any cogent evidence in respect thereto being adduced.

10. Be that as it may, the plaintiff's claim, for rendition of a decree for permanent prohibitory injunction vis-a-vis the suit property, dehors, his not being entitled to succeed to the estate of deceased K.N. Rama Nand, would acquire validation, in case evidence on record, makes a graphic disclosure of the plaintiff, being in evident possession of the suit property. (i) More so when the defendants do not stake any claim of title thereon rather vesting in them. A committee christened, as, Koteshwar Mela Committee, stands testified by the plaintiff, while rendering his deposition in his cross-examination, to conduct a Mela, at the site of the suit property, and, he also testifies, of the entire village community, contributing funds for the mela being organised, at the site of the suit property. The aforesaid echoings, made by the plaintiff is a significant portrayal, of Koteshwar Mela Committee, hence organizing a Mela, at the site of the suit property. Furthermore, the plaintiff, in his cross-examination, acquiesces, to a suggestion of Koteshwar Mela Committee, organizing a mela on Baishakhi, and, the necessary ceremonies appertaining thereto, being performed inside the Kuitya. The aforesaid testification, of, the plaintiff qua holding of a mela, by Koteshwar Mela Committee, on Baishakhi, at the site of the suit property, and, the imperative ceremonies prior thereto being performed inside the kutiya, does garner, an inference of lack of exclusivity of possession, of the plaintiff vis-a-vis the suit property. Corollary, of the aforesaid inference is, of, in case this Court proceeds, to render a decree for permanent prohibitory injunction vis-a-vis the suit property, and, qua the plaintiff, thereupon, it may render the ill consequence(s) of the plaintiff, in garb thereof hence barring, Koteshwar Mela Committee, from holding or organizing mela, on Baishakhi, at the site of the suit property, and, he may even

in the garb of a decree for permanent prohibitory injunction, preclude, the performance, of, the requisite necessary ceremonies, inside his kutiya. Consequently, the decree of permanent prohibitory injunction as sought by the plaintiff vis-a-vis the suit land, cannot, be granted to him. However, existence, of, an echoing in the cross-examination, of the successor-in-interest, of the donor, qua times, whereat the plaintiff maintaining his abode, inside the Kutiya, his maintaining lock and key thereof, and, on occasions, his leaving the Kutiya, his handing over the keys, to the authorised official, of the Committee concerned, besides his further making an articulation, of the plaintiff, since, 1970 keeping his wherewithals inside the Kutiya, (ii) does render open an inference, that the aforesaid affirmative echoings purveyed by the defendants ' witness vis-a-vis apposite therewith affirmative suggestion, (iii) hence, marshling an inference, of, the defendants, accepting the factum of the plaintiff, maintaining, a temporary abode, at the Kutiya, and, also accepting the fact, that, on the plaintiff leaving the Kuitya, his handing over the keys thereof, to the authorised officials of the Committee concerned, thereupon, it is befitting to conclude that the Kutiya, is a transitory abode of the plaintiff. With the defendants' witness also admitting that since 1971, the plaintiff maintaining, his wherewithals, inside the Kutiya, does also enable an inference of the defendants, accepting, the factum of his holding possession of the suit property, even if it is, of, a transitory nature. Since, the site of the suit property is used, only, on Baishakhi, for hence organizing a mela, also when the kutiya is used only on the aforesaid date, for performing the requisite ceremonies, hence, qua the Kutiya in respect whereto, hence, the plaintiff holds a transitory right of abode , since 1971, it would also not be befitting, to decline him the relief, to maintain his transitory abode vis-a-vis the Kutiya.

11. The upshot of the above discussion is that the relief of permanent prohibitory injunction a sprayed for by the plaintiff is declined, whereas, the defendants are restrained from refusing vis-a-vis the plaintiff, his right of maintaining, his transitory abode only qua the Kutiya concerned, along with his complying, with the aforesaid conditions, occurring in the testification of the successor-in-interest, of the donor. Accordingly, both the substantial questions of law are decided in the aforesaid manner.

12. In view of the above discussion, the present Regular Second Appeal is partly allowed. In sequel, the judgements and decrees rendered by both the learned Courts below are modified and the suit of the plaintiff hence is partly decreed. Consequently, as aforestated the defendants are restrained from refusing vis-a-vis the plaintiff, the right of his maintaining transitory abode only qua the kutiya situated over the suit land/property. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

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

Cr. Appeal No. 653 of 2008
Reserved on : 14.3.2018.
Decided on : 29.3.2018

Code Of Criminal Procedure, 1973- Section 374- **Indian Penal Code, 1860-** Section 307- Trial court convicted and sentenced accused for offence under Section 307– Trial Court held that accused had caused stab wounds on forehead and hip of victim – Appeal against- Accused was previously known to victim and eye witness- Both identified him in court as assailant – Statements of witnesses consistent with each other and also corroborated by medical evidence - Injuries relatable to period of offence – Accused produced dagger pursuant to his disclosure statement – Injuries possible with weapon used by accused- Weapon used as well as part of body

where stab wounds were caused give sufficient inference that intention of accused was to commit murder – However further held that offence was under Section 307 Second Part, therefore, Trial Court went wrong in imposing sentence under first part – State not filing appeal against sentence- Appeal of accused dismissed. (Para-10 to 18)

For the Appellant: Mr. G.R Palsara, Advocate.
For the Respondent: Mr. Yudhveer Singh Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed against the impugned judgment, of, 16.10.2008, rendered by the learned Sessions Judge, Kangra at Dharamshala, in, sessions case No. 28-N/VII-2006, whereby he convicted the appellant herein, for his committing an offence punishable under Section 307/324 of Indian Penal Code (hereinafter referred to as "IPC") also sentenced him as follows:-

> "……to undergo rigorous imprisonment for five years and fine of Rs.5,000/- under Section 307 IPC and rigorous imprisonment for six months and fine of Rs.500/- under section 324 IPC. In default of payment of fine, the accused person No.1 shall under go further simple imprisonment for six months and one month respectively on each count……"

2. Brief facts of the case are that PW-1 Prittam Singh is running a confectionery shop at Kotla. PW-1 had been visiting his shop daily from his house situated in village Anoohi. On 19.12.2005, PW-1 had closed his shop as usual at about 7 p.m. and had left for his house. PW-1 had reached his village at about 9.00 p.m. PW-3 Mohinder Singh is also resident of village Anoohi. PW-3 had met PW-1. PW-1 wanted to make a telephonic call and had accordingly visited the house of his uncle Shri Tara Chand. PW-3 had accompanied PW-1 to the house of Shri Tara Chand. Afterwards PW-1 had left for his house. PW-3 had been accompanying PW-1. When PW-1 and PW-3 had been passing by the side of the house of Shri Jigri Ram, the accused persons had been noticed coming from the opposite direction. All the accused persons had asked PW-1 as to where he had been proceeding at such odd hour of the day. Thereafter accused No. 2 to 4 namely Kahan Singh, Shiv Kumar and Roshan Lal had caught hold of PW-1. Accused Waryam Singh had been armed with a dagger Ex.P-1. Accused Waryam Singh had inflicted one blow of dagger on the left side of forehead of PW-1 and another blow on his right hip. PW-1 had cried for help. He had fallen down. PW-4 Harbans Singh had been attracted to the site of occurrence. PW-4 had rushed to the rescue of PW-1. The accused had managed to escape. PW-1 had informed PW-4 of the occurrence. PW-3, PW-4 and some others had picked up PW-1 and had taken him to the house of Shri Tara Chand. Shri Tara Chand had found the condition of PW-1 critical. The clothes of PW-1 had been soaked in blood. PW-1 had been in agony and pain. Shri Tara Chand had provided IMFL (brandy) to PW-1. Shri Tara Chand had also applied liquor to the injuries of PW-1. Thereafter PW-1 was taken to the hospital. The matter was also reported to the police. PW-1 was medically examined by the doctor concerned. 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 an offence punishable under Section 307, 324/34 IPC, to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 18 witnesses. On closure of prosecution evidence, the statements of the accused under Section 313 of the Code of Criminal Procedure were recorded, wherein, they pleaded innocence and claimed false implication. They chose not to lead any defence evidence.

5. On an appraisal of the evidence on record, the learned trial Court, while acquitting accused No. 2 to 4 of the charges punishable under Sections 307,324/34 IPC, hence returned findings of conviction against appellant herein/accused Waryam Singh, for his committing offences punishable under Sections 307 & 324 IPC.

6. The learned counsel appearing for the appellant herein/accused Waryam Singh, has concertedly and vigorously contended qua the findings of conviction 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 relevant material on record. Hence, he contends qua the findings of conviction, rather 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 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. PW-1 (Prittam) in his testification ascribes, vis-à-vis accused Roshan, Shiv Kumar and Kahan Singh, incriminatory role(s) of theirs' clasping him, whereafter he ascribes vis-à-vis accused Waryam Singh, an incriminatory role, of his, with the user of dagger Ex. P-1, hence inflicting injury on his forehead, and, another injury on his hip. The aforesaid ascriptions by PW-1, of incriminatory roles vis-à-vis the aforesaid accused hence acquire corroboration from the testification of PW-3 (Mohinder Singh). PW-3 is an eye witness to the occurrence. Hence, his testification in corroboration to the testification of PW-1, acquires formidable probative leverage. Both the aforesaid PWs stood subjected to an incisive cross-examination by the learned defence counsel, (i) yet when during course(s) thereof, they rather make disaffirmative echoings vis-à-vis the apt suggestions put to them, by the learned counsel, hence they sequelly negate the effects, of all exculpatory endeavors of the defence (ii) thereupon, when hence their echoings, occurring, in their respective testifications, are, consistent with their respectively recorded previous statements in writing, and, also when each depose with inter-se corroboration besides with inter-se harmony, qua, the genesis of the occurrence, concomitantly hence, their respective testifications, are, not drained of their probative vigor.

10. The mere factum of purported interestedness of PW-3, arising from, his being the neighbour of the victim, would not, perse shred the efficacy of his testification, in corroboration to the testification of PW-1, unless, (a) cogent evidence surgesforth in display of his rendering a tainted/slanted version qua the occurrence (b) inference whereof would arise only when upon making an incisive reading of his testification, rather graphic underlinings hence emanating qua his contriving the version qua the occurrence, (c) or his improving or embellishing upon his previous statement recorded in writing, (d) or graphic evidence surgesforth in display of his being an invented and contrived witness. However, as aforestated with both PW-1 and PW-3 rather in their respective testifications hence echoing a consistent version qua the occurrence, thereupon the mere factum of any purported interestedness, of, PW-3, arising from his being a neighbour of the victim, would hence not render his testimony to be incredible.

11. Further more, with the defence also being unable to establish the trite factum of the accused being mis-identified by both PW-1, and, by PW-3, rather contrarily with firm evidence surging forth qua the accused being previously known to the victim, and, to PW-3, thereupon with the prosecution, hence, firmly establishing the identity of the accused, hence, a firm inference is engendered of there being no misidentification of the accused by either PW-1, and, by PW-3.

12. Be that as it may, the version qua the incident consistently testified, by PW-1 and by PW-3, was also enjoined, to, beget corroboration from medical evidence. PW-15 (Dr. Raman Sharma), who subjected the victim to medical examination, and, subsequent thereto also

prepared the apposite MLC, borne in Ex. PW-15/A, has, during the course of his examination-in-chief, made articulations, in consonance with the injuries observed by him in Ex. PW-15/A, to be occurring on the person of PW-1, injuries whereof are extracted hereinafter:-

> " 1. Incise wound over left side of forehead of the size of 2 x 0.5 cm x 0.5 cm. The margins of the injuries were clear. Blood clots were present.
>
> 2. incised wound over right gluteal region of the size of 3 x 1 cm x 1 cm. Margins were clear. Blood clotting was present. Back of underwear was full of blood cloths.
>
> I reserved my opinion about injury No.1, which was to be given after 72 hours of observations.
>
> In my opinion, injury No.2 was simple in nature, but dangerous to life, if not treated well in time and the same was caused with sharp edged weapon within probable duration of 6 hours."

13. PW-15 has opined of injury No. 2 being simple in nature, yet dangerous to life, if not treated well in time. He has continued, to, testify of injury No. 2, being causable by user of a sharp edged weapon, and, the probable time, of its occurrence being six hours prior, to, his subjecting the victim to medical examination, thereupon the apposite injuries are relatable to the time of occurrence. He firmly testifies of dagger Ex. P-1, being the weapon, with user whereof, the injuries noticed by him to be occurring on the person of the victim, were hence caused. The afore-referred testification of PW-15, imminently synchronizes with the testifications of PW-1, and of PW-3, especially vis-à-vis the time of occurrence, borne in the apposite FIR. Moreover, with dagger (Ex. P-1) with user whereof, PW-1, and, PW-3 hence consistently testify of injuries being suffered, on the person of PW-1/the victim, being also alike them, also, standing testified by PW-15, to be the weapon, with user whereof the injuries depicted in Ex.PW-15/A, were hence caused, (i) thereupon it is inevitable to conclude that the testification of PW-15 is in absolute consonance with the testifications' of PW-1, and, of PW-3, whereupon, it is befitting to conclude of the prosecution being able to prove the charge against the accused.

14. Apart therefrom, the prosecution was also under an obligation, to prove the making of an efficacious recovery of dagger (Ex.P-1), from, the person of accused Waryam Singh, by the investigating officer concerned. Ex. PW-6/A, is, the disclosure statement, made by accused Waryam Singh vis-à-vis the Investigating Officer concerned, especially during, the course of his being subjected to custodial interrogation, wherein occur echoings, of the place of keeping and hiding of, Ex. P-1 (dagger) by accused Waryam Singh. One of the witnesses thereto, is PW-6 (Vijay Kumar), who during his testification, has hence proven contents thereof. In sequel to Ex. PW-6/A, the investigating Officer concerned, under Ex. PW-1/B, effectuated the recovery of Ex.P-1. The contents of Ex.PW-1/B stand proven by PW-3 Mohinder Singh, a witness thereto. In sequel, with both the disclosure statement borne in Ex. PW-6/A, and, the recovery memo borne in Ex.PW-1/B hence being sufficiently, proven, by witnesses' thereto, (a) thereupon, the aforesaid exhibits acquire firm probative vigor, (b) whereupon it is apt to conclude, of, the prosecution succeeding in proving the making of an efficacious recovery of weapon of offence (Ex. P-1) under memo Ex.PW-1/B. The effect of efficacious proof being hence lent vis-à-vis the valid execution of disclosure statement, and, vis-à-vis the valid execution of recovery memo, borne respectively in Ex. PW-6/A, and, in PW-1/B, is, of hence the prosecution lending added corroboration, to the testifications' of PW-1, and of PW-15.

15. Accentuated vigor to the aforesaid inference, is, garnered by clothes Ex. P-2 to P-6 belonging to PW-1, standing recovered, under memo Ex. PW-3/A, memo whereof stands efficaciously proven by PW-3, one of the witnesses thereto, to be hence validly executed. Conspicuously, when P-2 to P-3 comprising respectively, the Pant, and, underwear of the victim and both carry thereon cut marks, corresponding to the injuries suffered vis-à-vis the gluteal region of the victim, whereon, both PW-1, and, PW-3 also testify of accused waryam Singh, inflicting blows with user of dagger Ex.P-1, besides also PW-15 alike therewith, testifying of his

noticing injuries to be occurring thereat, thereupon, hence the prosecution has succeeded in proving the charge vis-à-vis accused Waryam Singh.

16. The learned counsel for the appellant herein, has, with force contended, that with PW-15 echoing, in, his testification qua injury No. 2 being simple in nature, yet dangerous to life, if not treated well in time, hence the prosecution being unable to prove the charge under Section 307 of IPC. However, the aforesaid submission is negated, by the factum of (i) the beacon of light, for sustaining a charge under Section 307 of IPC, being not comprised in the factum of the region whereon injuries are inflicted (ii) nor upon the Doctor's opinion rather the apt beacon of light, is mobilized, from, the trite proven factum of the offender/offenders concerned, doing any "act" with his or theirs carrying such intention or knowledge, and, under such circumstances that, if he or they by that act, caused death, he/they would be guilty of murder (iii) preponderantly dehors, the aforesaid proven inchoate act(s) though also provenly carrying the aforesaid intention or knowledge rather remain un-consummated, (iv) nonetheless, the apposite proven inchoate acts, provenly, carrying the ingredients, of, knowledge/intention, as, embodied in section 307 of IPC, yet, rendering the accused concerned, to face the penal consequences of theirs proven inchoate acts, punishment in respect whereof is embodied in the first part of Section 307 of IPC.

> "307. Attempt to murder.—Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to 1[imprisonment for life], or to such punishment as is hereinbefore mentioned.
>
> Attempts by life convicts.—[When any person offending under this section is under sentence of [imprisonment for life], he may, if hurt is caused, be punished with death.] llustrations
>
> (a) A shoots at Z with intention to kill him, under such circumstances that, if death ensued. A would be guilty of murder. A is liable to punishment under this section.
>
> (b) A, with the intention of causing the death of a child of tender years, exposes it in a desert place. A has committed the offence defined by this section, though the death of the child does not ensue.
>
> (c) A, intending to murder Z, buys a gun and loads it. A has not yet committed the offence. A fires the gun at Z. He has committed the offence defined in this section, and if by such firing he wounds Z, he is liable to the punishment provided by the latter part of 3[the first paragraph of] this section.
>
> (d) A, intending to murder Z by poison, purchases poison and mixes the same with food which remains in A's keeping; A has not yet committed the offence defined in this section. A places the food on Z's table or delivers it to Z's servant to place it on Z's table. A has committed the offence defined in this section."

17. In other words, for a charge under Section 307 of IPC, to, achieve success, the mere proof of preparation(s) of the offender or offenders concerned, to, commit an offence, also further proof qua theirs' carrying the requisite mens rea or the intention to commit an act, which is likely to cause death of the victim, rather is the apt sine qua non. Moreover, a charge constituted under the first part of section 307 IPC, and, on proof of ingredients whereof, entails imposition of punishment extending up to 10 years, upon the accused, and, which may extend up to 10 years (i) whereas the second part of Section 307 of IPC, begets attraction upon the inchoate acts', of the accused being furthered by proven injuries even if simple in nature, being inflicted upon the victim, (ii) besides for attracting the mandate of the second part of Section 307 of IPC, the evident proof of the manner of aggression perpetrated by the accused upon the victim hence is visibly begetting endangerment(s) to the latter's life, is also imperative, (iii) endangerment(s)

whereof is to be gauged also from the weapon of offence(s) used by the accused, and, portion(s) of the body of the victim(s) whereon it is struck (i) thereupon the innate nuance, of, the provisions borne in Section 307 IPC, provisions whereof are extracted hereinbefore, is, of the mere rendition of an opinion concerned, of the relevant injury being dangerous to life, if, not treated well in time, rather not galvanizing any inference of the accused, not, carrying the requisite mens rea or intention, to, by his/their acts, hence, spelling endangerment(s) vis-à-vis the life of the victim(s) (ii) rather, when the weapon of offence, is, a sharp edged weapon, and, with user whereof, an injury was provenly caused in the gluteal region or on the vital part of the body of the victim, injuries whereof, even if not lethal, yet, with the apt injuries stand provenly suffered by the victim, with user of Ex.P-1, by accused Waryam Singh, (iii) does constrain a conclusion, of, the inchoate act prior thereto, of the accused, to, hence endanger the life of victim, when, also provenly stood carried forward, thereupon the second part of section 307 of IPC, begets attraction, dehors, the opinion of PW-15, whereupon, hence the prosecution hence has firmly established charge under Section 307 IPC, and, also the imposition of sentence upon him, is both just and tenable.

18. Though punishment under Section 307 of IPC was imposable upon accused Waryam Singh, whereas, the learned trial Court imposing upon him a punishment, falling within, the first part of section 307 of IPC, though has hence committed an illegality, yet, with the State of Himachal Pradesh not filing any appeal for enhancing the sentence of imprisonment imposed upon the appellant herein, hence it is not fit, and, appropriate to interfere with the sentence of imprisonment, recorded by the learned trial Court, against the accused.

19. A wholesome analysis of the evidence on record, portrays that the appreciation of evidence as done by the learned trial Court, not suffering from any perversity and absurdity nor it can be said that the learned trial Court, in recording findings of conviction, has committed any legal misdemeanor, in as much, as, its mis-appreciating the evidence, on record or its omitting to appreciate the relevant and admissible evidence. In aftermath this Court does not deem it fit, and, appropriate that the findings of conviction recorded by the learned trial Court merit any interference.

20. 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 SANDEEP SHARMA, J.

Mohd. Arshad @ Kuki ... Petitioner

Versus

State of Himachal Pradesh ... Respondent

CrMP(M) No. 210 of 2018
Decided on April 2, 2018

Code Of Criminal Procedure, 1973- Section 439- Regular Bail - Grant of- Accused alleged of having committed offences under Sections 147 and 307, 325, 452 read with 149 Indian Penal Code- Investigation was complete and charge-sheet also filed in Court- No material on record that accused can tamper evidence – Other co-accused already on regular bail- Bail granted subject to conditions. (Para-7 and 14)

Cases referred:

Sanjay Chandra versus Central Bureau of Investigation (2012)1 Supreme Court Cases 49
Siddharam Satlingappa Mhetre versus State of Maharashtra and others, (2011) 1 SCC 694

Gurbaksh Singh Sibbia vs. State of Punjab, (1980) 2 SCC 565
Prasanta Kumar Sarkar versus Ashis Chatterjee and another (2010) 14 SCC 496

For the petitioner	Mr. N.K. Thakur, Senior Advocate with Mr. Divya Raj Singh, Advocate.
For the respondent	Mr. Dinesh Thakur, Additional Advocate General with Mr. Vikrant Chandel, Deputy Advocate General. ASI Subhash Kumar, I/O PS Sadar, Chamba, District Chamba, Himachal Pradesh.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

By way of instant bail petition under Section 439 CrPC, prayer has been made on behalf of the bail petitioner namely Mohd. Arshad alias Kuki, who is behind bars since 7.11.2017, for grant of regular bail in FIR No. 275/2017 dated 7.11.2017, under Sections 452, 307, 325, 107, 147, 148 and 149 IPC, registered at Police Station, Sadar, District Chamba, Himachal Pradesh.

2. Sequel to order dated 6.3.2018, ASI Subhash Kumar has come present with the record. Mr. Dinesh Thakur, learned Additional Advocate General has also placed on record status report, prepared on the basis of investigation carried out by the investigating agency. Record perused and returned.

3. Close scrutiny of record/ status report reveals that FIR mentioned herein above came to be lodged at the behest of complainant Nagina Begum, who alleged that on 6.11.2017, three persons including present bail petitioner jumped the wall and entered her house. As per complainant, her son namely Anwar Sheikh, who at the relevant time was sleeping in his room, was attacked by three persons. Having heard cries, complainant went into the room of her son and found that he was given merciless beatings, as a result of which, he had suffered injuries. Complainant specifically alleged that she could only identify one person namely Kuki (bail petitioner) son of Shri Abdul Qayum at the time of alleged incident. Investigation further reveals that since complainant had raised hue and cry, villagers gathered on the spot of occurrence and they also apprehended three persons at a distance of 50 metres. Victim namely Anwar Sheikh was taken to Regional Hospital, Chamba, from where he was referred to PGI Chandigarh. Investigation report further reveals that Anwar Sheikh was discharged from PGI Chandigarh on 30.11.2017, whereafter, he was again admitted at Regional Hospital, Chamba.

4. Mr. N.K. Thakur, learned Senior Advocate duly assisted by Mr. Divya Raj Singh, Advocate vehemently argued that mere naming of bail petitioner by the complainant may not be sufficient to conclude offence, if any, allegedly committed under Section 307 IPC because it has clearly come in the investigation that there was no dispute *inter se* complainant and bail petitioner, rather, dispute, if any, was with Shehnaz, who happened to be sister of bail petitioner. Mr. Thakur, learned Senior Advocate further contended that it is not the case of the prosecution that bail petitioner was apprehended on the spot by the mob gathered outside the gate of the complainant. Mr. Thakur, learned Senior Advocate further contended that there is no direct evidence available on record suggestive of the fact that bail petitioner inflicted injury on the person of Anwar Sheikh because, admittedly, in the instant case, weapon allegedly used for inflicting injury on the complainant came to be recovered at the behest of some other person i.e. Abdul Hameed and not the present bail petitioner. While referring to the record, Mr. Thakur, contended that otherwise also, complainant had been changing her stance frequently, because in her initial complaint, she stated that three persons had entered her house unauthorizedly, but, subsequently, after a few days, she named other persons i.e. Shaukat Ali and Mohd. Shahid, who have been already enlarged on bail by this Court. Mr. Thakur, learned Senior Advocate further contended that guilt, if any, of the bail petitioner is yet to be proved in accordance with law and

as such, petitioner can not be allowed to remain behind bars for indefinite period. He placed reliance upon judgment of Hon'ble Apex Court rendered in **Dataram Singh** vs. **State of Uttar Pradesh & Anr** (Criminal Appeal No. 227/2018, decided on 6.2.2018) and stated that it has been categorically held by Hon'ble Apex Court that freedom of an individual is of utmost importance and same can not be curtailed for indefinite period. While praying for grant of bail to the bail petitioner, Mr. Thakur, learned Senior Advocate contended that other co-accused have been already enlarged on bail and as such, bail petitioner, who is behind bars for almost six months, also deserves to be enlarged on bail. He further stated that investigation in the case is almost complete and *Challan* stands filed in the competent Court of law.

5. Mr. Dinesh Thakur, learned Additional Advocate General, while opposing aforesaid prayer having been made by the learned senior counsel appearing for the bail petitioner, contended that keeping in view the gravity of offence allegedly committed by bail petitioner, he does not deserve any leniency, rather he needs to be dealt with severely. He further stated that perusal of statement made by complainant suggests that bail petitioner had entered the house of the complainant unauthorizedly and he thereafter inflicted grievous injuries on the body of Anwar Sheikh and as such, there is no force in the arguments of Mr. Thakur, learned Senior Advocate representing bail petitioner that there is no direct evidence suggestive of the fact that the bail petitioner was not involved in the case. Mr. Dinesh Thakur, learned Additional Advocate General, further contended that in the event of petitioner being enlarged on bail, there is every likelihood of his influencing the witnesses because his previous record suggests that he is a hardened criminal. While referring to the medical record, adduced on record by prosecution, Mr. Thakur, contended that complainant remained admitted at PGI Chandigarh for a considerable time and it is quite apparent from the record that bail petitioner made an attempt to kill the victim with sharp edged weapon as such, he is not entitled to be released on bail at this stage.

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

7. True it is, that a close scrutiny of statement having been made by the complainant, clearly suggests that though three persons had jumped the wall of her house before entering the room, where victim Anwar Sheikh was sleeping but she has categorically stated that she could identify the person namely Kuki (bail petitioner) but this Court can not lose sight of the fact that guilt, if any, of bail petitioner is yet to be proved in accordance with law by the prosecution by leading cogent and convincing evidence. Similarly, medical evidence available on record though suggests that Anwar Sheikh suffered grievous injuries on account of injuries inflicted upon his body but as has been observed above, prosecution is yet to prove on record by leading cogent evidence that grievous injury was caused on the person of victim Anwar Sheikh by bail petitioner, as such, this Court sees no reason to allow him to incarcerate in jail for indefinite period, especially when investigation is complete and *Challan* stands filed in the competent Court of law. There is no material placed on record by investigating agency to demonstrate that in the event of petitioner being enlarged on bail, he may influence/tamper with evidence adduced on record by prosecution. Other co-accused namely Modh. Shahid and Shaukat Ali have been already enlarged on bail as such, present bail petitioner also deserves to be enlarged on bail.

8. Repeatedly, it has been held by Hon'ble Apex Court that gravity of offence alone can not be a factor to deny bail, rather, other competing factors are to be taken into consideration while considering prayer for grant of bail.

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

> "2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found

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

3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.

4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons."

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

"The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called

upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

11. Law with regard to grant of bail is now well settled. The Apex Court in **Siddharam Satlingappa Mhetre** versus **State of Maharashtra and others**, (2011) 1 SCC 694, while relying upon its decision rendered by its Constitution Bench in **Gurbaksh Singh Sibbia** vs. **State of Punjab**, (1980) 2 SCC 565, laid down the following parameters for grant of bail:-

"111. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. We are clearly of the view that no attempt should be made to provide rigid and inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualized for the grant or refusal of anticipatory bail. In consonance with the legislative intention the grant or refusal of anticipatory bail should necessarily depend on facts and circumstances of each case. As aptly observed in the Constitution Bench decision in Sibbia's case (supra) that the High Court or the Court of Sessions to exercise their jurisdiction under section 438 Cr.P.C. by a wise and careful use of their discretion which by their long training and experience they are ideally suited to do. In any event, this is the legislative mandate which we are bound to respect and honour.

112. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:

(i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

(ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) The possibility of the applicant to flee from justice;

(iv) The possibility of the accused's likelihood to repeat similar or the other offences.

(v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.

(vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.

(vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, the court

should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

(viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail." (Emphasis supplied)

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

13. The Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496**,** has laid down the following principles to be kept in mind, while deciding petition for bail:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(ix) reasonable apprehension of the witnesses being influenced; and

(x) danger, of course, of justice being thwarted by grant of bail.

14. In view of above, present bail petition is allowed. Petitioner is ordered to be enlarged on bail subject to his furnishing bail bonds in the sum of Rs.1,00,000/- (Rs. One Lakh) with one local surety in the like amount, to the satisfaction of the Investigating Officer concerned, besides following conditions:

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

(g) He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

(h) He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and

(i) He shall not leave the territory of India without the prior permission of the Court.

(j) He shall surrender passport, if any, held by him.

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

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

The petition stand accordingly disposed of. Copy dasti.

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

Nurdh ……Appellant.
Versus
State of Himachal Pradesh ……Respondent.

Cr. Appeal No. 272 of 2017
Reserved on 3.1.2018.
Date of decision: 2.4.2018

Narcotic Drugs and Psychotropic Substances Act, 1985- Section 50- Compliance thereof- Police party while on routine patrol spotting accused and searching his body- A packet containing 950 grams of 'charas' was found tucked inside his clothes- Held- Not being a case based on prior information, Section 50 of Act is not attracted. (Para-11)

Narcotic Drugs and Psychotropic Substances Act, 1985- Sections 2(iii)(a) and 20- Recovery of 'charas'- Insignificant variation (14 grams) in weight of contraband as recorded by Investigating Officer in recovery memo vis-à-vis weight mentioned in FSL report – Held - not fatal – Variation may be because of difference in types of instruments used for weighment of contraband. (Para-20)

Cases referred:

Sunil Kumar vs. State of Himachal Pradesh 2010 (1) Sim. L.C. 192
State of Himachal Pradesh versus Mehboob Khan 2013(3) Him.L.R. (FB) 1834
Govindaraju alias Govinda vs. State by Sriampuram Police Station & another (2012) 4 SCC 722
Tika Ram vs. State of Madhya Pradesh (2007) 15 SCC 760
Girja Prasad vs. State of M.P. (2007) 7 SCC 625
Aher Khima vs. State of Saurshtra AIR 1956 SC 217
Baldev Singh vs. State of Haryana 2016 Cri. L.J. 154
Kashmir Singh vs. State of Punjab 1999 Cri. L. J. 2876
Jarnail Singh vs. State of Punjab JT 2011 (2) SC 120
Takashi Sato vs. State of H.P. 2010(3) Shim.L.C. 449
Ajmer Singh vs. State of Haryana (2010) 3 SCC 746
State of H.P. vs. Vinod Kumar 2002 (3) Shim. L.C. 137
Tahir vs. State (Delhi), (1996) 3 SCC 338
Makhan Singh vs. State of Haryana JT 2015 (4) SC 222
Dehal Singh vs. State of H.P. AIR 2010 SC 3594

For the appellant : Mr. R.S.Chandel, Advocate.
For the respondent(s) : Mr. Parmod Thakur, Addl. Advocate General.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J.

Appellant, Nurdh (hereinafter referred to as the accused) has been convicted by learned Special Judge Chamba, Sessions Division Chamba for the commission of an offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as "NDPS Act", in short) and sentenced to undergo rigorous imprisonment for seven years and to pay a fine of Rs. 20,000/- vide judgment dated 11.5.2017 passed in Sessions Trial No. 18 of 2012.

2. Now, if coming to the factual matrix, a police party headed by HC Deva Nand (PW9) and comprising HC Shoukat Ali (PW1), Constable Sandip Kumar and SPO Sanjeev Kumar (PW3) had left police station during the night intervening 15-16/12/2011 for patrolling towards Lesuin, Kuddi, Bhanota and Bharada side. It is around 5.00 a.m. early in the morning on 16.12.2011, the police party when reached at Nagni jungle, noticed the accused coming from Chajot side. On seeing the police party, he tried to return back. He was asked to stop but of no avail, therefore, HC Deva Nand had apprehended him with the help of accompanying police officials. On inquiry, the accused disclosed his antecedents. Since the police had suspicion on his carrying some narcotic substance with him, therefore, his consent was obtained vide memo Ext. PW-1/B. On being consented for his search by the police officials itself, PW-9 had given his own search. Memo Ext. PW-1/A was recorded in this regard. During his personal search, he was found carrying white coloured packet which he had concealed inside the sweater and the shirt worn by him. The same was found to be tucked near his stomach. On checking the bag (Ext. P-2), charas Ext. P-3 was found kept inside. The same was in the shape of sticks (batties) and when weighed was found to be 950 grams. The recovered charas was put back in the same packet and sealed with five impressions of seal 'H'. The same was taken into possession vide memo Ext. PW-1/D. The sample of seal 'H' was taken on a piece of cloth, which is Ext. PW-1/C. The I.O. PW-9 HC Deva Nand thereafter prepared the rukka Ext. PW-9/A and it was sent to police station through PW-1 HC Shokat Ali for registration of FIR. Consequently, FIR Ext. PW-7/B came to be registered at Police Station, Tissa. The Investigating Officer had completed the codal formalities such as prepration of recording entries in the NCB forms in triplicate Ext. PW-9/A, spot map Ext. PW-9/C and thereafter apprised the accused about the grounds of arrest vide memo Ext. PW-9/D. He was then arrested on the same day. PW-9 HC Deva Nand had brought the accused and the case property to the police station and produced the same along with the sample of seal and seizure memo before the Inspector/SHO Jagdish Chand (PW7), who had re-sealed the parcel containing the charas with seal 'A'. The re-seal memo is Ext. PW-4/A. The impression of seal 'A' was also affixed on the NCB forms. He had retained the facsimile of seal on a piece of cloth which is Ext. PW-4/B. PW-7 had thereafter deposited the case property with MHC Avinder Singh (PW4), who in turn sent the same to Forensic Science Laboratory, Junga vide RC No. 148/2011. As per report of FSL, Ext. P-A, the contraband found in possession of the accused being extract of cannabis was sample of charas.

3. On completion of investigation, the report under Section 173 of the Code of Criminal Procedure was filed against the accused in the trial Court. Learned trial Court in view of the report and the documents annexed therewith and finding a prima-facie case having been made out against the accused had proceeded to frame charge under Section 20 of the NDPS Act against the accused. He, however, pleaded not guilty to the charge. Therefore, the prosecution has examined nine witnesses in all to substantiate the charge so framed against him.

4. The statement of accused under Section 313 of the Code of Criminal Procedure was also recorded. The accused had also examined Sh. Daulat Ram (DW1) in his defence.

5. On completion of the record, learned trial Judge has heard the parties on both sides and recorded the findings of acquittal on the sole ground that in view of the judgment in

Sunil Kumar vs. State of Himachal Pradesh 2010 (1) Sim. L.C. 192, the contraband allegedly recovered from him is charas alone has not been proved.

6. It is thus seen that initially the accused was acquitted of the charge under Section 20 of the NDPS Act by learned Special Judge vide judgment dated 10.12.2012 on the sole ground that in terms of the law laid down by a Division Bench of this Court in a case titled Sunil Kumar's case (supra) the contraband allegedly recovered from him on the basis of report of Chemical Examiner Ext. PA was not proved to be charas. In an appeal, Cr. Appeal No. 136 of 2013 preferred by the State against the findings of acquittal so recorded by learned trial Court, the same was allowed and the judgment passed by learned Special Judge quashed and set aside as well as the case remanded to learned trial Court for fresh disposal in accordance with law in view of the law laid down by a larger Bench of this Court in ***State of Himachal Pradesh*** versus ***Mehboob Khan 2013(3) Him.L.R. (FB) 1834,*** vide judgment dated 27.10.2016.

7. Consequent upon the remand of the case, learned Special Judge, Chamba has decided the case afresh and vide judgment under challenge in this appeal has convicted and sentenced the accused in the manner as pointed out at the very outset.

8. The legality and validity of the impugned judgment has been questioned on the grounds inter alia that the findings as recorded are based on hypothetical reasoning, surmises and conjectures. The evidence available on record has been appreciated in a slipshod and perfunctory manner. The evidence, no doubt, has not only been appreciated in its right perspective but at the same time, unrealistic standards have been set to evaluate the cogent and reliable evidence produced in his defence by the accused. The material contradictions in the statements of prosecution witnesses have not been taken into consideration and to the contrary, the findings of conviction recorded irrespective of the prosecution failed to prove its case beyond all reasonable doubt. The evidence that the parcel containing the case property when produced in the Court, the seals were not found intact has also not been considered in its right perspective. No plausible explanation in this regard is forthcoming. The prosecution has miserably failed to associate independent person to witness the search and seizure. The non-compliance of mandatory provisions enshrined under the NDPS Act have also not been taken into consideration.

9. Mr. R.S.Chandel, Advocate, learned counsel representing the appellant-accused has argued that the provisions contained under Section 50 of the NDPS Act have not been complied with and as a result thereof, the entire proceedings and also the trial has vitiated. It was also pointed out during the course of arguments that the contraband allegedly recovered from the accused was in the shape of sticks, however, it has come in the prosecution evidence that the parcel when opened the same was found in the shape of round or broken pieces. The weight of the contraband allegedly charas at the time of its seizure was 950 grams, however, when weighed in the laboratory, it was found to be 936 grams. Such variation in weight according to learned counsel remained unexplained. The occurrence was not witnessed by any independent person, hence on the basis of the testimony of official witnesses, no findings of conviction could have been recorded as according to him, as per the topography, the site at which the accused was nabbed and the search and seizure having taken place is a snow bound area. It has also been pointed out that although the site of occurrence is Nagni Jungle, but as per the version of PW-2, they did not stop there.

10. On the other hand, learned Addl. Advocate General has repelled the contentions so raised on behalf of the appellant-accused and argued that most reliable and tangible evidence having come on record by way of testimony of PW-1 Shoukat Ali and PW-2 SPO Sanjeev Kumar supported by that of the I.O. PW-9 HC Deva Nand, it is proved beyond all reasonable doubt that charas weighing 950 grams was recovered from the physical and conscious possession of the accused. The prosecution evidence is neither contradictory nor inconsistent and rather unequivocally supports the prosecution case on all material aspects. The spot being an isolated place is fully proved from the testimony of the prosecution witnesses and other evidence available on record. Learned Addl. Advocate General has also pointed out that no grounds qua compliance of Section 50 of the NDPS Act, recovered charas was not found in that very shape in which it was

recovered and that the ground qua variation in weight has not been raised in the memorandum of appeal and introduced for the first time during the course of arguments. No suggestion was put to the witnesses while in the witness box that the place of recovery was a snow bound area. The impugned judgment, as such, has been sought to be upheld.

11. Now, if coming to the question of non-compliance of Section 50 of the NDPS Act raised on behalf of accused, in our considered opinion, the same in all fairness as well as in the ends of justice, should be answered in negative for the reason that the present is not a case where the police had prior information of someone coming with charas in his possession in that area when they were patrolling. Anyhow, in the case in hand, the option was given to the accused vide memo Ext. PW-1/B. The same is in tune with Section 50 of the NDPS Act. The accused though has not made any endorsement in his hand, being an illiterate person and it is the I.O. PW-9 HC Deva Nand who himself has recorded that the accused opted for his search by the police itself. Anyhow, as already observed, the present is not a case where the compliance of Section 50 of the NDPS Act was involved, therefore, the contentions to the contrary raised by learned defence counsel are hardly of any help to the accused.

12. The rapat Rojnamcha Ext. PW-3/A reveals that the police party headed by PW-9 HC Deva Nand had left the police station at 11:15 PM for patrolling in the area towards Lasuin, Kuddi, Behnota and Bharada etc. On 16.12.2011 at 5:00 AM in the early morning, the accused was seen in Nagni forest coming from the side of Village Chajot. On seeing the police party, he became nervous and tried to flee away. He, however, was overpowered there and then by the police party. On enquiry, he disclosed his name and other antecedents to the I.O. PW-9 HC Deva Nand. It was an isolated place and odd hours so it was not possible to associate any person to witness search and seizure. He, therefore, associated PW-1 HC Shoukat Ali and PW-2 SPO Sanjeev Kumar as witnesses. PW-9 HC Deva Nand and the witnesses had given their search first to the accused vide memo Ext. PW-1/A. Nothing incriminating except I.O. kit was recovered from them. It is thereafter on apprising the accused of his legal right to be searched before a Magistrate or a Gazetted Officer, his search was conducted. He agreed to give search to the police officials present at the spot. A white coloured carry bag was found to be concealed by him in the sweater and shirt he had worn at that time which was tucked near his stomach. On checking, the carry bag, black coloured substance in the shape of sticks was recovered therefrom. According to the prosecution case, on the basis of its smell and experience, the police party found it to be charas (Ext. P-3). The same was weighed with the help of weighing machine in the I.O. kit and found to be 950 grams. After weighing the recovered charas, it was put in the same carry bag (Ext. P-2) and thereafter sealed in parcel of cloth (Ext. P-1) with 5 impressions of seal “H”. Sample of seal Ext. PW-1/C was drawn separately. The I.O. had filled in the relevant columns of NCB-I form in triplicate on the spot. The seal after its use was handed over to PW-1 HC Shoukat Ali.

13. After sealing and sampling process, rukka Ext. PW-9/A was prepared and it was handed over to PW-1 HC Shoukat Ali for being taken to Police Station Tissa for registration of FIR against the accused. On the basis of rukka, FIR Ext. PW-7/B was recorded by PW-4 HC Avinder Singh, the then M.H.C., Police Station Tissa. After registration of FIR, PW-7 Insp. Jagdish Chand has prepared the case file and it was handed over to PW-1 HC Shoukat Ali for being taken to I.O. on the spot. The said witness had subsequently handed over the case file to HC Deva Nand, the I.O.

14. The prosecution case as discussed hereinabove, stands satisfactorily proved from the testimony of PW-1 HC Shoukat Ali, PW-2 SPO Sanjeev Kumar and the I.O. PW-9 HC Deva Nand. If their testimony in cross-examination is seen, it would not be improper to conclude that their version in examination-in-chief remained un-shattered for the reason that they all in one voice tells us that they left the Police Post Nakrod on foot. They have also given the distance in between Police Post Nakrod and Village Kuddi, from village Kuddi to village Lesuin, village Lesuin to village Bhanota and village Bhanota to village Chajot and while giving such distance there is not much dissimilarities in their respective statements. They are also categoric that they did not

stop anywhere on the way to the spot. The suggestion that the police patrol had proceeded from Bhanota to Nagni jungle and that no habitation is there between two places has been admitted as correct. Being so, the accused himself admits that in between Bhanota and Nagni jungle, there was no habitation and as such, the prosecution case that the place of recovery was an isolated place hence it was not possible to join the independent witnesses stand proved even from the defence of the accused also. Though PW-2 SPO Sanjeev Kumar tells us that Village Chajot is situated adjoining Nagni Jungle and that 14-15 houses are situated in that village, even if it is believed to be so, no one could have come forward to assist the police being odd hours. They all are categoric that they reached at Nagni jungle around 5:00 am and the accused was spotted by them way back from Nagni jungle after patrolling. They have also stated in one voice that the accused was coming from village Chijjot side. It was an open clearance in the jungle where the accused was apprehended. They have also stated in one voice that NCB form was filled in on the spot. PW-1 though admitted that the people have grazing rights in Nagni jungle, however, expressed their ignorance that in the early morning people come there for grazing the cattle and cutting the fuel wood. He has admitted that no independent witness was associated, however, further stated voluntarily that recoveries are generally being effected during night and as such it is not possible to join independent witnesses.

15. True it is that PW-2 SPO Sanjeev Kumar while in the witness box has stated that the patrolling did not stop in Nagni jungle and also that the accused was apprehended in that very jungle. As a matter of fact, the police party after patrolling in the jungle was on its way when the accused spotted and nabbed, meaning thereby that the police party stopped in the jungle when the accused was apprehended and search was conducted. It is stated so by PW-2 SPO Sanjeev Kumar in the next line of his cross-examination that after the accused was apprehended they remained in the jungle for about 2 hours and 45 minutes. Therefore, it lie ill in the mouth of the defence to claim that the police party did not stop at Nagni jungle. PW-9 HC Deva Nand has clarified in his examination-in-chief that when the accused was nabbed, they had come back to Chajot village after patrolling in Nagni jungle.

16. All the incriminating circumstances were put to the accused in his statement recorded under Section 313 Cr.P.C. His answerer is denial simplicitor, without any explanation as to why such circumstances were not correct. Although, the prosecution has to stand on its own legs and no support can be drawn from the statement of the accused recorded under Section 313 Cr.P.C., yet some explanation must come from the accused also as to why the incriminating circumstances appeared against him in the prosecution evidence. His only explanation is that he is innocent and the witnesses have deposed falsely against him which cannot be believed as gospel truth to hold him innocent.

17. The plea the accused raised in his defence that he was made to alight from the bus at zero point Jasurgarh while travelling from Bhajradu to Chamba in a bus is not only an after thought but concocted also as DW-1 Daulat Ram, he examined in his defence, has not stated as to whether they were travelling in private or HRTC bus. He even has not produced any bus ticket also. Above all, in the absence of there being any enmity of the police with the accused, charas in huge quantity i.e. 950 grams cannot be said to be planted on him. The best available opportunity to the accused was to have lodged the repot with learned Magistrate that he has been implicated falsely before whom he was produced within 24 hours of his arrest. He, however, has not lodged any such complaint. On the other hand, learned trial Judge has considered and examined this part of the matter in its right perspective with the help of case law. For the sake of convenience, para 33 of the judgment under challenge is reproduced here as under:

> "33. Daulat Ram (DW2) was examined by the accused to show his false implication in the case by the police. It was stated by this defence witness that on 15.12.2011, he along with the accused was travelling in the last bus Enroute from Bhanjraru to Chamba. They had boarded the bus at Chilli and when they had reached at Zeero point Jasourgarh, the police had got the accused

disembarked from the bus and had detained him. However, I find that his testimony is of no help to the accused for the reason that he is a co-villager of the accused. Then, Daulat Ram had not produced any bus ticket so as to show that he indeed had been travelling along with the accused in the last bus Enroute from Bhanjraru to Chamba on 15.12.2011. Further, there is nothing on record to show that the accused had protested when he was wrongly arrested. The accused had been produced before the learned Chief Judicial Magistrate, Chamba on 17.12.2011. He had not complained before the learned Chief Judicial Magistrate, Chamba about his false implication. Therefore, the plea of the accused regarding false implication cannot be accepted. In **Som Nath Vs. State Cr. Appeal No. 341/07 decided on 13.11.2009,** a plea was taken that police officials were chasing some Sadhus and accused was falsely implicated. The defence witness was also examined to establish this plea. It was laid down by the Hon'ble High ourt that in the absence of any complaint at the earliest point of time such plea is not acceptable. Similarly, it was held in **Andre Moll vs. State of H.P. 2010 (3) Shim. L.C. 131** that when the accused was produced before the Magistrate for his remand within 24 hours of arrest and no complaint was made by him regarding false implication, such plea cannot be accepted. Therefore, in view of these binding precedents of the Hon'ble High Court, the plea regarding false implication is an afterthought and cannot be accepted."

18. True it is that no conviction can be recorded on the sole testimony of a police officer. However, if the evidence having come on record by his testimony is otherwise reliable and trustworthy, the same is legally admissible and can be relied upon to record the findings of conviction against the accused. It is worth mentioning that presumption that a person acts honestly applies as much in favour of a police officer viz-a-viz other persons and it is not proper to distrust and suspect him without there being good grounds therefor. Learned trial Judge has considered this aspect of the matter in its right perspective while placing reliance on the judgment of the Hon'ble Apex Court in ***Govindaraju alias Govinda vs. State by Sriampuram Police Station and another*** (2012) 4 SCC 722, ***Tika Ram vs. State of Madhya Pradesh*** (2007) 15 SCC 760, ***Girja Prasad vs. State of M.P.*** (2007) 7 SCC 625, ***Aher Khima vs. State of Saurshtra*** AIR 1956 SC 217, ***Baldev Singh vs. State of Haryana*** 2016 Cri. L.J. 154, ***Kashmir Singh vs. State of Punjab*** 1999 Cri. L. J. 2876, ***Jarnail Singh vs. State of Punjab*** JT 2011 (2) SC 120, ***Takashi Sato vs. State of H.P.*** 2010(3) Shim.L.C. 449, ***Ajmer Singh vs. State of Haryana*** (2010) 3 SCC 746, ***State of H.P. vs. Vinod Kumar*** 2002 (3) Shim. L.C. 137, ***Tahir vs. State (Delhi),*** (1996) 3 SCC 338 and ***Makhan Singh vs. State of Haryana*** JT 2015 (4) SC 222, which have been considered by this Court also in Criminal Appeal No. 305 of 2014 titled ***Sohan Lal vs. State of Himachal Pradesh*** decided on 2.11.2016.

19. Similar is the view of the matter taken by this Court in a recent judgment rendered in Cr. Appeal No. 374 of 2017 titled Het Ram vs. State of Himachal Pradesh decided on 26.3.2018.

20. Although difference in weight of the charas at the time when it was recovered and subsequently when weighed in the laboratory has not been raised as one of the grounds in the appeal, however, during the course of arguments, this omission has been brought to the notice of this Court by learned defence counsel. The submissions made in this regard are again without any substance for the reason that this aspect of the matter has also been dealt with appropriately by learned trial Court not only with the help of the given facts and circumstances but also the law applicable in such a situation. The scale of the I.O. kit cannot certainly be said to be so accurate to weigh the material like the recovered charas, whereas in the laboratory latest weighing machine/equipment is used to weigh a particular substance sent there for analysis, therefore, the weight of the contraband i.e. charas in the laboratory can reasonably be believed to be accurate as compared to the weight thereof with the scale in the I.O. kit. Otherwise also, the difference in weight of the recovered charas is only 14 grams which is not of such a nature so as to render the prosecution story qua its recovery from the accused improbable. Such variation in

weight may also occur as in the interregnum i.e. the day when it was recovered and the day when weighed in the laboratory got dried. Support in this regard can be taken from the judgment of the Apex Court in ***Dehal Singh vs. State of H.P. AIR 2010 SC 3594.*** Learned trial Court has taken into consideration this judgment while deciding this part of the controversy.

21. Therefore, the difference of 14 grams of charas when weighed in the laboratory is also not fatal to the prosecution case.

22. The so called variation in the shape of the recovered charas observed at the time of its recovery and when the sealed parcel opened in the Court has also been heavily pressed into service to belie the prosecution case. The entire prosecution evidence comprising oral as well as documentary is suggestive of that the recovered charas was in the shape of sticks/batties. It is stated so by PW-1 HC Shoukat Ali, PW-2 SPO Sanjeev Kumar and the I.O. HC Deva Nand (PW-9). However, when the sealed parcel containing the charas opened in the Court, the charas in the shape of broken rounds and small pieces was found sealed therein. This omission in the prosecution evidence has been pressed into service to persuade this Court to form an opinion that the case property was tampered with. Had it been so, the suggestions to this effect would have been given to PW-1 HC Shaukat Ali and PW-2 SPO Sanjeev Kumar during their cross-examination that the case property has been tampered with. However, no suggestion in this behalf was given to them. The prosecution witnesses, as such, had no occasion to clarify this aspect of the matter while in the witness-box. Even to the I.O. PW-9 HC Deva Nand also only it is suggested that in the statement of PW-1 HC Shoukat Ali it was recorded that the recovered charas was in the shape of batties (sticks). No suggestion to I.O. has also been given that the recovered charas was tampered with or that the same when taken out from the sealed parcel in the Court was not in that very shape in which it was recovered. The mere observation while recording the statement of PW-1 HC Shoukat Ali that the charas when taken out from the sealed parcel on its opening in the Court was in the shape of broken rounds and small pieces is not sufficient to form an opinion that the charas sealed in the parcel opened in the Court was not the same which was recovered from the accused during search and seizure. On the other hand, the possibility of the charas which was in the shape of sticks may have got broken into small pieces while in transit to the Forensic Science Laboratory cannot be ruled out. Anyhow, when there is no cross-examination of the prosecution witnesses in this regard nor it is one of the grounds of challenge to the impugned judgment, such plea seems to be raised by learned defence counsel merely for rejection.

23. It has also been pointed out during the course of arguments that seals were found to be broken when the parcel was produced in the Court. The ground so urged is again without any substance for the reason that all the seals were not found to be broken and rather it is one seal of impression 'A' was found partially damaged. Even the seals which were found to be damaged, its impressions were found visible on the parcel. The remaining seals of Forensic Science Laboratory and impression 'H' as well as 'A' were also found intact. Therefore, the breakage of few of the seals on the parcel also does not render the prosecution case doubtful nor is sufficient to persuade this Court to take a view of the matter contrary to the one taken by learned trial Court.

24. Now, coming to the link evidence, Ext. PW-9/A is the rukka scribed by PW-9 HC Deva Nand after completion of the search and seizure proceedings on the spot. It is well established that the same was taken to Police Station Tissa by PW-1 HC Shoukat Ali on the basis whereof FIR Ext. PW-7/B was registered against the accused. The entry in daily diary Ext. PW-1/D substantiates the prosecution case qua the police party having reached at the Police Station at 4:15 PM on 16.12.2011. The I.O. PW-9 HC Deva Nand handed over the sealed parcel to PW-7 SHO Jagdish Chand, Police Station Tissa. PW-7 SHO Jagdish Chand has resealed the parcel with 5 impressions of seal 'A'. The specimen of seal 'A' Ext. PW-4/B was also obtained on a piece of cloth. He also filled relevant entries in the NCB form in triplicate and affixed impression of seal 'A' thereon. He prepared the memo Ext. PW-4/A to prove that the parcel was resealed by him with seal 'A'. The parcel thereafter was handed over to PW-4 HC Avinder Singh for safe custody

in the malkhana. Rapat Ext. PW-4/G to this effect was also entered in the daily diary. The entries were made by PW-4 HC Avinder Singh qua receipt of the case property in the malkhana register, the extract whereof is Ext. PW-4/C. The copy of rukka Ext. PW-6/A and special report Ext. PW-6/B were sent to the office of Superintendent of Police Chamba through PW-2 SPO Sanjeev Kumar. The same were received by PW-6 HC Subhash Chand on 16.12.2011, the Reader to S.P. Chamba. He has entered both the documents at Sr. No. 14457/BD in the receipt register. PW-5 Const. Rajesh Kumar has taken the case property to FSL Junga along with the docket vide RC No. 148 of 2011 Ext. PW-4/D on 17.12.2011. He deposited the said articles at Forensic Science Laboratory on 19.12.2011 and produced the receipt before MHC on his return to the Police Station. The report Ext. PA reveals that the exhibit sent for analysis was containing extract of cannabis, hence, the sample of charas. Therefore, the link evidence produced by the prosecution also connects the accused with the commission of the offence.

25. Therefore, the overwhelming oral as well as documentary evidence, cogent and reliable, lead to the only conclusion that charas was recovered from the exclusive and conscious possession of accused Nurdh. He has, therefore, rightly been convicted and sentenced to undergo rigorous imprisonment for 7 years and to pay rupees twenty thousand as fine. Being so, the impugned judgment neither can be said to be based upon hypothesis, conjectures and surmises nor suffer from any illegality or irregularity on account of placing reliance on the testimony of the official witnesses. On the other hand, the prosecution has proved its case against the accused beyond all reasonable doubt.

26. For all the reasons hereinabove, this appeal fails and the same is accordingly dismissed. The impugned judgment is affirmed.

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

Sanjeev Kumar ... Petitioner

Versus

State of Himachal Pradesh ... Respondent

CrMP(M) No. 324 of 2018
Decided on April 2, 2018

Code Of Criminal Procedure, 1973- Section 439- **Protection of Children from Sexual Offences Act, 2012**- Sections 6 and 17- Bail- Accused allegedly enticed victim and took her away along with him - Both families were already known to each other - Also agreed for marriage of victim with accused, so no FIR was registered – Lateron, mother of accused brought victim to her parents house and left her there - No one thereafter came to took her back – Only then FIR was registered for said offences against accused and his mother - On facts, Victim allegedly remained in accused's house for three months, yet no attempt was made to register FIR by complainant- Initial report of medical officer and report of RFSL do not suggest commission of sexual intercourse with victim- Held- accused entitled for regular bail. (Para-7 and 8)

Cases referred:

Sanjay Chandra versus Central Bureau of Investigation (2012)1 Supreme Court Cases 49
Siddharam Satlingappa Mhetre versus State of Maharashtra and others, (2011) 1 SCC 694
Gurbaksh Singh Sibbia vs. State of Punjab, (1980) 2 SCC 565
Prasanta Kumar Sarkar versus Ashis Chatterjee and another (2010) 14 SCC 496

For the petitioner : Mr. Kulbhushan Khajuria, Advocate.

For the respondent : Mr. Dinesh Thakur, Additional Advocate General with Mr. Vikrant Chandel, Deputy Advocate General.
ASI Sat Pal, I/O, PS Tissa, District Chamba, Himachal Pradesh.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Bail petitioner namely Sanjeev Kumar, who is behind the bars since 9.12.2017, has approached this Court in the instant proceedings filed under Section 439 CrPC, praying therein for grant of regular bail in connection with FIR No. 133 of 2017 dated 7.12.2017, under Section 376 IPC and Sections 6 and 17 of Protection of Children from Sexual Offences Act, registered at Police Station, Tissa, District Chamba, Himachal Pradesh.

2. Sequel to order dated 26.3.2018, ASI Sat Pal has come present with the record. Mr. Dinesh Thakur, learned Additional Advocate General has also placed on record status report, prepared on the basis of investigation carried out by the investigating agency. Record perused and returned.

3. Perusal of record/ status report reveals that FIR detailed herein above, came to be lodged at the behest of the complainant namely Ram Dei, who alleged that her minor daughter was enticed and taken away in her absence by accused Sanjeev Kumar and his father on 25.9.2017. Allegedly on 26.9.2017, complainant contacted her daughter (prosecutrix), over the telephone, who disclosed that she has been brought to village Kanoi by accused Sanjeev Kumar and his father, Chaman Singh. Since families of complainant and accused were known to each other and they had also agreed for marriage of the victim and Sanjeev Kumar, complainant thought it not proper to register complaint in the Police Station against aforesaid illegal act of Sanjeev Kumar and his father. Allegedly after one and a half months of aforesaid incident, mother of petitioner, who is also accused in the case, visited the house of complainant alongwith victim but she left victim there and returned back to her house. Since for considerable time, none from the family of bail petitioner came back to take the victim, complainant with the assistance of Panchayat made an endeavour to contact bail petitioner and his parents but accused refused to accept her as such case referred to herein above came to be registered against them at Police Station Tissa, District Chamba.

4. Mr. Kulbhushan Khajuria, learned counsel representing the bail petitioner contends that it is quite apparent from the record that the daughter of the complainant had herself of her own volition joined the company of bail petitioner. He further stated that as per own statement of the complainant, victim remained with the family of the bail petitioner at Village Kanoi without there being any complaint, rather this fact was known to the complainant because during this period, she made no effort to contact her. Mr. Khajuria further contended that it has also come on record that families of victim and bail petitioner were known to each other for a considerable time and they had agreed for their marriage. While referring to the conduct of the mother of victim, learned counsel representing the bail petitioner contended that she despite having discovered the fact that her daughter is living with bail petitioner and his parents since 25.9.2017, never thought it proper to register the FIR, which ultimately came to be registered after a lapse of three months. While referring to the report of RFSL, learned counsel representing the bail petitioner contended that no case is made out against bail petitioner under Section 376 IPC and Sections 6 and 17 of the Protection of Children from Sexual Offences Act, as such, bail petitioner deserves to be enlarged no bail. While referring to judgments dated 19.1.2018 and 19.3.2018 passed by this Court in CrMP(M) N o. 39 of 2018 and CrMP No. 194 of 2018, learned counsel representing the bail petitioner contended that other co-accused have already been enlarged on bail, as such, present bail petitioner, who is a boy of tender age, deserves to be enlarged on bail.

5. Mr. Dinesh Thakur, learned Additional Advocate General, while opposing aforesaid prayer having been made by the learned counsel representing the bail petitioner, contended that keeping in view the gravity of the offence allegedly committed by bail petitioner, he does not deserve to be enlarged on bail. He further contended that true it is that as per forensic report, there is no recent evidence of sexual intercourse but that may not be sufficient to conclude that bail petitioner did not indulge in sexual assault, as has been categorically alleged by the victim. He further categorically stated that since in the report, it has been stated that there is no evidence of recent sexual intercourse, it cannot be concluded at this stage that the bail petitioner did not sexually assault the victim during the period she remained with him at his house. While fairly admitting that *Challan* stands filed in the competent Court of law and nothing is required to be recovered from the bail petitioner, Mr, Thakur, learned Additional Advocate General contended that in the event of petitioner being enlarged on bail, he may influence and tamper with evidence adduced on record by prosecution, as such, present petition may be dismissed.

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

7. It is quite apparent from the record made available to this Court that families of bail petitioner and victim were known to each other for quite considerable time and in fact they had agreed *inter se* them to solemnize marriage of victim with bail petitioner. Bail petitioner and other co-accused Chaman Singh had taken the victim to their house but despite that, she(complainant) failed to report the matter to the police, rather she remained quiet for almost 3-4 months. There is nothing on record suggestive of the fact that during this period, she made any attempt, if any, to lodge complaint in Gram Panchayat. Similarly, there appears to be no effort on her part to bring her daughter back to her house during the period of three months. Explanation rendered by complainant for delay in lodging FIR, does not appear to be plausible, rather there appears to be considerable force in the argument of learned counsel representing the bail petitioner that complainant was in the know of the things that her daughter is residing with the family of bail petitioner.

8. Leaving everything aside, perusal of medical evidence as well as report of RFSL placed on record, nowhere corroborates version put forth by victim and complainant. RFSL has categorically opined that there is no evidence of sexual intercourse. Even if the initial report of medical officer is perused, he has not given any conclusive report to the effect that victim was subjected to sexual intercourse, as such, this Court, at this stage, after having perused entire evidence collected on record by prosecution, sees no reason to keep the bail petitioner in custody for indefinite period. Guilt if any, of the bail petitioner is to be proved in accordance with law by prosecution by leading cogent and convincing evidence on record. Though, aforesaid aspect of the matter is to be considered and decided by the court below on the basis of evidence, if any, collected on record by prosecution, but this Court, sees no reason to let the bail petitioner incarcerate in jail for indefinite period, especially when *Challan* stands filed in the competent Court of law.

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

> "2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or

in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.

3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.

4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons."

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

"The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their

attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

11. Law with regard to grant of bail is now well settled. The Apex Court in **Siddharam Satlingappa Mhetre** versus **State of Maharashtra and others**, (2011) 1 SCC 694, while relying upon its decision rendered by its Constitution Bench in **Gurbaksh Singh Sibbia** vs. **State of Punjab**, (1980) 2 SCC 565, laid down the following parameters for grant of bail:-

"111. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. We are clearly of the view that no attempt should be made to provide rigid and inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualized for the grant or refusal of anticipatory bail. In consonance with the legislative intention the grant or refusal of anticipatory bail should necessarily depend on facts and circumstances of each case. As aptly observed in the Constitution Bench decision in Sibbia's case (supra) that the High Court or the Court of Sessions to exercise their jurisdiction under section 438 Cr.P.C. by a wise and careful use of their discretion which by their long training and experience they are ideally suited to do. In any event, this is the legislative mandate which we are bound to respect and honour.

112. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:

(i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

(ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) The possibility of the applicant to flee from justice;

(iv) The possibility of the accused's likelihood to repeat similar or the other offences.

(v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.

(vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.

(vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

(viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be

prevention of harassment, humiliation and unjustified detention of the accused;

(ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail." (Emphasis supplied)

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

13. The Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496**,** has laid down the following principles to be kept in mind, while deciding petition for bail:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(xi) reasonable apprehension of the witnesses being influenced; and

(xii) danger, of course, of justice being thwarted by grant of bail.

14. In view of above, present bail petition is allowed. Petitioner is ordered to be enlarged on bail subject to his furnishing bail bonds in the sum of Rs.1,00,000/- (Rs. One Lakh) with one local surety in the like amount, to the satisfaction of the Investigating Officer concerned, besides following conditions:

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

(l) He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

(m) He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and

(n) He shall not leave the territory of India without the prior permission of the Court.

(o) He shall surrender passport, if any, held by him.

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

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

The petition stand accordingly disposed of.

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

Smt. Sunita Sharma .....Petitioner.

Versus

Shri Kamal Prakash ....Respondent.

CMPMO No. 433 of 2014
Decided on : 2.4.2018.

Code of Civil Procedure, 1908- Order XXXIX Rules 1 and 2- Temporary Injunction – Plaintiff seeking right of way over part of land of defendant – Trial court declining temporary injunction but Appellate Court in appeal granting relief- Petition against- Held- Sale deed referred to and relied upon by District Judge for granting relief could be looked into only after leave to produce such documents is granted under Order 41 Rule 27 Code of Civil Procedure, 1908- Matter remanded to District Judge. (Para-4 and 5)

For the Petitioner: Mr. Neel Kamal Sood, Advocate.
For the Respondent: Mr. Suneet Goel, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The plaintiff/respondent herein (for short "plaintiff"), by constituting Civil Suit No. 98/1 of 2013, before the learned Civil Judge (Senior Division), Sirmaur District at Nahan, H.P., claimed vis-à-vis a portion of Khasra No. 1991, an apposite right of user thereof by him, as a path, for his accessing his house, and, obviously, espoused rendition of a decree of permanent prohibitory injunction, against, the defendant, for restraining him, from precluding him to use a portion of Khasra No. 1991, as a path. The common vendor of the parties at contest, is, one Prabhat Kumar, wherefrom the parties at contest hence purchased separate khasra numbers.

2. During the pendency of the aforesaid Civil suit, an application was preferred by the plaintiff, cast under the provisions of Order 39 Rule 1 and 2 readwith section 151 of Code of Civil Procedure, wherein he sought rendition of an ad-interim injunction, against, the defendant/petitioner herein (for short "petitioner"), for, hence restraining her, from, interfering with his using a portion of khasra No. 1991, as a path, for his accessing his house. The learned trial Court declined relief to the plaintiff. The plaintiff being aggrieved from the order rendered by the learned trial Court, preferred an appeal, therefrom before the learned District Judge, Sirmaur, District at Nahan, H.P. The learned District Judge granted relief to the plaintiff. The defendant being aggrieved, from, the order rendered by the learned District Judge, has hence preferred the present petition.

3. Even though certain pleaded admissions are made by the defendant vis-à-vis the averments borne in the plaint, with respect to right to user of path, by the plaintiff vis-à-vis a portion borne, on Khasra No. 1991. (i) However, the effect thereof, is, qua thereupon the plaintiff cannot perse, at this stage, make any capitalization (b) given the dimensions thereof being not admitted nor relevant demarcation(s), for ascertaining its commencement, and, ending and

besides its evident dimension not existing on record (c) whereas existence of the aforesaid material, is imperative, for rather rendering an apposite efficacious binding conclusive decree (d) nonetheless with Khasra No. 1991 being borne in a sale deed executed by Mr. Prabhat Kumar vis-à-vis the plaintiff, execution of sale deed whereof, is evidently prior to a sale deed executed by Mr. Prabhat Kumar vis-à-vis the defendant, (c) and, with right of user of path, borne on Khasra No. 1991, stands, espoused to be preserved vis-à-vis the vendee therein, and, when a covenant qua the aforesaid facet, is also borne in the earlier sale deed executed inter-se Mr. Prabhat Kumar, and, the plaintiff (d) thereupon the defendant, the latter vendee, is obliged to carry into effect the aforesaid apposite covenant, hence occurring in the earlier apposite sale deed. However, though the aforesaid espousals made before this Court appears to be borne in mind by the learned appellate Court, yet, when imputation of credence thereto, was without leave being granted, for adduction of the apposite sale deed into evidence, hence any reliance placed thereon, was neither appropriate nor legally proper.

4. Further more, even if the learned District judge, upon remand, of the apposite CMA vis-à-vis him, for his making an efficacious decision upon it, after, his earlier thereto passing orders in accordance with law, on an application already preferred under Order 41 Rule 27 readwith section 151 of CPC, (a) he may also, given old Khasra No. 1991 being ascribed, a new Khasra Number, (b) thereupon he may also ask for adduction of the apposite revenue records, for, his tallying therefrom "sabik" Khasra No. 1991 vis-à-vis the "hal" thereto ascribed Khasra Number.

5. Consequently, the learned District Judge is directed to make a pronouncement, upon, an application already preferred, under, the provisions of Order 41 Rule 27 readwith Section 151 of CPC also the plaintiff is permitted to adduce into evidence, the apposite documentary evidence(s) revealing therein the hitherto khasra No. 1991, and, also revealing the thereto ascribed new khasra number, for hence his being enabled to conclude qua both appertaining, to, the apt khasra Number, borne in the earlier sale deed.

6. Consequently, the petition is allowed. The learned District Judge is directed, to, after deciding an application preferred under Order 41 Rule 27 CPC readwith Section 151 of CPC, proceed to make an efficacious order upon CMA No. 96/6 of 2013. The parties are directed to appear before the learned District Judge on 23.4.2018. Pending applications, stand, also disposed of accordingly. Records be sent down.

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

Smt. Anjana Gupta ...Petitioner

Versus

Himachal Pradesh State Agricultural Marketing Board and another ...Respondents

Arb. Case No. 70 of 2017
Decided on: April 3, 2018

Arbitration and Conciliation Act, 1996- Section 9- Interim measures - Relief of – Committee constructed shops in market yard at Parala – Deciding to allocate them by way of auction - Also deciding Rs.6,000/- per month as minimum premium per shop- Bids invited thereafter- Petitioner being highest bidder with premium of Rs.32,000/- per month qua shop No.42, became its allottee and she also paid rental till May, 2016- Petitioner then raising dispute that she was liable to pay rent only at rate of Rs.6,000/- per month and stopped paying rent @ Rs.32,000/- per month - Respondents not responding to her request for reference of dispute for arbitration – Petition under Section 9 of Act before High Court for reference of dispute for arbitration and injunction against recovery of rental etc. – Held- Petitioner had offered bid of Rs.32,000/- per

month for shop in question in an open auction- Petitioner's offer was accepted by respondents and pursuant thereto an agreement was executed inter se parties- Petitioner also paid rental @ Rs.32,000/- per month till May, 2016- No dispute requiring reference for arbitration exists - Petition dismissed (Para-6 to 9)

For the Petitioner : Mr. Lakshay Thakur, Advocate.
For the Respondents : Mr. Sanjay Ranta, Advocate.

The following judgment of the Court was delivered:

Justice Sandeep Sharma, Judge.

Petitioner has approached this Court in the instant proceedings filed under Section 9 of Arbitration & Conciliation Act, 1996, seeking therein direction to respondent No. 2 to renew licence of Shop No. 42 and not to enforce recovery of amount in terms of notice dated 7.6.2017 (Annexure P-4). Petitioner has also prayed that the respondents be restrained from interfering in any manner, in the shop and business of the petitioner, pending disposal of the case at hand.

2. Necessary facts as emerge from the record are that the respondents constructed a market yard at Parala (Theog) by incurring an expenditure of Rs.12.76 Crore. In order to make the yard functional, respondent No.2 Committee decided to make allotment of shops at newly constructed market yard in open auction in terms of Bye Law No. 62 and Allotment Policy 2014. Respondent Committee invited applications through public notice dated 10.6.2015 published in daily newspaper "*Amar Ujala*". Respondents, with a view to invite greater competition and established businessmen, held its meeting dated 9.7.2015 prior to commencement of auction proceedings and decided that there would be minimum premium/base price for shops under respective categories i.e. Rs.6,000. Petitioner amongst others also participated in the auction qua Shop No. 42. Petitioner offered bid of Rs.32,000/- qua Shop No. 42 in the category of Traders under the Allotment Policy. She duly signed allotment proceedings of her own volition. As per record, petitioner also paid rent qua Shop No. 42 at the rate of Rs.32,000/- per month till May, 2016. Petitioner stopped paying rent after aforesaid date and raised a dispute that since minimum base price was fixed at Rs.6,000/- per month at the time of auction, she was liable to pay rent at the rate of Rs.6,000/- only. Vide legal notice dated 10.7.2017 (Annexure P-2), petitioner called upon the respondent Board to refer the dispute to arbitration in terms of Section 80 of the Himachal Pradesh Agricultural and Horticulture Produce Marketing (Development and Regulation) Act, 2005. Since no action was taken by the respondents pursuant to aforesaid notice, petitioner approached this Court by way of instant proceedings, praying therein for interim protection, as has been mentioned herein above.

3. Respondent Board, by way of reply, has categorically disputed the claim put forth by the petitioner that she was liable to pay rent of Rs.6,000/- only. Respondents have further stated in the reply that Rs.6,000/- was fixed as minimum base rent for the shops and tenderers were required to offer their bids over and above that amount. Since petitioner in the category of 'traders' offered price of Rs.32,000/- qua Shop No. 42, she could not be allowed to raise a dispute, if any, qua the same at this stage. It has been further stated in the reply that similarly situate persons have approached civil court, praying therein for same and similar relief, but the civil suits filed by them are still pending adjudication.

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

5. Having carefully perused the pleadings as well as documents adduced on record, there appears to be no force in the arguments of Mr. Lakshay Thakur, learned counsel representing the petitioner that she was liable to pay rent qua Shop No. 42 at the rate of Rs.6,000/- only. It is quite apparent from the record that the respondent Committee before

commencement of auction proceedings convened a meeting of all the tenderers and informed that minimum reserved price would be Rs.6,000/-, whereafter, all the tenderers including petitioner offered their respective bids qua the shops intended to be taken by them on rent.

6. Mr. Lakshay Thakur, learned counsel representing the petitioner was unable to dispute the fact that in the auction proceedings held on 9.7.2015, petitioner had offered bid of Rs. 32,000/- qua Shop No. 42. It is also not in dispute that the petitioner pursuant to allotment made in her favour in open auction executed agreement with the respondents, wherein, she categorically agreed to pay rent at the rate of Rs.32,000/- qua Shop allotted to her in the open auction, which she paid till May, 2016. Thereafter, petitioner stopped paying rent on the pretext that respondents could not charge rent over and above Rs.6,000/- fixed at the time of auction.

7. Though Section 80 of the Act *ibid* suggests that in the event of dispute, if any, *inter se* parties, matter shall be resolved through conciliation and arbitration but this Court is persuaded to agree with the contention of Mr. Sanjay Ranta, learned counsel representing the respondents that there is no dispute *inter se* parties, which can be referred to arbitration.

8. Admittedly, in the case at hand, petitioner herself participated in the open auction and offered amount of Rs. 32,000/- qua Shop No. 42 and as such, she can not be allowed to plead at this stage that the respondents could not charge amount over and above Rs. 6,000/- per month qua the shop in question. Otherwise also, aforesaid contention of the petitioner is without any merit and deserves outright rejection. Apparently, before commencement of auction proceedings, all the tenderers including petitioner were informed that they are supposed to offer price over and above Rs.6,000/- i.e. minimum base rent, whereafter, all the tenderers including petitioner offered their respective price/bids qua the shops intended to be taken by them on rent.

9. Since petitioner by way of agreement agreed to pay Rs.32,000/- qua Shop No. 42, there can not be any dispute qua the same and as such, there is no dispute, if any, *inter se* parties qua the same, which is required to be referred to arbitration in terms of Section 80 of the Act *ibid*.

10. Consequently, in view of detailed discussion made hereinabove, this Court sees no merit in the present petition and same is dismissed. Pending applications, if any, are also disposed of. Interim orders, if any, passed in the present petition are vacated.

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

Harinder Kumar and others .....Petitioners.
Versus
M/S S.S.V Traders ....Respondent.

Cr.M.P No. 335 of 2018 in
Cr. Revision No. 81 of 2018.
Decided on : 3.4.2018.

Code Of Criminal Procedure, 1973- Section 389(1)- **Negotiable Instruments Act, 1881**- Section 138- Suspension of Sentence- Held- Appellate Court while suspending sentence imposed by trial court, can direct appellant to deposit as condition precedent, fine or atleast part thereof which is just or conscionable within certain period. (Para-2 and 3)

Case referred:
Stanny Felix Pinto v. Jangid Builders Pvt. Ltd., AIR 2001 SC 659

For the Petitioners: Mr. P.S Goverdhan, Advocate.
For the Respondent: Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

Under the impugned judgment, the learned trial Court convicted the petitioner herein, for his committing an offence punishable under Section 138 of the Negotiable Instruments Act, 1881. The relevant portion of the sentence imposed upon the convict is extracted hereinafter:

> **".....convict is sentenced to undergo simple imprisonment for a period of six months and to pay a fine of Rs.1,50,000/- . In the event of default in making payment of fine convict shall be liable to undergo further simple imprisonment for a period of one month....."**

2. As mandated in a judgment, of the Hon'ble Supreme Court reported in AIR 2001 SC 659, in case titled as ***Stanny Felix Pinto*** v. ***Jangid Builders Pvt. Ltd.,*** relevant portion whereof is extracted hereinafter, qua as a pre condition for suspending the execution of sentence, of imprisonment imposed upon the convict, it being not imperative for the Court, to, direct the convict to deposit the entire fine amount/compensation amount, yet imposition, qua depositing of some reasonable per centum thereof solitarily being sufficient, to, aptly enable the Court, while excising its jurisdiction, to suspend the execution of sentence of imprisonment imposed upon the convict, to hence make an apposite order qua its execution being suspended.

> **".....When a person was convicted under Section 138 of the Negotiable Instruments Act and sentenced to imprisonment and fine he moved the superior court for suspension of the sentence. The High Court while entertaining his revision granted suspension of the sentence by imposing a condition that part of the fine shall be remitted in court within a specified time. It is against the said direction that this petition has been filed. In our view the High Court has done it correctly and in the interest of justice. We feel that while suspending the sentence for the offence under Section 138 of the Negotiable Instruments Act it is advisable that the court imposes a condition that the fine part is remitted within a certain period. If the fine amount is heavy, the court can direct at least a portion thereof to be remitted as the convicted person wants the sentence to be suspended during the pendency of the appeal. In this case the grievance of the appellant is that he is required by the High Court to remit a huge amount of rupees four lakhs as a condition to suspend the sentence. When considering the total amount of fine imposed by the trial court (twenty lakhs of rupees) there is nothing unjust or unconscionable in imposing such a condition. Hence, there is no need to interfere with the impugned order. As such no notice need be issued to the respondent....."**

3. In aftermath, subject to deposit of 15% of the fine amount within four weeks, if not already deposited, and subject to the petitioner's furnishing within four weeks, from today, personal and surety bonds in the sum of Rs.50,000/- each to the satisfaction of the learned trial Court, and also with an undertaking therein to (a) appear in the Court as and when called upon to do so (b) and in case the instant Revision is dismissed, the petitioner shall surrender before the learned trial Court for receiving the sentence, thereupon the operation/execution of the sentence recorded on 9.12.2016 by the learned Judicial Magistrate, Ist Class, Court No.2, Kasuali, District Solan, H.P., in case No. 43/3 of 2013, and, as stands affirmed by the learned Additional Sessions Judge-II, Solan, District Solan, H.P in criminal appeal No. 2 ASJ-II/10 of 2017 on 28.2.2018, is suspended till further orders. However, it is made clear that in event of the petitioner herein omitting to comply with the conditions aforesaid within the stipulated period aforesaid,

thereupon, the order suspending the execution of sentence of imprisonment imposed upon him shall stand vacated, and, the Registry shall issue warrants for committing the petitioner herein, to judicial custody.

In view of the above, the application stands disposed of.

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

M/s Dr. R.K. Puri(registered Firm) and others ...Plaintiffs

Versus

M/S Costal Project Pvt. Ltd. and others ...Defendants

Civil Suit No. 80 of 2016
Decided on: April 3, 2018

Code of Civil Procedure, 1908- Order XXXVII- Summary procedure - Defendants No.1 and 2 hired machinery of plaintiff from time to time to execute work allotted to them by NHPC – Different work orders were issued by defendants No.1 and 2 in favour of plaintiff qua different work – Suit is for ascertained sum based on written contract - Held- Suit is maintainable under Order XXXVII. (Para-10 and 11)

Limitation Act, 1963- Sections 18 and 19- Schedule- Article 18- Extension of period of limitation- Recovery suit can be filed within three years of part payment/date of acknowledgment, if same is made by party within limitation. (Para-15)

Cases referred:

Ajay Bansal v. Anup Mehta, AIR 2007 SC 909

Vijaya Home Loans Ltd. v. M/s. Crown Traders Ltd., AIR 1998 Delhi 183

For the plaintiffs	Mr. Devender K. Sharma, Advocate.
For the defendants	Defendants No.1 and 2 proceeded against *ex parte*. Defendant No.3 deleted.

The following judgment of the Court was delivered:

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

Instant suit under Order 37 CPC has been filed by the plaintiffs for recovery of Rs.85,83,780/- (principal amount) plus Rs.37,20,538/-(interest) at the rate of 10% per annum upto 20.6.2016, total amounting to Rs.1,23,04,318/- against the defendants, averring therein that plaintiff No. 1 is a Firm registered under Indian Partnership Act, 1932 having its office at H.N. 98/7, Upper Samkhetar Mandi, Himachal Pradesh and plaintiffs No.2 and 3 are the partners of plaintiff No. 1. Earlier Dr. R.K. Puri was the sole proprietor of the plaintiff-Firm but after his death, plaintiff Nos. 2 and 3 became partners of the plaintiff-Firm. Plaintiff has also placed on record photocopies of registration certificates, legal heir certificate, partnership deeds and death certificates of Dr. R.K. Puri and Dipanshu Puri. As per plaintiffs, they possessed heavy earth moving machinery, which they provided on hire basis. Proforma defendant i.e. National Hydroelectric Power Corporation (deleted from array of parties) awarded work of Hydro Electric Power Project Stage-II Sainj to defendant No. 1 and this work was being executed and supervised by defendant No.1 through defendant No. 2. Defendants No.1 and 2 approached plaintiff-Firm

through its proprietor Dr. R.K. Puri in July, 2011 with a proposal to hire machinery from the firm for excavation work/trenching work on their site. Subsequently defendants No.1 and 2 placed/issued various work orders to the plaintiff-Firm for execution of work on the site. Detail of work done by the plaintiff-Firm, as has been detailed in the plaint, is reproduced herein below (verbatim):

"**SCHEDULE OF WORK**

i) Volvo-Excavator-140

(a) This machine is hired by the defendant vide work Order No. 276, dated 1-8-2013 at the monthly rate of Rs.1,85,000/- P.M. The main terms and condition of this work was that the Diesel is to be provided by the defendants for running the Machine and a log book is also maintained by defendants pertaining to every vehicle in which the details of work done every day by that vehicle is to be recorded, which Log Book is maintained by the site Incharge of defendants No. 1 and 2, on the basis of which the monthly bill is to be prepared and this lo book remained in the custody of the employees of defendants.

That vide this work order the machine worked as under: -

Sr. No.	Period	Amount
1.	9-8-2013 to 31-8-2013	1,41,833/-
2.	1-9-2013 to 30-9-2013	1,85,000/-
3.	1-10-2013 to 31-10-2013	1,85,000/-
	Total	**5,11,833/-**

Photo Copy of Log Book is attached herewith.

(b) That the above work order No-276 was further extended on dated 1-11-2013 to 30-11-2013, the detail of work done on the spot is duly given in the log-book and the following work is done under the extended order as under:-

Sr. No.	Period	Amount
1.	1-11-2013 to 30-11-2013	1,85,000/-
	Total	**1,85,000/-**

Photo Copy of Log Book is attached herewith.

(c) That the above work order No-276 was further extended on dated 31-1-2014 and the following work is done under the extended order as under:-

Sr. No.	Period	Amount
1.	31-1-2014 to 28-2-2014	1,85,000/-
2.	1-3-2014 to 31-3-2014	1,85,000/-
	Total	**3,70,000/-**

Photo Copy of Log Book is attached herewith.

(d) That the plaintiff also worked with the above said machines earlier also as under: -

Sr. No.	Period	Amount
1.	20-7-2012 to 30-8-2012	2,46,667/-
2.	1-12-2013 to 31-12-2013	1,85,000/-
	Total	**4.31,667/-**

Photo Copy of Log Book is attached herewith.

That the total amount payable by the defendants to the plaintiff for the work done by this Machine for the above referred period comes to Rs.14,98,500/-.

That the amount of interest on this entire payment at the rate of Rs.10% P.A. up to 20-6-2016 from due date comes to Rs.4,63,222/-.

As such the total amount alongwith interest of this machine up to 20-6-2016 comes to Rs.19,61,722/-.

ii). Excavator Ex-110

(a). This machine is hired by the defendant vide work Order No-07, dated 7-7-2011 at the monthly rate of Rs.1,50,000/- P.M. on the same terms and conditions.

Original of work order No-07 is attached herewith.

That vide this work order the machine worked as under:

Sr. No.	Period	Amount
1.	7-7-2011 to 31-7-2011	1,25,000/-
2.	1-8-2011 to 31-8-2011	1,50,000/-
3.	1-9-2011 to 21-9-2011	1,05,000/-
	Total	**3,80,000/-**

(b). That the defendants also further awarded the work vide Work order No-61, dated 1-10-2011 to this machine.

Original of work order No-61 is attached herewith.

That vide this work order the machine worked as under:

Sr. No.	Period	Amount
1.	1-10-2011 to 31-10-2011	1,50,000/-
2.	1-11-2011 to 15-11-2011	75000/-
	Total	**2,25,000/-**

Photo Copy of Log Book is attached herewith.

(c). That the defendants also further awarded the work vide Work order No-232, dated 27-1-2013 to this machine. **Original of work order No-232 is attached herewith.**

That vide this work order the machine worked as under:

Sr. No.	Period	Amount
1.	27-1-2013 to 27-2-2013	1,30,000/-
2.	28-2-2013 to 31-3-2013	1,30000/-
	Total	**2,60,000/-**

(d). That the above said machine also worked for a following period, the detail of work done on the spot is duly maintained in the log-book and the following work is done under this machine as under:-

Sr. No.	Period	Amount
1.	20-9-2011 to 30-9-2011	50,000/-
2.	16-11-2011 to 30-11-2011	75,000/-
3.	This Machine worked in Dec., 2011 for 18 Days	90,000/-
4.	1-4-2012 to 30-4-2012	1,50,000/-

5.	1-4-2013 to 25-4-2013	1,25,000/-
	Total	**4,90,000/-**

Photo Copy of Log Book is attached herewith.

That the total amount payable by the defendants to the plaintiff for the work done by this Machine for the above referred period comes to Rs.13,55,000/-.

That the amount of interest on this entire payment at the rate of Rs.10% P.A. up to 20-6-2016 from due date comes to Rs.6,77,113/-.

As such the total amount alongwith interest of this Machine up to 20-6-2016 comes to Rs.20.32,113/-.

iii) Excavator CAT-320:

(a). This machine is hired by the defendants vide work Order No-11, dated 08-9-2011, at the monthly rate of Rs.2,50,000/- P.M. on the same terms and conditions:

Original Work Order No-11 is attached herewith.

That vide this work order the machine worked as under:

Sr. No.	Period	Amount
1.	10-9-2011 to 30-9-2011	1,66,666
2.	1-10-2011 to 31-10-2011	2,50,000/-
3.	1-11-2011 to 10-11-2011	83,333/-
	Total	**4,99,999/-**

Photo Copy of Log Book is attached.

(b). This machine is further hired by the defendants vide work Order Nno-129-A, dated 1-3-2012 on the same terms and conditions: **Original Work Order No-129-Ais attached herewith.**

That vide this work order the machine worked as under:

Sr. No.	Period	Amount
1.	1-3-2012 to 31-3-2012	2,50,000/-
2.	1-4-2012 to 30-4-2012	2,50,000/-
	Total	**5,00,000/-**

Photo Copy of Log Book is attached.

(c). This machine is further hired by the defendants vide work Order No-199-A, dated 1-2-2013 on the same terms and conditions. **Photo Copy of Work Order No-199-A, Photo Copy of extension letter of work and are attached herewith.**

That vide this work order the machine worked as under:

Sr. No.	Period	Amount
1.	1-2-2013 to 28-2-2013	2,50,000/-
2.	1-3-2013 to 31-3-2013	2,50,000/-
3.	1-4-2013 to 30-4-2013	2,50,000/-
4.	1-5-2013 to 31-5-2013	2,50,000/-
5.	1-8-2013 to 31-8-2013	2,50,000/-
6.	1-9-2013 to 30-9-2013	2,50,000/-
7.	1-10-2013 to 5-10-2013	41,667/-

	Total	**15,41,667/-**

Photo Copy of Log Book is attached.

That the total amount payable by the defendants to the plaintiff for the work done by this Machine for the above referred period comes to Rs.25,41,666/-.

That the amount of interest on this entire payment at the rate of Rs.10% P.A. up to 20-6-2016 from due date comes to Rs.10,44,095/-.

iv) Second Excavator CAT-320:

(a). This machine is hired by the defendants vide work No-280, dated 14-8-2013, on the same terms and conditions the following work was assigned to the plaintiff by the defendants, which is completed by another Machine. **Photo Copy of Work Order No-280 is attached herewith.** The details of work as under:

Sr. No.	Period	Amount
1.	**15-8-2013 to 29-8-2013**	**2,10,000/-**

Photo Copy of Log Book is attached.

(b). That the above said machine also worked for a following period on the same terms and conditions the following work is done under this machine as under:-

Sr. No.	Period	Amount
1.	11-11-2011 to 30-11-2011	1,66,666/-
2.	1-12-2011 to 31-12-2011	2,50,000/-
3.	1-6-2013 to 30-6-2013	2,50,000/-
4.	1-7-2013 to 31-7-2013	2,50,000/-
	Total	**9,16,666/-**

Photo Copy of Log Book is attached herewith.

That the total amount payable by the defendants to the plaintiff for the work done by these above said Machines for the above-referred period comes to Rs.11,26,666/-.

That the amount of interest on this entire payment at the rate of Rs.10% P.A. up to 20-6-2016 from due date comes to Rs.4,50,110/-.

As such the total amount alongwith interest of this Machine up to 20-6-2016 comes to Rs.15,76,776/-.

v) That a separate work order No-199, dated 10-8-2012 was awarded by the defendants to the plaintiff for the construction of Coffer Dam and removal of Muck and debris at Trench Weir PHEP Stage-II Sainj, which work is to be complete from 10-8-2012 to 25-11-2012 and with mutual discussion, the value of the work is determined as Rs.22,02,355/- (Rupees Twenty Two Lac, Three Thousand Three Hundred fifty Five), which work is also completed by the plaintiff as per to the terms and conditions of the work order with in stipulated time. However, the defendants assessed the value of the work done by the plaintiff on the spot Rs.20,61,918/-. **Original Work Order No-199, and completion report of the work are attached herewith.**

That the total amount payable by the defendants to the plaintiff for the work done by **him comes to Rs.20,61,918/-.**

That the amount of interest on this entire payment at the rate of Rs.10% P.A. up to 20-6-2016 from due date comes to Rs.8,38,513/-.

As such the total amount alongwith interest of this Machine up to 20-6-2016 comes to Rs.29,00,431/-.

vi). One ACE HYDRA 12-T:-

This machine is hired by the defendant vide work Order No-07-A, dated 1-8-2011 at the monthly rate of Rs.50,000/- P.M. on the same terms and conditions. **Original Work Order No-07A is attached herewith.**

That vide this work order the machine worked as under:

Sr. No.	Period	Amount
1.	1-8-2011 to 31-8-2011	50,000/-
2.	1-9-2011 to 30-9-2011	50,000/-
3.	1-10-2011 to 31-10-2011	50,000/-
4.	1-11-2011 to 30-11-2011	50,000/-
5.	1-12-2011 to 31-12-2011	50,000/-
	Total	**2,50,000/-**

Photo Copy of Log Book is attached herewith.

That the total amount payable by the defendants to the plaintiff for the work done by this Machine for the above referred period comes to **Rs.2,50,000/-.**

That the amount of interest on this entire payment at the rate of Rs.10% P.A. up to 20-6-2016 from due date comes to Rs.1,39,382/-.

As such the total amount alongwith interest of this Machine up to 20-6-2016 comes to Rs.3,89,382/-.

vii). JCB Machine:-

(a). This Machine is hired by the defendant vide work Order No-271, dated 18-6-2013 at the monthly rate of Rs.80,000/- P.M. on the same terms and conditions.

Photo Copy of Work Order No-271 is attached herewith.

That vide this work order the machine worked as under:

Sr. No.	Period	Amount
1.	18-6-2013 to 30-6-2013	34,667/-
2.	1-7-2013 to 31-7-2013	80,000/-
3.	1-8-2013 to 31-8-2013	80,000/-
4.	1-9-2013 to 30-9-2013	80,000/-
5.	1-10-2013 to 31-10-2013	80,000/-
	Total	**3,54,667/-**

Photocopy of Log Book is attached herewith.

That the total amount payable by the defendants to the plaintiff for the work done by this Machine for the above referred period comes to **Rs.3,54,667/-**.

That the amount of interest on this entire payment at the rate of Rs.10% P.A. up to 20-6-2016 from due date comes to Rs.1,08,103/-.

As such the total amount alongwith interest of this Machine up to 20-6-2016 comes to Rs.4,62,770/-.

As such the total amount recoverable from the defendants by plaintiff up to 20-6-2016 alongwith interest comes to Rs.1,29,08,955/-."

2. As per detail furnished herein above, an amount of Rs.1,29,08,955/- is recoverable from the defendants by the plaintiff-Firm upto 20.6.2016 alongwith interest. Plaintiff-Firm has further averred that out of aforesaid amount, defendants had paid Rs.5.00 lakh on 30.6.2013 and Rs. 1,04,637/- on 23.8.2013. Though, the defendants had assured plaintiffs to make the balance payment within shortest possible time but till date, no money was paid and as such, plaintiff-Firm was compelled to issue a legal notice dated 15.3.2016 calling upon the defendants to make the payment good within stipulated period, however, fact remains that the defendants failed to make payment good within the time as stipulated in the legal notice as such, plaintiff-Firm was compelled to initiate instant proceedings in this Court.

3. As per plaintiffs, cause of action accrued to them on different dates i.e. firstly on 7.7.2011, when defendants vide Work Order dated 11.8.2011 called upon the plaintiffs to start work on 7.7.2011 and to complete the same on or before 21.9.2011. Plaintiffs have also placed on record as many as six work orders to demonstrate that they were awarded work orders by defendants on different dates. On 30.6.2013 and 23.8.2013, defendants made payments to the plaintiff to the extent of Rs.5,00,000/- and Rs.1,04,637/- through RTGS. Lastly, plaintiffs sent a legal notice dated 15.3.2016 through registered post, calling upon the defendants to make the payment good. Plaintiffs have further averred in the plaint that defendants vide communication dated 23.8.2013, while making part payment have admitted the claim of the plaintiffs and as such, they are liable to pay the amount claimed in the present suit.

4. Since the defendants despite service failed to put in appearance, they came to be proceeded against *ex parte* vide order dated 23.5.2017. Subsequently, defendant No. 3 moved an application for setting aside *ex parte* order and vide order dated 19.9.2017, this Court allowed the application i.e. OMP No. 332 of 2017 having been filed by defendant No. 3 and recalled its order dated 23.5.2017 qua defendant No. 3. This Court vide order dated 19.9.2017 also permitted defendant No.3 to participate in the proceedings. Defendant No. 3 by way of OMP No. 346 of 2017 sought permission of this Court to defend the suit on behalf of defendant No. 3, however, fact remains that plaintiffs in their reply to the application categorically stated that they have no claim against defendant No.3 as such, this Court vide order dated 27.2.2018, ordered for deletion of name of defendant No.3 from the array of respondents.

5. As has been taken note herein above that defendant Nos. 1 and 2 despite service failed to put in appearance, instant suit having been filed by plaintiffs under Order 37 CPC needs to be determined/ adjudicated on the basis of material adduced on record by the plaintiffs, being a summary suit.

6. Before ascertaining the correctness of the claim put forth by the plaintiffs, it would be apposite to make detailed reference to Order 37 CPC as under:

"ORDER XXXVII : SUMMARY PROCEDURE [***]

[1. Court and classes of suits to which the Order is to apply

(1) This Order shall apply to the following Courts, namely :-

(a) High Courts, City Civil Courts and Courts of Small Causes: and

(b) other Courts:

Provided that in respect of the Courts referred to in clause (b), the High Court may, by notification in the Official Gazette, restrict the operation of this Order only to such categories of suits as it deems proper, and may also, from time to time, as the circumstances of the case may require, by subsequent notification in the official Gazette, further restrict, enlarge 6r vary, the categories of suits to be brought under the operation of this Order as it deems proper.

(2) Subject to the provisions of sub-rule (1), the Order applies to the following classes of suits, namely:-

(a) suits upon bills of exchange, hundies and Promissory notes:

(b) suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising,-

(i) on a written contract, or

(ii) on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or

(iii) on a guarantee, Where the claim against the principal is in respect of a debt or liquidated demand only.]

[7][2. Institution of summary suits

(1) A suit, to which this Order applies, may if the plaintiff proceed desires to desires hereunder, be instituted by presenting a plaint which shall contain,-

(a) a specific averment to the effect that the suit is filed under this Order;

(b) that no relief, which does not fall within the ambit of this rule; has been claimed in the plaint; and

(c) the following inscription, immediately below the number of the suit in the title of the suit, namely :-

"(Under Order XXXVII of the Code of Civil Procedure, 1908)."

(2) The summons of the suit shall be in Form No. 4 in Appendix B or in such other Form as may, from time to time, be prescribed.

(3) The defendant shall not defend the suit referred to in sub-rule (1) unless he enters an appearance and in default of his entering an appearance the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree for any sum, not exceeding the sum mentioned in the summons, together with interest at the rate specified, if any, up to the date of the decree and such sum for costs as may be determined by the High Court from time to time by rules made in that behalf and such decree may be executed forthwith.]

[8][3. Procedure for the appearance of defendant

(1) In a suit to which this Order applies, the plaintiff shall, together with the summons under rule 2, serve on the defendant a copy of the plaint and annexures thereto and the defendant may, at any time within ten days of such service, enter an appearance either in person or by pleader and, in either case, he shall file in Court an a address for service of notices on him.

(2) Unless otherwise ordered, all summonses, notices and other judicial processes, required to be served on the defendant, shall be deemed to have been duly served on him if they are left at the address given by him for such service.

(3) On the day of entering the appearance, notice of such appearance shall be given by the defendant to the plaintiff's pleader, or, if tile plaintiff sues in person, to the plaintiff himself, either by. notice delivered at or sent by a pre-paid letter directed to the address of the plaintiff's pleader or of the plaintiff, as the case may be.

(4) if the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgement in Form No. 4A in Appendix B or such other Form as may be prescribed from time to time, returnable not less than ten days from the date of service supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit.

(5) The defendant may, at any time within ten days from the service of such summons for judgement, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to

defend such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just:

Provided that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous vexatious:

Provided further that, where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court.

(6) At the hearing of such summons for judgement,-

(a) if the defendant has not applied for leave to defend, or if such application has been made and is refused, the plaintiff shall be entitled to judgement forthwith; or

(b) if the defendant is permitted to defend as to the whole or any part of the claim, the Court or Judge may direct him to give such security and within such time as may be fixed by the Court or Judge and that, on failure to give such security within the time specified by the Court or Judge or to carry out such other directions as may have been given by the Court or Judge, the plaintiff shall be entitled to judgement forthwith.

(7) The Court or Judge may, for sufficient cause shown by the defendant, excuse the delay of the defendant in entering an appearance or in applying for leave to defend the suit.]

4. Power to set aside decree

After decree the Court may, under special circumstances set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to de, and on such terms as the Court thinks fit.

5. Power to order bill, etc., to be deposited with officer of Court

In any proceeding under this Order the Court may order the bill, hundi or note on which the suit is founded to be forthwith deposited with an officer of the Court, and may further order that all proceedings shall be stayed until the plaintiff gives security for the costs thereof.

6 Recovery of cost of noting non-acceptance of dishonoured bill or note

The holder of every dishonoured bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same for non-acceptance or non-payment, or otherwise, by reason of such dishonour, as he has under this Order for the recovery of the amount of such bill or note.

(b) Procedure in suits

Save as provided by this Order, the procedure in suits hereunder shall be the same as the procedure in suits instituted in the ordinary manner."

7. Rule (1) of Order 37 provides for summary procedure for suits which are based upon bills of exchange, Hundies and promissory notes or suits where plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising on a written contract, or on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only. Similarly, Rule 2 of Order 37 relates to institution of summary suits and provides that plaintiff may make a specific averment that the suit has been filed under Order 37 and that no relief which does not fall within the scope and ambit of Order 37 has been claimed.

8. Rule(3) further provides procedure for appearance of defendant. In the case at hand, plaintiffs have specifically mentioned in the head note of suit that it is a summary suit under Order 37 CPC for recovery of amount. Sub-rule (3) of Rule 2 specifically provides that in case defendant does not put in appearance, it shall be deemed that he has admitted the claim.

9. In the case at hand, admittedly defendants No.1 and 2 despite service, chose not to remain present in the court and as such, this Court before proceeding with the matter, needs to ascertain whether the claim put forth by plaintiffs in the instant suit could be sought by them by way of summary proceedings as envisaged under Order 37 or not?

10. Documents placed on record certainly suggest that defendant No. 1 issued work orders in favour of the plaintiffs for the works as detailed herein above, repeatedly. First work order came to be issued in favour of the plaintiffs vide communication dated 11.8.2011, whereby defendants placed work order for hire charge of the Excavator 110 for CPL at PHEP Stage-II Sainj. In terms of this order, plaintiffs were supposed to commence work on the site on or before 7.7.2011 and they had to complete the same on or before 21.9.2011. Similarly, documents filed alongwith suit reveal that as many as six work orders dated 8.9.2011, 30.11.2011, 29.2.2012 and 10.8.2012, 1.8.2013 and 31.1.2014 came to be issued in favour of the plaintiffs qua different works. Undisputedly, all the work orders referred to herein above contain general terms and conditions including rates qua the work required to be accomplished on the site by the plaintiffs in terms of work orders awarded in their favour by the defendants. Last work order came to be issued to the plaintiffs vide communication dated 18.6.2013, whereby defendant No.1 agreed to pay Rs.80,000/- to the plaintiffs as hire charge of JCB and such work was to be completed within a period of four months from the date of start i.e. 18.6.2013.

11. It is abundantly clear from the perusal of aforesaid work orders placed on record by plaintiffs that defendants were required to pay certain amounts to the plaintiffs qua the works done by them on the site in terms of work orders referred to herein above. Confirmation of accounts issued by defendant No.1 dated 30.9.2015 further suggests that defendants made certain payments in terms of work orders placed by it to the plaintiffs, wherein defendant No.1 admittedly claimed that they owe an amount of Rs.62,69,045/- to the plaintiffs on account of works done by them in terms of work orders referred to herein above. Though, aforesaid amount has been disputed by the plaintiffs by stating that they are entitled to an amount of Rs.85,83,780/- and not Rs.62,69,045/-, but it is quite apparent from the documents available on record, especially confirmation of accounts dated 30.9.2015 that plaintiffs have not only executed work on the site in terms of work orders placed to it, rather they have received part payment of Rs.6,04,637/-.

12. Having perused work orders and confirmation of accounts issued by defendant No.1, this Court is convinced and satisfied that plaintiffs are within their right to institute summary suit under Order 37 to recover debt/money payable by defendants, alongwith interest.

13. This court further finds from the pleadings as well as documents adduced on record by the plaintiffs that cause of action accrued to the plaintiffs firstly on 7.7.2011, when defendants placed work order for hire charge of Excavator Ex.-110 vide work order No. 07. Subsequent to aforesaid work order, defendants repeatedly issued work orders in favour of the plaintiffs specifically providing therein rate to which plaintiffs were held entitled. Lastly, as has been taken not above defendants vide communication dated 18.6.2013, again placed work order in favour of the plaintiffs and agreed to pay a sum of Rs.80,000/- per month as hire charges of JCB. Subsequently, vide communication dated 30.9.2015, defendants not only acknowledged their liability to pay certain amounts in terms of work orders placed by them on different dates, rather, also claimed that an amount of Rs.6,04,637/- stands paid to the plaintiffs.

14. Having carefully perused documents referred herein above, this Court finds that summary suit having been filed by plaintiffs is well within limitation in terms of Article 18 of Schedule of Period of Limitation under Part I- suits relating to accounts and further Sections 18 and 19 of the Limitation Act. Ss. 18 and 19 of Limitation Act are reproduced hereunder:

"18. Effect of acknowledgment in writing.—

(1) Where, before the expiration of the prescribed period for a suit of application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received.

Explanation.—For the purposes of this section,—

(a) an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set-off, or is addressed to a person other than a person entitled to the property or right;

(b) the word "signed" means signed either personally or by an agent duly 444authorized in this behalf; and

© an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right.

19. Effect of payment on account of debt or of interest on legacy.—Where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy or by his agent duly authorized in this behalf, a fresh period of limitation shall be computed from the time when the payment was made:

Provided that, save in the case of payment of interest made before the 1st day of January, 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment." Explanation.—For the purposes of this section,—

Explanation.—For the purposes of this section,—"

(a) where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment; (a) where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment;"

(b) "debt" does not include money payable under a decree or order of a court. (b) "debt" does not include money payable under a decree or order of a court."

15. Bare perusal of aforesaid provisions of law suggests that suit, if any, for recovery of debt/money can be filed by plaintiff within a period of three years from the date of part payment and/or from the date of acknowledgement, if the same is made by the person liable to pay the debt before expiration of the prescribed period.

16. In the case at hand, admittedly, defendants in the confirmation of accounts dated 30.9.2015, have not only admitted liability to the extent of 62,69,045/- but have also admitted that they have made part payment of Rs.6,04,637/- and as such, if period of limitation is counted from the date of aforesaid confirmation of accounts, suit having been filed by plaintiffs definitely is well within limitation as prescribed under Article 18 of The Schedule "Period of Limitation" Part I-Suits relating to accounts of Limitation Act, which is reproduced hereunder:

"Description of suit	Period of limitation	Time from which period begins to run
18. For the price of work done by the plaintiff for the defendant at his request, where no time has been fixed for payment .	Three years	When the work is done"

17. In view of discussion made herein above, this Court finds that instant suit filed under Order 37 is maintainable and plaintiffs are well within their right to recover amount as claimed in the suit. Since, defendants No. 1 and 2 despite service failed to put in appearance, sub-rule (3) of Rule-2 of Order 37 shall come into play and it would be deemed that the defendants No.1 and 2 have admitted the claim of the plaintiffs as put forth in the plaint. In this regard, reliance is placed upon judgment of Hon'ble Apex Court in **Ramkarandas** v. **Bhagwandas**, AIR 1965 SC 1144, relevant paragraph whereof is reproduced as under:

> "10. On the merits too, we think that the contention is fallacious. It proceeds on the basis that when leave to defend has been refused to a defendant, the Court is bound to pass a decree. It seems to us that what sub-r. (2) of r. 2 of Or. 37 contemplates is that the Court will accept the statements in the plaint as correct and on those statements pass such decree as the plaintiff may in law be entitled to. If, for example, the plaint discloses no cause of action, the Court cannot pass any decree in favour of the plaintiff. If this were not so, the words "allegations in the plaint shall be deemed to be admitted" in sub-r. (2) of r. 2 of Or. 37 would have been unnecessary. The Court in making a decree under sub-r. (2), r. 2 of Or. 37 has to keep the law in mind. If the law requires the Court to exercise a discretion on the facts deemed to be admitted, it will have to do so."

18. Hon'ble Apex Court in **Ajay Bansal** v. **Anup Mehta**, AIR 2007 SC 909, has held as under:

> "2. This appeal is directed against a judgment and order dated 30.01.2006 passed by a learned Single Judge of the High Court of Delhi whereby and whereunder an application filed under Article 227 of the Constitution of India filed by the respondents herein against a judgment and order dated 27.05.2005 passed by a learned Civil Judge, Karkardooma, Delhi was allowed.
>
> 3. Appellant herein filed a suit which was marked as Suit No. 303 of 2004 for recovery of a sum of Rs. 2,93,987/- with interest on account of dishonoured cheques. The said suit was filed in terms of Order XXXVII of the Code of Civil Procedure (Code). The respondents filed an application purported to be under Order XXXVII, Rule 3 (5) of the Code praying for grant of leave to defend the said suit. The learned Civil Judge refused to do so by an order dated 27.05.2005 opining:
>
> > "I am convinced with the plaintiff's contention that the defence as disclosed by defendant in their application is sham and illusory and in my considered opinion, the defendants are not entitled for leave to defend the present suit and the plaintiff is entitled to have the judgment signed. Accordingly, the application under Order 37, Rule 3(5) CPC of the defendants is devoid of any merits. The same is hereby dismissed. Application is disposed of accordingly."
>
> 4. On the said date itself, a final judgment and decree was passed for a sum of Rs. 2,83,987/- with interest at the rate of 12% thereon holding:
>
> > "4. It is contemplated under Order 37, Rule 3(5) CPC that if any application for leave to defend the suit has been made by the defendant and is refused, the plaintiff shall be entitled to judgment everywhere. Since the application under Order 37, Rule 3(5) CPC of the defendants has been dismissed as the defendants failed to raise any triable issue or disclose any defence in their application, in my considered opinion, the plaintiff has become entitled to have the judgment signed. Accordingly, suit of the plaintiff is hereby decreed with cost plaintiff is

> entitled for a decree to recover a sum of Rs. 2,83,987/- from the defendants. However, since the plaintiff has failed to establish his claim of interest @ 18% per annum which he has claimed is the market rate for commercial transaction, I am inclined to award the interst at the prevailing rate only which is @ 12% per annum on the decretal amount from the date of institution of the present suit till realization. Decree sheet be prepared"

5. An application filed thereagainst by the respondents has been allowed by the impugned judgment. The appellant is, thus, before us.

6. The short contention raised by Mr. Jitender Sharma, learned senior counsel appearing on behalf of the appellant, is that keeping in view of the fact that an appeal was maintainable under Section 96 of the Code against the judgment and decree passed by the learned Civil Judge, the application under Article 227 of the Constitution of India was not maintainable.

7. The contention of Mr. V.L. Madan, learned counsel appearing on behalf of the respondents, on the other hand, is that the writ petition was maintainable as the respondents could not have been put to undue hardship of depositing the entire decretal amount in terms of Order XLI Rule 1 of the Code of Civil Procedure although it had made out a good case for obtaining leave to defend the suit.

Order XXXVII, Rule 3(5) of the Code reads, thus:

> "(5) The defendant may, at any time within ten days from the service of such summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just :
>
> Provided that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious :
>
> Provided further that, where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court."

9. A "decree" is defined under Section 2 (2) of the Code to mean:

> ""decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include
>
> > (a) any adjudication from which an appeal lies as an appeal from an order, or
> >
> > (b) any order of dismissal for default."

10. A "judgment" is defined under Section 2(9) of the Code to mean "the statement given by the Judge on the grounds of a decree or order".

11. An order refusing to grant leave is a judgment within the meaning of Letters Patent of the Chartered High Courts. [See Shah Babulal Khimji v. Jayaben D. Kania and Another, (1981) 4 SCC 8]

12. A decree passed in a summary suit where leave to defend the suit has been refused is almost automatic. The consequence of passing a decree cannot be avoided.

13. Ordinarily, an application under Article 227 of the Constitution of India would not be maintainable where an appeal lies. An appeal lay from the decree under Section 96

of the Code. When an appeal could be filed, ordinarily, an application under Article 227 of the Constitution of India would not be entertained.

14. A decree passed subsequent to the refusal of leave to defend could either be under Order XXXVII Rule 3(6) of the Code or it could be based on the affidavit evidence on the side of the plaintiff and the documents produced or even based on oral evidence formally proving, say, the execution of a promissory note by the defendant. It may not be proper or necessary to apply the theory of "dependent order" in such circumstances. For one, the theory may not apply. Even if this Court were to set aside the order of the court below and give the defendant leave to defend the suit, the decree that is passed may not go automatically. It may have to be set aside. Secondly, the defendant can always go to the court which passed the decree and move under Rule 4 of Order XXXVII of the Code to reopen the decree.

The theory of "dependant order" may not apply in a case of this nature because even if this Court were to set aside the order refusing leave to defend, the decree subsequently passed may not fall by itself. It has still to be set aside either by resort to Order XXXVII Rule 4 or by way of an appeal, or by some other mode known to law. In a given case like the present one as it may not be proper to interfere with the decree merely because in an appeal against an order refusing leave to defend, this Court is inclined to take a different view. [See V.S. Saini & Anr. v. D.C.M. Ltd., AIR 2004 Delhi219.]

19. Reliance is also placed upon judgment rendered by Delhi High Court in **Vijaya Home Loans Ltd.** v. **M/s. Crown Traders Ltd.**, AIR 1998 Delhi 183, wherein it has been held as under:

> "(3) Defendants were served with the summons under Order xxxvii, Civil Procedure Code by publication in 'Statesman' on November 30, 1996.
>
> (4) Since the defendants did not enter appearance within 10 days of the service of the summons on them, the plaintiff filed Ia No. 12534/96 on December 12,1996, under Order xxxvii Rule 2(3) read with Section 151, Civil Procedure Code for passing a decree for the suit amount alongwith interest against the defendants.
>
> (5) SUB-RULE (3) of Rule 2 of Order xxxvii, Cpc, which is relevant, provides as under:
>
> > "DEFENDANT shall not defend the suit referred to in Sub-rule (1) unless he enters an appearance and in default of his entering an appearance the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree for any sum, not exceeding the sum mentioned in the summons, together with interest at the rate specified, if any, upto the date of the decree and such sum for costs as may be determined by the High Court from time to time by Rules made in that behalf and such decree may be executed forthwith."
>
> (6) As the defendants failed to enter appearance within 10 days of the service of the summons by publication the allegations made in the plaint shall be deemed to be admitted by them under said Sub-rule (3) of Rule 2 of Order xxxvii, CPC. Plaintiff-Company is, thus, entitled to a decree for the suit amount with interest pendente lite and future @ 22% p.a. being the contractual rate against the defendants.
>
> (7) Consequently, suit is decreed for recovery of Rs. 49,35,184.00 with interest pendente lite and future till realisation @ 22% per annum on Rs. 32,56,630.00 and the costs against the defendants."

20. While applying ratio of aforesaid exposition of law, suit of the plaintiffs needs to be decreed in the absence of defendants No.1 and 2, as they failed to put in appearance in this Court despite service. Needless to say, this Court before decreeing the suit of the plaintiffs, needs to satisfy itself that the suit filed by the plaintiffs is well within limitation and plaint discloses

cause of action in favour of the plaintiffs. In the case at hand, as has been discussed herein above, suit filed by the plaintiffs is well within limitation and plaintiffs have sufficient cause of action to institute the suit against defendants No.1 and 2. At the cost of repetition, it may be noticed that though defendants No.1 and 2 in the confirmation of accounts dated 30.9.2015, have categorically admitted the claim of the plaintiffs to the extent of Rs.62,69,045/- but there is no reply, if any, to the legal notice issued by the plaintiffs, wherein plaintiffs have claimed that defendants owe an amount of Rs. 85,83,780/- to them on account of works executed on the site pursuant such work orders and, as such, plaintiffs are entitled to the amount as claimed by them in the instant suit.

21. Since plaintiffs, have failed to establish their claim to interest at the rate of 10% per annum, this Court deems it fit to award interest at the prevalent rate of interest and as such, plaintiffs are held entitled to interest at the rate of 7.5% per annum, on the decreetal amount, from the date of institution of suit till its realization.

22. Accordingly, suit of the plaintiffs is hereby decreed. Plaintiffs are held entitled to recover an amount of Rs.85,83,780/- alongwith interest at the rate of 7.5% per annum on the decreetal amount from the date of institution of suit till realization, from defendants No. 1 and 2. No orders as to costs of the suit.

Decree sheet be prepared accordingly.

****

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

Nand Kishore .....Petitioner

Versus

State of Himachal Pradesh & Others .....Respondents

Cr.WP No.4 of 2018
Decided on: April 03, 2018

Hindu Minority and Guardianship Act, 1956- Section 6- Vis-à-vis **Indian Penal Code, 1860**- Sections 363 and 366- Petitioner seeking directions to police to produce her daughter 'P' in Court and also for her custody – However, 'P' and one 'H' themselves appearing before High Court and stated to have married each other – Also mentioning of their having filed petition in Punjab and Haryana High Court for police protection- Held - Custody of wife even if minor, should be with husband – Principles laid down in Shishu Pal vs. State of H.P., ILR 2017 (IV) 712 reiterated. (Para-5 to 7)

Case referred:

Independent Thought versus Union of India and Another, (2017) 10 SCC 800
Shishu Pal vs. State of H.P., ILR 2017 (IV) 712

For the petitioner Mr. N.S. Chandel, Advocate.

For the respondent(s) : Mr. S.C. Sharma, Mr. Narinder Guleria and Mr. Vikas Rathore, Addl. AGs, for respondents No.1, 3 & 5.
Mr. Anuj Gupta and Mr. Rohit Sharma, Advocates, for respondent No.6.
None for respondents No.2 and 4.
Respondent No.6, in person.
ASI Chiranji Lal, Incharge, Police Post, Dada Siba, P.S. Dehra, Distt. Kangra.

The following judgment of the Court was delivered:

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

In this writ petition following relief(s) has been sought to be granted:-

"a. *That respondents No.1 to 5 be directed to produce Pariksha Thakur, daughter of the petitioner, in this Hon'ble Court.*

b. That the custody of the minor daughter of the petitioner be restored to the petitioner and his wife."

2. The order passed in this writ petition on the previous date, i.e. 27.03.2018, reads as follows:-

> *"Consequent upon the orders passed on the previous date, learned Additional Advocate General has placed on record the status report. As per this report, the investigation is still in progress. Respondent No. 6 (accused in FIR No. 4 of 2018), though was neither traceable nor available to the police, however, he is present in person along with the daughter of the petitioner. Mr. H.S. Rakhra, Advocate learned counsel representing respondent No. 6 submits that they both have solemnized marriage in a temple at Panchkula. Also that a petition, registered as CRM-M-11896-2018 has also been filed by both of them in Punjab and Haryana High Court for seeking police protection. Certified copy of the order passed in this petition has also been placed on record. Pariksha, the daughter of the petitioner has disclosed her age as 18 years in the petition, she filed along with respondent No.6 in the Punjab and Haryana High Court. They seem to have solemnized the marriage and residing in the company of each other as husband and wife. Since they are present in person, therefore, the petition, so far as the relief for production of Pariksha in this Court is concerned, has turned infructuous. In case she has solemnized marriage with respondent No.6, whether the petitioner is entitled to her custody, has to be seen in the light of the legal provisions and also the judgment of this Court in Cr. MMO NO. 338 of 2016 titled Shishu Pal vs. State of H.P. decided on 10.8.2017 and its connected petition Cr.MMO No.110 of 2017 titled Inder Singh versus State of H.P.*
>
> *2. Learned counsel representing the petitioner seeks time to have instructions in the matter and also to make further submissions. Allowed. List on 3rd April, 2018. Respondent No.6 is directed to attend this Court in person on the next date along with Pariksha. The police of Police Station, Dehra, however, shall not arrest respondent No. 6, who is an accused in FIR No,.4 of 2018, registered in the said Police Station. The custody of Pariksha shall also remain with respondent No.6 in the meanwhile."*

3. Mr. N.S. Chandel, Advocate, representing the petitioner, while citing the judgment of the Apex Court, in **Independent Thought** versus **Union of India and Another**, **(2017) 10 SCC 800,** has made an effort to persuade us that even if Pariksha has solemnized marriage with respondent No.6, being minor below 18 years of age, she cannot live in the company of the said respondent. The ratio of the judgement cited by Mr. Chandel is that sexual intercourse with a girl below 18 years of age is rape regardless of whether she is married or not. Exception 2 of Section 375 IPC as per this judgment creates an unnecessary and artificial distinction between a married girl child and unmarried girl child having no rational nexus nor any object sought to be achieved. Exception 2 of Section 375 IPC needs meaningful reading, i.e. *"sexual intercourse or sexual acts by a man with his own wife, the wife not being under 18 years of age, is not rape".* Also that it is reading of Exception 2 in this manner that social justice to a married girl child and the constitutional vision of the framers of our Constitution, can be preserved and protected. Such, however, is not the situation before us in the present case.

4. On the other hand, Smt. Suman Rani, the mother of Pariksha and complainant in FIR No.4 of 2018, dated 04.01.2018, registered under Sections 363 & 366-A IPC, in Police Station, Dehra, District Kangra, H.P., against respondent No.6 and her father Shri Rajender Singh, are present in person and seem to be in favour of amicable solution of the present controversy. The complainant submits that custody of Pariksha, her daughter, be entrusted to her so that she can solemnize her marriage as per Hindu Rites and Customary Ceremonies with respondent No.6 Himanshu Sharma itself. The grand-father of Pariksha, also submits that since Pariksha and respondent No.6 are in company of each-other since long, therefore, they (complainant party) have to take a decision to settle them in their life, meaning thereby that the controversy is considerably narrowed down.

5. So far as the relief sought in this petition is concerned, we have already said in the order supra that for the grant of the said relief the petition has already turned infructuous because respondent No.6 Himanshu Sharma and Pariksha both have appeared at their own in this Court on the previous date of hearing.

6. Now, if coming to the second prayer, this Court has held in Cr.MMO No.338 of 2016, titled Shishu Pal versus State of H.P., decided on 10.08.2017, that the custody of wife may be minor must remain in the company of her husband. Therefore, we are not inclined to entrust the custody of Priksha to her mother, the complainant.

7. Any how, in view of the subsequent development narrated above, the writ petition is finally disposed of, leaving it open to Pariksha to visit the house of her parents at village Dalwal (Khudiana), Post Office Tiyamal, Tehsil Dehra, District Kangra, H.P., along with respondent No.6 Himanshu. If so desire, they may accompany the complainant and her father Rajender Singh, present in the Court, today itself. We hope and trust that in case Pariksha and respondent No.6 Himanshu visit the house of the complainant Suman Rani, as desired by her, they will not be manhandled or harassed in any manner whatsoever. We are not commenting upon their marriage, however, as per the record presuming them husband and wife, we further direct that without there being any authoritative adjudication qua their marriage, the complainant party shall not force them to part with the company of each-other. We are also not commenting upon criminal case registered under Section 363 & 366-A of IPC, in Police Station, Dehra, District Kangra, H.P., vide FIR No.4 of 2018 on 04.01.2018. However, in the given facts and circumstances, the police of Police Station, Dehra, is directed not to arrest respondent No.6 Himanshu in this case, for a period of two weeks from today, enabling thereby him to approach the competent Court for grant of bail.

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

Copy ***"Dasti".***

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

Pritpal Singh .....Petitioner.

Versus

M/S Singla Medical Agencies .....Respondents.

Cr.M.P No. 319 of 2018 in
Cr. Revision No. 76 of 2018.
Decided on : 3.4.2018.

Code Of Criminal Procedure, 1973- Section 389- Suspension of sentence- Held- Appellate Court can suspend execution of sentence subject to deposit of fine or part thereof, which is just and conscionable within certain period. (Para-5)

Cases referred:
Somnath Sarkar vs. Utpal Basu Mallick and Anr., 2013 (4) Civil Court Cases 689 (SC)
Stanny Felix Pinto v. Jangid Builders Pvt. Ltd., AIR 2001 SC 659

For the Petitioner:	Mr. P.S Goverdhan, Advocate.
For the Respondents:	Nemo for respondent No.1. Mr. Hemant Vaid, Additional Advocate General with Mr. Yudhveer Singh Thakur, Deputy Advocate General for respondent No.2-State.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

Under the impugned judgment, the learned trial Court convicted the petitioner herein, for his committing an offence punishable under Section 138 of the Negotiable Instruments Act, 1881. The relevant portion of the sentence imposed upon the convict is extracted hereinafter:

> **".....that the convict shall undergo simple imprisonment for one year and six months and to pay fine double of the cheque amounts i.e. Rs.3,97,658/- for the commission of an offence under Section 138 of the Negotiable Instrument Act and in default of payment of fine, he shall undergo further simple imprisonment for six months. It is ordered that after realization of fine amount, the same shall be paid to the complainant as compensation after appeal period and in case of appeal it shall be dealt as per the directions of the learned Appellate Court....."**

2. A perusal thereof reveals that the learned Magistrate concerned, has, within mandate of Section 138 of Negotiable instrument Act, sentenced the petitioner herein, to, pay fine in a sum, double than the one, borne in the negotiable instrument, yet, the Magistrate concerned has also ordered, for the sum aforesaid being liquidated, as, compensation towards the complainant.

3. Consequently, the learned Magistrate has complied with the judgment reported in 2013 (4) Civil Court Cases 689 (SC) in case titled as ***Somnath Sarkar*** vs. ***Utpal Basu Mallick and Anr.,*** relevant portion whereof is extracted hereinafter, wherein it is postulated that, upon imposition of sentence of fine, upon the convict, by the Convicting Court, in a sum double than the one comprised in the dishonoured cheque, thereupon the Magistrate concerned, being also obliged to order for its liquidation, as compensation vis-à-vis the complainant, as aptly done hereat.

> **" 11. We do not consider it necessary to examine or exhaustively enumerate situations in which Courts may remain content with imposition of a fine without any sentence of imprisonment. There is considerable judicial authority for the proposition that the Courts can reduce the period of imprisonment depending upon the nature of the transaction, the bona fides of the accused, the contumacy of his conduct, the period for which the prosecution goes on, the amount of the cheque involved, the social strata to which the parties belong, so on and so forth. Some of these factors may indeed make out a case where the Court may impose only a sentence of fine upon the defaulting drawer of the cheque. There is for that purpose considerable discretion vested in the Court concerned which can and ought to be exercised in appropriate cases for good and valid reasons. Suffice it to say that the High Court was competent on a plain reading of Section 138 to impose a sentence of fine only upon the appellant. In as much as the High Court did so, it committed no jurisdictional error. In the absence of a**

challenge to the order passed by the High Court deleting the sentence of imprisonment awarded to the appellant, we do not consider it necessary or proper to say anything further at this stage.

12. Coming then to the question whether the additional amount which the High Court has directed the appellant to pay could be levied in lieu of the sentence of imprisonment, we must keep two significant aspects in view. First and foremost is the fact that the power to levy fine is circumscribed under the statute to twice the cheque amount. Even in a case where the Court may be taking a lenient view in favour of the accused by not sending him to prison, it cannot impose a fine more than twice the cheque amount. That statutory limit is inviolable and must be respected. The High Court has, in the case at hand, obviously overlooked the statutory limitation on its power to levy a fine. It appears to have proceeded on the basis as though payment of compensation under Section 357 of CrPC is different from the power to levy fine under Section 138, which assumption is not correct.

13. The second aspect relates precisely to the need for appreciating that the power to award compensation is not available under Section 138 of Negotiable Instruments Act. It is only when the Court has determined the amount of fine that the question of paying compensation out of the same would arise. This implies that the process comprises two stages. First, when the Court determines the amount of fine and levies the same subject to the outer limit, if any, as is the position in the instant case. The second stage comprises invocation of the power to award compensation out of the amount so levied. The High Court does not appear to have followed that process. It has taken payment of Rs.80,000/- as compensation to be distinct from the amount of fine it is imposing equivalent to the cheque amount of Rs.69,500/-. That was not the correct way of looking at the matter. Logically, the High Court should have determined the fine amount to be paid by the appellant, which in no case could go beyond twice the cheque amount, and directed payment of compensation to the complainant out of the same. Viewed thus, the direction of the High Court that the appellant shall pay a further sum of Rs.69,500/- does not appear to be legally sustainable as rightly observed by my erudite Brother Vikramajit Sen, J. I, therefore, entirely agree with my Brother's view that payment of a further sum of Rs.20,000/- towards fine, making a total fine of Rs.1,00,000/- (Rupees one lac) out of which Rs.80,000/- has already been paid as compensation to the complainant, should suffice. The amount of Rs.20,000/- (Rupees twenty thousand) now directed to be paid shall not go to the complainant who is, in our view, suitably compensated by the amount already received by him. In the event of failure to pay the additional amount of Rs.20,000/- the appellant shall undergo imprisonment for a period of six months. With these words, I concur with the order proposed by Brother Vikramajit Sen, J."

4. Further more, as mandated in a judgment, of the Hon'ble Supreme Court reported in AIR 2001 SC 659, in case titled as ***Stanny Felix Pinto*** v. ***Jangid Builders Pvt. Ltd.,*** relevant paragraph whereof is extracted hereinafter, qua as a pre condition for suspending the execution of sentence, of imprisonment imposed upon the convict, it being not imperative for the Court, to, direct the convict to deposit the entire fine amount/compensation amount, yet imposition, qua depositing of, some reasonable per centum thereof, solitarily being sufficient, to, enable the Court, while excising its jurisdiction, to suspend the execution of sentence of imprisonment imposed upon the convict, to hence make an apposite order qua its execution being suspended.

".....When a person was convicted under Section 138 of the Negotiable Instruments Act and sentenced to imprisonment and fine he moved the superior court for suspension of the sentence. The High Court while entertaining his revision granted suspension of the sentence by imposing a condition that part of the fine shall be remitted in court within a specified time. It is against the said direction that this petition has been filed. In our view the High Court has done it correctly and in the interest of justice. We feel that while suspending the sentence for the offence under Section 138 of the Negotiable Instruments Act it is advisable that the court imposes a condition that the fine part is remitted within a certain period. If the fine amount is heavy, the court can direct at least a portion thereof to be remitted as the convicted person wants the sentence to be suspended during the pendency of the appeal. In this case the grievance of the appellant is that he is required by the High Court to remit a huge amount of rupees four lakhs as a condition to suspend the sentence. When considering the total amount of fine imposed by the trial court (twenty lakhs of rupees) there is nothing unjust or unconscionable in imposing such a condition. Hence, there is no need to interfere with the impugned order. As such no notice need be issued to the respondent....."

5. In aftermath, subject to deposit of 15% of the fine amount within four weeks from today, if not already deposited, and subject to the petitioner's furnishing within four weeks, from today, personal and surety bonds in the sum of Rs.50,000/- each to the satisfaction of the learned trial Court, and also with an undertaking therein to (a) appear in the Court as and when called upon to do so (b) and in case the instant Revision is dismissed, the petitioner shall surrender before the learned trial Court for receiving the sentence, thereupon the operation/execution of the sentence recorded on 31.10.2017 by the learned Judicial Magistrate, Ist Class, Court No.1, Solan, District Solan, H.P., in criminal case No. 294/3 of 2011/09, and, as stands affirmed by the learned Additional Sessions Judge-II, Solan, District Solan, H.P in criminal appeal No. 54ASJ-II/10 of 2017 on 15.3.2018, is suspended till further orders. However, it is made clear that in event of the petitioner herein omitting to comply with the conditions aforesaid within the stipulated period aforesaid, thereupon, the order suspending the execution of sentence of imprisonment imposed upon him shall stand vacated, and, the Registry shall issue warrants for committing the petitioner herein, to judicial custody.

In view of the above, the application stands disposed of.

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

Jagjit Singh ....Petitioner.

Vs.

Gurdev Singh and another ....Respondents.

Civil Revision No.: 241 of 2017
Date of Decision: 04.04.2018

Code of Civil Procedure, 1908- Section 80- Order 1 Rule 10- Impleadment of State sought by plaintiff during pendency of suit filed against private party - Application dismissed by trial court on ground that prior notice was required before filing suit against State – Petition against- Held- If cause of action against State has accrued during pendency of suit on account of subsequent

developments, it can be impleaded as defendant in same suit after complying with provision of Section 80. (Para-8)

For the petitioner:	Mr. Ajay Sharma, Advocate.
For the respondents:	Mr. Devender K. Sharma, Advocate, vice Mr. Sunny Moudgil Advocate, for respondent No. 1. Mr. Desh Raj Thakur, Additional Advocate General, with Mr. Kamal Kant, Deputy Advocate General and Mr. Rajat Chauhan, Law Officer, for respondent No. 2.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

On the request of Mr. Ajay Sharma, learned counsel for the petitioner, State of Himachal Pradesh through Collector, Una is ordered to be impleaded as party respondent No. 2. Registry is directed to carry out necessary corrections in the memo of parties.

2. Notice. Mr. Desh Raj Thakur, learned Additional Advocate General accepts notice on behalf of the newly added respondent No. 2.

3. By way of this petition, the petitioner has assailed order, dated 03.10.2017, passed by the Court of learned Civil Judge(II), Amb, vide which, an application filed by the present petitioner before the learned Court below under Order 1 Rule 10 of the Code of Civil Procedure for impleadment of the State of Himachal Pradesh through Collector Una, as party respondent, stands dismissed.

4. A perusal of the order dated 03.10.2017 demonstrates that learned Trial Court, *inter alia*, dismissed the application so filed by the present petitioner on the ground that because as per the provisions of Section 80 of the Code of Civil Procedure, two months prior notice is necessary to be issued to the State before the institution of a suit, therefore, in view of the said mandatory statutory provision, the application for impleadment of the State was not maintainable during the pendency of the suit, because in such a case, admittedly, a notice under Section 80 of the Code of Civil Procedure was to be served upon the State before the institution of the suit. Para 10 of the impugned order for ready reference is quoted hereinbelow:

> *"10. Further more, bare reading of Section 80 CPC suggests that the intent of the legislature is that a prior two months notice is to be given before institution of the suit and not after instituting the suit against Government or public officer. Since the State of H.P. has denied to waive its right of mandatory notice u/s 80 of CPC, hence the suit of the plaintiff against the proposed defendant is bad for want of mandatory notice. I have also considered the case law cited by Ld. Counsel for the plaintiff i.e. 2010(2) S.L.J (H.P.) 830 titled Devi Singh and others Vs. The Chairman, Managing Committee, DAV Public School Chitar Gupt Road, New Delhi and others but the ratio of the aforesaid case is not applicable in the present case as in that case State of H.P. was found to be a proper party whose presence is required only for complete adjudication of that case whereas in this case State of H.P., in my considered view is a necessary party."*

5. In my considered view, the findings so returned by the learned Trial Court are completely perverse. If the reason given by the learned Trial Court is accepted, then probably, in no eventuality, whatsoever, during the pendency of a suit, State can be ordered to be impleaded as a party, for lack of issuance of notice under Section 80 of the Code of Civil Procedure before the institution of the suit.

6. Section 80 of the Code of Civil Procedure reads as under:

"80. Notice.- *(1) Save as otherwise provided in sub-section (2), no suit shall be instituted against the Government (including the Government of the State of Jammu and Kashmir) or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to, or left at the office of—*

(a) in the case of a suit against the Central Government, except where it relates to a railway, a Secretary to that Government;

(b) in the case of a suit against the Central Government where it relates to a railway, the General Manager of that railway;

(bb) in the case of a suit against the Government of the State of Jammu and Kashmir, the Chief Secretary to that Government or any other officer authorised by that Government in this behalf;

(c) in the case of a suit against any other State Government, a Secretary to that Government or the Collector of the district; and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.

(2) A suit to obtain an urgent or immediate relief against the Government (including the Government of the State of Jammu and Kashmir) or any public officer in respect of any act purporting to be done by such public officer in his official capacity, may be instituted , with the leave of the court, without serving any notice as required by sub-section (1); but the court shall not grant relief in the suit, whether interim or otherwise, except after giving to the government or public officer, as the case may be, a reasonable opportunity of showing cause in respect of the relief prayed for in the suit:

Provided that the court shall, if it is satisfied, after hearing the parties, that no urgent or immediate relief need be granted in the suit, return the plaint for presentation to it after complying with the requirements of sub-section (1).

(3) No suit instituted against the government or against a public officer in respect of any act purporting to be done by such public officer in his official capacity shall be dismissed merely by reason of any error or defect in the notice referred to in sub-section (1), if in such notice—

(a) the name, description and the residence of the plaintiff had been so given as to enable the appropriate authority or the public officer to identify the person serving the notice and such notice had been delivered or left at the office of the appropriate authority specified in sub-section (1), and

(b) the cause of action and the relief claimed by the plaintiff had been substantially indicated."

7. A perusal of the said statutory provision demonstrates that service of a notice under Section 80 of the Code of Civil Procedure is not a mere formality, but there is an aim and object as to why such a notice has to be given and that object is to provide an opportunity to the Government to reconsider the legal position and if so advised, to have the matter settled so as to avoid litigation. There is a noble legislative intent behind this provision, which is that neither public money nor public time should be wasted on avoidable and unnecessary litigation and further that reasonable opportunity is available with the Government or the public officer to examine the claims which are made against them. No doubt, in these circumstances, failure to serve notice complying with the requirements as are mentioned in Section 80 of the Code of Civil Procedure will entail dismissal of suit. Therefore, ordinarily, before any suit is instituted against the Government, it is imperative that a notice under Section 80 of the Code of Civil Procedure is served upon it. However, there can be a set of cases where when the suit was instituted, there

was no cause of action to implead the State as a defendant. In such like cases, if subsequently, an application is so filed under Order 1 Rule 10 of the Code of Civil Procedure for impleadment of the State as a party defendant, then the same cannot be dismissed solely on the ground that no notice under Section 80 of the Code of Civil Procedure was issued to the State before the institution of the suit. This is for the reason that no notice could have been issued to the State before the institution of the suit, as there was no cause of action for the plaintiff to have had done the same. Therefore, in such like cases where cause of action accrues during the pendency of the suit to implead State as defendant, after complying with the provisions of Section 80 of the Code of Civil Procedure, a party can move an application under Order 1 Rule 10 of the Code of Civil Procedure, which then the Court concerned has to decide on merit.

8. At the cost of repetition, it is reiterated that in such like cases, where this kind of application is filed, what has to be seen is as to when did the cause of action accrue on the basis of which a party has filed an application under Order 1 Rule 10 of the Code of Civil Procedure for impleading State as defendant. In a case where the State is being intended to be impleaded as party defendant on a cause which had accrued before the filing of the suit, then may be in the absence of any notice having been issued under Section 80 of the Code of Civil Procedure to the State before the initiation of the suit, such an application may not be maintainable. However, in those cases where cause of action accrues on account of subsequent events during the pendency of the suit, then obviously an application under Order 1 Rule 10 of the Code of Civil Procedure can be filed by the plaintiff to implead the State as a party defendant after complying with the statutory provisions of Section 80 of the Code of Civil Procedure and such application has to be adjudicated on merit.

9. In this view of the matter, as the impugned order dated 03.10.2017, passed by the Court of learned Civil Judge (II), Amb in Civil Suit titled *Jagjit Singh* Vs. *Gurdev Singh* is not sustainable in the eyes of law, the same is quashed and set aside. Learned Trial Court is further directed to decide afresh the application so filed by plaintiff under Order 1 Rule 10 of the Code of Civil Procedure.

Petition is allowed in above terms. Miscellaneous application(s), if any, stand disposed of.

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

Hari Ram ...Petitioner

Versus

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

CWPs No.2352 of 2017 alongwith CWPs No.2353 to 2357, 2328, 2330 to 2336, 2343 to 2346, 2348 to 2350, 2358, 2359, 2361 to 2365 & 2562 of 2017.
Date of Decision: April 7, 2018.

Constitution of India, 1950- Article 19(1)(g) and 19(6)- Right to trade- Meaning and scope – Held- It is a right subject to reasonable restrictions in the interest of general public - There is no right of street vending at any particular place- Street hawking can be regulated by law. (Para-31)

Street Vendor (Protection of Livelihood and Regulation of Street Vending) Act, 2014- Section 3 and 22(2)- Street Vending Committees on basis of executive assessment are to categorize vendors and issue certificates for street vending in vending zones so determined by

local authority – Not anyone and everyone has a right to hawk- Only licence holders can vend by hawking that too in vending zone subject to conditions stipulated in licence. (Paras-15 to 20)

Cases referred:

Gainda Ram& others versus Municipal Corporation of Delhi & others, (2010) 10 SCC 715

Maharashtra Ekta Hawkers Union & another v. Municipal Corporation, Grater Mumbai & others, (2014) 1 SCC 490

Maharashtra Ekta Hawkers Union vs. Municipal Corporation, Greater Mumbai, (2009) 17 SCC 151

Dharam Chand v. Chairman, New Delhi Municipal Council and others, (2015) 10 SCC 612

For the Petitioners	:	Mr. V.B. Verma, Advocate.
For the Respondents	:	Mr. Ajay Vaidya, Senior Additional Advocate Genral & Mr. Ranjan Sharma, Additional Advocate General, for respondents No.1 & 2. Mr. C.N. Singh, Advocate, for respondent No.3. Mr. Dalip K. Sharma, Advocate, for respondent No.4.

Sanjay Karol, Acting Chief Justice

All these petitions are being disposed of vide common judgment. Facts and issues being similar and identical, we are dealing with the facts of CWP No.2352 of 2017, titled as *Hari Ram v. State of Himachal Pradesh & others.*

2. The petitioner has prayed for the following common reliefs:

> "i) Issue a writ in the nature of mandamus directing the respondents to the effect that the petitioner be immediately re-located as per the provision of Street Vendor (Protection of Livelihood and Regulation of Street Vending) Act, 2004.
>
> ii) Further respondents are directed to pay damages to the Petitioner for the illegal demolition of reharis/kokhas without complying the provisions of street vendor act."

3. Petitioner alleges that despite holding licence for setting up Tehbazari Rehadi, issued by the Municipal Council, Parwanoo, he even as "street vendor", is being ejected, without following due process of law and all this despite the matter having been brought to the notice of the concerned Police Officers, vide representation dated 9.5.2017 (Annexure P-4).

4. For the last about 26 years, Nagar Panchayat/ Municipal Council, Parwanoo, has been issuing licences for setting up Khokhas/Rehadis. 40 such Khokhas/ Rehadis were set up on the National Highway-22, near new HIMUDA Complex and Rehadi Market, Parwanoo.

5. On 9.5.2017, without any proper notice, HIMUDA demolished 32 Khokhas by using force and petitioners also apprehend similar action, for they cannot be removed, save and except, in accordance with the provisions of the Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act, 2014 (hereinafter referred to as the Act).

6. Respondent No.3 (HIMUDA) has filed reply-affidavit, clearly stating that petitioners are encroachers over public land. Also, petitioners have no right or licence to set up Rehadis at the place(s) in question. Prior to the widening of the National Highway and construction of the Commercial Complex, 25 moving Rehadis, which were actually parked, were got removed. Also, general notice dated 2.2.2017 was issued to all the encroachers, asking them to vacate this portion of the encroached land.

7. From the record, in this regard, it is evident that even the Civil Court(s) have vacated interim orders passed in civil proceedings initiated by the encroachers.

8. It is in this backdrop, respondents No.1 & 2 adopt the reply filed on behalf of respondent No.3.

9. At the threshold, we may clarify that petitioners do not have any right to continue to occupy the place in question, i.e. property of HIMUDA/Municipal Council, Parwanoo, near Punjab National Bank, Sector-1, Parwanoo, and as such they must immediately vacate the same.

10. However, the issue, which arises for consideration, is as to where would they go.

11. We are informed that place for relocation of 'street vendors', as defined under the provisions of the Act and identified by the Vending Committee, stands earmarked. It is in Sectors 1 and 2 of Parwanoo. The proposal for development of the same stands recommended to the State Government and money for executing the lease deed stands deposited with HIMUDA.

12. But, the issue is larger and requires deeper consideration. From the copy of licence placed on record, one notices that the petitioner(s) are not residents of the State and it is not that the Municipal Council, Parwanoo, had been issuing licence(s) in their favour, continuously over a period of more than 2-3 decades, as is so averred by them. In the case of one such writ petitioner, i.e. Hari Ram, we find the licence to have been issued only in the year 2014-15, and the said writ petitioner hails from the State of Bihar. The situation with regard to the other petitioners is more or less similar. Thus, the question, which arises for consideration, is as to whether the petitioners are entitled to the protection/benefits under the Act or not?

13. We now proceed to examine the rights of the petitioners.

14. As is evident from the Preamble, the Act was enacted to protect the rights of urban street vendors and to regulate street vending activities.

15. Chapter-II of the Act regulates vending on the streets. Sub-section (2), Section 22 of Chapter-VII of the Act mandates constitution of 'Town Vending Committees' in each local authority. Section 3 of Chapter-II makes it obligatory for the Town Vending Committees to conduct survey of the street vendors, within the area falling under its jurisdiction. Further, such committees are to ensure that all the existing street vendors, identified in the survey, are accommodated in the vending zones, subject to a norm conforming two and half per cent of the population of the ward or zone or town or city, as the case may be, in accordance with the plan for street vending and the holding capacity of the vending zones.

16. Noticeably, after the survey is conducted, the vending zones and scheme for street vendors are required to be prepared.

17. Who is a "street vendor", stands defined in clause (l) of sub-section (1), Section 2 of Chapter-I of the Act, as under:

> "(l) "street vendor" means a person engaged in vending of articles, goods, wares, food items or merchandise of everyday use or offering services to the general public, in a street, lane, side walk, footpath, pavement, public park or any other public place or private area, from a temporary built up structure or by moving from place to place and includes hawker, peddler, squatter and all other synonymous terms which may be local or region specific; and the words "street vending" with their grammatical variations and cognate expressions, shall be construed accordingly."

"Vending zone" stands defined under clause (n) of the said Section as under:

> "(n) "vending zone" means an area or a place or a location designated as such by the local authority, on the recommendations of the Town Vending Committee, for the specific use by street vendors for street vending and includes footpath, side walk, pavement, embankment, portions of a street, waiting area for public or any such place considered suitable for vending activities and providing services to the general public."

18. The Act itself does not protect anyone and everyone, who is a rank encroacher and considers itself to be street vendor. In fact, Chapter-III prescribes the rights and obligations of such persons. No doubt, in terms of Section 12, every street vendor has a right to carry out the business of street vending activity, but then this has to be in terms of the terms and conditions mentioned in the certificate of vending. In fact, sub-section (2) of Section 12 prohibits any vendor to carry out any vending activity in a no vending zone. Section 14 mandates that the street vendor has to remove his goods and wares every day at the end of time-sharing period allowed to him. In terms of Section 15, vendor has to maintain cleanliness and public hygiene in the vending zone, so also not cause damage or destroy any public property. The vendor is under an obligation to pay, periodically, maintenance charges for civic amenities and the facilities provided in the vending zone.

19. Careful perusal of Chapter-II of the Act indicates that every street vendor identified under the survey is required to be issued a certificate of vending by the Town Vending Committee. This is subject to certain terms and conditions. Again, from sub-section (3) of Section 4, it is evident that not anyone and everyone has a right to vend at the place, time or manner in which he so chooses or desires. All this is regulated by the Town Vending Committee, as is further evident from Sections 5,6 & 7 of the Act. The Town Vending Committee, on the basis of executive assessment and keeping in view the safeguards provided under Section 7, has to categorize the vendors, be it stationary, mobile or any other category and issue certificates for vending. Also, it is seen that the vendor is required to pay fee and the vending certificate does not confer any right of permanency, for it is to be renewed under Section 9 and can be cancelled/ suspended under Section 10 of the Act.

20. Thus, in our considered view, the vendor does not have an absolute right of vending his wares at the time, manner, mode and/or place which he so desires or chooses to do so.

21. Further, we notice that the Act itself provides mechanism for relocation and eviction of street vendors. This is in terms of Chapter-VI of the Act.

22. We may only observe that menace of street hawking/vending, on account of rapid urbanization, has acquired a different dimension. It has its advantages, benefits as also hazards.

23. When it comes to the State of Himachal Pradesh, which undisputedly is a tourist destination, one finds that there is multiple increase in the tourist population, which is neither stationary nor seasonal. Now, it is a permanent and regular feature, spread throughout the year, more so during the week ends. Also, there is overall growth of industry, be of whatever nature and scale. All this has resulted into influx of migrant labourers, seeking livelihood in every part of the State. Overnight, one finds, public places to be crowded with hawkers and vendors, be it on the National Highway or commercial establishments and this activity, though unorganized, is enormous.

24. One finds neither the hawkers nor the functionaries of the State actually understanding and implementing the import or the provisions of the Act. In our considered view, the authorities have totally misconstrued the provisions of the Act, for it is not that the hawkers are to be relocated with proper shops/ structures provided to them. The Act does not envisage a situation where a market is to be constructed for street vendors. It is in this backdrop, we reiterate that both HIMUDA and Municipal Council, Parwanoo, have misconstrued the intent, purpose and scope of the Act.

25. It is also not that every hawker has got a right of protection from ejectment/eviction, under the provisions of the Act. People indulging in the activity of hawking/ vending, but without complying with the provisions of the Act, cannot seek any protection in terms thereof, for vending is permissible only in accordance with the provisions of the Act. In fact, it is regulated, considering various factors, including holding capacity of the vending zone. There is no automatic application of the Act qua every vendor, who under misconception chooses to sit on any place or time on a public property, vending anything and everything. Persons, who

come to the State, seeking employment, only on weekends or during tourist season, when tourists throng the State in large number, have no right of protection under the Act.

26. We are informed that in Parwanoo more than 306 street vendors stand identified, but then the affidavit filed by the respondents herein, is conspicuously silent on this aspect. Names and number of the persons identified as street vendors, in terms of the Act, who have been vending in Parwanoo, a highly industrialized town, has not been placed before us. Are we to understand that only 306 vendors/hawkers are vending in Parwanoo or are there many more? Is it that no action has been taken against the remaining persons? Or is it that all other stand evicted?

27. Again, we reiterate and take judicial notice of the fact that on the National Highway, passing through Parwanoo Municipal Council, more so over the weekends hundreds of persons can be seen hawking their wares, be it eatables or any other item.

28. Though the scope of this petition is limited, with respect to Parwanoo, but then such scene is noticeable at all tourist spots and destinations of Himachal Pradesh. This, in a great measure, has resulted into law and order problem, apart from causing degradation of the environment, for one finds the entire roadside and countryside to be littered with items of non-biodegradable material.

29. It was only pursuant to the directions issued by the Hon'ble Supreme Court of India in *Gainda Ram& others versus Municipal Corporation of Delhi & others,* (2010) 10 SCC 715, that the Act in question came to be enacted.

30. The Apex court in *Maharashtra Ekta Hawkers Union & another v. Municipal Corporation, Grater Mumbai & others,* (2014) 1 SCC 490, while highlighting the plight of the street vendors/hawkers and the raw treatment suffered by them at the hand of the administration, emphasized the need for constitution of Town Vending Committees, in view of the Act, which was a Bill at that point in time, emphasizing the need for registration of the hawkers/ vendors, entitling them to operate in the area, specified by such Committees. The restriction imposed upon the High Courts for entertaining the matters pertaining to hawkers, pursuant to the directions contained in *Maharashtra Ekta Hawkers Union vs. Municipal Corporation, Greater Mumbai*, (2009) 17 SCC 151, was also lifted.

31. Further, in *Dharam Chand v. Chairman, New Delhi Municipal Council and others,* (2015) 10 SCC 612, the Court emphasized that the Fundamental Right guaranteed under the Constitution of India, under Article 19(1)(g) is also subject to reasonable restrictions, and keeping in view the security and public order of the area. The Court was dealing with the case of removal of owner of kiosk, in close proximity to the Court premises. It is in this backdrop, the Court observed that wherever necessary, personal liberties of citizens may be curbed within reasonable limits, restricted in the interest of peace, security, law and order. In fact, the Court reiterated its earlier view that even though the hawkers have a right under Article 19(1)(g) of the Constitution of India, but it is subject to reasonable restrictions, under Article 19(6). It emphasized that hawking may not be permitted where, e.g. due to narrowness of road, free flow of traffic or movement of pedestrians is hindered or where for security reasons an area is required to be kept free, Hospitals, places of worship, etc. are also required to be kept free of hindrance. It clarified that there is no fundamental right under Article 21 to carry on any hawking business. Equally, there is no right to do hawking at any particular place. In fact, it emphasized the need for having regulated activity, for small traders, for it could suitably add to the convenience and comfort of the general public, by making available ordinary articles of everyday use for a comparatively lesser price. Now, all this has to be kept in mind by the authorities, while taking a decision.

32. In view of the same, we dispose of the present petitions with the following directions:

(a) Municipal Council, Parwanoo/Town Vending Committee/HIMUDA shall re-examine and revisit the entire provisions of the Act andthen take appropriate decision/action for strict enforcement thereof.

(b) The Deputy Commissioner and the Superintendent of Police, Solan, District Solan, Himachal Pradesh; the Chief Executive Officer-cum-Secretary, HIMUDA; Chairman and Executive Officer of Municipal Council, Parwanoo; Sub Divisional Magistrate, Parwanoo, shall conduct a joint meeting and take appropriate action for proper and complete implementation of the provisions of the Act, including for (i) correctly identifying all street vendors, (ii) adhering to the vending zones, (iii) issuing vending licences, in terms of the Act, (iv) evict all persons who do not fall within the holding capacity/provisions of the Act, and (v) relocate such of those persons who stand identified as street vendors at such places, which stand identified, i.e. Sectors 1 & 2 or at another area.

(c) We clarify that we have not adjudicated the status and rights of the writ petitioners, for we leave it open to be so considered and decided by the authorities concerned. It is for the authorities to decide the same and the writ petitioners to establish their rights and entitlements under the Act, which shall positively be done within a period of four weeks from today.

(d) Municipal Council, Parwanoo; HIMUDA and the other functionaries, under the statute, shall ensure compliance of the provisions of the Act. They shall further ensure that no squatting zone is maintained and once the street vendors are settled, all other squatters are removed. It shall be ensured that the squatters are not allowed to return to the squatting zone.

(e) In any event, all Khokhas/Rehadis, near Punjab National Bank, Sector-1, Parwanoo, shall be removed immediately.

(f) The Superintendent of Police, Solan, District Solan, Himachal Pradesh, shall also render all necessary assistance for evicting the vendors and the squatters.

(g) The Sub Divisional Magistrate and the Station House Officer, Parwanoo, shall be personally liable for ensuring compliance of the orders and any direction found to be flouted shall amount to misconduct, warranting disciplinary action. They shall maintain proper register of removal of all encroachers, so as to ensure that repeatedly such persons may not continue to violate the provisions of the Act. Necessary action, if so required, be also taken against them.

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

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

State of Himachal Pradesh and another .....Appellants.

Vs.

Shri Chaman Singh .....Respondent.

LPA No.: 67 of 2015
Date of Decision: 07.04.2018

Constitution of India, 1950- Article 226- **Himachal Pradesh Civil Services (Revised Pay 1st Amendment) Rules, 1998-** A public servant governed by the said Rules is entitled to benefit of Assured Career Progression Scheme (ACPS) after completion of 4, 9 and 14 years of service- Petitioner was inducted in the Himachal Pradesh Administrative Service on 4.10.1992 - Given

benefits under the ACPS on completion of service of 4 & 9 years- He completed 14 years of service on 30.9.2006 but denied benefits of ACPS on completion of 14 years of service owing to 'administrative instructions/guidelines' issued by Finance Department on 23.6.2000 providing for giving of such benefits on and w.e.f. 1.1.2007 only – Petition against – Hon'ble Single Bench allowing writ of petitioner- Letter Patent Appeal - Held – Petitioner admittedly had completed 14 years of service before his superannuation – He could not have been arbitrarily denied benefits on basis of mere administrative 'instruction/guideline' – Letter Patent Appeal dismissed.

(Para-10 and 11)

For the appellant:	Mr. Ajay Vaidya, Senior Additional Advocate General, with Mr. Ranjan Sharma, Additional Advocate General.
For the respondents:	Mr. Sanjeev Bhushan, Senior Advocate, with M/s Rajesh Sharma and Abhilasha Kaundal, Advocates.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

By way of this appeal, State has challenged judgment dated 29.08.2014, passed by the learned Single Judge in CWP No. 5903 of 2010, titled as *Chaman Singh* Vs. *State of H.P. and another*, vide which, learned Single Judge while allowing the writ petition filed by the present respondent-petitioner, directed the State to grant and release the benefits of four tier pay scale as per Himachal Pradesh Civil Services (Revised Pay) Rules, 1998 and further release the benefit of Assured Career Progression Scheme in favour of the petitioner on completion of 14 years of service with all consequential benefits in relation to gratuity, pension, leave encashment, as also revised pension based on the scale as would be granted to the petitioner upon completion of 14 years of service w.e.f. 01.10.2006.

2. Brief facts necessary for the adjudication of present appeal are that the respondent-petitioner (hereinafter referred to as "the petitioner) approached this Court with the grievance that after his initial appointment as Block Development Officer on 25.09.1986, he stood promoted to the cadre of Himachal Pradesh Administrative Services on 01.10.1992. On 20.01.1998, a notification was issued by the respondent-State, which amended Rule 3 of the Himachal Pradesh Civil Services (Revised Pay 1st Amendment) Rules, 1998. This was followed by issuance of another notification on 01.09.1998, vide which certain modifications were introduced in the earlier notification. Thereafter, on 23.06.2000, State again issued instructions on grant of four tier pay scale. According to the petitioner, as he was inducted into Himachal Pradesh Administrative Services on 01.10.1992, accordingly in terms of notification dated 20.01.1998 as also amendment carried out on 01.09.1998, he became eligible for grant of benefits on completion of 14 years of service on 30.09.2006, but because of impediment which was subsequently created by Clause C(iii) of instructions issued on 23.06.2000, the scale to which the petitioner was otherwise entitled to upon completion of 14 years service was denied. As per the petitioner, Clause 3 of instructions (*supra*) was not in consonance with the Rules which were framed under Article 309 of the Constitution of India.

3. In response to the petition, State took the stand that the induction of the petitioner initially in H.P. Administrative Services on 01.10.1992 was on temporary basis and thereafter he was appointed on regular basis on 07.12.1993. He was thereafter released pay scales to which he was entitled to on completion of 4 and 9 years of service by computing length of service from 01.10.1992. According to the State, though the petitioner had completed 14 years of service on 30.09.2006, but he superannuated on 31.12.2006. He was to be released next higher pay scale w.e.f. 01.01.2007 as per the provisions of guidelines notified by the Finance Department on 23.06.2000, however, as he was not in service as on 01.01.2007, i.e. the day when he was to be considered for release of pay scale on completion of 14 years service in the cadre, he could not be conferred said benefit.

4. Learned Single Judge held that the dispute in issue was no more *res integra* in view of the judgment passed by the Hon'ble Division Bench of this Court in LPA No. 706 of 2011 titled as *State of H.P. & Ors* Vs. *Dr. (Mrs.) Madhuri Dhadwal*. Relying upon the said judgment, learned Single Judge reiterated what was laid down by the Hon'ble Division Bench that benefits under Assured Career Progression Scheme could not be taken away by an executive order unless such a power was reserved to the Government either in the original Rules or the amended Rules. On these basis, learned Single Judge allowed the writ petition in following terms:

> *"5. Thus, what would appear from the aforesaid decision is that the question posed before this Court is otherwise no longer res integra and fully answered by the aforesaid decision. Consequently, I have no option, but to allow this writ petition and accordingly the respondents are directed to grant and release the benefits of four tier pay scale as per Himachal Pradesh Civil Service (Revised Pay) Rules, 1998 and further release the benefit of Assured Career Progression Scheme to the petitioner on completion of 14 years of service with all consequential benefits as emerged out of out with relation to gratuity, pension, leave encashment and the revised pension based upon the scale as will now be granted to the petitioner after completion of 14 years w.e.f. 1.10.2006. The needful be done within a period of three months from the date of production of the copy of this order."*

5. Feeling aggrieved, the State has filed this appeal.

6. We have heard the learned Additional Advocate General, as also learned Senior Counsel for the respondent. We have also carefully gone through the judgment passed by the learned Single Judge and the records of the case.

7. As per the learned Additional Advocate General, perversity with the judgment under challenge was that there was a subsequent amendment carried out in the Rules in the year 2013 and as the said amendment was not brought into the notice of the learned Single Judge, therefore, the judgment so passed by the learned Single Judge was not sustainable in the eyes of law.

8. No other point was urged.

9. In our considered view, there is no merit in the arguments so raised by the learned Additional Advocate General. This we say for the reason that the amendment, admittedly, has been carried out vide notification dated 14th August, 2013 and that too on the basis of judgment of this Court in *Dr. (Mrs.) Madhuri Dhadwal's case* (*supra*). Respondent in the present appeal superannuated as far back as in the year 2006. His grievance was that he was entitled to the benefits under the Assured Career Progression Scheme on completion of 4-9-14 years of service as from the date of his induction into Himachal Pradesh Administrative Services and the benefits to which he was entitled on completion of 14 years service were arbitrarily denied to him on the basis of executive instructions. This act of the State was held to bad in law by the learned Single Judge. Now, denial of a benefit to the petitioner, which took place in the year 2006 and which was held to be bad in law by the learned Single Judge, relying upon the Rule position, as it existed in the year 2006, cannot be said to be bad on the touchstone of the amendment in the Rules, which has been carried out vide notification dated 14th August, 2013. Incidentally, it is not the case of the State that this notification was retrospective in operation. Even otherwise, rights which stood accrued to the petitioner as per the existing Rules at the time when he had completed 14 years of service cannot be otherwise also taken away by referring to a notification dated 14th August, 2013. The effect of this notification obviously is prospective and therefore, we are not in agreement with the submissions made by the learned Additional Advocate General that because the amendment carried out on 14th August, 2013 was not brought to the notice of the learned Single Judge, therefore, the judgment passed by the learned Single Judge is liable to be quashed and set aside.

10. Even otherwise, having carefully perused the judgment passed by the learned Single Judge, we do not find any perversity in the same. Learned Single Judge has rightly held by placing reliance upon the judgment passed by the Division Bench of this Court that the right of Assured Career Progression Scheme to which the petitioner was entitled on completion of 14 years of service could not have been arbitrarily denied on the basis of executive instructions. It is not the case of the State that the petitioner had not completed 14 years of service from the date of his induction in the cadre of Himachal Pradesh Administrative Services before his superannuation. The stand of the State simply is that because subsequently instructions stood issued to the effect that such a benefit was accruable only w.e.f. 01.01.2007, therefore, as the petitioner was not in job as on that date, he was not entitled for the same.

11. We are afraid, the stand of the State, in our considered view, is otherwise also not sustainable in the eyes of law, because when as per the Scheme, the incumbent is entitled for benefit of Assured Career Progression Scheme on completion of 14 years of service, the same cannot be arbitrarily denied to him by extending the date on the basis of executive instructions for the purpose of grant of this benefit.

In view of above discussion, as we do not find any merit in the present appeal, the same is dismissed. Miscellaneous applications, if any, also stand disposed of.

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

Sameer Yadav ...Petitioner

Versus

State of Himachal Pradesh and others ...Respondents

Cr.MMO No. 120 of 2018
Decided on: April 9, 2018

Code of Criminal Procedure, 1973- Sections 320 and 482- Inherent powers of High Court- Quashing of FIR and consequent criminal proceedings- Held- Power under Section 482 is not circumscribed by provisions of Section 320 - However, nature and gravity of crime and its social impact are relevant factors for consideration- On facts, FIR was found having been registered for offences under Sections 279 and 337 of I.P.C.- Matter was compounded by parties and composition was bonafide – Petition allowed – FIR and consequent criminal proceedings pending before Judicial Magistrate quashed. (Paras- 8 and 11)

Cases referred:

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

Gian Singh v. State of Punjab and anr. (2012) 10 SCC 303

Dimpey Gujral and Ors. vs. Union Territory through Administrator, UT, Chandigarh and Ors. (2013(11 SCC 497

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

For the petitioner: Mr. Maan Singh, Advocate.

For the respondents: Mr. Dinesh Thakur, Additional Advocate General with Mr. Vikrant Chandel, Deputy Advocate General, for respondent No. 1.

Mr. Ashwani Kaundal, Advocate, for respondents No.2 and 3.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

By way of instant petition filed under Section 482 CrPC, prayer has been made on behalf of petitioner for quashing FIR No. 12/2017 dated 19.1.2017 under Sections 279 and 337 IPC, registered at Police Station, Sadar, District Kullu, Himachal Pradesh.

2. Facts, as emerge from the record made available to this Court are that on 19.1.2017, respondents No.2 and 3 were going in a car bearing registration No. HP-58-5863, being driven by respondent No.2 Hemant Thakur. When they reached at Babeli, petitioner came from the opposite side while overtaking a bus, allegedly in a rash and negligent manner, due to which respondent No.2 had to take his car on *Kachha* portion of road. Petitioner having lost control over his vehicle i.e. car bearing registration No. HR-36R-4753 (Fiat Punto), dashed it against the car of respondent No.2, causing damage to the car and injury to respondent No.3 Shri Jagdish Thakur. On the basis of aforesaid statement made by respondent No.2 to the police, above said FIR came to be registered against the petitioner and subsequently *Challan* was put in the court of Chief Judicial Magistrate, Kullu.

3. Mr. Maan Singh, learned counsel representing the petitioner, while inviting attention of this Court to annexure P-2, compromise arrived at *inter se* parties, contended that the complainant(respondent No.2) as well as injured (respondent No.3) have resolved the matter amicably with the petitioner and as such, FIR detailed above, alongwith consequential proceedings pending in the court of Judicial Magistrate 1st Class, Kullu, may be ordered to be quashed and set aside.

4. Mr. Ashwani Kaundal, learned counsel representing respondents No.2 and 3, acknowledged the aforesaid factum with regard to compromise arrived *inter se* parties and contended that since the parties have resolved/settled their disputes amicably, respondents No.2 and 3 have no objection in case FIR registered against the petitioner at the behest of respondent No. 2 and consequential proceedings pending in the Court of Judicial Magistrate 1st Class, Kullu, Himachal Pradesh are ordered to be quashed and set aside.

5. Though perusal of compromise placed on record suggests that with the intervention of elder people, parties have resolved to settle the dispute *inter se* them, but this Court solely with a view to ascertain correctness and genuineness of the compromise also recorded statements of complainant and injured i.e. respondents No.2 and 3, on oath. Mr. Jagdish Chand, respondent No. 3 (injured) as well as Mr. Hemant Thakur, respondent No. 2 (complainant) stated on oath before this Court that they have compromised the matter with the petitioner of their own volition and without any fear, coercion or pressure from any side and since matter stands settled between them and petitioner, they have no objection in case FIR and consequential proceedings against the petitioner are quashed and set aside. They also acknowledged the factum that they have received Rs. 1.50 Lakh from the petitioner on account of damage to their car and injuries sustained by respondent No. 3. Their statements recorded on oath are taken on record.

6. Since the instant petition has been filed under Section 482 Cr.P.C, this Court deems it fit case to consider the same in the light of the judgment passed by Hon'ble Apex Court in **Narinder Singh and others** versus **State of Punjab and another** (2014)6 Supreme Court Cases 466, whereby Hon'ble Apex Court has formulated guidelines for accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings. Perusal of judgment referred above clearly depicts that in para 29.1, Hon'ble Apex Court has returned the findings that power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be

exercised sparingly and with great caution. Para Nos. 29 to 29.7 of the judgment are reproduced as under:-

> "29. In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:
>
> 29.1 Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.
>
> 29.2. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:
>
> (i) ends of justice, or
>
> (ii) to prevent abuse of the process of any Court.
>
> While exercising the power under Section 482 Cr.P.C the High Court is to form an opinion on either of the aforesaid two objectives.
>
> 29.3. Such a power is not be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.
>
> 29.4. On the other, those criminal cases having overwhelmingly and pre-dominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.
>
> 29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.
>
> 29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore is to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the later case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement

between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime".

7. Careful perusal of para 29.3 of the judgment suggests that such a power is not be exercised in the cases which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Apart from this, offences committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender. On the other hand, those criminal cases having overwhelmingly and predominantly civil character, particularly arising out of commercial transactions or arising out of matrimonial relationship or family disputes may be quashed when the parties have resolved their entire disputes among themselves.

8. The Hon'ble Apex Court in case **Gian Singh** v. **State of Punjab and anr.** (2012) 10 SCC 303 has held that power of the High Court in quashing of the criminal proceedings or FIR or complaint in exercise of its inherent power is distinct and different from the power of a Criminal Court for compounding offences under Section 320 Cr.PC. Even in the judgment passed in **Narinder Singh's** case, the Hon'ble Apex Court has held that while exercising inherent power of quashment under Section 482 Cr.PC the Court must have due regard to the nature and gravity of the crime and its social impact and it cautioned the Courts not to exercise the power for quashing proceedings in heinous and serious offences of mental depravity, murder, rape, dacoity etc. However subsequently, the Hon'ble Apex Court **in Dimpey Gujral and Ors**. vs. **Union Territory through Administrator, UT, Chandigarh and Ors**. (2013(11 SCC 497 has also held as under:-

"7. In certain decisions of this Court in view of the settlement arrived at by the parties, this Court quashed the FIRs though some of the offences were non-compoundable. A two Judges' Bench of this court doubted the correctness of those decisions. Learned Judges felt that in those decisions, this court had permitted compounding of non-compoundable offences. The said issue was, therefore, referred to a larger bench.

The larger Bench in Gian Singh v. State of Punjab (2012) 10 SCC 303 considered the relevant provisions of the Code and the judgments of this court and concluded as under: (SCC pp. 342-43, para 61)

61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre-dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding." (emphasis supplied)

8. In the light of the above observations of this court in Gian Singh, we feel that this is a case where the continuation of criminal proceedings would tantamount to abuse of process of law because the alleged offences are not heinous offences showing extreme depravity nor are they against the society. They are offences of a personal nature and burying them would bring about peace and amity between the two sides. In the circumstances of the case, FIR No. 163 dated 26.10.2006 registered under Section 147, 148, 149, 323, 307, 452 and 506 of the IPC at Police Station Sector 3, Chandigarh and all consequential proceedings arising there from including the final report presented under Section 173 of the Code and charges framed by the trial Court are hereby quashed."

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

"11. The first contention advanced at the hands of the learned counsel for the appellants was, that the respondents-accused have been charged of offences under Sections 406, 408, 409, 477A and 120B of the Indian Penal Code. It was the pointed contention of the learned counsel for the appellants, that most of the provisions under which the accused-

respondents had been charged, were non-compoundable under Section 320 of the Criminal Procedure Code. And as such, the matter could not have been compounded.

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

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

> "5. It is on the basis of this compromise that the application was filed in the High Court for quashing of proceedings which has been dismissed by the impugned order. We notice from a reading of the FIR and the other documents on record that the dispute was purely a personal one between two contesting parties and that it arose out of extensive business dealings between them and that there was absolutely no public policy involved in the nature of the allegations made against the accused. We are, therefore, of the opinion that no useful purpose would be served in continuing with the proceedings in the light of the compromise and also in the light of the fact that the complainant has on 11-1-2004, passed away and the possibility of a conviction being recorded has thus to be ruled out.
>
> 6. We need to emphasise that it is perhaps advisable that in disputes where the question involved is of a purely personal nature, the Court should ordinarily accept the terms of the compromise even in criminal proceedings as keeping the matter alive with no possibility of a result in favour of the prosecution is a luxury which the courts, grossly overburdened as they are, cannot afford and that the time so saved can be utilised in deciding more effective and meaningful litigation. This is a common sense approach to the matter based on ground of realities and bereft of the technicalities of the law." (Emphasis is ours)

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

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

> "59. B.S. Joshi (2003) 4 SCC 675: (AIR 2003 SC 1386)Nikhil Merchant (2008) 9 SCC 677: (AIR 2009 SC 428), Manoj Sharma (2008) 16 SCC 1: (AIR 2008 SC

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

60. We find no incongruity in the above principle of law and the decisions of this Court in Simrikhia (1990) 2 SCC 437: (AIR 1990 SC 1605) Dharampal (1993) 1 SCC 435: (AIR 1993 SC 1361),Arun Shankar Shukla (1999) 6 SCC 146:(AIR 1999 SC 2554),Ishwar Singh (2008) 15 SCC 667:(AIR 2009 SC 675), Rumi Dhar (2009) 6 SCC 364: (AIR 2009 SC 2195)and Ashok Sadarangani (2012) 11 SCC 321: (AIR 2012 SC 1563)The principle propounded in Simrikhia that the inherent jurisdiction of the High Court cannot be invoked to override express bar provided in law is by now well settled. In Dharampal the Court observed the same thing that the inherent powers under Section 482 of the Code cannot be utilised for exercising powers which are expressly barred by the Code. Similar statement of law is made in Arun Shankar Shukla. In Ishwaqr Singh the accused was alleged to have committed an offence punishable under Section 307 IPC and with reference to Section 320 of the Code, it was held that the offence punishable under Section 307 IPC was not compoundable offence and there was express bar in Section 320 that no offence shall be compounded if it is not compoundable under the Code. In Rumi Dhar although the accused had paid the entire due amount as per the settlement with the bank in the matter of recovery before the Debts Recovery Tribunal, the accused was being proceeded with for the commission of the offences under Sections 120-B/420/467/468/471 IPC along with the bank officers who were being prosecuted under Section 13(2)read with 13 (1)(d) of the Prevention of Corruption Act. The Court refused to quash the charge against the accused by holding that the Court ould not quash a case involving a crime against the society when a prima facie case has been made out against the accused for framing the charge. Ashok Sadarangani was again a case where the accused persons were charged of having committed the offences under Sections 120-B, 465, 467, 468 and 471, IPC and the allegations were that the accused secured the credit facilities by submitting forged property documents as collaterals and utilised such facilities in a dishonest and fraudulent manner by opening letters of credit in respect of foreign supplies of goods, without actually bringing any goods but inducing the bank to negotiate the letters of credit in favour of foreign suppliers and also by misusing the cash-credit facility. The Court was alive to the reference made in one of the present matters and also the decisions in B.S.Joshi, Nikhil Merchant and Manoj Sharma and it was held that B.S.Joshi, and Nikhil Merchant dealt with different factual situation as the dispute involved had overtures of a civil dispute but the case under consideration in Ashok Sadarangani was more on the criminal intent than on a civil aspect. The decision in Ashok Sadarangani supports the view that the criminal matters involving overtures of a civil dispute stand on a different footing.

61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the

> power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice, or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and the victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and the offender in relation to the offences under special statutes like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity, etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and predominatingly civil flavour stand on a different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, the High Court may quash criminal proceedings if in its view, because of the compromise between the offender and the victim, the possibility of conviction is remote and bleak and continuation of the criminal case would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and the wrongdoer and whether to secure the ends of justice, it is appropriate that the criminal case is put to an end and if the answer to the above question(s) is in the affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding."
>
> (Emphasis is ours)

15. A perusal of the above determination, leaves no room for any doubt, that this Court crystalised the position in respect of the powers vested in the High Court under Section 482 of the Criminal Procedure Code, to quash criminal proceedings. It has now been decisively held, that the power vested in the High Court under Section 482 of the Criminal Procedure Code, is not limited to quashing proceedings within the ambit and scope of Section 320 of the Criminal Procedure Code. The three-Judge Division Bench in the above case, clearly expounded, that quashing of criminal proceedings under Section 482 of the Criminal Procedure Code, could also be based on settlements between private parties, and could also on a compromise between the offender and the victim. Only that, the above power did not extend to crimes against the society. It is also relevant to mention, that the jurisdiction vested in the High Court under Section 482 of the Criminal Procedure Code, for quashing criminal proceedings, was held to be exercisable in criminal cases having an overwhelming and predominatingly civil flavour, particularly offences arising from commercial, financial, mercantile, civil, partnership, or such like transactions. Or even offences arising out of matrimony relating to dowry etc. Or family disputes where the wrong is basically private or personal. In all such cases, the parties should have resolved their entire dispute by themselves, mutually.

16. The question which emerges for our consideration is, whether the allegations levelled in the complaint against respondent Nos.1 to 3, would fall within the purview of the High Court, so as to enable it to quash the same, in exercise of its jurisdiction under Section 482 of the Criminal Procedure Code?"

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

11. Consequently, in view of the peculiar facts and circumstances of the case, wherein parties have compromised the matter at hand, this Court while exercising power vested in it under Section 482 Cr.P.C., deems it fit to accept the prayer having been made by the learned counsel representing the petitioner and as such, the matter is ordered to be compounded. Proceedings pending before Judicial Magistrate 1st Class, Kullu, Himachal Pradesh against the petitioner Samee Yadav, arising out of FIR No. 12/2017 dated 19.1.2017, registered at Police Station, Sadar, District Kullu, Himachal Pradesh are quashed and set aside.

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

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

Anant Ram Sharma ...Appellant/defendant.
Versus
Ramesh Singh ...Respondent/plaintiff.

RSA No. 456 of 2004.
Reserved on : 4th April, 2018.
Decided on : 10th April, 2018.

Torts- Libel – Grant of damages – Defendant filing FIR with police that plaintiff was misusing government vehicle for personal use and transporting sand in it – Police investigated case and presented cancellation report- Defendant not shown to have filed any objection to final report of police- In written statement also, he pleaded that investigation was not properly conducted and complaint in fact, was true- Held- Investigation by police resulted in publicity of imputations made by defendant- Allegations being false and contrived, diminished esteem and reputation of plaintiff- District Judge was justified in allowing plaintiff's appeal and decreeing his suit for damages- Regular Second Appeal of defendant dismissed. (Para-2 and 3)

For the Appellant: Mr. Rajneesh K. Lal, Advocate.
For the Respondent: Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiff's suit, for rendition of a decree, for damages, comprised in a sum of Rs.1,00,000/-, arising from the defendant's libel, stood dismissed by the learned trial Court. In an appeal carried therefrom, before the learned First Appellate Court, by the defendant, the latter Court allowed his appeal besides obviously reversed the trial Court's judgment and decree. Hence the instant appeal by the aggrieved defendant.

2. Briefly stated the facts of the case are that the suit of the plaintiff was for a claim of Rs.1,00,000/-, on account of libel. The defendant lodged a complaint with police station Ghumarwin, alleging that the plaintiff was misusing government vehicle for his personal use, for carrying sand from river. On this complaint, police registered a case and carried out investigation at plaintiff's village Panthera and also at Saproon (Solan). The plaintiff was put to harassment and suffered in reputation. On investigation, the complaint was found to be false.

3. The defendants contested the suit and filed written statement, wherein, the defendant took the plea that the investigation was not properly made and that the complaint was in fact true.

4. The plaintiff filed replication to the written statement of the defendant, 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 the following issues inter-se the parties at contest:-

1. Whether the plaintiff is entitled for the recovery of the suit amount, as claimed? OPP.
2. Whether the court has no jurisdiction to try the suit? OPD.
3. Whether the plaintiff has no cause of action to file the present suit? OPD
4. Whether the plaintiff is estopped from filing the suit, as alleged? OPD.
5. Relief.

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

7. Now the defendant/appellant herein, has instituted the instant Regular Second Appeal before this Court, wherein he assails the findings, recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, on 28.02.2005, 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 question of law:-

a) Whether the judgment of Distt. Judge reversing he judgment of the trial Court and awarding Rs.1 lakh as damages is perverse, based on misreading of oral and documentary Evidence, particularly the complaint Ex.PW6/A and document Ex.PW6/B to Ex.PW6/F, Ex. DA and statements of PW-1, PW-2, PW-6 and DW-1 and DW-2?

Substantial question of Law No.1:

8. The plaintiff's suit for damages, arising, from the defendant circulating libelous material, libelous scribing(s) whereof is comprised in Ex.PW-6/A, is contended by the learned counsel appearing, for the defendant/appellant herein, to stand inaptly decreed by the learned first Appellate Court. In making the aforesaid contention, the learned counsel appearing, for the defendant/appellant, has contended that with Ex.PW6/A, not, carrying therein, the name of the plaintiff, hence, the impugned judgment and decree, pronounced by the learned first Appellate Court, thereupon is rendered legally frail. However, the aforesaid submission, cannot, gather any weight, given Ex. P-1 along with the documents appended therewith, clearly bespeaking (a) of plaintiff Ramesh Kumar, being the driver of the vehicle bearing number HP-14-2779, (b) the recitals aforesaid, carrying conclusivity, for want of cogent evidence in rebuttal thereto, being adduced by the defendant/appellant herein. Furthermore, the trite factum of Ex.PW6/A, squarely appertaining to the plaintiff, is clinched by the factum, of the defendant while meteing reply to paragraph No.3 of the plaintiff, his rather pleading an admission, of the apposite vehicle being, at the relevant time, hence used for personal use, by the plaintiff. The effect of the pleaded

admission, comprised in paragraph No.3 of the written statement, is, of the defendant rather hence pleading the apposite defence vis-a-vis the tort of libel, hence being embodied in truth. However, the apposite defence reared by the defendant vis-a-vis the commissions, of, tort of libel, is bereft of credence, given (a) the investigating Officer concerned after holding investigations vis-a-vis FIR No. 37/96, his instituting a closure report. (b) The effect of the Investigating Officer concerned, instituting a closure report, subsequent to his holding investigations vis-a-vis the apposite FIR, is, of the allegations constituted therein, directly appertaining to the plaintiff, being both false and contrived. The aforesaid inference is strengthened, by the factum of no material, being placed on record, by the defendant/appellant herein, with a clear display therein, of the closure report, borne in Ex.P-1, standing not accepted by the learned Magistrate concerned, or upon the closure report being accepted by the learned Magistrate concerned, the defendant preferring a revision therefrom, before the revisional Court concerned, wherein, rather dis concurrent thereto findings stand borne. The omissions of the defendant, to adduce the aforesaid evidence, constrain a conclusion, of the libelous material reflected in Ex.P-1, and, its appertaining vis-a-vis the plaintiff, hence not carrying any iota of substance or truth. Reiteratedly, the defence espoused, by the defendant/appellant herein, of all, the allegations constituted in Ex.PW-6/A being truthful, are, amenable for being discountenanced by this Court, (a) given, for the reason ascribed hereinabove, the scribed defamatory imputations reared therein, by the defendant vis-a-vis the plaintiff, being omitted, to be concerted, to be holding truth, (b) and, with obviously, during the course of Investigations being carried by the Investigating Officer vis-a-vis the apposite FIR, the scribed defamatory imputations gained publicity, and, in consequence thereof, the esteem and reputation, in society of the plaintiff, was diminished, (c) thereupon, the awarding of damages, for, commission of proven libel by the plaintiff, cannot be construed to be wanting, in any infirmity, arising, from discarding of the apposite material on record by the learned Appellate Court, or its bringing into consideration, any inapposite material.

9. Be that as it may, the calibration, of, monetary damages by the plaintiff arising, from, circulation of proven libelous material, whereupon, his reputation and esteem in society, hence stood reduced, is also not wanting, given its not being established to be grooved, upon, inapposite legal principle(s), more so, when the plaintiff has restricted, his, claim for monetary damages, only in a sum of Rs.1,00,000/-.

10. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court being 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. Substantial questions of law No.1 answered in favour of the respondent, and, against the appellant.

11. In view of above discussion, there is no merit in the instant appeal and it is dismissed accordingly. Consequently, the judgment and decree rendered by the learned First Appellate Court in Civil Appeal/Case No. 17FT/13 of 2004/2002, on 23.8.2004 is affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

Jagan Nath & others. ....Petitioners/defendants.

Versus

Maghi Ram & another ....Respondents/Plaintiff(s).

CMPMO No. 166 of 2017
Reserved on : 05.04.2018
Decided on: 10th April, 2018.

Code of Civil Procedure, 1908- Section 151- Suit for declaration challenging sale deed as null and void- Suit at stage of final arguments- Plaintiff moving an application under Section 151 for leave of Court for filing copy of charge sheet in evidence- Application allowed by Trial Court- Petitopm against- Held- Charge sheet not accompanied with report of any hand writing expert nor showing that signatures of executant on sale deed are forged – Order of trial court allowing application of plaintiff, is illegal- Petition allowed. (Para-2)

For the Petitioners:	Mr. Ramakant Sharma, Senior Advocate with Ms. Soma Thakur, Advocate.
For Respondent No.1 :	Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate.
For Respondent No.2:	Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Upon the apposite Civil Suit, the learned Senior Civil Judge, Nalagarh had struck the hereinafter extracted apposite issue No.5:-

> "5. Whether the sale deed registered on 11.8.2009, No.699, is illegal, null and void, as alleged?OPP.

The civil suit had progressed upto the stage of arguments, whereat, an application cast under the provisions of Section 151 of the CPC, was preferred by the plaintiff(s)/applicant(s) before the learned trial Court, seeking therein permission for producing before it, the copy of challan instituted, in FIR No.26/2011, (i) the adduction of the aforesaid documentary piece of evidence, was, espoused to be, both just, and, essential for hence enabling rendition of befitting findings vis-a-vis the aforesaid issue. The aforesaid application was allowed by the learned trial Court. The defendant being aggrieved therefrom, has motioned this Court, through, the instant petition.

2. Conclusive cogent proof, for rendering befitting findings upon the hereinabove extracted apposite issue No.5, is, comprised in the report of the handwriting expert, who, after comparing the disputed and admitted scribings, of, the executor of the apposite sale deed, hence makes a conclusion vis-a-vis similarities, and, variances thereof. However, the learned trial Court cursorily, and, in a slip shod manner, and, without perusing the copy of the challan, has, made the impugned order, (a) whereas, especially, on a close perusal thereof, it makes apparent disclosures, of it remaining unaccompanied, by the report of the handwriting expert concerned, (b) wherein, he on examination of the apposite admitted, and, disputed signatures of the executor concerned, hence, rendered, his apposite opinion thereon. Since, the aforesaid report, of, the handwriting expert concerned, comprised the most befitting and potent material, for rendering a pronouncement upon issue No.5, whereas, its, not being appended with the challan, thereupon, the leave as granted, to, the plaintiff, for producing on record a copy of challan, filed in FIR No.26 of 2011 is both illegal besides improper, it per se not enabling the trial judge, to render any conclusive finding upon apposite issue No.5.

3. Consequently, the instant petition is allowed, and, the order impugned before this Court is set aside. However, since for rendering befitting findings, upon, issue No.5, the report of the handwriting expert is imperative, thereupon, the plaintiff is permitted, to institute an application, cast under Section 45 of the Indian Evidence Act, before the learned trial Court, who shall, in accordance with law, make a decision thereon, and, shall thereafter upon its, in accordance with law, making an affirmative decision thereon, shall elicit the report of the handwriting expert concerned, and, shall thereafter in consonance therewith, and, in consonance with rebuttal evidence, if any, adduced by the aggrieved concerned, make a pronouncement upon the apposite civil suit. The parties are directed to appear before the learned trial Court on 23rd April, 2018. All pending applications also stand disposed of. Records be sent back forthwith.

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

Jali ... Petitioner
Vs.
State of Himachal Pradesh ... Respondent

CrMP(M) No. 330 of 2018
Decided on April 10, 2018

Code of Criminal Procedure, 1973- Section 438- Grant of Pre-arrest Bail Principles – Applicant/accused was allegedly having illicit relationship with deceased, who was already married to complainant 'S'- Applicant and deceased were staying in hotel where latter consumed poison after some altercation with applicant/accused – Applicant joined investigation- Her custodial interrogation was not required- Pre-arrest bail granted subject to conditions.

(Para- 7 and 12)

Cases referred:

Sanjay Chandra versus Central Bureau of Investigation (2012)1 Supreme Court Cases 49
Prasanta Kumar Sarkar versus Ashis Chatterjee and another (2010) 14 SCC 496

For the petitioner	Mr. Surinder Saklani, Advocate.
For the respondent	Mr. Dinesh Thakur, Additional Advocate General with Mr. Vikrant Chandel, Deputy Advocate General. SI Radhey Shyam, PS Sadar, District Shimla, Himachal Pradesh.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Bail petitioner namely Jali, apprehending her arrest, approached this Court in the instant proceedings, seeking pre-arrest bail in FIR No. 34 of 2018, dated 9.3.218, under Section 306 registered with Police Station Sadar, District Shimla, Himachal Pradesh.

2. Sequel to order dated 26.3.2018, whereby bail petitioner was ordered to be enlarged on bail in the event of arrest, SI Radhey Shyam has come present with the record. Mr. Dinesh Thakur, learned Additional Advocate General has also placed on record status report, prepared on the basis of investigation carried out by the investigating agency. Record perused and returned.

3. Perusal of record/ status report suggests that FIR detailed herein above came to be lodged at the behest of the complainant namely Sandeepna, who alleged that her husband had illicit relations with the bail petitioner, who despite having known the fact that deceased Raj Kumar was married, kept on living with him as his wife. Complainant further alleged that she has suspicion that the bail petitioner is responsible for the death of her husband, who allegedly committed suicide on 24.12.2017. As per investigation, husband of the complainant was staying in Hotel Pushpak, Fingask on 24.12.2017 alongwith the bail petitioner. Allegedly, some altercation took place between the bail petitioner and the deceased, whereafter he(deceased) allegedly consumed poison and ultimately passed away. Investigation further reveals that the bail petitioner was with the deceased on 24.12.2017, who after having discovered the fact that the deceased has consumed poison, took him to IGMC, but unfortunately, he could not be saved.

4. Mr. Surinder Saklani, learned counsel representing the bail petitioner, while referring to the record/ status report, contended that no case, if any, is made against the bail petitioner under Section 306 IPC, because there is no evidence adduced on record by the investigating agency, suggestive of the fact that deceased Raj Kumar consumed poison after being tortured or harassed by the bail petitioner, who was admittedly known to him for quite

considerable time. Mr. Saklani, further states that otherwise also it was the bail petitioner, who immediately after alleged incident took deceased to the hospital. Lastly, Mr. Surinder Saklani contended that sequel to order dated 26.3.2018, bail petitioner has joined the investigation and she has handed over her mobile phone containing record of conversation between her and deceased Raj Kumar, to the investigating agency and as such no fruitful purpose shall be served in case she is kept in custody.

5. Mr. Dinesh Thakur, learned Additional Advocate General, while fairly acknowledging the factum that the bail petitioner has joined the investigation pursuant to order passed by this Court, contended that keeping in view the gravity of offence allegedly committed by bail petitioner, it may not be proper to grant her anticipatory bail at this stage, especially when investigation in the case is yet to be completed. Mr. Dinesh Thakur further, on instructions, admitted that the bail petitioner has handed over her mobile phone to the investigating agency, but stated that in the event of her being enlarged on bail, there is every possibility of her tampering with the evidence, as such, present bail application may be dismissed.

6. Having heard the learned counsel representing the parties and gone through the record, this Court is of the view that since the bail petitioner has joined the investigation and she is fully co-operating with the investigating agency, as such, no fruitful purpose shall be served in case her custodial interrogation is allowed. As has been fairly admitted by the learned Additional Advocate General that the bail petitioner has joined investigation and has also consented for giving her voice sample, this Court sees no reason to deny bail to the petitioner.

7. Guilt if any, of the bail petitioner is yet to be proved in accordance with law by the prosecution by leading cogent and convincing evidence, as such, this Court finds no reason for her custodial interrogation. Freedom of an individual is of utmost importance and same can not be allowed to be curtailed, especially when bail petitioner is cooperating with investigating agency. Repeatedly it has been held by the Hon'ble Apex Court as well as this Court that merely on suspicion, freedom of an individual can not be curtailed and he/she is deemed to be innocent until proved guilty.

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

> "2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.
>
> 3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.

> 4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.
>
> 5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons."

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

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

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

11. The Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496**,** has laid down the following principles to be kept in mind, while deciding petition for bail:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(xiii) reasonable apprehension of the witnesses being influenced; and

(xiv) danger, of course, of justice being thwarted by grant of bail.

12. In view of above, bail petitioner has carved out a case for grant of bail and as such, interim order dated 26.3.2018, is made absolute, subject to the petitioner's furnishing fresh bail bonds in the sum of Rs.50,000/- (Rs. Fifty Thousand) with a local surety in the like amount, to the satisfaction of the Investigating Officer concerned, besides following conditions:

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

(q) She shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

(r) She shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and

(s) She shall not leave the territory of India without the prior permission of the Court.

(t) She shall surrender passport, if any, held by her.

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

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

The petition stands accordingly disposed of.

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

Naim Akhtar ...Petitioner

Versus

Executive Engineer, Mandi Division-II ...Respondent

Arb. Case No. 77 of 2017
Decided on: April 10, 2018

Arbitration and Conciliation Act, 1996- Section 12(3)(5), 7th Schedule as amended vide Act 3 of 2016 and Section 13(2)- Held – In terms of Section 12(5) of Act, person having direct or indirect relationship with parties or in relation to subject matter in dispute cannot be appointed as Arbitrator. (Para-12)

Arbitration and Conciliation Act, 1996- Section 12(3)(5), 7th Schedule as amended vide Act 3 of 2016 and Section 13(2)- Work of construction of road was awarded to contractor by HP PWD – Dispute arising inter se parties was referred by Chief Engineer to Superintending Engineer (SE), Kullu for arbitration – Appointment of SE as Arbitrator challenged by petitioner on ground of its being violation of Section 12(5) read with Category-I of 7th Schedule – Held- SE, Kullu who is employee of State has relation with respondent/State, which is a party to dispute – He cannot be appointed as Arbitrator- Petition allowed. (Para-14 to 16)

Case referred:
Volestalpine Schienen GMBH v. Delhi Metro Rail Corporation Ltd., (2017) 4 SCC 665

For the Petitioner : Mr. Suneet Goel, Advocate.
For the Respondent : Mr. Dinesh Thakur, Additional Advocate General with Mr. Vikrant Chandel, Deputy Advocate General.

The following judgment of the Court was delivered:

Justice Sandeep Sharma, Judge.

By way of instant application filed under Sections 14 and 15 of the Arbitration & Conciliation Act, as amended upto date, prayer has been made on behalf of the petitioner for termination of the mandate of arbitrator and for appointment of substitute arbitrator.

2. For having a bird's eye view, facts as emerge from the record are that the petitioner was awarded work of construction of Ghatta-Sihan Road Km. 0/0 to 1/900 (ii) C/o Chunahan Malhnoo Road Km. 0/0 to 4/500 under PMGSY for the year 2003-04 Package No. HP-08-08, Agreement No. 2 of 2004-05. Since certain disputes arose between the parties, matter came to be referred to the arbitration of Superintending Engineer Arbitration Circle, HPPWD Solan, vide order dated 13.3.2014. However, aforesaid Superintending Engineer vide communication dated 18.11.2016, requested for appointment of another arbitrator since dispute pertained to the works executed during his incumbency as Executive Engineer, Mandi. Consequently, Chief Engineer, Mandi Zone, vide communication dated 2.12.2016 substituted Superintending Engineer 6th Circle, HPPWD Solan with Superintending Engineer, Arbitration Circle Kullu. A corrigendum came to be issued on 7.12.2016 since name of petitioner was wrongly recorded as Balak Ram (annexure P-2). Petitioner submitted letter dated 24.1.2017, raising dispute with regard to appointment of Superintending Engineer 6th Circle, Kullu as sole arbitrator claiming that he could not be appointed as such, in terms of Section 12 of the Act. He claimed that the person appointed as Sole Arbitrator is under direct employment of the Department as such, he is precluded from being appointed as an arbitrator in terms of amended provisions of the Act *ibid*. Since respondent failed to take action, if any, pursuant to aforesaid request made by petitioner, petitioner approached this Court in the instant proceedings.

3. Mr. Suneet Goel, learned counsel representing the petitioner, while inviting attention of this Court to Section 12 of the Arbitration & Conciliation Act, contended that a person having either direct or indirect relationship or interest in any of the parties or in relation to subject matter of dispute, can not be appointed as an arbitrator, as such, appointment of Superintending Engineer 6th Circle, Kullu, as sole arbitrator is not sustainable and an independent arbitrator is required to be appointed. He further contended that Superintending Engineer, 6th Circle, is under direct employment of respondent-Department and as such, his appointment is in violation of the conditions enumerated in 7th Schedule of Arbitration & Conciliation Act as amended upto date. He further contended that apart from above, learned arbitrator has not made any disclosure as required under amended provisions of Arbitration & Conciliation Act disclosing the circumstances, which may lead to justifiable doubts as to the impartiality and neutrality of the arbitrator.

4. Respondent-State, by way of reply has opposed aforesaid prayer having been made by the petitioner. Mr. Vikrant Chandel, learned Deputy Advocate General, while disputing aforesaid contention raised in the petition by the petitioner, contended that the petitioner is estopped from challenging the appointment of the arbitrator at this belated stage because petitioner has participated in the proceedings and has waived off his right in view of Section 4 of the Arbitration & Conciliation Act. He further contended that as per clause 25 of the contract agreement, petitioner could not raise objection, if any, to the appointment of a government servant as an arbitrator, as such, objection raised by the petitioner by way of petition is devoid of merit and deserves outright rejection. He further contended that the Superintending Engineer, HPPWD Arbitration Circle Solan expressed his inability to adjudicate the dispute on the ground that the works, which are subject matter of dispute, were executed during his incumbency as Executive Engineer, Mandi, respondent-Department appointed Superintending Engineer 6th Circle Kullu as sole arbitrator vide communication dated 2.12.2016. He further contended that the record clearly suggests that even new incumbent after having entered into reference fixed two dates but even at that time, petitioner though filed reply to the claim of respondent, but never raised any objection with regard to his appointment as sole arbitrator. Lastly, Mr. Chandel contended that otherwise also, Section 12 as amended by Act No. 3 of 2016 is not applicable in the present proceedings, because appointment in terms of dispute raised by petitioner came to be made prior to amendment in Section 12 of the Act *ibid*. Mr. Chandel, further contended that challenge if any to the appointment of the arbitrator could be laid within 15 days of his appointment as provided under Sub-section (3) of Section 13, but in the case at hand, such request came to be made after expiry of period referred herein above.

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

6. Admittedly, in the case at hand, new arbitrator i.e. Superintending Engineer 6th Circle, HPPWD, Kullu came to be appointed on 2.12.2016, vide annexure R-5. It is also not in dispute that arbitrator so appointed entered into reference on 26.12.2016. Though the petitioner attended first hearing held on 21.9.2017, but on that he never chose to file application, laying therein challenge, if any, to the appointment of arbitrator. Bare perusal of Section 13 of the Arbitration & Conciliation Act suggests that a party intending to lay challenge, if any, to the appointment of arbitrator is required to move a written statement of reasons, if any, within a period of 15 days after becoming aware of constitution of arbitral tribunal or becoming aware of any circumstance as provided under Sub-section (3) of Section 13. In the case at hand, admittedly petitioner sent communication to the arbitrator i.e. Superintending Engineer 6th Circle HPPWD on 24.1.2017, annexure R-15, raising question with regard to impartiality and independence of the arbitrator so appointed by Chief Engineer, (MZ), HPPWD, substituting Superintending Engineer, Arbitration Circle, Solan.

7. No doubt, in the case at hand, application in terms of Section 13 (2) came to be filed on 24.1.2017 i.e. after one and a half months, whereas as per Section 13 (2) such application could be made within a period of 15 days after becoming aware of constitution of

arbitral tribunal or becoming aware of any circumstances as referred in Sub-section (3) of section 12. Sub-section (3) of Section 12 provides that appointment of arbitrator can be challenged only if circumstances exist that give rise to justifiable doubts as to his independence or impartiality or he/she does not possess qualifications agreed to by the parties. Perusal of communication dated 24.1.2017 filed in terms of Section 13(2) of the Act *ibid*, suggests that the petitioner objected to appointment of Superintending Engineer 6th Circle as an arbitrator on the ground that in the arbitral proceedings, respondent-State is being represented by Executive Engineer, Mandi, who is an authorized authority of the Government. Petitioner further contended that arbitrator i.e. Superintending Engineer 6th Circle, Kullu, at present is working employee of State as such, his relationship is directly established with the respondent, which is in violation of Sr. No. 1 of 7th Schedule of amended Act of 2015. Petitioner also contended before the arbitrator in the application referred to herein above that in terms of Section 11(1) of Arbitration & Conciliation Act both the parties should agree to the person to be appointed as an arbitrator but no such consent was ever taken from the petitioner and order has been passed unilaterally by the respondents.

8. True it is that there appears to be delay on the part of petitioner in moving application laying challenge to the appointment of the arbitrator but as has been noticed above that the application laying challenge to the appointment of the arbitrator could also be filed within a period of fifteen days from the discovery of the fact that arbitrator is not eligible to be appointed as an arbitrator in terms of the conditions contained in Sub-section (3) of Section 12. In the case at hand, petitioner appeared on 21.1.2017 before the Superintending Engineer, 6th Circle, HPPWD, Kullu, after his appointment as an arbitrator, whereafter on 24.1.2017, application in question came to be filed.

9. Leaving everything aside, bare perusal of Section 12 (3) of the amended Act, which came to be amended by Act No. 3 of 2016 clearly suggests that a person having either direct or indirect relationship with the parties or in relation to subject matter in dispute can not be appointed as an arbitrator. In the case at hand, Mr. Vikrant Chandel, learned Deputy Advocate General has not been able to dispute that the Superintending Engineer, Kullu, who subsequently came to be appointed as an arbitrator has no direct or indirect relationship or interest with any of the parties or in relation to subject matter of dispute, rather, petitioner has categorically stated in his application that Superintending Engineer 6th Circle is working employee of State as such, he has direct relation with the respondent-State, which is one of the parties to the dispute.

10. At this stage, it would be profitable to take note of Section 12 of the Act.

> "12. Grounds for challenge.— (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances ,-
>
> > a) Such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and b) Which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.
> >
> > Explanation 1. –The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.
> >
> > Explanation 2. – the disclosure shall be made by such person in the form specified in the Sixth Schedule.]
>
> (2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any

circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if—

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

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

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

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

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

8. (i) for sub-section (1), the following Sub-section shall be substituted, namely

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

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

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

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

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

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

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

THE SEVENTH SCHEDULE

Arbitrator's relationship with the parties or counsel

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> NEUTRALITY of ARBITRATORS
>
> 53. It is universally accepted that any quasi-judicial process, including the arbitration process, must be in accordance with principles of natural justice. In the context of arbitration, neutrality of arbitrators, viz. their independence and impartiality, is critical to the entire process. 54. In the Act, the test for neutrality is set out in Section 12(3) which provides
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> > 12(3) An arbitrator may be challenged only if—
> >
> > (a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality..."
>
> 55. The Act does not lay down any other conditions to identify the "circumstances" which give rise to "justifiable doubts", and it is clear that there can be many such circumstances and situations. The test is not whether, given the circumstances, there is any actual bias for that is setting the bar too high; but, whether the circumstances in question give rise to any justifiable apprehensions of bias.
>
> 56. The limits of this provision has been tested in the Indian Supreme Court in the context of contracts with State entities naming particular persons/designations (associated with that entity) as a potential arbitrator. It appears to be settled by a series of decisions of the Supreme Court (See Executive Engineer, Irrigation Division, Puri v. Gangaram Chhapolia MANU/SC/0001/1983 : 1984 (3) SCC 627; Secretary to Government Transport Department, Madras v. Munusamy Mudaliar MANU/SC/0435/1988 : 1988 (Supp) SCC 651; International Authority of India v. K.D. Bali and Anr. MANU/SC/0197/1988 : 1988 (2) SCC 360; S. Rajan v. State of Kerala

MANU/SC/0371/1992 : 1992 (3) SCC 608; Indian Drugs & Pharmaceuticals v. IndoSwiss Synthetics Germ Manufacturing Co. Ltd. MANU/SC/0139/1996 : 1996 (1) SCC 54; Union of India v. M.P. Gupta (2004) 10 SCC 504; Ace Pipeline Contract Pvt. Ltd. v. Bharat Petroleum Corporation Ltd. MANU/SC/7273/2007 : 2007 (5) SCC 304) that arbitration agreements in government contracts which provide for arbitration by a serving employee of the department, are valid and enforceable. While the Supreme Court, in Indian Oil Corporation Ltd. v. Raja Transport (P) Ltd. MANU/SC/1502/2009 : 2009 8 SCC 520 carved out a minor exception in situations when the arbitrator "was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other department) to the officer whose decision is the subject matter of the dispute", and this exception was used by the Supreme Court in Denel Proprietary Ltd. v. Govt. of India, Ministry of Defence MANU/SC/0010/2012 : AIR 2012 SC 817 and Bipromasz Bipron Trading SA v. Bharat Electronics Ltd. MANU/SC/0478/2012 : (2012) 6 SCC 384, to appoint an independent arbitrator Under Section 11, this is not enough.

57. The balance between procedural fairness and binding nature of these contracts, appears to have been tilted in favour of the latter by the Supreme Court, and the Commission believes the present position of law is far from satisfactory. Since the principles of impartiality and independence cannot be discarded at any stage of the proceedings, specifically at the stage of constitution of the arbitral tribunal, it would be incongruous to say that party autonomy can be exercised in complete disregard of these principles-even if the same has been agreed prior to the disputes having arisen between the parties. There are certain minimum levels of independence and impartiality that should be required of the arbitral process regardless of the parties' apparent agreement. A sensible law cannot, for instance, permit appointment of an arbitrator who is himself a party to the dispute, or who is employed by (or similarly dependent on) one party, even if this is what the parties agreed. The Commission hastens to add that Mr. PK Malhotra, the ex officio member of the Law Commission suggested having an exception for the State, and allow State parties to appoint employee arbitrators. The Commission is of the opinion that, on this issue, there cannot be any distinction between State and non State parties. The concept of party autonomy cannot be stretched to a point where it negates the very basis of having impartial and independent adjudicators for resolution of disputes. In fact, when the party appointing an adjudicator is the State, the duty to appoint an impartial and independent adjudicator is that much more onerous-and the right to natural justice cannot be said to have been waived only on the basis of a "prior" agreement between the parties at the time of the contract and before arising of the disputes.

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

59. The Commission has proposed the requirement of having specific disclosures by the arbitrator, at the stage of his possible appointment, regarding existence of any relationship or interest of any kind which is likely to give rise to justifiable doubts. The Commission has proposed the incorporation of the Fourth Schedule, which has drawn from the Red and Orange lists of the IBA Guidelines on Conflicts of Interest in International Arbitration, and which would be treated as a "guide" to determine whether circumstances exist which give rise to such justifiable doubts. On the other hand, in terms of the proposed Section 12(5) of

> the Act and the Fifth Schedule which incorporates the categories from the Red list of the IBA Guidelines (as above), the person proposed to be appointed as an arbitrator shall be ineligible to be so appointed, notwithstanding any prior agreement to the contrary. In the event such an ineligible person is purported to be appointed as an arbitrator, he shall be de jure deemed to be unable to perform his functions, in terms of the proposed explanation to Section 14. Therefore, while the disclosure is required with respect to a broader list of categories (as set out in the Fourth Schedule, and as based on the Red and Orange lists of the IBA Guidelines), the ineligibility to be appointed as an arbitrator (and the consequent de jure inability to so act) follows from a smaller and more serious sub-set of situations (as set out in the Fifth Schedule, and as based on the Red list of the IBA Guidelines).
>
> 60. The Commission, however, feels that real and genuine party autonomy must be respected, and, in certain situations, parties should be allowed to waive even the categories of ineligibility as set in the proposed Fifth Schedule. This could be in situations of family arbitrations or other arbitrations where a person commands the blind faith and trust of the parties to the dispute, despite the existence of objective "justifiable doubts" regarding his independence and impartiality. To deal with such situations, the Commission has proposed the proviso to Section 12(5), where parties may, subsequent to disputes having arisen between them, waive the applicability of the proposed Section 12(5) by an express agreement in writing. In all/all other cases, the general Rule in the proposed Section 12(5) must be followed. In the event the High Court is approached in connection with appointment of an arbitrator, the Commission has proposed seeking the disclosure in terms of Section 12(1) and in which context the High Court or the designate is to have "due regard" to the contents of such disclosure in appointing the arbitrator. (emphasis supplied)

17. We may put a note of clarification here. Though, the Law Commission discussed the aforesaid aspect under the heading "Neutrality of Arbitrators", the focus of discussion was on impartiality and independence of the arbitrators which has relation to or bias towards one of the parties. In the field of international arbitration, neutrality is generally related to the nationality of the arbitrator. In international sphere, the 'appearance of neutrality' is considered equally important, which means that an arbitrator is neutral if his nationality is different from that of the parties. However, that is not the aspect which is being considered and the term 'neutrality' used is relatable to impartiality and independence of the arbitrators, without any bias towards any of the parties. In fact, the term 'neutrality of arbitrators' is commonly used in this context as well.

18. Keeping in mind the afore-quoted recommendation of the Law Commission, with which spirit, Section 12 has been amended by the Amendment Act, 2015, it is manifest that the main purpose for amending the provision was to provide for neutrality of arbitrators. In order to achieve this, Sub-section (5) of Section 12 lays down that notwithstanding any prior agreement to the contrary, any person whose relationship with the parties or counsel or the subject matter of the dispute falls under any of the categories specified in the Seventh Schedule, he shall be ineligible to be appointed as an arbitrator. In such an eventuality, i.e., when the arbitration Clause finds foul with the amended provisions extracted above, the appointment of an arbitrator would be beyond pale of the arbitration agreement, empowering the court to appoint such arbitrator(s) as may be permissible. That would be the effect of non-obstante Clause contained in Sub-section (5) of Section 12 and the other party cannot insist on appointment of the arbitrator in terms of arbitration agreement."

13. It is quite apparent from the reading of aforesaid judgment rendered by Hon'ble Apex Court that main purpose for amending the provision is to provide for neutrality of the arbitrators. Hon'ble Apex Court has categorically held that in order to achieve neutrality as

referred above, Sub-section (3) of Section 12 lays down that notwithstanding any prior agreement to the contrary, any person having relation with the parties or with the subject matter of dispute falling in any of the categories specified in Schedule, shall be ineligible to be appointed as arbitrator. In view of the aforesaid specific finding returned by Hon'ble Apex Court, submission having been made by the learned Deputy Advocate General that the petitioner himself had agreed at the time of the execution of agreement that he shall not raise any objection for appointment of government servant as an arbitrator, has no merit and deserves outright rejection.

14. Another contention put forth by Mr. Vikrant Chandel, learned Deputy Advocate General that amended Section 12 is not applicable in the present case, since the arbitrator i.e. Superintending Engineer, 6th Circle, Kullu was appointed prior to the amendment in Section 12 i.e. 23.4.2015, is also devoid of merit and deserves outright rejection because admittedly Superintending Engineer, 6th Circle, HPPWD Kullu came to be appointed as sole arbitrator in place of Superintending Engineer, Arbitration Circle, HPPWD Solan on 2.12.2016 i.e. after amendment in Section 12 of the Act *ibid*.

15. Consequently, in view of detailed discussion made herein above, as well as law laid down by Hon'ble Apex Court, present petition is allowed. Mr. **Rajesh Mandhotra, Advocate, HP High Court**, is appointed as an arbitrator to adjudicate upon the dispute *inter se* parties. His consent/declaration under Section 11 (8) of the Act *ibid* has been obtained and is placed on record. Mr. Mandhotra has no objection to his appointment as an arbitrator in the present matter. He is requested to enter into reference within a period of two weeks from the date of receipt of a copy of this order. It shall be open for the learned arbitrator to determine his own procedure with the consent of the parties. Otherwise also, entire procedure with regard to fixing of time limit for filing pleadings or passing of award stands prescribed under Sections 23 and 29A of the Act.

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

17. The petition is disposed of.

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

Narain Dass & Anr. .....Petitioners.

Versus

State of H.P. ....Respondent.

Cr. Revision No. 87 of 2011.
Reserved on: 26th March, 2018.
Date of Decision: 10th April, 2018.

Indian Penal Code, 1860- Sections 323, 324, 506/34- Complainant was allegedly caught hold by Nand Lal (A-2), and then stabbed by Narain Dass (A-1) on abdomen – Both were convicted of offences under Sections 323, 324 and 506/34 I.P.C. by Trial Court- Appeal dismissed by Additional Sessions Judge - Revision against- Held- Statement of complainant was corroborated from medical evidence as well as from his blood stained clothes- Weapon of offence was recovered from Narain Dass (A-1) during his interrogation - Other injured witness also testified allegations against accused- Conviction proper- Revision dismissed. (Paras- 10 to 12)

Indian Evidence Act, 1872- Sections 8 and 27- Recovery of knife from accused when he was being interrogated by police- Held- It not being a case of recovery at his instance from any place –

Recording of his statement under Section 27 was not necessary – Factum of recovery of knife is admissible in evidence. (Para- 9)

For the Petitioners:	Mr. Lakshay Thakur, Advocate.
For the Respondent:	Mr. Hemant Vaid, Addl. Advocate General with Mr. Yudhveer Singh Thakur, Dy. Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant Criminal Revision Petition stands directed by the petitioners/accused, against, the judgment rendered on 31.03.2011, by the learned Addl. Sessions Judge, Mandi, H.P. in Criminal Appeal No. 24/2006, whereby, he affirmed the judgement of conviction and sentence recorded, upon, the accused/petitioners herein, by the learned trial Court.

2. The facts relevant to decide the instant case are that PW-1 Surjan Singh had gone to attend marriage to village Pali on 11.02.2004. He was returning home on 12.02.2004 alongwith his wife Meera, his children, his brother-in-law Hans Raj (PW-3) and sister-in-law Mathra Devi (PW-7). When he reached at Rao at 5.30 PM, accused Narian Dass and Nand Lal came towards him. Accused Narian stopped the complainant and inquired as to why the complainant had maintained, relations with his sister-in-law Maheshru. Narian took out a knife and inflicted an injury on the abdomen of the complainant. The other accused Nand Lal caught the complainant by his arms. He shouted for help on which Meera, Hans Raj and Mathara Devi came on the spot. The accused also gave beatings to Hans Raj and ran away from the spot. They also threatened the complainant. The matter was reported to police. FIR Ex. PW2/A was registered in the Police Station. Thereafter the police carried investigations in the case and completed the same.

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/petitioners herein stood charged by the learned trial Court for theirs committing offences punishable under Sections 341, 323, 324, 506 read with Section 34 of the IPC. In proof of the prosecution case, the prosecution examined 9 witnesses. On conclusion of recording of the prosecution evidence, the respective statement(s) of the accused under Section 313 of the Code of Criminal Procedure were recorded by the learned trial Court wherein each of the accused claimed innocence and pleaded false implication in the case.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of conviction upon the accused/petitioners herein for theirs committing offences punishable under Sections 323, 324, 506 read with Section 34 of the IPC. In an appeal preferred therefrom by the accused/petitioners herein before the learned Addl. Sessions Judge, Mandi, H.P, the latter affirmed the apposite findings of conviction and sentence recorded in the judgment pronounced by the learned trial Court.

6. The the petitioners herein/accused stand aggrieved by the findings recorded by the learned Addl. Sessions Judge, Mandi in affirmation to the judgment of conviction recorded against them by the learned trial Court. The learned counsel appearing for the petitioners herein/accused has concertedly and vigorously contended qua the findings of conviction, recorded by the learned Addl. Sessions Judge, Mandi 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 conviction warranting reversal by this Court in the exercise of its revisional jurisdiction and theirs being replaced by findings of acquittal.

7. On the other hand, the learned Addl. Advocate General has with considerable force and vigour, contended qua the findings of conviction 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. In respect of the offences, borne, in Sections 341, 323, 324, 506 read with Section 34 of the IPC, an apposite FIR, borne in Ex.PW1/A, was lodged at the Police Station Balh. Therein, there is an ascription vis-a-vis accused Narian Dass, qua the latter delivering a blow with knife Ex.P-4, upon the left side of stomach, of the complainant/injured. In sequel thereto, blood started oozing therefrom, whereupon, blood stains hence gathered on the clothes of the victim. Co-accused Nand Lal, is alleged (a) to aid and abet, and, also share a joint mens rea, with accused Narian Dass, in the latter inflicting a knife blow, on, the left side of the stomach of the complainant. (b) Mens rea whereof, is alleged, to be comprised, in his act of clutching the complainant. In proof of the prosecution case, the prosecution led into the witness box Surjan Singh, Hans Raj and Mathara Devi. Surjan Singh, the complainant while testifying as PW-1, has, in his testification, rendered a version holding a complete harmony, and, unison with his previous statement, borne in Ex.PW1/A, (c) besides a whole some reading, of his testification, omits, to make any graphic disclosure(s) of his either embellishing or improving, upon, his previous statement recorded in writing, (d) nor also it makes any vivid disclosure, of, his contradicting, his apt previous statement recorded in writing. Consequently, when he deposes in absolute concurrence, with, his previous version, borne in Ex.PW1/A, hence his testification enjoys creditworthiness. Corroboration, to the testification of PW-1, is, meted by Hans Raj, who has testified as PW-3, and, who in his testification, has meted omnibus corroboration, to the testification, qua the occurrence, rendered by PW-1. Even though in his testification, he has echoed (e) of his being behind a curve, and, his being disabled to witness, qua what was happening ahead of him, (f) yet therefrom, no capitalization, can be derived by the accused, especially with his also suffering injuries, on his person, evident from proven apposite MLC, borne in Ex.PW5/B. Moreover, the further effect of PW-3 also sustaining injuries, in the relevant assault, and, with the defence, not espousing, of persons other than the accused, being also available at the site of occurrence, (g) thereupon, even if assumingly, PW-3 Hans Raj, arrived at the site of occurrence, with an iota of delay, since its eruption, hence, with his naturally noticing continuation, of the perpetration, of assault by the accused, upon PW-1 Surjan Singh, (h) thereupon, any stray acquiescence, by PW-3 of his being behind a curve, and, hence his being disabled, to witness what was happening ahead of him, does not discount the factum of his presence, at the site of occurrence, (i) thereupon, an inference is erectable, of his arrival at the site of occurrence though being slightly delayed, yet delay whereof not benumbing, his testification, of, upon his arrival at the site of occurrence, hence his witnessing the assault perpetrated, by the accused upon the complainant. More so, when he also sustained injuries upon his person. PW-7, Mathara Devi, the other eye witness, to the occurrence has also lent corroboration, to the testification of PW-1, and, vis-a-vis the testification, of, PW-3. With the eye witnesses to the occurrence, meteing inter se corroboration vis-a-vis their respective testifications, (j) pointedly bereft of any inter se or intra se contradiction(s), thereupon, credence is to be imputed vis-a-vis their respective testifications, dehors the factum of theirs, being purported interested witness(es), and, also dehors the factum, of any purported, inimicality, occurring inter se Mathara Devi and the accused, arising, from hers purportedly lodging a case, of sexual harassment against the accused, (k) predominantly when their respective testifications, pointedly unfold, the presence of the accused, at the site of occurrence, and, also pointedly unfold, their respective incriminatory role(s) in the relevant assault. Even if, Mathara Devi, in contradistinctivity, with the complainant, who rather attributes, the role of infliction of knife blow, on the stomach of the complainant vis-a-vis accused No.1, has hence ascribed the aforesaid incriminatory role vis-a-vis accused No.2, (l) yet when both the accused are twins, hence given their apparent similarities in resemblance(s) or in characteristic physical features, she appears to

be hence led to make the aforesaid contradistinction, (m) hence, the aforesaid contradistinction, occurring inter se PW-1, and, PW-7 is rendered insignificant nor therefrom, the testification(s) either of PW-1, and, of, PW-7, are rendered bereft of credence. The testifications, of ocular witnesses to the occurrence, when for the reasons aforestated, are rendered creditworthy, and, when the doctor concerned, who carried the medical examination of PW-1, and, PW-3, when testifying as PW-5, hence, has proven the injuries observed by him, to be respectively, occurring on the persons of PW-1, and, of PW-3, injuries whereof, find reflections, in Ex.PW5/A and in Ex.PW5/B, and, when exhibits aforesaid, stand proven by him, (n) besides when he unequivocally, depose(s), of the injuries noticed by him to be occurring on the person of PW-1, being causable by knife, Ex.P-4, and, his dispelling the suggestion, of theirs being self inflicted, besides, his connecting the time, of, infliction of injuries vis-a-vis the time, of occurrence borne in the apposite FIR, hence, the testifications of ocular witnesses vis-a-vis the reported time of occurrence, also are hence meted corroboration by PW-5.

10. Further corroboration to the testification, of ocular witnesses, as also to the testification of PW-5, is evidently meted by Ex.PW1/B, whereunder clothes, of the complainant, clothes whereof gathered stains of blood, as oozed, from the apposite injuries caused with user of knife, by accused Narian Dass, stood hence recovered. Witness thereto one Prakash Chand, while testifying, as PW-2 has efficaciously proven contents thereof, (i) and, with the learned defence counsel, while subjecting him to cross-examination, omitting to mete apposite suggestion(s) vis-a-vis the clothes recovered, under Ex.PW1/B, not appertaining, to the complainant rather recovery thereof being invented, (ii) hence, it has to be concluded of recovery(ies), of blood stained clothes, of the complainant being efficaciously effectuated. Even Ex.PW4/A whereunder recovery of knife, Ex.P-4, was, effectuated by the Investigating Officer, during, the course of his subjecting him, to, custodial interrogation, (iii) does, on its incisive reading, unfold, of accused Narain Dass, handing over knife, Ex.P-4, to the Investigating Officer concerned, (iv) consequently, when, during the course of the accused being subjected to custodial interrogation, by the Investigating Officer concerned, he was carrying with him knife, Ex.P-4, (v) thereupon, when evidently he was hence carrying, Ex.P-4 with him, and, hence with its not being obviously hidden nor camouflaged, (vi) whereas, in the latter scenario, alone it was imperative, for the Investigating Officer concerned, to record his disclosure statement, in respect of its place of keeping, and, hiding by him, and thereafter to effectuate, its recovery, (vii) necessarily, when hence, during, the course of Narain Dass being held to custodial interrogation, it hence, stood carried by him, (viii) thereupon, with his thereat producing, knife Ex.P-4, before the Investigating Officer Concerned, in sequel the non recording, of his, apposite disclosure statement, by the Investigating Officer concerned, would neither vitiate nor render legally infirm the handing over, of weapon of offence, by accused Narian Dass, to the Investigating Officer, in respect whereof Ex.PW4/A stood efficaciously prepared nor its corroborative connecting vigour vis-a-vis ocular evidence, can hence be blunted. Even though witnesses thereto, namely Bhadar Singh and Rakesh Kumar, resiled, from their previous statements recorded in writing. However, when both admitted their respective signatures, on Ex.PW4/A, thereupon the factum of theirs admitting their signatures, on Ex.PW4/B cannot be overlooked, (ix) whereupon, they, as mandated by the provisions of Section 91 and 92 of the Indian Evidence Act, stood, interdicted, besides forbidden, to depose in variance therefrom, rather with theirs being interdicted, by the statutory mandate engrafted, in the afore-referred apposite provisions of the Indian Evidence Act, reiteratedly hence they by admitting their signatures existing thereon, hence impute conclusive proof qua all the recitals, occurring therein, (x) significantly on occurrence of unflinching evidence qua their signatures existing thereon, irrefragable evidence whereof stands evinced, by theirs admitting, the prime factum of the apposite memo, rather holding their signatures, hence, when their apposite admission, sequelly statutorily belittles, the effect of theirs deposing orally in variance or in detraction thereto, (xi) naturally when they rather emphatically prove the recitals comprised in the apposite memo, thereupon it is neither appropriate nor tenable for this Court, to conclude of the recorded recitals borne in Ex.PW4/A, holding no evidentiary clout nor it is legally apt for this Court, to outweigh, the creditworthiness of the testimonies, of ocular witnesses.

11. For the reasons which have been recorded hereinabove, this Court holds that the learned Addl. Sessions Judge concerned, as also, the learned trial Court, have appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned Courts below does not suffer from any gross perversity or absurdity of mis-appreciation and non appreciation of germane evidence on record.

12. Consequently, the instant revision petition is dismissed. In sequel, the judgment(s) impugned hereat are maintained and affirmed. All pending applications also stand disposed of. The learned trial Court is directed to forthwith execute the sentence imposed upon the accused/petitioners herein. Records be sent back forthwith.

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

New Jagdambay Finance Corporation ....Appellant.
Versus
Man Singh ....Respondent.

Cr. Appeal No. 512 of 2007.
Reserved on: 27th March, 2018.
Date of Decision: 10th April, 2018.

Negotiable Instruments Act, 1881- Sections 138 and 139- Accused got financed truck from complainant- Also issued cheques in favour of Financer - On dishonour of cheque, financer filing complaint under Section 138 of Act - Trial court acquitted accused by holding that cheque was given as 'security'- Appeal against- On facts, vehicle found to have been repossessed by Financer and at that time, accused had demanded his cheques back- Financer not producing any record regarding amount due to it from accused despite claim of availability of such record with it- Held- Adverse inference is liable to drawn against financer - Cheque in question not proved to have been issued to discharge 'debt' or 'any other liability'- Acquittal upheld. (Para-9 to 12)

For the Appellant: Mr. Tashi Negi, Advocate vice Mr. Onkar Jairath, Advocate.
For the Respondent: Mr. Keshav Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge .

The complainant/appellant herein, is aggrieved, by the judgement of acquittal pronounced by the learned Judicial Magistrate 1st Clas, Court No. III, Una, District Una, H.P. upon Cr. Complaint No. RBT-114-II-06/-2 on 22.09.2007, hence has instituted therefrom the instant appeal before this Court.

2. The facts relevant to decide the instant case, (i) are of the respondent/accused, under, a hire purchase agreement executed inter se him and the complainant, hence acquiring possession, of, vehicle bearing No. HIB-0695. (ii) In purported discharge of his liabilities, towards loan installments, vis-a-vis the complainant, the accused issued cheque borne in Ex.C-1 vis-a-vis the complainant. However, on its presentation before the bank concerned, it, for want of funds in the account(s) of the accused, was hence refused to be honoured. The apposite memos reflecting the factum of insufficient funds existing, in, the account(s) of the accused, are, borne in Ex.C-2, and, in Ex. C-3. Consequently, the complainant issued a notice borne in Ex. C-4, vis-a-vis the accused, and, with the accused/respondent herein despite, expiry of the statutory period,

rather omitting to liquidate the amount, borne in Ex. C-1, hence, constrained the complainant to institute a complaint, before, the Magistrate concerned.

3. The learned trial Court, on, finding sufficient material on record, to proceed against the accused, hence, issued notice to the accused. On his appearance before the learned trial Court, notice of accusation for his committing an offence punishable under Section 138 of the Negotiable Instruments Act, stood put to him. In proof of the case, the complainant examined three witnesses. On conclusion of recording of the complainant's evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure, was recorded by the learned trial Court, wherein he claimed innocence and pleaded false implication. However, he has examined two witnesses in his defence.

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

5. The complainant is aggrieved by the judgment of acquittal recorded in favour of the accused/respondent, by the learned trial Court. The learned counsel appearing for the complainant/appellant herein, 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.

6. 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, rather 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.

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

8. The learned trial Court, on consideration, of the material, and, evidence adduced before it, has concluded, (a) of Ex.C-1 being not issued by the accused vis-a-vis the complainant, in discharge of the formers' liability(ies) vis-a-vis the latter, (b) nor its issuance being towards, any, legally recoverable debt or towards any other legally recoverable liability(ies) from him, by the complainant, (c) rather it being issued only as a security, (d) hence, with the Hon'ble Apex Court in a judgment reported in ***2006(3) CCC 665 (S.C.),*** rather expostulating, qua upon, a negotiable instrument being evidently issued only as a security, thereupon, on its issuance, it not falling within the domain of Section 138, of the Negotiable Instruments Act (hereinafter referred to as the Act), (e) hence, the learned trial Court, on anvil, of evidence inconsonance therewith rather existing on record, made a conclusion, of, the presumption embodied in Section 139 of the Act, provisions whereof of stand extracted hereinafter:

> "**139. Presumption in favour of holder**.—It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability."

qua the holder of a cheque, receiving, it in discharge of any debt or other liability, thereupon, also standing rebutted, in sequel,whereto it pronounced an order of acquittal upon the accused.

9. The efficacy(ies) of aforesaid inference(s), and, of conclusion(s) drawn, by the learned trial court, upon its construing the import, of the provisions, respectively, borne in Section 138, of the Act and in Section 139 of the Act, (a) wherein it is explicitly mandated, that, "unless" cogent evidence is adduced, in display of the negotiable instrument concerned, being not issued by the accused, only as a security vis-a-vis the complainant, (b) thereupon, the presumption, of it, being issued by the accused vis-a-vis the complainant, in discharge of his

legally recoverable debts, "rather hence, holding force", (c) whereupon the accused hereat, given, adequate evidence existing in rebuttal thereof, being construed to stand rather rendered unamenable to face the penal consequence thereof, are also hence, enjoined to be gauged, by alluding to evidence germane thereto.

10. The accused/respondent herein, for succoring, his espousal of Ex. C-1 being issued, only as security towards the complainant, and, in pursuance to a hire purchase agreement being entered qua the apposite vehicle inter se him, and, the complainant, and, it being not issued in discharge of his loan liability(ies), thereagainst vis-a-vis the complainant, had depended upon the testification of DW-1, (a) who in his examination-in-chief, unequivocally echoes of Ex. C-1, being delivered blank, to the complainant, and, only as a security. However, upon the counsel for the complainant, holding DW-1 to cross-examination, he apparently omitted to mete any apposite dis-affirmative suggestion(s) to him, for his hence concerting to bely the aforesaid echoing(s), borne in the examination-in-chief of DW-1, qua Ex. C-1 being issued only as a security, to the complainant firm. Want of apposite dis-affirmative suggestion(s), being put, by the counsel for the complainant, while holding DW-1 to cross-examination, pointedly qua the facet aforesaid, (b) whereupon, alone the aforesaid echoing(s) may stand belied, (c) rather fillips an inference of the complainant hence acquiescing, to the issuance of Ex.C-1 by the accused, to the complainant, being only as a security, than its being issued towards liquidation of the apposite loan installment(s). In sequel, the further corollary thereof, is that all the inferences drawn therefrom, by the learned trial Magistrate, qua hence, the mandate expostulated in ***2006(3) CCC 665 (S.C.)***, standing attracted, and, carrying weight hereat, (c) especially when in consonance therewith cogent evidence exists on record, evidence whereof graphically displays of the relevant negotiable instrument being issued, not, for liquidation of loan installment(s) nor for liquidating any legally recoverable debt or any other liability, rather it being evidently issued, only, as a security, (d) thereupon, the penal consequences arising from the dishonour of the negotiable instrument remaining unattracted vis-a-vis the accused.

11. Furthermore, DW-2 in his testification has also voiced, that on 11.11.2001, the complainant along with 4 to 5 persons hence arriving at the Truck Union, and, carrying away the vehicle concerned, and, upon the accused asking the complainant to return the cheques, the latter refusing. The aforesaid echoing also remains unbelied. Jagdish Ram, the complainant's witness, has testified, of the relevant documents appertaining, to the hire purchase agreement, being available with the complainant firm, and, has acquiesces, to a suggestion, of, his being disabled, to orally testify with respect to the exact outstanding loan amount(s), recoverable by the complainant, from the accused. Apparently, hence with the complainant firm, not, formidably through its witnesses, hence, making any articulation of its not maintaining any account(s) with respect to the borrowings, made by the accused, (i) thereupon, it is impliedly inferable therefrom, of, despite all the relevant record, qua the remaining recoverable purportedly borrowed loan amount(s), or qua the legally recoverable, by it, from the accused, "though" standing maintained by it, yet its omitting to produce, the relevant record, whereas, only on production thereof, it would evidently bespeak qua the outstanding loan liability, of the accused, towards it. (ii) Nonetheless, omission of its production, contrarily, nails a conclusion, of, withholding(s) thereof, rather rendering open an adverse inference being drawable against the complainant, and, also an inference, being being drawable, of, the amount borne in Ex.C-1, not appertaining, to any legally recoverable outstanding loan amount, borrowed by the accused from it nor it constituting any legally recoverable liability, (iii) besides upon conjoining the aforesaid inferences, with, the unrebutted testifications of DW-1, wherein, he voices, of the accused delivering Ex.C-1, only as a security to the complainant, rather formidably enables this Court, to erect, clinching inferences of (a) the accused proving, of the amount borne in Ex.C-1 being not a legally recoverable debt; (b) it being proved of it being issued only as a security by him, to the complainant; (c) thereupon, the application, by the learned trial Court of the mandate of the Hon'ble Apex Court, expostulated in 2006(3) CCC 665 (S.C.), being construable to be befitting, as well as, legally apt.

12. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court has appraised the entire evidence on record in a wholesome and harmonious

manner apart therefrom the analysis of the material on record by the learned trial Court does not suffer from a gross perversity or absurdity of mis-appreciation and non appreciation of evidence on record.

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

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

Sh. Roshan Lal (since deceased) through his legal representatives and others
..Appellants/Plaintiffs.

Versus

Smt. Salochana Devi ..Respondent/Defendant.

RSA No. 95 of 2005.
Reserved on : 3rd April, 2018.
Decided on : 10th April, 2018.

Specific Relief Act, 1963- Section 34- Suit for declaration, possession and injunction- Plaintiff claiming succession to estate of deceased by inheritance - Also alleging that Will dated 2.4.1989 set up by defendant is forged and fabricated – Moreover, deceased was 'Bhatt Gaddi' and agriculturist by profession – She was governed by Kangra custom in matter of alienation of property, which prohibited bequeath of suit land – Defendant claiming succession to her estate on basis of Will as her adopted daughter- Also pleading that she continued to live with deceased, even after her marriage and cultivated suit land – Trial court dismissed suit – Appeal also dismissed by First Appellate Court- Regular Second Appeal – Thumb mark of testatrix on Will found smudged and not proved to be of testatrix – Report of expert, Questioned documents also not clear- Mere fact of registration of Will by Sub Registrar after death of testatrix at instance of legatee does not prove due execution of Will by deceased – Regular Second Appeal allowed – Judgments and decrees of lower courts set aside- Suit decreed. (Para-8 and 9)

For the Appellant: Mr. Bhupender Gupta, Sr. Advocate with Ms.Rinki Kashmiri, Advocate.

For the Respondent: Mr. Rajnish K. Lal, Advocate vice to Mr. Sanjeev Sood, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

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

2. Briefly stated the facts of the case are that deceased Smt. Mohro Devi, owner in possession of half share of the suit land entered in Khata No.71, Khatauni No.150 and 151, Khasra Nos. 976, 980, 979, 981, plots 4, land measuring 0-01-390 hectares, i.e. land measuring 0-00-70 hectares, ½ share of land entered in Khata No.72, Khatauni Nos. 153 and 154, Khasra Nos. 969, 968, plots 2, land measuring 0-11-75 hectares, i.e. land measuring 0-05-87 hectares, ½ share of khata No.73, Khatauni No.155 and 156, khasra No. 960, 1428, 82, 338, 940, 945, 958, 959, 986, 1036, 1445, 381, 428, 429, 337, 942, 1154, 1436, 1446, 427, plots 21, land measuring 0-88-41 hectares, i.e. land measuring 0-44-20 hectares, including a house double

storey, comprising of two rooms and Varanda in the ground floor and two rooms in the first floor and cowshed and ¼ share of land entered in Khata No.74 Khatauni Nos. 161, to 166, Khasra Nos. 1169, 1012, 1043, 1046, 1053, 1180, 1013, 1041, 1042, 1009, 1045, 1050, 1051, 1181, 1007, 1054, 1077, 1179, 1014, 1049, 1168, 1177, plot 22, land measuring 0-95-39 hectaresi.e. land measuring 0-23-85 hectares vide jamabandi for the year 1994-95, situated in Mohal Kaloond, Mauja Chachian, Tehsil Palampur, District Kangra, H.P. (hereinafter referred to as the suit land). It has been pleaded that deceased Smt. Mohro Devi wd/o Sh. Roomi Ram, r/o village Kaloond, Mauja Chachian, Teh. Rampur, District Kangra, H.P. is the wife of the plaintiffs' father/s brother. Smt. Mohro Devi had never executed any Will during her life time. The Will set up by the defendant of 2.4.1989, alleged to be executed by Mohro Devi, is the result of forgery and the same has been fabricated after the death of Smt. Mohro Devi by the defendant, in connivance with the marginal witnesses thereto. The alleged Will is not a genuine document and does not convey any right to the defendant. In case the execution of the Will is proved then the Will of 2.4.1989 is the result of fraud, misrepresentation, deception on late Smt. Mohro Devi. The impression on the alleged Will showing the same as thumb impression of late Smt. Mohro Devi is in fact not the thumb impression of late Smt. Mohro Devi and the same is smudged one which cannot be conveniently compared or identified. Maintained that suit land in the hands of Smt. Mohro Devi was ancestral in nature and the plaintiff and Mohro Devi belonged to "Bhatt Gaddi" by caste and agriculturists by profession and are governed by Kangra custom in the matter of alienation, succession etc., and as such Smt. Mohro Devi ws not competent to execute any will of the suit property in favour of the defendant. It is pleaded that plaintiffs have inherited the suit property and as such are owners of the same. The defendant cannot acquire any right on the basis of the alleged forged and fabricated document. It is further alleged that the defendant on the strength of the alleged Will took forcible possession of the suit property in the month of May, 1989 and is continuing, as such, the possession of the defendant on the suit land is highly uauthorised and the plaintiffs are entitled for the relief of possession.

3. The defendant contested the suit and filed written statement, wherein, she has taken preliminary objections inter alia locus standi, cause of action, valuation and estoppel etc. On merits, it was admitted that Mohro Devi happened to be owner in possession of the suit land and it was claimed that the plaintiffs are not the real brother etc., and had separated long back and not entitled to inherit Mohro Devi's estate. It is alleged that late Roomi Ram and Mohro Devi had no issue so they took defendant in adoption at the age of two years, i.e., factually and ritually adopted her as their daughter and is entitled to succeed her, and after the demise of Roomi Ram, Mohro Devi was looked after by the defendant, who not only looked-after the house holding affairs, but also cultivated her land and continued living with Mohro Devi, even after her marriage and when she fell ill, the defendant nursed and looked after her and in lieu of services, Mohro Devi executed a Will of 2.4.1989 in the presence of marginal witnesses including her real brother. Mohro Devi expired on 9.4.1989 and will was got registered after her death on 21.1.1997. It is claimed that the will is genuine one. The ancestral nature of the suit land had also been denied. The parties being governed by Kangra custom had also been disputed.

4. The plaintiffs filed replication to the written statement of the defendant, wherein, they denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the plaintiffs have inherited the suit property, from Mohro Devi, as alleged?OPP.
2. Whether parties are governed by agriculture custom which prohibits alienation by way of Will, as alleged? OPP.
3. Whether the suit property is ancestral, as alleged, if so its effect? OPP.

4. Whether Smt. Mohro Devi executed a valid Will in favour of the defendant, if so its effect?OPD.

5. Whether the plaintiffs have no locus standi? OPD.

6. Whether the plaintiffs have no cause of action? OPD.

7. Whether suit is not properly valued for the purpose of court fee and jurisdiction? OPD.

8. Whether the plaintiffs are estopped to file the present suit by way of their act and conduct, as alleged?OPD.

8-A. Whether Smt. Mohro Devi deceased had adopted Smt. Salochana Devi as daughter and Smt. Salochana Devi is entitled to succeed the estate of deceased Mohro Devi, as alleged?OPD.

9. Relief.

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

7. Now the plaintiffs/appellants herein, have instituted the instant Regular Second Appeal, before, this Court, wherein they assail the findings, recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, this Court, on 8.7.2005, admitted the appeal instituted by the plaintiffs/appellants against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether the Lower Appellate Court has committed grave error of law and jurisdiction in holding the property to be ancestral in hands of the testator by not agreeing to the findings returned by the Trial Court on Issue No.3? Was not it incumbent for the Lower Appellate Court to have given cogent reason, after appreciating the evidence and the documents, in not accepting the findings of the Trial Court?

b) Whether the Lower Appellate Court has further committed grave error of law in not accepting the findings of the Trial Court on Issue NO.8-A which repelled the claim of adopting put forth by defendant-respondent? Was not it necessary for the Lower Appellate Court to have recorded its independent findings by taking into consideration the relevant pleadings, evidence and the law regarding the contentions of the Defendant-Respondent regarding the alleged adoption?

c) Whether the Lower Appellate Court has further committed grave error of jurisdiction in not at all taking into consideration the question of applicability of Kangra custom, which is widely acclaimed and recognized, governing the respective rights of the parties, who were admittedly Gaddis and being members of Scheduled Tribe, thereby materially affecting the decision?

Substantial questions of Law No.1 to 3:

8. Though this Court, had, admitted the instant Regular Second Appeal, on, 8.7.2005, upon the hereinabove extracted substantial questions of law, (i) nonetheless, before proceeding to make any adjudication thereon, this Court deems it fit, to satisfy its judicial conscience, whether the valid execution, of, the testamentary disposition propounded by the defendant, testamentary disposition whereof, is borne, in Ex.D-1, stands unflinchingly proven, and, also qua it satiating, the statutory ingredients, borne in Section 63 of the Indian Succession Act, (ii) ingredients whereof, warrant, by adduction of clinching evidence, hence satiation qua (a) of Ex. D-1 being proven by marginal witnesses thereto, to be thumb marked, by the deceased testator, in their respective presence, (b) and, the marginal witnesses thereto, also making, vivid

clear testifications, of theirs thereafter, in the presence of the deceased testator, also appending their thumb marks or signatures thereon. The marginal witnesses, to Ex. D-1, though, in their respective testifications adduced proof, in respect of execution, of, the apposite Will, hence, satiating the aforesaid statutory ingredients, and, also scribe thereto, deposes in unanimity thereto, (i) yet upon a close glance of EX. D-1, it is ex-facie apparent of thumb impression(s), purportedly existing thereon, of the deceased testator, not rather visibly, carrying any decipherable thumb impressions, of, the deceased testator. Want of existence in Ex.D-1, of clear unsmudged thumb impressions, of, the deceased testator, cannot, obviously constrain this Court to conclude, of, the deceased testator hence embossing, thereupon, her thumb impressions, (ii) also want of clear, and, unsmudged thumb impressions of the deceased testator, on Ex.D-1, nor can hence empower marginal witnesses thereto, to render consistent affirmative testifications, of the deceased testator, thumb marking, Ex. D-1, in their presence, and, thereafter in the presence of the deceased testator, theirs also appending their signatures thereon. Contrarily, existence, of, smudged thumb impressions of the deceased testator, on Ex. D-1, benumbs the testifications, of marginal witnesses, to Ex.D-1, and, also bolsters an unflinching conclusion (i) of with no thumb impression(s) of the deceased testator, existing, on Ex.D-1, hence rather theirs contriving, the factum of the deceased testator, in their respective presence(s), hence, embossing her thumb impressions thereon. The aforesaid inference and conclusion(s), drawn by this Court, qua hence the affirmative consistent testifications, rendered, by the marginal witnesses to Ex. D-1, rather being a contrivance besides an invention, does obviously, relieve this Court, to not proceed, to answer the aforesaid substantial questions of law, as stood formulated by this Court, given the judicial conscience, of this Court remaining unsatiated, vis-a-vis Ex.D-1, being proven to be thumb marked, by the deceased testator.

9. By that as it may, the learned counsel appearing for the respondent/defendant, has continued, to contend, that with the Sub Registrar concerned embossing an endorsement, on, the reverse of Ex. D-1, hence, per se, thereupon, effects, if any, of non existence of clear thumb impressions, of, the deceased testator, rather being effaced. (i) More so, when preceding therewith, the Sub Registrar concerned, on posthumous presentation, of Ex. D-1, before him, for hence its registration, significantly by Salochana Devi, the legatee constituted thereunder, the Sub Registrar concerned, rather evidently making an order, within the ambit of Section 41 and 42 of the Registration Act vis-a-vis the posthumous registration, of Ex.D-1, provisions whereof stand extracted hereinafter:-

> 41. Registration of wills and authorities to adopt.—
>
> (1) A will or an authority to adopt, presented for registration by the testator or donor, may be registered in the same manner as any other document.
>
> (2) A will or authority to adopt presented for registration by any other person entitled to present it shall be registered if the registering officer is satisfied—
>
> (a) that the will or authority was executed by the testator or donor, as the case may be;
>
> (b) that the testator or donor is dead; and
>
> (c) that the person presenting the will or authority is, under section 40, entitled to present the same.
>
> 42. Deposit of wills.—Any testator may, either personally or by duly authorized agent, deposit with any Registrar his will in a sealed cover superscribed with the name of the testator and that of his agent (if any) and with a statement of the nature of the document.

He also contends that with the Sub Registrar concerned, hence posthumously rendering the apt statutory order(s), and, it also containing an echoing qua the finger print bureau, being disabled to make a clear finding, with respect, to the unauthenticity of the thumb impressions, of the deceased testator, borne in Ex.D-1, (i) hence, the plaintiffs/appellants, being forbidden to contest, the authenticity of the thumb impressions, of the deceased testator, existing on Ex.D-1.

However, the aforesaid submission, cannot, be accepted (ii) given posthumous rendition, of, the apt statutory order by the Sub Registrar concerned, standing obviously apparently made, subsequent to the demise of the deceased testator, (iii) also when the relevant endorsements, made, on the reverse of Ex.D-1, are necessarily a sequel vis-a-vis the preceding therewith order, made by the Sub Registrar concerned, and, predominantly also when the post demise order, for registration of Ex. D-1, (iv) neither operate(s) as res judicata nor estops,Civil Courts, from, adjudging, the authenticity of the thumb impressions of the deceased testator, existing on Ex.D-1. Nowat, the recitals borne, in the order pronounced, by the Sub Registrar concerned, qua the finger print bureau, not, rendering any affirmative opinion, qua the authenticity or unauthenticity, of the thumb impressions of the deceased testator, occurring, on Ex. D-1, (v) also cannot, hence, per se, thereupon, constrain this Court, to accept as authentic, the purported thumb impressions of the deceased testator, nor the consistently rendered affirmative testifications, by the marginal witnesses thereto, can thereupon hence, satiate the apposite statutory ingredients, significantly (a) with reiteratedly lack of existence of clear thumb impressions, of the deceased testator, on Ex. D-1; (b) rather carrying a concomitant disabling effect, upon, the apposite marginal witnesses, to hence make deposition(s) of the deceased testator, thumb marking, Ex. D-1, in their respective presence. Contrarily, it appears that the smudging, of thumb impressions, purportedly, of the deceased testator, upon Ex. D-1, being, engendered, by contrivance besides inter se collusion, of, the legatee vis-a-vis the marginal witnesses thereto, and, also the scribe thereof, (c) merely, for precluding, detection(s) of authenticity(ies) or unauthenticity(ies) thereof, and, obviously in garb thereof, theirs rather facilitating the legatee constituted thereunder, to acquire the assets of the deceased testator. Consequently, all contrivances, and, the collusions aforestated, cannot, be accepted by this Court, nor hence, the judicial conscience of this Court vis-a-vis the trite statutory principles, being evidently satiated, cannot obviously be assuaged. Consequently this Court, does not deem it fit to answer the aforesaid substantial questions of law.

10. Even though a testamentary disposition, is not compulsorily registrable, and, even when an unregistered Will, assumes, a mantle of authenticity, upon evident proof standing adduced, qua satiation being begotten, of, the mandate enshrined in Section 63 of the Indian Evidence Act, (a) yet only upon registration of the Will, rather occurring during the life time of the deceased testator, and, with the relevant endorsements being made in his/her presence, by the Sub Registrar concerned, they would hence acquire conclusivity, unless potent evidence in rebuttal thereto, is adduced, (b) and also would over come the effects, if any, of any disaffirmative testifications, rendered by marginal witnesses thereto. Nowat when the disabling effect(s), of, the smudged thumb impressions, of the deceased testator, existing on Ex.D-1, hence may accordingly stand effaced, upon , the deceased testator presenting the Will, before the Sub Registration concerned, (c) whereat obviously the relevant endorsements, would occur, in her/his presence, and, also they would acquire an aura of conclusivity vis-a-vis valid execution of the “Will”, unless potent evidence in rebuttal thereto hence stands adduced. (d) Contrarily want thereof, and, rather the will being unregistered, renders spurring, of, an inference, of, the smudged thumb impressions, of the deceased testator, arousing suspicion, and also bolstering an inference of rendition(s), of, affirmative testifications, of, marginal witnesses thereto, hence standing, marginalized.

11. The above discussion, unfolds, that the conclusions as arrived by the learned first Appellate Court as also by the learned trial Court, being not based, upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court, have excluded germane and apposite material from consideration.

12. In view of the above discussion, the present Regular Second Appeal is allowed. In sequel, the judgements and decrees rendered by both the learned Courts below are set aside, and, the suit of the plaintiff is decreed. Consequently, the plaintiffs are declared to be entitled to inherit the share of deceased Mohro Devi in the suit property in accordance with law, and, defendant is directed to handover vacant possession of the suit land to the plaintiffs within three

months from today besides the defendant is also restrained from interfering in the suit land in any manner whatsoever through her agents servants, assigns etc. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

Smt. Sashi Verma .....Petitioner/Plaintiff.

Versus

Shri Tek Singh and another .....Respondents/defendants.

CMPMO No. 154 of 2017.
Reserved on : 2nd April, 2018.
Date of Decision: 10th April, 2018.

Code of Civil Procedure, 1908- Order XXXIX, Rules 1 and 2- Ad-interim mandatory injunction- Relief of possession by way of restoration of status quo ante sought – Held- It can be granted in exceptional circumstances when person is found to have been in settled possession of disputed property before his illegal dispossession by opposite party- Relief also being necessary for obviating promoting of illegal dispossession- Principles laid down in ***Anil Sharma & another vs. Mehboob Hussan***, ***2012 (suppl.) Him. L. R., 2275,*** reiterated. (Para- 2)

Code of Civil Procedure, 1908- Order XXXIX, Rules 1 and 2- Ad-interim mandatory injunction- Grant thereof- Plaintiff's application seeking possession of premises by restoring status quo ante dismissed by Trial Court and her appeal against that order by Appellate Court- Revision against- Plaintiff was found in possession of suit premises based on partnership deed executed between her and defendant No.2- Eviction suit was filed by defendant No.2 against defendant No.1 on ground of his having sublet premises in favour of plaintiff- Held- plaintiff's lawful possession prior to her dispossession by defendant No.2 is prima facie established- plaintiff entitled to ad-interim mandatory injunction for possession of suit premises- Petition allowed. (Para-3)

Cases referred:

Anil Sharma & another vs. Mehboob Hussan, 2012 (suppl.) Him. L. R., 2275

For the Petitioner: Mr. J.L. Bhardwaj, Advocate.
For Respondent No.1 : Ms. Abhilasha Kaundal, Advocate.
For Respondent No.2: Mr. R.K. Bawa, Senior Advocate with Mr. Ajay Kumar, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

During the pendency of Civil Suit No. 27-S/1, of 14/13, an application cast, under the provisions of Order 39, Rules 1 and 2 of the CPC, was, preferred by the plaintiff/applicant/petitioner herein, before the learned trial Court, wherein, she sought relief of ad interim mandatory injunction being pronounced vis-a-vis her, and, qua the suit premises. Also obviously she concerted to seek the restoration of possession of the suit premises, from, the defendant. The learned trial Court, dismissed the apposite application. In an appeal carried therefrom, by the plaintiff/petitioner herein, before, the learned Additional District Judge-1, Shimla, the latter did likewise. Now, the plaintiff/petitioner herein being aggrieved therefrom, hence, has instituted the instant petition before this Court.

2. Normally, Courts of law, would, be reluctant in granting any relief of ad interim mandatory injunction vis-a-vis the suit premises concerned, also, would obviously refrain, from, till an adjudication is pronounced on merits vis-a-vis the apposite lis, mete directions, upon the defendant(s), qua handing over, of, possession of the suit premises vis-a-vis the plaintiff/petitioner herein. However, certain exceptions tot he aforesaid intradictory bar, against, the apposite relief of ad interim mandatory injunction, being pronounced qua the suit premises, till an adjudication is meted upon the civil suit, are also encapsulated, in a judgment pronounced by this Court in a caste titled as ***Anil Sharma & another vs. Mehboob Hussan***, reported in ***2012 (suppl.) Him. L. R., 2275***, exceptions whereof are comprised in trite evidence, making prima facie displays (i) of the applicant/plaintiff/petitioner being in evident possession of the suit premises, prior to his/her unlawful eviction therefrom; (b) affording of relief being necessary, for obviating the promoting of illegal dispossession, of the applicant/plaintiff/petitioner, from the suit premises; (c) dehors no adjudication on merits being pronounced, upon the apposite therewith similar lis borne in the civil suit, (i) whereupon, the Courts, are, enjoined to hence ensure, the status quo qua ante, prior to the date of institution, of the suit. This Court would proceed, to apply, the expostulations borne, in the afore referred pronouncement, recorded by this Court in Anil Sharma's case (supra), (ii) only, upon prima facie material existing on record, and, its earmarking a graphic display qua 6 months prior to the plaintiff/applicant/petitioner, herein being purportedly illegally dispossessed, from, the suit premises by defendant No.1, rather hers being in possession thereof. The plaintiff/petitioner herein had depended, upon a partnership deed executed inter se her and defendant No.2, for hers legitimizing her claim qua hers holding possession, of, the suit premises. The learned Appellate Court, discounted vigour thereof, on, the trite grounds, of, with rent agreement being evidently executed vis-a-vis the suit premises inter se defendant No.1, and, with defendant No.2, thereupon, the plaintiff/applicant, prima facie failing to adduce cogent proof qua hers holding possession of the suit premises, importantly six months prior to hers being purportedly illegally dispossessed, from, the suit premises, besides concluded of the partnership deed executed inter se defendant No.1, and, the plaintiff/applicant/petitioner herein, especially vis-a-vis the suit premises being a sequel, of contrivance inter se defendant No.2, and, the plaintiff/petitioner herein. The factum, of, tenancy qua the suit premises inhering in defendant No.1, though, is borne by a copy, of eviction petition existing on record, wherein, defendant No.2 claims eviction of defendant No.1, and, of the plaintiff/petitioner herein, from, the suit premises, on anvil or ground, of defendant No.1 subletting the same vis-a-vis the plaintiff/petitioner herein, (a) yet any imputation of any credence thereto, is totally insignificant, for determining the tenacity of the espousals, made, by the plaintiff/applicant, in her apposite application, (b) importantly when the mandate expostulated by this Court in Anil Sharma's case **(supra)**, for hence the plaintiff/petitioner herein being rendered empowered, to seek the relief ventilated in her apposite application, rather enjoins satiation of the trite factum, of, the plaintiff/petitioner herein being in evident possession of the suit premises, prior to hers being unlawfully dispossessed therefrom. Even though, the aforesaid revelations, borne, in the rent petition, may hence, with evidently a partnership deed being executed inter se the plaintiff and defendant No.2, beget concomitant adversarial effects upon its success, nonetheless, prima facie at this stage, as aforestated, and, for the reasons to be ascribed hereinafter, the learned Appellate Court, has visibly gone astray, in omitting to apply the expostulation(s), enshrined by this Court in Anil Sharma's case (supra). His deviations, from, the mandate of the verdict pronounced by this Court, in Anil Sharma's case (supra), is comprised in his not alluding, to evidence germane, to hence satiation being begotten vis-a-vis the trite principles borne therein, of the plaintiff holding possession of the suit premises, six months, prior to hers being illegally dispossessed therefrom. The relevant evidence germane thereto, and, which appears to stand visibly untenably discarded, by the learned Appellate Court, is comprised, in defendant No.1 lodging a complaint, on 3.2.2013, with, the Incharge of Police Post, Solan, complaint whereof carries therein, articulations of his hence acquiescing, of, his not holding possession of the suit premises. The effects of the aforesaid acquiescences, borne in the report made on 3.2.2013, by defendant No.1, with, the In-charge of Police Post, Solan, is of the complaint lodged, by the plaintiff/applicant with Police Post, Solan, on 4.3.2013, with recitals occurring therein, of hers being illegally

dispossessed, from, the suit premises by defendant No.1, in the intervening night of 3/4.04.2013, rather hence, prima facie, obviously holding tenacity. On a combined conjunctive reading, of, the aforesaid material, it stands prima facie, unfolded, qua hence of the plaintiff/applicant/petitioner herein being, in possession, of the suit premises, prior to the institution of the suit, and, hers being illegally dispossessed therefrom, by defendant No.1 In aftermath, with the apposite expostulations, occurring, in Anil Sharma's case (supra), rendered by this Court, hence, begetting satiation, thereupon, it is imperative to make, a firm conclusion, of the learned Appellate Court, misdirecting itself, in refusing apposite relief to the plaintiff/petitioner herein, also its discarding material germane to resting, the controversy, hence, emerging inter se the parties at contest, (i) whereupon, it is to be concluded of the verdicts concurrently pronounced by both the learned Courts below, upon the plaintiff's/petitioner's application, cast under the provisions of Order 39, Rules 1 and 2 of CPC, warranting reversal, (ii) given, theirs obviously falling outside the principles expostulated, by this Court in Anil Kumar's case (supra), (iii) especially when for the reasons stated hereinabove, upon satiation hereat of all the trite principles expostulated therein, they stood rather empowered to grant the relief, of, ad interim mandatory injunction.

3. For the foregoing reasons, the instant petition is allowed and the impugned orders are set aside. Consequently, the plaintiff's/petitioner's application, cast under the provisions of Order 39, Rules 1 and 2 CPC, is allowed, and, defendant No.1/respondent No.1 herein is directed to, within two weeks from today, hand over the possession of the suit premises, to the plaintiff/petitioner herein. The parties are directed to appear, before, the learned trial Court on 23rd April, 2018. However, it is made clear that the observations made hereinabove shall have no bearings on the merits of the case. No order as to costs. All pending applications also stand disposed of . Records be sent back forthwith.

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

State of H.P. .....Appellant.
Versus
Roop Lal and others .....Respondents.

Cr. Appeal No. 692 of 2008.
Reserved on: 4th April, 2018.
Date of Decision: 10th April, 2018.

Code of Criminal Procedure, 1973- Section 378- Appeal against acquittal- Accused charged and tried on allegations of committing house trespass and causing simple/grievous injuries after making preparations to cause hurt- And also of threatening complainant, 'M', her mother-in-law, 'T' and sister-in-law, 'S' – Accused convicted by trial Court but acquitted in appeal by Sessions Judge- Appeal by State – Appellant contending that evidence was not appreciated correctly – On facts, Statements of M, T and S were found consistent and duly corroborated by 'RS' and 'RK', independent witnesses – No contradictions in their statements vis-à-vis site plan qua place of occurrence – Injuries on person of victims possible with dandas – Sticks were recovered from place of occurrence – Held – Seessions Judge misread evidence and went wrong in acquitting accused – Appeal allowed- Acquittal set aside. (Para-6 and10 to 13)

For the Petitioners: Mr. Hemant Vaid, Addl. Advocate General
For the Respondents: Mr. Divya Raj Singh, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal stands directed by the State of H.P., against, the judgment rendered on 13.08.2008, by the learned Sessions Judge, Hamirpur, H.P. in Criminal Appeal No. 37 of 2007, whereby, he set aside the judgement of conviction, and, sentence recorded, upon, the accused/respondents herein, by the learned trial Court.

2. The facts relevant to decide the instant case are that Meena Devi wife of Kamaljeet went to Police Station Bhoranj, and made the statement Ex.PW1/A under Section 154 Cr.P.C. It was stated by her that her husband and her "jeth" are serving in Indian Army and that she is residing with her in-laws and sister-in-law (jethani) in village Gagheri, Tappa Bamson, Tehsil and Police Station Bhoranj, District Hamirpur, H.P. On May 12, 2000, she and her mother-in-law Tara Devi went to show grass to their cattle in their cowshed and thereafter, they were removing the stones kept by accused persons in the courtyard of their cowshed. In the meantime, after finishing the work, when they were returning to house, at about 8.30 p.m., Roop Lal accused came on his tempo and stopped it, in front of the shop. His driver and conductor also got down from the tempo along with him. His wife Sandhya Devi and son Naresh Kumar @ Sanju told him that Meena and her mother-in-law had removed the stones from there. Then Roop Lal started abusing them filthily. In the meantime, all the accused persons went inside the shop and came out with dandas. She and her mother-in-law, went to their room, but the accused persons chased them there and gave them beatings. In the meantime, her "jethani" Salochana Devi came and when she intervened, the accused persons gave beatings to her also. When alarm was raised, Santosh Kumar, Ashwani Kumar, Sanjeev and Raghubir Singh came to the spot and rescued them. While going away the accused persons threatened to kill them subsequently. Upon this statement, FIR was registered in the police station concerned and the police completed all the codal formalities.

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

4. The accused/respondents herein stood charged by the learned trial Court for theirs committing offences punishable under Sections 147, 452, 323, 325, 504, 506 read with Section 149, IPC. In proof of the prosecution case, the prosecution examined 10 witnesses. On conclusion of recording of the prosecution evidence, the respective statement(s) of the accused under Section 313 of the Code of Criminal Procedure were recorded by the learned trial Court, wherein, each of the accused claimed innocence and pleaded false implication in the case. They also examined three witnesses in their defence.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of conviction upon the accused/respondents herein, for theirs committing offences punishable under Sections 147, 452, 323, 325, 504 and 506 IPC read with Section 149 of the IPC. In an appeal preferred therefrom, by the accused/respondents herein, before, the learned Sessions Judge concerned, the latter reversed the apposite findings of conviction, and, sentence recorded in the judgment pronounced by the learned trial Court.

6. The State of H.P. stand aggrieved by the findings recorded by the learned Sessions Judge concerned, in dis-concurrence vis-a-vis the judgment, of conviction recorded against them by the learned trial Court. The learned Addl. Advocate General appearing for the appellant herein, has concertedly and vigorously contended qua the findings of acquittal, recorded by the learned Sessions Judge concerned, standing not based on a proper appreciation by him, 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 rather 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 defence counsel has with considerable force and vigour, contended qua the findings of acquittal recorded by the learned Sessions Judge standing based on a mature and balanced appreciation, by him, of the evidence on record, and, theirs not necessitating any interference, rather theirs meriting vindication.

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

9. The relevant occurrence, occurred at the apposite place reflected in the site plan, borne in Ex.PW1/C. The victims/injured Salochana Devi, Meena Devi and Tara Devi, in their respectively rendered testifications, qua the occurrence reported in FIR embodied in Ex.PW10/A, (i) therein make vivid consistent therewith echoings, bereft of any inter se or inter se contradictions, vis-a-vis the incriminatory roles of the accused. PW-2 Raghubir Singh, an independent witness to the occurrence, has, rendered a testification holding absolute tandem with the unblemished testifications, rendered by the victims aforesaid. Alike PW-2, another independent witness to the occurrence, one Rajesh Kumar (PW-4), has, in his testification, also meted absolute corroboration vis-a-vis the testification(s), of the victims, and, vis-a-vis the testification of PW-2. In aftermath, given the untainted unblemished testimonies rendered by the aforesaid prosecution witnesses, hence constrains this Court, to impute credence thereto besides constrains this Court to prima facie dis-affirm the findings of acquittal recorded by the learned Sessions Judge concerned.

10. However, the counsel appearing for the respondents/accused has contended with vigour, that the testification, occurring, in the cross-examination of PW-1, (a) wherein, she makes a disclosure, of, the relevant occurrence taking place inside the cowshed, (b) thereupon, the revelations, borne in the site plan, embodied in Ex.PW10/C being rendered vulnerable to skepticism, (c) more so, when the Investigating Officer in his testification, occurring in his cross-examination has made a vivid echoing, of, during the course of his holding investigations, his rather detecting qua the occurrence not taking place, at the place testified, by the PWs. However, the aforesaid espousal, made before this Court by the learned counsel appearing for the accused/respondents, for the reasons to be ascribed hereinafter, is extremely fragile besides frail, hence is amenable to be discountenanced. (i) PW-1 in her cross-examination, after bespeaking, of, a verbal wrangle occurring inside the cowshed, thereafter clarifying, of, the alleged belabouring, occurring, at the first floor of the relevant building, (ii) of the learned defence counsel while holding her to cross-examination, permitting her, to make an echoing of one Raghubir, making, the initial intercessory arrival at the site of occurrence, and, also permitting her to make an echoing, of, upon arrival of PW2 Raghuvir Singh, at the site of occurrence, the scuffle yet remaining in progress. The effects thereof, being, (i) the defence acquiescing of the site of occurrence hence comprising the one reflected in the apposite site plan, (ii) and also acquiescing of the relevant penal scuffle taking place thereat, besides importantly, also acquiescing, of, the incriminatory involvement therein, of, the accused. The effect, if any, of the Investigating Officer, in his cross-examination, making an echoing of his, during, the course of holding investigations, rather detecting of the reflections borne in the site plan being falsified, is ridden of its disabling effect vis-a-vis the prosecution case, (iii) given the learned defence counsel, immediately subsequent thereto, putting an affirmative suggestion, qua Mark-X, embodied in Ex.PW10/C, being, the relevant site of occurrence, whereto, a compatible therewith affirmative echoing rather emanating, from, the Investigating Officer concerned. Reiteratedly, hence, the aforesaid affirmative formidable echoing meted by the Investigating Officer concerned, vis-a-vis a compatible thereto, affirmative suggestion, put qua him by the learned defence counsel while holding him, to cross-examination, hence enhances an inference, of the defence conceding qua not only the occurrence taking place at the place denoted, as, Mark-X in Ex.PW10/C, besides also the defence rather acquiescing, of, the incriminatory roles of the accused, in the relevant assault.

11. With this Court imputing credibility, to the apposite reflections occurring in the site plan, besides of this Court imputing sanctity to the testifications, of ocular witnesses to the occurrence, though hence does constrain findings, of, the charge against the accused being prima facie proven, (i) yet it is also to be marshalled, from, the medical evidence, whether it holds

bespeaking, in consonance with the testifications rendered, by the ocular witnesses to the occurrence. PW-6, Dr. Lalit Kalia, examined the victims, namely, Salochana, Meena Devi, and, Tara Devi and qua them issued apposite MLCs, respectively borne in Ex.PW6/A, Ex.PW6/B, and, in Ex.PW6/C. The aforesaid apposite MLCs were proven by him, during the course of his testifying in Court. With PW-6 proving the respectively drawn MLCs by him, vis-a-vis the victims, and, his also during the course of his examination-in-chief, making, a candid echoing qua the injuries borne therein, being causable by user, of, dandas, Ex.P-1 to P-3, dandas whereof stood shown to him in Court, also, hence galvanizing an inference of the medical evidence rather meteing corroboration vis-a-vis the testification(s) of ocular witnesses, to the occurrence.

12. Be that as it may, during the course of the relevant assault, glass bangles of the victims were broken, besides bulbs were also broken. The broken glass bangles, besides broken glasses of bulbs, were, taken into possession, through, memo Ex.PW2/A. Witnesses thereto are PW-2 Raghubir Singh, and, PW-4 Rajesh Kumar. Both of whom, during the course of their respective testifications, admitted, the occurrence of their respective signatures thereon besides also admitted qua the apposite recoveries, as reflected therein, being effectuated, in their presence. The learned defence counsel, while holding both PW-2 and PW-5, to cross-examination, has omitted to put apposite suggestions to each, carrying therein, echoings qua preparation of Ex.PW2/A being fictitious or the items reflected therein to be recovered thereunder, being a sequel of sheer contrivance, and, stratagem deployed by the Investigating Officer. Omission(s), of the learned defence counsel, while holding PW-2 and PW-5, to cross-examination, to hence put the aforesaid apposite suggestion(s) to them, for hence belying the efficacy of preparation of Ex.PW2/A, rather constrains an aplomb conclusion, of the aforesaid memo, being, evidently proven to be efficaciously drawn, and, hence also it being a clinching pointer, towards, the incriminatory rules of the accused, besides it meteing unflinching corroboration vis-a-vis the testification of ocular witnesses.

13. The recovery of dandas Ex.P-1 to P-3, was effectuated under memo Ex.PW2/A, by the Investigating Officer, from, the site of occurrence. Consequently, the recovery of Ex.P1 to P-3, was not made or effectuated within the domain of Section 27, of the Indian Evidence Act nor obviously the Investigating Officer concerned either recorded the apposite disclosure statements of the accused, nor in pursuance thereto, he effectuated recoveries thereof. However, want of adherence by the Investigating Officer vis-a-vis the mandate of Section 27 of the Indian Evidence Act, would yet not erode, the efficacy of the recitals borne in Ex.PW2/A, whereunder danda(s) were recovered. The reason for forming the aforesaid conclusion emanates from (a) the witnesses thereto PW-2 and PW-5, proving, the recitals borne in Ex.PW2/A, and, both, during the course of their respective cross-examinations, by the learned defence counsel, being not put any apposite suggestion(s), of occurrence or collection of the dandas, at/from, the site of occurrence, being an invention or contrivance deployed by the Investigating Officer or there existence thereat, being, a sequel of a clever mechanism deployed by the Investigating Officer, (b) significantly, arising from his colluding, with the complainant/victims, (c) whereas, meteing of the aforesaid suggestion to the aforesaid witnesses, was imperative, for nailing a conclusion, qua, for evident want of adherence by the Investigating Officer concerned vis-a-vis the mandate of Section 27 of the Indian Evidence Act, thereupon, the collections by him of dandas, from, the site of occurrence, hence not constituting evidence of any probative vigour, for, hence connecting the apposite collection of dandas, imperatively, with their user by the accused. Reiteratedly, hence for want of apt meteings vis-a-vis them, the aforesaid suggestions, does dispel, any rearings, of, any adversarial inference(s) vis-a-vis the efficacy, of their recoveries arising from non meteing, of, compliance vis-a-vis the mandate, of Section 27 of the Indian Evidence Act, (d) rather their collection, from, the site of occurrence, by the Investigating Officer, in respect whereof he drew memo Ex.PW2/A, (e) memo whereof stands efficaciously proven also hence enjoys apt probative vigour, (f) besides hence the existence of dandas, at, the site of occurrence neither being an invention nor a contrivance deployed by the Investigating Officer concerned, (g) rather the prosecution proving, of, dandas being hence used by the accused in the relevant assault, more so, when for reasons

aforestated, the defence acquiesces, to the relevant occurrence taking place at Mark-X, as, denoted in the site plan, borne in Ex.PW10/C.

14. The learned Sessions Judge concerned, had misread the significance, and, import of the relevant evidence, rather had dwelt upon the occurrence, of compromise(s) inter se the accused, and, the complainant, compromise(s) whereof are borne in Ex.DW4/A and in Ex.DW4/B, besides he on anvil of PW-1, making a disclosure in her cross-examination, that, staking of stones, rather occurring on the land belonging to accused Roop Lal, hence, has drawn the conclusion, of the accused, in exercise of their right to private defence, of, property, theirs using reasonable force, to thwart the aggression mounted, by the complainant. However, the aforesaid pointed focus cast upon the aforesaid evidence, is beyond the apposite espousal(s), of the defence. Consequently, any inference drawn upon the aforesaid evidence, was, neither permissible nor hence can come to be countenanced by this Court.

15. For the reasons which have been recorded hereinabove, this Court holds that the learned 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 Sessions Judge concerned, suffers from a gross perversity or absurdity of mis-appreciation, and, non appreciation of germane evidence on record.

16. Consequently, the instant appeal is allowed. In sequel, the judgment rendered by the learned Sessions Judge, Hamirpur, in Criminal Appeal No. 37 of 2007, on 13.8.2008 is set aside, whereas, the judgment rendered by the learned Additional Chief Judicial Magistrate, Hamirpur, in Police Challan No.59-I-2000/72-II-2007 is affirmed and maintained. All pending applications also stand disposed of. The learned trial Court is directed to forthwith execute the sentence imposed upon the accused/respondents herein. Records be sent back forthwith.

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

State of H.P. ....Appellant.
Versus
Sher Singh & another ....Respondents.

Cr. Appeal No. 322 of 2009
Reserved on: 4th April, 2018.
Date of Decision: 10th April, 2018.

Code of Criminal Procedure, 1973- Section 378- **Indian Penal Code, 1860-** Sections 294, 354, 509/34- Accused allegedly used criminal force to outrage modesty of victim and also did obscene activity to her annoyance- Accused acquitted by trial court- State in appeal – Incident happened on 10.4.2001, whereas FIR filed on 12.4.2001- No explanation for delay in filing FIR – Same could be result of pre- meditation – Name of one of co-accused 'L' missing in FIR- Eye-witnesses 'R' and 'I' not supporting stand of victim- Held- Findings of trial court are based on proper appreciation of evidence- No interference in appeal – Appeal dismissed. (Para-9 to 11)

For the Appellant: Mr. Hemant Vaid, Addl. Advocate General
For the Respondents: Mr. H.S. Rangra, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed by the State of Himachal Pradesh against the judgment rendered on 16.02.2009 by the learned Addl. Chief Judicial Magistrate, Court No.1,

Mandi, H.P. in Criminal Case No. 93-II/2001, whereby, he acquitted the accused for theirs allegedly committing offences punishable under Sections 354, 294, 509 IPC read with Section 34 of the IPC.

2. The facts relevant to decide the instant case are that on 10.4.2001 at about 5.15 p.m. at place Bangot, accused Sher Singh an Lakshman Ram in furtherance of their common intention have used criminal force against Kumari Nirmal Devi with an intention to outrage her modesty and also done obscene activities to annoy her. Accused Sher Singh is alleged to have opened his pant and used filthy language against complainant Nirmala Devi. At that time, complainant Nirmala Devi was accompanied by her mother Smt. Soma Devi. Smt. Nirmal Devi qua the occurrence lodged the FIR with Police Station Balh and thereafter the police completed all 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 354, 294, 509 IPC read with Section 34 of the IPC. In proof of the prosecution case, the prosecution examined 7 witnesses. On conclusion of recording of the prosecution evidence, the statements of the accused under Section 313 of the Code of Criminal Procedure were recorded by the learned trial Court, wherein the accused claimed innocence, and, pleaded false implication.

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/respondents, by the learned trial Court. The learned Addl. 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/respondents herein has with considerable force and vigour, contended qua the findings of acquittal recorded by the learned trial Court rather standing based on a mature and balanced appreciation by it of the evidence on record, and, theirs not necessitating any interference, rather theirs meriting vindication.

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

9. The apposite FIR is borne in Ex.PW3/A. The aforesaid FIR, as lodged on 12.04.2001, contains, recitals qua an alleged incident which occurred, on 10.04.2001. However, no explication has emanated either from the complainant or from the prosecution vis-a-vis the belated lodging of the FIR, thereupon, the recitals borne therein, are construable to be sequel of proactive premeditation or contemplation, besides hence are rendered unamenable for imputation of credence thereto. The aforesaid inferences, are, enhanced by the factum of non occurrence, in the apposite FIR, the name of co-accused Lakshman, whereas, the aforesaid is testified to be also accompanying co-accused Sher Singh besides is testified to use filthy language.

10. Furthermore, even though, the prosecutrix, and, her mother deposed consistent versions qua the occurrence, yet their consistent testifications qua the recitals borne in Ex.PW3/A, rather lose their probative sanctity, (a) given both eye witnesses to the occurrence one Indru, who testified as PW-1, and, one PW Ratni Devi, who testified as PW-6, rather hence in their respectively rendered testifications hence resiling from their previous statements recorded in writing, (b) also upon theirs being, on a request made by the learned APP, hence declared hostile

by the learned trial Magistrate, yet theirs during the course, of their respective cross-examination(s), rather not making any articulations, supportive of the charge. The effects of the aforesaid independent witnesses to the occurrence, not, lending succor to the consistent testifications of the prosecutrix, and, her mother, obviously hence render all the echoings made by the prosecutrix, and, her mother, in their respectively rendered testifications, to hence, not acquire any creditworthiness, rather with the FIR being belatedly lodged, and, with no tangible explanation being purveyed by the prosecution, for the belated lodging of the FIR, thereupon, it has to be firmly concluded of the complainant, and, her mother inventing a coloured version(s) qua the occurrence, rendering them, hence, to be not amenable for imputation of credence thereto.

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 a gross perversity or absurdity of mis-appreciation and non appreciation of evidence on record.

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

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

RSA No. 536 of 2006 along with Cross Objections No.134 of 2007.
Reserved on : 27th March, 2018.
Decided on : 10th April, 2018.

1. RSA No. 536 of 2006.
Suraksha & another ...Appellants/defendants.
Versus
Adarsh Kumar ...Respondent/Plaintiff.

2. Cross Objection No. 134 of 2007.
Adarsh Kumar ...Cross-objector.
Versus
Suraksha & another ...Non-objectors/respondents.

Specific Relief Act, 1963- Section 34- Suit for declaration and injunction- Hindu Law- Ancestral Property- Plaintiff, son from first wife challenging alienation of land made by father (D1) by way of gift in favour of defendant No.2, second wife of D1 on ground of suit land being ancestral in hands of father qua him- Defendants taking plea that suit land was self acquired property of D1- Trial court dismissed suit- In appeal, First Appellate Court partly allowed appeal and decreed suit qua land recorded as abadi deh by holding it to be ancestral in hands of D1 – Regular Second Appeal by defendants- As well as cross-objections by plaintiff – On facts, D1 found to have acquired property except abadi deh by way of Will dated 25.9.1972 from his own father 'J' – No one ever challenged Will of 'J' on ground of property being ancestral in his hands – However, abadi deh land found to have come to 'J' from his grand-father, so held to be ancestral- Gift of suit land except abadi deh found valid – Appeal as well as cross-objections dismissed. (Para-9)

Case referred:
Ganga Devi and another vs/ Ashok Kumar & others, Latest HLJ 2011 (HP) 721

For the Appellants: Mr. K.D. Sood, Senior Advocate with Mr. Rajnish K. Lal, Advocate.

For the Respondent: Mr. Bhupender Gupta, Sr. Advocate with Ms. Rinki Kashmiri, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiffs' suit for rendition of a decree, for permanent prohibitory injunction besides for rendition of a decree, for declaration, stood dismissed, by the learned trial Court, whereas, in an appeal carried therefrom, by the plaintiff before the learned First Appellate Court, the Appellate Court, affirmed, the findings recorded by the learned trial Court vis-a-vis the valid execution of gift deed of 12.06.1995 except qua property borne in Ex.P-6, besides qua valid execution of Will, by the deceased testator vis-a-vis defendant Surender Kumar. Emphasisingly, the learned First Appellate Court, reversed, the trial Court's findings vis-a-vis gift deed made qua Khasra Nos. 1375, 1378, 1381, 1382, 1383 and 1384, khasra numbers whereof extantly bear Khasra No.256, and, is carried in Ex.P-6, exhibit whereof is the authentic Hindi translation, from Urdu, of the apt jamabandi, (a) wherein khasra No.256 stands reflected as abadi tika, and, carries an area of 2-10 bighas, (b) tritely on the ground of it being ancestral coparcenary property. The defendants being partly aggrieved therefrom hence instituted the instant appeal before this Court, whereas, the plaintiff, also, through an application cast, under the provisions of Order 41, Rule 22 read with 151 of the CPC, institute cross-objections, wherein, they assail the validity of apposite findings rendered by the learned Appellate Court, hence, both the appeal as well as the cross-objections are liable to be disposed of, by, a common verdict.

2. Briefly stated the facts of the case are that the plaintiff claimed himself to be the son of defendant No.1 and it had been claimed that the suit property as detailed in the plaint is ancestral property in the hands of defendant No.1, who has succeeded it from his father Jai Lal and the parties being Mitakshara Hindu Joint Family, the defendant have no right or title to bequeath the suit property in any manner. However, defendant No.1 bequeathed the suit property by way of gift in favour of his second wife i.e. defendant No.2, whereas, the plaintiff, who is the son, has been deprived of his right of share being a coparcener. It had also been averred that the gift deed dated 12.6.1985, is void and illegal. The plaintiff had also sought decree of permanent prohibitory injunction restraining the defendants to change the nature and character the suit land or to alienate it, in any way.

3. The defendants contested the suit and filed written statement, wherein, they have taken preliminary objections of estoppel, cause of action, locus standi maintainability and limitation. On merits, it had also been averred that the suit land is not joint Hindu Family coparcenary property and it was the self acquired property in the hands of defendant No.1 and he has every right to alienate it or deal with the property in any manner. It has, therefore, been averred that the gift deed executed by defendant No.1 in favour of defendant No.2, qua the suit land is legal and valid and thereby the suit is not maintainable. The defendants have also averred that the plaintiff is not entitled for any relief of injunction having got no right of title over the suit land.

4. The plaintiff filed replication to the written statement of the defendant(s), wherein, he denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the suit property is ancestral property? OPP.

1.A Whether the parties are governed by Hindu Mitakshra Law, as alleged? OPP.

2. Whether the gift deed dated 12.6.1995 is void, if so its effect? OPP.

3. Whether the plaintiff is estopped by his act and conduct? OPD.

4. Relief.

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

7. Now the defendants/appellants herein, as also, the plaintiff/respondent/cross-objector, have respectively instituted the instant Regular Second Appeal, as also, the Cross-objections, before this Court, wherein they assail the apt findings recorded in its impugned judgment and decree, by the learned first Appellate Court. The appeal as also the Cross-objections, are, respectively admitted, on the following substantial question of law:-

RSA No. 536 of 2006.

a) Whether the inferences drawn that the gift qua khasra Nos.1375, 1378, 1381, 1382, 1383 and 1384 was void being ancestral property in the hands of Shri Surinder Kumar, is sustainable in law when Shri Surender Kumar got suit property under the Will of his father and became the self acquired property of Shri Surinder Kumar?

b) Whether the judgment of the learned Addl. District Judge is contradictory in as much as having held that the gift qua khasra No. 1378 was valid and while granting the relief held that gift qua khasra No.1378 be void and inoperative by treating property to be ancestral property?

c) Whether the property in dispute in respect of which the suit had been partly decreed could be treated as ancestral coparcenary property when the same had not come to appellant under the Will of Shri Jiya Lal, who had his widow and daughters surviving at the time of death?

d) Whether the share which the appellant would have got in the absence of the Will of Shri Jiya Lal and which came in his possession could otherwise be gifted by him to Smt. Suraksha Devi, his wife and which could be challenged by the plaintiff?

Cross Objections No.134 of 2007.

1. Whether the Lower Appellate Court recorded arbitrary erroneous and perverse findings by holding that part of suit land was self acquired property on account of the same being tenancy land for which proprietary rights were conferred on defendant No.1 and part of the land was devolved upon defendant No.1 by testamentary succession on account of the Will dated 25.1.1972 which was not challenged by the natural heirs who would have succeeded to such property in absence of such Will?

8. Since, all the afore extracted substantial questions of law are inter linked , hence, they are being disposed of by a common verdict.

9. The apposite Will of 25.09.1972, whereunder, one defendant Surender Kumar, was, constituted as legatee, cannot be, subjected to any weighty challenge, by the cross-objector/plaintiff/respondent, imperatively when (a) with defendant Surender Kumar, even in absence thereof also evidently being the natural successor of deceased testator Jai Lal, hence on demise of deceased testator Jai Lal, he held the apposite entitlement to, succeed to the latter's estate, (b) even if Sobha Devi, the mother of defendant No.1, qua the property bestowed upon defendant Surender Kumar, through, a Will executed by the deceased testator, was also along, with, the legatee constituted thereunder, hence entitled to succeed vis-a-vis the estate of the deceased testator, (c) given assumingly, the property embodied in the apposite Will, being a coparcenary property, (d) yet effect of exclusion, from, inheritance of Sobha Devi, by the deceased

testator, and, his rather constituting defendant Surender Kumar, as the exclusive legatee, rather is subsumed, by the factum, of the demise of Sobha Devi, occurring in the year 1977, (e), and, with the apposite suit being instituted on 7.10.1994, thereupon, even if, assumingly Sobha Devi may during her life time, held any locus standi, to challenge the apposite Will, (f) nonetheless, when she was no longer surviving, on the date of institution of the extant suit, and, when no evidence exists on record, qua apart from defendant Surender Kumar, she had other natural heirs, who may hence hold the apposite locus standi, (g) thereupon, with the purportedly befitting persons, holding any apposite locus standi, to challenge the Will of 25.1.1972, hence, not rearing any challenge vis-a-vis it, (h) thereupon the constitution, of, defendant No.1 as the apposite exclusive legatee, cannot be construed to be wanting in legal sanctity, (i) even if assumingly, the suit property is construed to don the trait, and, character of ancestral coparcenary property. In sequel, the findings rendered by both the learned Courts below vis-a-vis the apposite Will, not attracting any challenge vis-a-vis it, on anvil of its purportedly being ancestral coparcenary property, cannot be concluded to be either misfounded or erroneous.

10. The acerbic contest, warranting its being put to rest, and qua part whereof "gift" came to be executed, is comprised in the factum (a) of defendant No.1, one Surender Kumar, under an order of mutation, borne in Ex. D-10, hence standing bestowed with exclusive proprietary rights vis-a-vis extant Khasra No.256. (b) Any conclusion, of the property borne in Ex.P-6, being the self acquired property, of the, donor, would hence impute validity vis-a-vis the apposite gift deed executed qua it. Uncontrovertedly, vestment of exclusive proprietary rights thereon, stand bestowed upon Surender Kumar, through, an order borne in Ex. D-10. Uncontestedly, possession thereof had been initially received by one Vidyadhar, and, thereafter by one Jai Lal, whereafter possession thereof was unbrokenly transmitted vis-a-vis Surender Kumar, defendant No.1, (a) hence, with unbroken possession, of, land, borne in Ex.P-6, bearing Khasra No.256, being transmitted vis-a-vis defendant No.1, conspicuously from his immediately preceding two predecessors-in-interest, hence, with his constituting the 3rd generation, from one Vidyadhar, thereupon, prima facie hence rendered property borne in Ex.P-6, to acquire or don the traits, of ancestral coparcenary property. However, on anvil of Ex.D-10, defendant Surender Kumar has reared a vehement espousal (b) qua upon its recording, and, with conferment thereunder, of absolute title vis-a-vis the land bearing Khasra No.256, (c) hence, effects, if any, qua prior thereto, his immediately preceding two ancestors, rather holding possession thereof, (d) is rendered insignificant nor hence it can be concluded, of its, being yet characterized, as ancestral coparcenary property. Even if, this Court does not disturb the validity of recording of Ex. D-10, (e) yet for making an appropriate construction vis-a-vis the traits borne by the property embodied in Ex. D-10, dehors, absolute title therein, rather inhering in defendant No.1, it is also imperative to allude, to, the nomenclature assigned, to the land reflected in Ex.P-6, especially in classification column thereof. In the classification column of Ex.P-6, a part, of, the suit land, carrying an area of 2-10 bighas, stands reflected as gair mumkin abadi deh. Before proceeding to dwell upon the import(s), of, the apt classification, assigned vis-a-vis the land denoted in Ex. P-6, hence, its, also in consonance therewith, being construable or not, to be ancestral coparcenary property, it is also necessary to bear in mind, the parlance carried, by, phrase abadideh, Undisputedly, the parlance borne, by phrase "abadideh" (i) is it being the inhabited site of village, consisting of sites on which the house of the members of the brotherhood or proprietary body are usually building close together, small plots attached or annexed thereto which are used for penning the cattle, storing manure or stacking straw, empty or vacant sites unoccupied by any individual, common plots etc. With the phrase "abadi deh" carrying the aforesaid connotation, and, the plaintiff pleading co-title vis-a-vis a part, of, the suit land, classified as abadi deh, pointedly along with the defendants, thereupon, for his espousal to carry any succor also enjoined him to adduce cogent proof, displaying qua after demise of defendant No.1, his father, his evidently being entitled to succeed, vis-a-vis the property classified in Ex. P-6, as, abadi deh. For making, an appropriate conclusion vis-a-vis the legality of entitlement qua inheritance of the plaintiff, of land classified in Ex.P-6, as abadi deh, it is befitting to draw succor, from, a judgment of this Court, rendered in a case titled as ***Ganga Devi and another vs/ Ashok Kumar & others,***

reported in ***Latest HLJ 2011 (HP) 721***, the apposite paragraph No.8 stands extracted hereinafter:

> "8. The very wide proposition laid down by the Divisions Bench in the aforesaid case was only in the context o the Panchayati Raj Act. It cannot be stretched to all cases. Let us leaves behind two legal heirs. Both of them would be entitled to an equal share in land as well as on the structure. Definitely, one of the legal heirs can file a suit against the other for partition both of structure and of the land. Therefore, it cannot be said that the Abadi Deh land is indivisble in all circumstances. In fact, the Division Bench also very carefully said that in most cases Abadi land is indivisble." (p..723)

wherein it has been clearly expostulated, (i) of all, the natural legal heirs of persons, holding possession of land classified as abadideh, also with , it, in the column of ownership and possession, of the jamabandi apposite thereto, hence standing described to be abadi tika, (ii) rather being entitled, to, on demise of their predecessors-in-interest, for an equal share therein also theirs being entitled to, even, during the life time of their father, to hence seek partition of land described, as abadideh, in the apposite classification column. The effect of the aforesaid expostulation, borne in paragraph No.8 of Ganga Devi's case (supra), (a) is of obviously with its being evidently proven, of, the property borne in Ex. P-6, conspicuously prior to defendant Surneder Kumar, hence, standing held initially by one Vidyadhar, and, thereafter by one Jai Lal, (b) hence, upon Surender Kumar unbrokenly receiving it, from his immediately preceding two ancestors, and, his hence becoming the 3rd generation from Vidyadhar, thereupon, hence, it is rendered amenable to per se don the trait, and, character of ancestral coparcenary property, (c) dehors Ex. D-10, vesting absolute title, as, owner, singularly vis-a-vis Surender Kumar, solitarily vestment whereof is wholly insignificant, nor its effaces the factum of the suit property borne in Ex.P-6, rather uninterruptedly travelling upto him, from his immediately preceding two ancestors, namely, one Vidyadhar and one Jai Lal. Predominantly when unless the aforesaid transmissions had occurred, he would be disable to possess it.

11. Also assumingly, if, apt exclusive title vis-a-vis Surender Kumar, is conferred, through, an order borne in Ex. D-10, yet the aforesaid mode, of, travelling, of possession, of property borne in Ex.P-6, vis-a-vis Surender Kumar, besides its being nomenclatured, as Abadi deh, in the classification column, of, Ex. P-6, (a) thereupon, with the preponderant requirement qua the entitlement of the plaintiff, to seek succession to the land borne in Ex.P-6, arising, for his being the natural legal heir of one Surender Kumar, (b) and, concomitantly thereto, his being also entitled, to, during the life time of Surender Kumar, hence seek partition thereof, also, overwhelms and subsumes, the clothing of absolute title vis-a-vis the land borne in Ex. P-6, especially vis-a-vis the defendant. The suit property bearing khasra No.256, is hence construed to be ancestral coparcenary property, and, the findings rendered qua it, by the learned First Appellate Court, of it, donning the character, and, trait of ancestral coparcenary property rather do not warrant any interference.

12. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court being 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. Substantial questions of law are answered accordinlgy.

13. In view of above discussion, there is no merit in the instant appeal as well as in the Cross-objections and both are dismissed accordingly. Consequently, the judgment and decree rendered by the learned First Appellate Court in Civil Appeal No. 13-G/XVI/05//02 is affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

Arb. C. Nos. 20 & 21 of 2018
Decided on: 11.04.2018

Arb.C. No. 20 of 2018
M/s SGI Power Limited ...Petitioner/Objector
Versus
M/s Himachal Wire Ind. Pvt. Ltd. ...Respondent/Claimant

Arb.C. No. 21 of 2018
M/s SGI Power Limited ...Petitioner/Objector
Versus
M/s Himachal Steel & Wires ...Respondent/Claimant

Interpretation of Statutes- Non-obstante clause - Effect thereof- Held- Non-obstante clause is a legislative devise generally invoked to give an overriding effect to certain provision over contrary legislative stipulations contained either in same or other enactments. (Para- 5)

Micro, Small and Medium Enterprises Development Act, 2006- Section 24- Scope and effect – By virtue of non-obstante clause incorporated in Section 24, provisions of Sections 15 to 23 of said Act shall have an overriding effect over provisions of Arbitration and Conciliation Act, 1996. (Para-4)

Micro, Small and Medium Enterprises Development Act, 2006- Sections 18 and 19- **Arbitration and Conciliation Act, 1996 (A & C) Act-** Section 34- Award passed by Arbitrator on reference having been made under Section 18 of Act of 2006- Objections against award by way of Objection Petition under Section 34 of A & C Act– However, objector /petitioner not depositing 75% of award money in Court while filing objection petition in compliance of Section 19 of Act of 2006- Held- Section 24 of Act of 2006 gives Section 19 of said Act an overriding effect over provisions of A & C Act– For non-compliance of mandatory provisions of Section 19 of Act of 2006, Objection Petition is not maintainable. (Paras- 4 to 7)

Case referred:
Chandavarkar Sita Ratna Rao vs. Ashalata S. Guram (1986) 4 SCC 447

For the petitioner: Mr. Shivank Singh Panta, Advocate.
For the respondent: Mr. Atul Jhingan, Advocate

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge (Oral)

Both these petitions have been preferred by the petitioner/objector/judgment debtor under Section 34 of the Arbitration and Conciliation Act (for short the 'Act') read with Section 19 of the Micro, Small and Medium Enterprises Development Act, 2006 (for short 'MSME Act').

2. At the outset, it may be observed that an application for setting aside the decree, award or order under Section 19 is maintainable only with pre-condition of deposit 75% of the decreetal or award amount, which reads thus:-.

> *"19. **Application for setting aside decree, award or order**.- No application for setting aside any decree, award or other order made either by the Council itself or by any institution or centre providing alternate dispute resolution services to which*

a reference is made by the Council, shall be entertained by any court unless the appellant (not being a supplier) has deposited with it seventy-five per cent of the amount in terms of the decree, award or, as the case may be, the other order in the manner directed by such court:

Provided that pending disposal of the application to set aside the decree, award or order, the court shall order that such percentage of the amount deposited shall be paid to the supplier, as it considers reasonable under the circumstances of the case subject to such conditions as it deems necessary to impose."

3. It is not in dispute that the award passed by the learned Arbitrator was on the basis of the reference made by the Council under Section 18 of the Act.

4. At this stage, it would be necessary to refer to Section 24 which gives an overriding effect to the provisions of Sections 15 to 23 of the MSME Act or any other law for the time being in force and read thus:-

"24. Overriding effect.- The provisions of sections 15 to 23 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force."

5. Evidently, Section 24 starts with non obstante clause and it is well known that a non obstante clause is a legislative device which is usually implied to give overriding effects to certain provisions over contrary provisions that may be found either in the same enactment or some other enactment, that is to say, to avoid operation and effect of contrary provisions.

6. In ***Chandavarkar Sita Ratna Rao vs. Ashalata S. Guram (1986) 4 SCC 447***, the scope of non obstante clause was explained in the following words:

A clause beginning with the expression "notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force, or in any contract" is more often than not appended to a section in the beginning with a view to give the enacting part of the section in case of conflict an overriding effect over the provision of the Act or the contract mentioned in the non obstante clause. It is equivalent to saying that in spite of the provision of the Act or any other Act mentioned in the non obstante clause or any contract or document mentioned the enactment following it will have its full operation or that the provisions embraced in the non obstante clause would not be an impediment for an operation of the enactment.

7. Since, the objector has not complied with the provisions of Section 19 of the MSME Act, by depositing 75% of the decreetal award amount, therefore, these appeals are not maintainable and dismissed as such, leaving the parties to bear their costs.

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

Prem Dutt ....Petitioner.

Vs.

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

CMPMO No.: 40 of 2018
Date of Decision: 11.04.2018

Code of Civil Procedure, 1908- Order XXVI Rule 9- Appointment of Local Commissioner- Plaintiff seeking removal of underground sewerage pipe from his land - Not leading any evidence whatsoever yet filing an application for appointment of Local Commissioner for ascertaining

whether pipe stood laid under suit land- Trial Court dismissed application- Revision against- Held- Provisions of Order 26 Rule 9 cannot be permitted to be used by party to create evidence in its favour- Local Investigation can only be for elucidating any matter in dispute- Order of Trial Court upheld. (Para-8)

For the petitioner: Mr. Sanjeev Kumar Suri, Advocate.
For the respondents: Mr. Desh Raj Thakur, Additional Advocate General.

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 assailed order dated 07.09.2017, passed by the Court of learned Civil Judge, Court No. IV, Una, vide which, an application filed by the petitioner-plaintiff under Order 26 Rule 9 of the Code of Civil Procedure has been dismissed.

2. Facts as they emerge from the pleadings on record are that the present petitioner-plaintiff has filed a suit praying for mandatory injunction against the respondents-defendants, i.e., the State of Himachal Pradesh for directing them to remove the illegal and unauthorized construction of underground water sewerage RCC pipe from the suit land.

3. The case of the petitioner-plaintiff has been refuted by the respondents-defendants both on merits as also on the maintainability of the suit itself. It appears that when the case was listed for recording the statements of plaintiff witnesses, he failed to lead evidence. Thereafter, an application was filed under Order 26 Rule 9 of the Code of Civil Procedure by the petitioner-plaintiff with the prayer that a Local Commissioner be appointed to demarcate the suit land to ascertain as to whether underground water sewerage RCC pipe stand laid under it or not. This application has been dismissed by the learned Court below by way of impugned order.

4. I have heard the learned counsel for the parties and have also gone through the impugned order as well as the material available on record.

5. A perusal of the order demonstrates that learned trial Court has assigned plausible reasons as to why it has rejected the application so filed by the present petitioner. It is mentioned in the order that the stage at which the application was filed under Order 26 Rule 9 of the Code of Civil Procedure by the petitioner-plaintiff, was when the case was being fixed for recording the statements of plaintiff's witnesses. On one hand, no witness was got examined and on the other hand, an application was filed under Order 26 Rule 9 of the Code of Civil Procedure with the prayer already mentioned above. Learned trial Court thereafter held that Local Commissioner can be appointed in case the plaintiff had done everything to bring the spot situation on record, however, in the case in hand, there was nothing which had been done by the petitioner-plaintiff to bring the spot situation on record and, therefore, without a party being able to *prima facie* establish any right, the Court could not be called upon to create evidence in favour of the party by invoking the provisions of Order 26 Rule 9 of the Code of Civil Procedure. Learned trial Court has also held that plaintiff in fact had filed a suit for mandatory injunction and had not led any evidence to substantiate his pleadings. It further held that the plaintiff had to stand on his own legs and in this view of the matter also, application under Order 26 Rule 9 of the Code of Civil Procedure with the prayer therein could not have been allowed.

6. The findings so arrived at by the learned Court below, in my considered view, are correct findings. By no stretch of imagination the provisions of Order 26 Rule 9 of the Code of Civil Procedure can be permitted to be used by a party to create evidence in its favour. It is settled law that he who alleges, has to prove. It is the plaintiff, who is praying for a decree of mandatory injunction. Therefore, it was mandatory upon the plaintiff to have had produced cogent and reliable evidence on record to demonstrate that he was entitled for a decree of mandatory injunction. Simply because, as has been submitted by the learned counsel for the petitioner, the

plaintiff is not able to establish his case of his own, he cannot be permitted to do so by filing an application under Order 26 Rule 9 of the Code of Civil Procedure.

7. Order 26 Rule 9 of the Code of Civil Procedure provides as under:

"Order 26 Rule 9: ***Commissions to make local investigations:-***

In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property, or the amount of any mesne profits or damages or annual net profits, 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:

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules."

8. A perusal of the provisions of Order 26 Rule 9 of the Code of Civil Procedure demonstrates that a Commission for local investigation is to be appointed where the Court deems it to be requisite or proper for the purpose of elucidating any matter in dispute etc. In other words, Order 26 Rule 9 of the Code of Civil Procedure is not a tool which is to be used by the party to create evidence in its favour, in case the party on its own is not in a position to garner evidence to prove its case.

9. In this view of the matter, as there is no infirmity with the order impugned and further as there is no merit in the present petition, the same is dismissed. Miscellaneous applications, if any, also stands disposed of.

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

Shri Shashi Pal. .....Petitioner.

Versus

Shri Kuldeep. .....Respondent.

CMPMO No. 411 of 2017.
Date of decision: April 11, 2018.

Code of Civil Procedure, 1908- Order XXVI Rule 9- Appointment of Local Commissioner- In suit seeking decree of permanent prohibitory injunction on ground of unauthorized interference of defendant, plaintiff filing an application under Order 26 Rule 9 of C.P.C. for appointment of Local Commissioner for demarcation of suit land- His plea being that defendant had made encroachment over his land and that part required to be identified by way of demarcation – Defendant resisted application on ground that land was demarcated earlier also – Application dismissed by trial court- Petition against- Held- Suit land stood already demarcated and unless earlier demarcation is set aside by competent authority, fresh demarcation of land cannot be ordered- Petition dismissed. (Para-5)

Cases referred:

State of H.P. vs. Mangat Ram, AIR 1995 SC 665
Radha Swami Satsang Veas vs. State of H.P. ILR 1984 HP 317

For the petitioner : Mr. Neeraj Gupta, Advocate.
For the respondent : Mr. Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

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

Order dated 10.6.2016 passed by learned Civil Judge (Junior Division)-II, Dharmashala is under challenge in this petition. As a matter of fact, learned trial Court has dismissed an application under Order 26 Rule 9 read with Section 151 CPC filed by the petitioner-plaintiff with a prayer to appoint local commissioner for demarcation of the land entered in Khata No. 24, Khatauni No. 51, Khasra No. 1843/298 situate in Mohal Gabli Dar, Mauza Ghaniyara, Tehsil Dharamshala, District Kangra (hereinafter referred to as 'suit land' in short) vide the order under challenge in this petition.

2. The suit has been filed for permanent prohibitory injunction restraining the respondent-defendant from causing interference in the suit land in any manner whatsoever. The respondent-defendant in the written statement has denied the claim of the plaintiff being wrong. He has also placed on record the report qua the demarcation conducted on 20.12.2010 and on the basis thereof it is claimed that he has nothing to do with the suit land nor has caused any interference therein. Replication also stands filed. On the completion of the pleadings, issues were framed and the plaintiff evidence has also been recorded partly. The suit presently is at the stage of recording plaintiff's remaining evidence. It is at this stage the application under Order 26 Rule 9 CPC came to be filed for appointment of local commissioner on the grounds, inter alia, that the respondent-defendant has made encroachment upon the suit land and hence is in unauthorized and illegal possession thereof.

3. The application was, however, resisted and contested on the grounds, inter-alia, that the report qua the demarcation of the land conducted previously on 20.12.2010 is already produced on record and until and unless the said report is quashed and set aside by the competent Authority, no fresh demarcation of the land can be ordered.

4. Admittedly, the suit land was demarcated on 20.12.2010 and the report has been placed on record by the defendant. There is again no controversy so as to the demarcation so conducted was even acceptable to the plaintiff also. However, now he claims that the demarcation so conducted was not in accordance with the instructions issued by the Financial Commissioner. It is for this reason the plaintiff has filed an application under Section 107 of the Land Revenue Act registered as case No. 137/12 before Assistant Collector Ist Grade, Dharamshala. The local commissioner has been appointed by the Assistant Collector Ist Grade to conduct the demarcation, who has submitted his report that there being difference of Karukans in Aks Musabi and Aks Momi, it is not possible to demarcate the land on the spot. Acting on the report so submitted by the local commissioner, the Assistant Collector vide order dated 6.3.2012 has observed that in view of such difference in Karukans the matter need to be examined and necessary correction ordered by the competent court. These documents produced during the course of arguments have been perused and returned to learned Counsel for the petitioner-plaintiff after perusal.

5. Learned Counsel submits that demarcation report already placed on record by the defendant cannot be relied upon being contrary to the instructions issued by the Financial Commissioner. Such submissions, however, are contrary to the law laid down by the Apex Court in ***State of H.P.*** vs. ***Mangat Ram, AIR 1995 SC 665*** and ***Radha Swami Satsang Veas*** vs. ***State of H.P. ILR 1984 HP 317*** which has been considered by learned trial Judge while arriving at a conclusion that unless and until the demarcation conducted earlier is not set aside by appointing another revenue official, no fresh demarcation can be ordered. Whether the demarcation report already on record is contrary to the instructions or the law applicable has to be seen by learned trial Court at an appropriate stage during the course of further proceedings in the suit. Therefore, at this stage when the demarcation report dated 20.12.2010 already exist on record, no fresh demarcation of the land could have been ordered, more particularly, when the demarcation conducted previously was acceptable to the petitioner-plaintiff also. Learned trial

Court, therefore has rightly dismissed the application filed by the petitioner with a prayer to appoint local commissioner for demarcation of the suit land. The impugned order, therefore, neither suffers from any illegality nor infirmity. The same rather being legally sustainable is accordingly up-held and this petition dismissed.

6. The petitioner-plaintiff in the changed circumstances, if any, however, may approach the trial Court for appointment of the local commissioner and in that event the prayer so made shall be considered in accordance with law and appropriate orders passed after affording the parties due opportunity of being heard.

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

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

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

OSA No.8 of 2011 with OSA No.13 of 2011.
Judgment reserved on: 05.04.2018.
Date of decision : 12th April, 2018.

1. OSA No.8 of 2011.

Mahendra Pal (deceased) through his LRs Rani Lalita Kumari and others
.....Appellants/Plaintiffs.

Versus

The State of Himachal Pradesh and others .....Respondents/Defendants.

For the Appellants : Mr.S.S.Mittal, Senior Advocate with Mr.Ajay Kumar Dhiman, Advocate, for appellants No.1(a) and 1(e).
Mr.R.K.Bawa, Senior Advocate with Mr.Ajay Kumar Sharma, Advocate, for appellant No.1(b).
Mr.Ankush Dass Sood, Senior Advocate with Mr.Rakesh Kumar, Advocate, for respondent No.1(c).
Mr.Ajay Kumar, Senior Advocate with Mr.Dheeraj K.Vashisht, Advocate, for respondent No.1(d).

For the Respondents : Mr.Sudhir Bhatnagar and Mr.Vinod Thakur, Additional Advocate Generals with Mr.J.S.Guleria, Deputy Advocate General, for respondents No.1 and 2.

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2. OSA No.13 of 2011.

State of Himachal Pradesh and another .....Appellants.

Versus

Mahendra Pal (deceased) through his LRs Rani Lalita Kumari and others
.....Respondents/Plaintiffs.

For the Appellants : Mr.Sudhir Bhatnagar and Mr.Vinod Thakur, Additional Advocate Generals with Mr.J.S.Guleria, Deputy Advocate General.

For the Respondents : Mr.S.S.Mittal, Senior Advocate with Mr.Ajay Kumar Dhiman, Advocate, for respondents No.1(a) and 1(e).
Mr.R.K.Bawa, Senior Advocate with Mr.Ajay Kumar Sharma, Advocate, for respondent No.1(b).
Mr.Ankush Dass Sood, Senior Advocate with Mr.Rakesh Kumar, Advocate, for respondent No.1(c).

Mr.Ajay Kumar, Senior Advocate with Mr.Dheeraj K.Vashisht, Advocate, for respondent No.1(d).

Himachal Pradesh Kutlehar Forest (Acquisition of Management) Act, 1992- Section 4- Plaintiff was appointed as Forest Officer under Section 2(2) of Indian Forest Act and given management of Kutlehar Forests with right to retain 3/4th share in gross income of forest produce – This arrangement existed prior to the Act which came into force on 11.3.1995 – Entitlement of plaintiff to have share in income of Forest produce accruing prior to that date – Held- Under Section 4 of the Act grant in favour of plaintiff stood extinguished only on and w.e.f. 11.3.1995 when the Act came into force- - Plaintiff entitled to share in income derived from forest produce prior to 11.3.1995 – Suit rightly decreed. (Para-30 to 35)

Code of Civil Procedure, 1908- Section 34- Grant of interest- Held- Even in absence of any agreement or custom to that effect, interest can be made payable on basis of principle of equity subject of course to a contract to contrary- Principles laid down in South Eastern Coalfields Ltd. Vs. State of M.P. and others (2003) 8 SCC 648 relied upon. (Para-36)

Cases referred:

Mahendra Pal versus State of Himachal Pradesh and others (2010) 13 SCC 441

Secretary, Irrigation Department, Government of Orissa and others versus G.C.Roy (1992) 1 SCC 508

Riches versus Westminster Bank Ltd., 1947 AC 390 : (1947) 1 All ER 469 (HL) (AC at p.400: All ER at p.472-E-F)

CIT versus Dr.Sham Lal Narula AIR 1963 Punj 411

Dr.Sham Lal Narula versus CIT, AIR 1964 SC 1878

South Eastern Coalfields Ltd. Vs. State of M.P. and others (2003) 8 SCC 648

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The case has a chequered history. The suit, out of which the present appeals arise, was initially dismissed by the learned Single Judge of this Court vide judgment and decree dated 02.07.2002. The judgment and decree so passed were assailed by the plaintiff by filing OSA No. 13 of 2002 before the learned Division Bench of this Court, but that was dismissed vide judgment and decree dated 12.08.2008.

2. Aggrieved by the said order, the plaintiff filed an appeal by way of SLP before the Hon'ble Supreme Court and the same came to be allowed on 26.10.2010 vide decision reported in ***Mahendra Pal*** *versus* ***State of Himachal Pradesh and others (2010) 13 SCC 441*** and the judgment and decree passed by the learned Single Judge as also the Division Bench of this Court were set aside and the matter was remanded to the learned Single Judge for afresh consideration. It was after such remand that the learned Single Judge vide impugned judgment and decree dated 27.04.2011 decreed the suit for a sum of Rs.24,02,154/- in favour of the plaintiff and against the defendants along with future interest at the rate of 6% per annum from the date of decree till realization of the decretal amount, who held liable defendants No.1 to 3 to pay the entire decretal amount along with interest jointly and severally to the plaintiff. The parties shall be referred to as the plaintiff and defendants.

3. Both the parties aggrieved by the judgment and decree passed by the learned Single Judge have filed the instant appeals.

4. As regards OSA No.8 of 2011 preferred by the plaintiff, he has assailed the judgment and decree passed by the learned Single Judge on the ground that even though the learned Single Judge has rightly come to the conclusion that the plaintiff is entitled for 3/4th

share with respect to 1,33,453 resin blazes but has wrongly come to the conclusion that the plaintiff was entitled to Rs.24/- per blaze as fixed for the year 1994 tapping season, whereas, according to the admitted position between the parties, this rate was Rs.26/- per blaze for the year 1995 tapping season, therefore, the findings on issues No.4 and 5 as recorded by the learned Single Judge were liable to be modified to the extent that the plaintiff was to be held entitled to 3/4th value of 1,33,453 resin blazes at the rate of Rs.26/- per blaze which comes to Rs.26,02,338.59/- as against the decretal amount of Rs.24,02,154/-. The other ground of challenge made by the plaintiff/appellant is with respect to rate of interest, as according to him, he was entitled to the interest at the rate of 16.5% per annum from the date it was due i.e. year 1995 or in the alternate with effect from 1998 when the suit came to be filed till the payment, instead of 6% per annum from the date of decree.

5. On the other hand, the defendant-State has filed OSA No. 13 of 2011 mainly on the ground that the suit of the plaintiff could not have been decreed since the entire resin was produced during the period when the forest was in the hands of the State and further there was no cogent and legal evidence qua handing over of 1,33,453 resin blazes by the respondent/plaintiff prior to 11.03.1995.

6. However, before adverting to the merits of the appeals, certain basic facts, as have been noticed in its decision by the Hon'ble Supreme Court in ***Mahendra Pal's case*** (supra) need to be noticed.

7. Kutlehar was a small princely State in Kangra Hills having 16 tapas (tikas) as forests which were known as "Kutlehar Forests". These forests were managed by the Raja of Kutlehar subject to the terms and conditions specified by the then Government. Such management continued generation after generation.

8. The plaintiff was appointed as a Forest Officer in the capacity of Superintendent of Kutlehar forests under Section 2(2) of the Forest Act by Notification dated 01.10.1958 issued by the then Government of Punjab before the formation of the State of Himachal Pradesh. The said forests were under the charge and management of the plaintiff and he was entitled to dispose of the forest produce such as resin, timber, bamboo, grass, etc. in accordance with the working plans prepared by the Forest Department. As per the terms and conditions of the management, he was entitled to retain 3/4th share of the total income from the said forests and 1/4th share of the gross income was payable to the Government. The entire expenditure on the management and exploitation of the forests were to be incurred by the plaintiff.

9. In the year 1992, the State Legislative Assembly passed the Himachal Pradesh Kutlehar Forest (Acquisition of Management) Act, 1992 (hereinafter referred to as "the Act"). Pursuant to the provisions of Section 4 of the said Act, the management of these forests was taken over by the State Government. Challenging the constitutionality of the Act, the plaintiff filed Civil Writ Petition No. 707 of 1992 in this Court whereby this Court vide judgment dated 09.05.1994 upheld the constitutional validity of the aforesaid Act except Section 5.

10. During the year 1995, when the management of the Kutlehar forests was with the plaintiff, he offered 1,33,591 resin blazes to the Divisional Manager, H.P. State Forest Corporation Ltd., Una (hereinafter referred to as the "State Corporation"), respondent No.3 herein, for resin tapping, but on 14.02.1995, the State Corporation took over the resin blazes so offered and invited tenders for undertaking the work of tapping. On 10.03.1995, the State of H.P. issued the Notification and enforced the provisions of the Act with effect from 11.03.1995 and asked the plaintiff to hand over the management of the Kutlehar forests. On 16.03.1995, the plaintiff filed Civil Writ Petition No.127 of 1995 challenging the Notification dated 10.03.1995 in this Court. This Court passed the interim order to the effect that the plaintiff would continue with the management of the forests.

11. On 25.04.1995, the "Pricing Committee" of the State Corporation decided the prices of resin blazes at the rate of Rs.25 per blaze for the 1995 season. On 09.08.1995, this Court dismissed the writ petition observing that the disputed questions of fact could not be gone

into in exercise of extraordinary jurisdiction under Articles 226/227 of the Constitution of India and the plaintiff was given liberty to resort to appropriate proceedings before the appropriate forum. On 05.01.1996, the plaintiff filed a special leave petition before the Hon'ble Supreme Court which became Civil Appeal No. 239 of 1996 and was dismissed by order dated 22.08.2000.

12. On 07.02.1996, the management of the Kutlehar forests was taken over by the State Corporation in absentia.

13. As observed earlier, the suit came to be filed in the year 1998 for recovery of Rs.35,67,722/- along with interest at the rate of 16.5% per annum with costs in respect of 1,33,591 resin blazes offered to the Divisional Manager, Himachal Pradesh, for resin tapping when the management of the Kutlehar forests was with him in the 1995 season.

14. The defendants contested the suit by filing written statement in which several preliminary objections were taken. It was stated that the suit was the repetition of CWP No.1758 of 1995 filed by the plaintiff which was dismissed on 28.10.1997. It was further averred that after coming into force the Act on 11.03.1995, the Government had authorized Divisional Forest Officer, Una, to enter upon the land and premises vested in the State Government under Section 4 of the Act which was evaded by the plaintiff by filing CWP No.127 of 1995. It was also alleged that with effect from 11.03.1995 as per Section 4 of the Act, the grant in favour of the plaintiff stood extinguished and all rights, title and interest of the grantee vested in the Government free from all encumbrances.

15. On the pleadings of the parties, the learned Single Judge framed the following issues:-

"1. Whether the suit is properly valued for the purpose of court fee and jurisdiction? OPP.

2. Whether the plaint is not properly verified? OPD-3.

3. Whether the suit has been instituted by competent person? OPD-3.

4. Whether the plaintiff is entitled to the suit amount or any other amount? If so, from whom? OPP.

5. Whether the plaintiff is entitled to claim interest on the amount of the royalty? If so, on what rate? OPP.

6. Whether the plaintiff has no cause of action as alleged? OPD.

7. Whether the plaintiff is guilty of acts of suppressio-veri-suggestio falsi? OPD.

8. Relief."

16. After recording evidence and evaluating the same, the learned Single Judge decreed the suit, as aforesaid, which judgment and decree have been challenged by both plaintiff and the State by filing the aforesaid appeals.

17. At the outset, it may be observed that as regards the findings to the entitlement of amount upto 11.03.1995, the claim of the plaintiff has been upheld even by the Hon'ble Supreme Court in ***Mahendra Pal's case*** (supra) and the case was remanded to the learned Single Judge only to determine the quantum of amount till the appointed day i.e. 11.03.1995 as per the materials placed by both the parties in the form of oral and documentary evidence. This is evidently clear from the following observations:-

> *"Hence, it is clear that Kutlehar Forests were under the charge and management of the appellant and he was competent not only to maintain and preserve the said forests but was also entitled to his share in accordance with the working plans prepared by the Forest Department. It is also his claim that he took adequate steps for the protection of Fauna and Flora available in the forests in question. It is also his claim that according to the terms and conditions subject to which management of the said forests was entrusted to the appellant and his forefathers, they were entitled to retain 3/4th share of the total income derived or*

derivable from the forests whereas 1/4th share of the gross income was payable to the Government."

The Supreme Court continued that :

"The learned Single Judge and the Division Bench of the High Court basing reliance on Section 4 of the Act held that the right, title and interest of the plaintiff/appellant herein grantee/superintendent of Kutlehar Forests stood extinguished on the appointed day, i.e. 11.03.1995, therefore, he was under no obligation to continue with the management of the forests nor has any right to share in income arising out of the produce of the said forests on and after 11.03.1995. It is true that after 11.03.1995, the appellant cannot have any right over the forest produce. However, in view of the earlier order of this Court clarifying the position and his entitlement, there is no need to go into the vesting right etc. as claimed by the State Government. Admittedly, the appellant was asked to look after the forest produce as Superintendent of Forests and in lieu of salary he was assured grant of 3/4th of the price of resin blaze. It is specifically pleaded and the materials were also placed by the appellant about the work done such as maintenance, manuring protecting the trees etc. It is also specifically pleaded that before the appointed day, 1.e. 11.03.1995, he was still in the management of Kutlehar Forests, offered 1,33,591 resin blazes to the Divisional Manager of the State Corporation at Una for resin tapping during 1995 vide letter dated 03.02.1995. It is also seen that the State Corporation-respondent No.3 herein took over the resin blazes so offered and invited tenders for undertaking the work of tapping on 14.02.1995 and the tenders were opened on 01.03.1995 at 2.30 p.m. All these details are available in the letter of the State Corporation dated 22.03.1995. Inasmuch as the appellant was continuing as Superintendent of Forests without a specific salary but with an assurance of 3/4th price of forest produce such as resin blazes etc. till the appointment day, i.e. 11.03.1995, we are of the view that the appellant is entitled for his legitimate dues till such date. Those aspects were not being correctly adverted to and appreciated by the learned Single Judge as well as by the Division Bench of the High Court and mainly concentrated on the "vesting" of forests on or after 11.03.1995 in favour of the State Corporation by holding that the appellant was not entitled to claim anything thereafter. Even though the appellant placed relevant materials including the assertion and statement of PW-3 who is none else than the Divisional Manager for the State Corporation, Una, those aspects have not been properly appreciated. In those circumstances, we are of the view that ends of justice would be met by remitting the matter to the learned Single Judge for fresh disposal and quantifying the eligible amount."

The Supreme Court further held that:

"Under these circumstances, we set aside the orders passed by the learned Single Judge as well as the Division Bench of the High Court and remit the matter to the learned Single Judge for fresh consideration with the available materials. Except pointing out the claim of the appellant, we have not expressed anything on the merits and it is for the learned Single Judge to determine the quantum of the amount till the appointed day, i.e. 11.03.1995 as per the materials placed by both parties in the form of oral and documentary evidence. Inasmuch as the matter is pending from 1999, we request the learned Single Judge to restore the suit to its original number i.e. Civil Suit No. 36 of 1998 and dispose of the same within a period of six months from the date of receipt of this judgment."

18. The Section 4 of the Act is as follows:-

"Vesting of rights of grantee in Government and extinction of rights in grant.- Notwithstanding anything contained in any law for the time being in force, or in

any contract or in any judgment, decree or order of any Court, with effect from the appointed day,-

(i) The grant shall stand extinguished and any service or obligation attached to such land shall stand abolished; and the grantee shall have no liability to perform any condition or obligation to render any service attached to such grant;

(ii) all rights, title and interest of the grantee in the forests or waste lands held by him, shall vest in the Government free from all encumbrances."

19. Bearing in mind the aforesaid observations, it would be noticed that under Section 4 of the Act, the grant was extinguished and any service/obligation attached to such land stood abolished and the same was vested in the Government free from all encumbrances.

20. Now, adverting to the oral and documentary evidence available on record, it would be noticed that plaintiff Mohinder Pal stepped into the witness box as PW-9 and proved on record that he had been notified as Superintendent of Kutlehar Forests and in accordance with the terms and conditions of the notification, he was to share the revenue income of the forests with the State Government. 3/4th of the revenue income was to fall to his share while remaining 1/4th was that of Government. The arrangement was in force since the time of his forefathers and continued till 07.02.1996. The prices of produce were fixed by the Pricing Committee of defendant No.3. On 03.02.1995 vide Ex. PW-3/A 1,33, 453 resin blazes were handed over to defendant No.3 from Kutlehar Forests. On 14.02.1995, defendant No.3 vide Ex.PW-3/C issued tender notice. Thereafter, the amount despite repeated demands/notice was not paid to him which constrained plaintiff to file a writ petition before this Court and the same was dismissed and even SLP filed was dismissed constraining him to file the instant suit. In cross-examination, the plaintiff denied that he had not been given the rights to manage the forests and stated that the services of the staff were taken over by the State only with effect from 07.02.1996. He denied having received 3/4th share in the forest produce of Kutlehar Forests as an employee or agent of the State. He also denied that this amount was given to him as Superintendent of Kutlehar Forests.

21. PW-2 Abdul Wahid Khan produced copy of notification dated 18.05.1974 Ex.PW-2/A vide which Pricing Committee for Himachal Pradesh Forest Corporation Ltd. was constituted. This notification was subsequently modified vide notification dated 28.11.1988 Ex.PW-2/B. He further proved the proceedings of the Pricing Committee held on 16.05.1988 vide Ex.PW-2/C and thereafter the proceedings of the Pricing Committee held on 25.04.1995 vide Ex.PW-2/D whereby for the year 1994 rate of Rs.24/- per blaze was fixed and Rs.26/- per blaze was tentatively fixed for 1995 tapping season. He also proved on record the proceedings of the Pricing Committee held on 12.06.1991 vide Ex.PW-2/E whereby the rate of interest for belated payments with effect from 1991-92 was fixed at the rate of 16.5%.

22. PW-3 Chander Bhushan Pandey, Divisional Manager, State Forest Corporation, proved letter Ex.PW-3/A dated 03.02.1995 addressed by the plaintiff to the Divisional Manager, Una, whereby the plaintiff informed the Divisional Manager that 1,33,453 blazes would be available in 1995 tapping season. He also proved on record letter dated 10.06.1995 vide Ex.PW-3/B whereby the aforesaid blazes were received and acknowledged by the defendants. He further stated that public notice with regard to auction/tender of labour supply mate and tapping of resin blazes for the year 1995 was issued on 14.02.1995 vide Ex.PW-3/C pursuant to which tenders were received and final tenders were accepted and royalty to the extent of Rs.34,73,366/- was payable to the plaintiff.

23. PW-4 Bhagi Rath, Assistant Manager, Himachal Pradesh State Forest Corporation, proved certificate Ex.PW-4/A dated 22.03.1995 vide which 1,33,453 resin blazes for tapping season 1995 were received from Kutlehar Forests.

24. PW-8 R.P. Kapila, Manager, State Bank of India, has proved the copies of circulars issued by the State Bank of India with regard to various rates of lending by the Bank during 1995 vide Ex.PW-8/A to Ex.PW-8/C.

25. As against the evidence led by the plaintiff, the defendants examined D1W1 Kirpal Singh, Forest Ranger, who stated that resin extracted season is from 15th February to 30th November every year. D1W2 Piare Lal, Senior Assistant, in the Office of Principal Chief Conservator of Forests proved notification dated 10.03.1995 Ex. D1/A vide which 11.03.1995 was fixed as the appointed date on which the Act came into force. He also proved order dated 10.03.1995 Ex.D1/B whereby the Divisional Forest Officer, Una, was authorized to enter upon the land/premises vested in the State Government under Section 4 of the Act.

26. As noticed above, the claim of the plaintiff is being contested by the defendants only on the ground that after issuance of the notification plaintiff had no interest left in the forests so as to claim decretal amount and that the plaintiff was not the owner of the forest land after the notification dated 10.03.1995. Therefore, there was no question of entering any contract as the plaintiff had no subsisting interest left in the forests.

27. As already observed above, the Hon'ble Supreme Court in its decision dated 26.10.2010 in ***Mahendra Pal's case*** (supra) had categorically observed that the plaintiff was asked to look after the forests produce as Superintendent and in lieu of salary he was assured grant of 3/4th that of the resin blazes. The plaintiff continued as Superintendent of forests without a specific salary but with an assurance of 3/4th of such resin blazes etc. till the appointed day i.e. 11.03.1995. It was further observed that it was not only specifically pleaded, but there was material placed on record by the plaintiff about the work done such as maintenance, manuring, protecting the trees etc.. Therefore, the plaintiff was entitled for his legitimate dues till such date i.e.11.03.1995.

28. It is not in dispute that the Corporation took over the resin blazes so offered by the plaintiff on 03.02.1995 and thereafter invited tenders for undertaking tapping work on 14.02.1995 and the tenders were opened on 01.03.1995 at 2.30 p.m. Admittedly, by this time, the plaintiff had done the work of maintenance, manuring, protecting of trees etc. and, therefore, was entitled to the amount received after tapping and the mere fact that the forests came to be vested in the State Government under the Act in the interregnum has no force because by that time the plaintiff had not only put inputs and maintained the forests, but even offered 1,33,453 resin blazes to the defendants. Not only this, further even the defendants had already invited tenders on 14.02.1995. It is not in dispute that the defendants had infact extracted resin from above 1,33,453 resin blazes in the year 1995 tapping season. Therefore, the plaintiff was entitled to the rate of Rs.26/- per blaze that was fixed in the year 1995 tapping season as against Rs.24/- , as awarded by the learned Single Judge.

29. The learned Single Judge has erred in applying the rates of 1994 when admittedly the tapping season pertained to the year 1995 and was to be governed by the said rate. Even the Hon'ble Supreme Court while remanding the matter has not negated the claim of the plaintiff, but has only directed this Court to determine the quantum of amount. In this way, the plaintiff would be entitled to Rs.26/- per blaze as against Rs.24/- per blaze as awarded by the learned Single Judge.

30. Now, remains the question of interest. It cannot be disputed that in case the plaintiff has been deprived of use of money, because of lapse or fault of the defendants, to which he is otherwise legally entitled to, then he would have a right to be compensated for such deprivation which may be called interest, compensation or damages etc.

31. A Constitution Bench of the Hon'ble Supreme Court in ***Secretary, Irrigation Department, Government of Orissa and others*** *versus* ***G.C.Roy (1992) 1 SCC 508***, held that:-

"43...(i) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages..... ."

32. Black's Law Dictionary (7th Edition) defines 'interest' inter alia as:

"3. The compensation fixed by agreement or allowed by law for the use or detention of money, or for the loss of money by one who is entitled to its use; especially, the amount owed to a lender in return for the use of [the] borrowed money."

33. According to Stroud's Judicial Dictionary of Words And Phrases (5th Edition) interest means, inter alia, compensation paid by the borrower to the lender for deprivation of the use of his money.

34. The essence of interest in the opinion of Lord Wright, in ***Riches*** *versus* ***Westminster Bank Ltd., 1947 AC 390 : (1947) 1 All ER 469 (HL)*** (AC at p.400: All ER at p.472-E-F) is that:-

'.....it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or conversely the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation';

the money due to the creditor was not paid, or, in other words,

'was withheld from him by the debtor after the time when payment should have been made, in breach of his legal rights, and interest was a compensation, whether the compensation was liquidated under an agreement or statute'.

35. At this stage, it may be relevant to note that the following observations made by a Division Bench of the High Court of Punjab in ***CIT*** *versus* ***Dr.Sham Lal Narula AIR 1963 Punj 411*** on the concept of 'interest' were duly approved by the Hon'ble Supreme Court in ***Dr.Sham Lal Narula*** *versus* ***CIT***, ***AIR 1964 SC 1878*** and it was held as under:-

"8. The words "interest" and "compensation" are sometimes used interchangeably and on other occasions they have distinct connotation. "Interest" in general terms is the return or compensation for the use or retention by one person of a sum of money belonging to or owed to another. In its narrow sense, "interest" is understood to mean the amount which one has contracted to pay for use of borrowed money.....

In whatever category "interest" in a particular case may be put, it is a consideration paid either for the use of money or for forbearance in demanding it, after it has fallen due, and thus, it is a charge for the use or forbearance of money. In this sense, it is a compensation allowed by law or fixed by parties, or permitted by custom or usage, for use of money, belonging to another, or for the delay in paying money after it has become payable."

36. In ***South Eastern Coalfields Ltd. Vs. State of M.P. and others (2003) 8 SCC 648,*** it was held that interest is also payable in equity in certain circumstances. It was further observed that rule in equity is that interest is payable even in the absence of any agreement or custom to that effect though subject, of course, to a contrary agreement. Applicability of the rule to avoid interest in equity is attracted when the existence of a state of circumstances is established which justify the exercise of such equitable jurisdiction and such circumstances can be many. It is apt to reproduce paragraphs 21, 24, 26 and 28 of the judgment, which reads thus:-

"21. Interest is also payable in equity in certain circumstances, me rule in equity is that interest is payable even in the absence of any agreement or custom to that effect though subject, of course, to a contrary agreement (See: Chitty on Contracts,

Addition 1999, Vol. II, Part 38-248, at page 712). Interest in equity has been held to be payable on a market rate even though the deed contains no mention of interest. Applicability of the rule to award interest in equity is attracted on the existence of a state of circumstances being established which justify the exercise of such equitable jurisdiction and such circumstances can be many.

24. We are, therefore, of the opinion that in the absence of there being a prohibition either in law or in the contract entered into between the two parties, there is no reason why the Coalfields should not be compensated by payment of interest for the period for which the consumers/purchasers did not pay the amount of enhanced royalty which is a constituent part of the price of the mineral for the period for which it remained unpaid. The justification for award of interest stands fortified by the weighty factor that the Coalfields themselves are obliged to pay interest to the State on such amount. It will be a travesty of justice to hold that though the Coalfields must pay the amount of interest to the State but the consumers/purchasers in whose hands the money was actually withheld be exonerated from liability to pay the interest.

***Liability of the consumers/purchasers to pay interest to the Coalfields**:*

(b) for the period for which the restraint order passed by the Court remained in operation.

26. In our opinion, the principle of restitution takes care of this submission. The word 'restitution' in its etymological sense means restoring to a party on the modification, variation or reversal of a decree or order, what has been lost to him in execution or decree or order or the court or in direct consequence of a decree or order (See : Zafar Khan and Ors. v. Board of Revenue, U.P., and Ors., . In law, the term 'restitution' is used in three senses; (i) return or restoration of some specific thing to its rightful owner or status; (ii) compensation for benefits derived from a wrong done to another; (iii) compensation or reparation for the loss caused to another. (See Black's Law Dictionary, Seventh Edition, p.1315). The Law of Contracts by John D. Calamari & Joseph M. Perillo has been quoted by Black to say that 'restitution' is an ambiguous term, sometimes referring to the disgorging of something which has been taken and at times referring to compensation for injury done:

> *"Often, the result in either meaning of the term would be the same. ..... Unjust impoverishment as well as unjust enrichment is a ground for restitution. If the defendant is guilty of a non-tortuous misrepresentation, the measure of recovery is not rigid but, as in other cases of restitution, such factors as relative fault, the agreed upon risks, and the fairness of alternative risk allocations not agreed upon and not attributable to the fault of either party need to be weighed."*

The principle of restitution has been statutorily recognized in Section 144 of the Code of Civil Procedure, 1908. Section 144 of the C.P.C. speaks not only of a decree being varied, reversed, set aside or modified but also includes an order on par with a decree. The scope of the provision is wide enough so as to include therein almost all the kinds of variation, reversal, setting aside or modification of a decree or order. The interim order passed by the Court merges into a final decision. The validity of an interim order, passed in favour of a party, stands reversed in the event of final decision going against the party successful at the interim stage. Unless otherwise ordered by the Court, the successful party at the end would be justified with ail expediency in demanding compensation and being placed in the same situation in which it would have been if the interim order would not have been passed against it. The successful party can demand (a) the delivery of benefit earned by the opposite party under the interim order of the court, or (b) to make

restitution for what it has lost; and it is the duty of the court to do so unless it feels that in the facts and on the circumstances of the case, the restitution would far from meeting the ends of justice, would rather defeat the same. Undoing the effect of an interim order by resorting to principles of restitution is an obligation of the party, who has gained by the interim order of the Court, so as to wipe out the effect of the interim order passed which, in view of the reasoning adopted by the court at the stage of final decision, the court earlier would not or ought not to have passed. There is nothing, wrong in an effort being made to restore the parties to the same position in which they would have been if the interim order would not have existed.

28. That no one shall suffer by an act of the court is not a rule confined to an erroneous act of the court; the 'act of the court' embraces within its sweep all such acts as to which the court may form an opinion in any legal proceedings that the court would not have so acted had it been correctly apprised of the facts and the law. The factor attracting applicability of restitution is not the act of the Court being wrongful or a mistake or error committed by the Court; the test is whether on account of an act of the party persuading the Court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage which it would not have otherwise corned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the Court and the set of such party. The quantum of restitution, depending on the facts and circumstances of a given case, may take into consideration not only what the party excluded would have made but also what the party under obligation has or might reasonably have made. There is nothing wrong in the parties demanding being placed in the same position in which they would have been had the court not intervened by its interim order when at the end of the proceedings the court pronounces its judicial verdict which does not match with and countenance its own interim verdict. Whenever called upon to adjudicate, the court would act in conjunction with what is the real and substantial justice. The injury, if any, caused by the act of the court shall be undone and the gain which the party would have earned unless it was interdicted by the order of the court would be restored to or conferred on the party by suitably commanding the party liable to do so. Any opinion to the contrary would lead to unjust if not disastrous consequences. 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, or 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."

37. Judged in the light of the aforesaid exposition of law, We are of the considered view that the ends of justice would be subserved in case the plaintiff is awarded interest at the rate of 6% per annum from the date of institution of the suit i.e. 23.02.1998 till the date of payment. Ordered accordingly.

38. In view of the above, OSA No.8 of 2011 is allowed in the aforesaid terms and a decree of Rs.26,02,333.50/- as against Rs.24,02,154/-, along with interest at the rate of 6% per annum on the awarded amount, from the date of institution of the suit i.e. 23.02.1998, is passed in favour of the plaintiff. Whereas, OSA No. 13 of 2011 is ordered to be dismissed, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of. Decree-sheet

be prepared accordingly. 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 VIVEK SINGH THAKUR, J.

Sukhpreet .....Petitioner.

Versus

State of Himachal Pradesh & others .....Respondents

Cr.MMO No. 64 of 2018
Decided on : 13.04.2018

Code of Criminal Procedure, 1973- Sections 320 and 482**- Indian Penal Code, 1860-** Sections 279, 337 and 338 – Petitioner/accused seeking quashing of FIR and consequent criminal proceedings on ground of compromise with complainant- Petition contested by State on ground of offences being 'non-compoundable' – Held- Inherent powers of High Court have no statutory limitations including Section 320 of Cr.P.C. and can be exercised for quashing criminal proceedings to meet ends of justice with due regard to nature and gravity of offences involved.

(Paras– 4 and 9)

Cases referred:

Gian Singh Vs. State of Punjab and Ors, (2012) 10 SCC 303

Narinder Singh and Ors. Vs. State of Punjab and Ors., (2014) 6 SCC 466

For the Petitioner :	Petitioner in person with Mr. Karan Singh Kanwar, Advocate.
For the Respondent:	Mr. Shiv Pal Manhans, Additional Advocate General with Mr. Raju Ram Rahi and Mr. Amit Kumar Dhumal, Deputy Advocate Generals, for respondents No. 1 to 3. Respondents No. 4 & 5 in person with Mr. Subhash Chand, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge *(oral)*

This petition has been filed by petitioner- accused, pending investigation in criminal proceedings in case under Sections 279, 337 and 338 of the Indian Penal Code (for short 'IPC') in FIR No. 90 of 2017, dated 10.07.2017, registered with Police Station, Nahan, District Sirmaur, H.P., for quashing the FIR and criminal proceedings initiated in pursuance thereto, on the basis of compromise, (Annexure P-2), arrived at between petitioner-accused and injured and complainant i.e. respondents No. 4 & 5 .

2. Petitioner is present in person in Court. Respondents No. 4 & 5, who are also present in person in Court, duly identified by their counsel, endorse compromise, Annexure P-2 and in their statements, recorded on oath in this Court, have not only reiterated signing of the compromise by them with accused with free consent and will without any coercion and pressure, but also deposed to the effect that the accident had not occurred on account of rash and negligent driving of accused. Complainant has deposed that though he was present on the spot, but he could not say with certainty that it was rash and negligent act on the part of the petitioner which resulted into the accident, as his shop is situated at a distance of 200-250 meters from the spot and he rushed to the spot only after hearing the noise of collusion of the vehicles, however, on the basis of observation at that time and information received from the passers-by who had

seen the accident, he had drawn the conclusion that the accident had taken place on account of rash and negligent act of the petitioner and accordingly, he had lodged the complaint with the police and arrived at the spot. Similarly, complainant-Vijay Saini has also deposed that the accident had taken place all of a sudden, cause of which was not known to him and on the basis of information received from others, he was considering that the accident had taken place on account of rash and negligent driving of accused/petitioner. However, later on, petitioner had met him and explained the manner in which the accident had taken place and in his opinion, his impression that the accident had taken place due to rash and negligent act of the petitioner was incorrect, therefore, he does not want to proceed with criminal proceeding against petitioner.

3. It is contended on behalf of respondent-State that accused is not entitled to invoke inherent jurisdiction of this Court to exercise its power on the basis of compromise arrived at between the parties with respect to an offence not compoundable under Section 320 Cr.PC.

4. Three Judges Bench of the Apex Court in **Gian Singh Vs. State of Punjab and Ors**. reported in (**2012) 10 SCC 303**, explaining that High Court has inherent power under Section 482 of the Code of Criminal Procedure with no statutory limitation including Section 320 Cr.PC, has held that these powers are to be exercised to secure the ends of justice or to prevent abuse of process of any Court and these powers can be exercised to quash criminal proceedings or complaint or FIR in appropriate cases where offender and victim have settled their dispute and for that purpose no definite category of offence can be prescribed. However, it is also observed that Courts must have due regard to nature and gravity of the crime and criminal proceedings in heinous and serious offences or offence like murder, rape and dacoity etc. should not be quashed despite victim or victim's family have settled the dispute with offender. Jurisdiction vested in High Court under Section 482 Cr.PC is held to be exercisable for quashing criminal proceedings in cases having overwhelming and predominating civil flavour particularly offences arising from commercial, financial, mercantile, civil partnership, or such like transactions, or even offences arising out of matrimony relating to dowry etc., family disputes or other such disputes where wrong is basically private or personal nature where parties mutually resolve their dispute amicably. It was also held that no category of cases for this purpose could be prescribed and each case has to be dealt with on its own merit but it is also clarified that this power does not extend to crimes against society.

5. The Apex Court, in case **Narinder Singh and Ors. Vs. State of Punjab and Ors.**, reported in **(2014) 6 SCC 466**, has summed up and laid down principles, by which the High Courts would be guided in giving adequate treatment to the settlement between the parties and exercise its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with criminal proceedings.

6. Sections 337 and 338 of IPC are compoundable and Section 279 of IPC is not compoundable under Section 320 Cr. P.C. However, as explained by Hon'ble Supreme Court in ***Gian Singh's*** and ***Narinder Singh's*** cases supra, power of High Court under Section 482 Cr.PC is not inhibited by the provisions of Section 320 Cr.PC and FIR as well as criminal proceedings can be quashed by exercising inherent powers under Section 482 Cr.PC, it was warranted in given facts and circumstances of the case for ends of justice or to prevent abuse of the process of any Court, even in those cases which are not compoundable where parties have settled the matter between themselves.

7. In present case, complainant and injured have appeared in person in the Court and have endorsed the compromise filed with petition duly signed by them and accused with free consent and will without any coercion. Their statements recorded on oath in the Court, do not disclose the rash and negligent driving of accused, rather reflect that even in case criminal proceedings are allowed to continue, there is no probability of conviction of accused. It is also stated that the complaint was lodged by respondent No. 5 on the basis of his observation and

information supplied by passers-by, which he feels not to be correct. Respondents No. 4 has categorically stated that in these circumstances, he is not interested to continue with criminal proceedings against accused.

8. Offence in question does not fall in the category of offences termed to be prohibited, in the pronouncements of Apex Court, to be compounded exercising power under Section 482 of the CrPC. In view of statement of respondent No. 4, recorded on oath in this Court, probability of conviction is also too remote.

9. Considering facts and circumstances of the case in entirety, I am of the opinion that present petition deserves to be allowed for ends of justice and the same is allowed accordingly and FIR No. 90 of 2017, dated 10.07.2017, under Sections 279, 337 and 338 of IPC, registered at Police Station, Nahan, District Sirmour, H.P. is quashed. It is stated that as per information of petitioner, challan is yet to be presented as investigation has not been finalized yet. Consequent to quashing of FIR, investigation against accused also stands closed. Needless to say, criminal proceedings, if any, initiated in pursuance to aforesaid FIR by now, also stands quashed. Petition stands disposed of in above terms.

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

Ishwar Dass ... Petitioner

Versus

The State of Himachal Pradesh ... Respondent

CrMMO No. 484 of 2017
Reserved on: April 3, 2018
Decided on: April 16, 2018

Code of Criminal Procedure, 1973- Sections 91 and 482- Narcotic Drugs and Psychotropic Substances Act, 1985- Section 20- Accused facing trial on allegations that he was apprehended by police at 'Dashalani' and 1.4 kg charas was recovered from him- He moved an application under Section 91 of the Code for production of customer application forms, tower location and call detail records of police personnel said to be members of police party apprehending him at 'Dashalani'- Application rejected by Special Judge on ground that Court cannot create evidence in defence for accused- Petition against - Held- Documents which petitioner/accused cannot himself procure for proving his defence can certainly be requisitioned by invoking powers under Section 91 of Code provided Court is satisfied that these are necessary and desirable- On facts, accused simply wanted to show that he was not apprehended at 'Dashalani' by police party by causing call details and tower location of cell numbers of police officials, who alleged to have apprehended him- Production of such documents is necessary and desirable- Order of Special Judge set aside and petition allowed. (Paras-12 and 26)

Cases referred:

State of Orissa v. Debendra Nath Padhi, (2005) 1 SCC 568
V.K. Sasikala v. State (2012) 9 SCC 771
State of Haryana and Ors. vs Ch. Bhajan Lal and Ors. , 1992 Supp (1) SCC 335

For the petitioner : Mr. B.L. Soni, Advocate.
For the respondent : Mr. Dinesh Thakur, Additional Advocate General with Mr. Vikrant Chandel, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

Petitioner, who is facing proceedings in Sessions Trial No. 50/16 pending before Special Judge-II, Kullu, Himachal Pradesh, preferred an application under Section 91 CrPC, averring therein that he has been falsely implicated in the case and as such, in order to establish his innocence, requires the assistance of the copies of call details, location and documents given for issuance of SIM cards of following mobile phone number:-

(i) Mukesh Kumar holder of Cell No. 98179-73425 (Reliance);

(ii) Manoj Kumar holder of Cell No. 94181-83325 of BSNL

(iii) Vijay Kumar holder of Cell No. 94182-69680 of BSNL, and;

(iv) Ram Lal Thakur, holder of Cell No. 94184-50373 of BSNL

2. Petitioner-accused further averred that the service providers may be directed to produce requisite information i.e. copies of call details and tower location for the period from 23.5.2016 to 24.5.2016 as also the identity documents and application forms alongwith photographs qua aforesaid mobile phone numbers. In support of aforesaid prayer having been made by way of application under Section 91 CrPC, petitioner also invited attention of the court below to the judgment rendered by High Court of Delhi in **Suresh Kalmadi** vs. **CBI**, Crl. M.C. No. 2143/2015 decided on 22.5.2015 and claimed that the power under Section 91 is to discover truth and to do complete justice to the case and, as such, discretion vested in the Court must be exercised judiciously while keeping in mind Constitutional mandate and purpose of Section 91.

3. Aforesaid application came to be opposed vehemently by the respondent-State, who claimed that the application is not maintainable at this stage and same is barred under provisions of Sub-section (3)(b) of Section 91, wherein it is specifically provided that nothing in this Section shall apply to any document or thing which is in the custody of Telegraph Authority. Respondent-State further alleged that the accused had not given reasoning showing any urgency in filing the application and in the given facts and circumstances of the case, call details and other documents furnished by persons named in the application for issuance of SIM cards of mobile numbers would not serve any purpose and, as such, application deserves to be dismissed. Prosecution further claimed that the evidence adduced on record duly establishes the case of the prosecution and application has been filed solely with a view to prolong the trial. Apart from above, prosecution further claimed that the accused himself is not barred to apply for said call details, tower location, documents etc. and there is no provision of law, which empowers/casts a duty upon the court to create evidence for the accused.

4. Learned court below, vide order dated 21.12.2017 rejected the aforesaid application. Court below taking note of the averments contained in the application, reply filed by the prosecution and the arguments advanced by the learned counsel representing the parties, passed following order:

> "7. From the perusal of the case file, it is transpired that on 21.11.2017, the applicant/accused has examined two witnesses and as per the separate statement of the learned counsel for the applicant/accused, the defence evidence was closed. Thereafter, the case was fixed for arguments on 05.12.2017, on which date the learned counsel for the applicant/ accused sought time for arguments and the case was listed for arguments on 16.12.2017. From the perusal of the record, it also transpired that the applicant/ accused had also filed similarly application, which was dismissed vide order dated 02.12.2017. Moreover, there is no provision of law where the Court will create defence evidence for the applicant/ accused. Therefore, the law cited above by the learned counsel of the applicant/accused is not applicable in this case. Hence, the present applications deserves dismissal.

8. Hence, in view of my above discussions, the present application is hereby dismissed. It be tagged with main case file after due completion."

5. It may be noticed that para Nos. 1 to 6 of the order contain only rival contentions of the parties and reasoning, if any, for rejection of the application has been given in para Nos. 7 and 8. In the aforesaid background, petitioner-accused being aggrieved and dissatisfied with the rejection of his application referred to herein above has approached this Court in the instant proceedings filed under Section 482 CrPC, praying therein for setting aside impugned order dated 21.12.2017 passed by learned Special Judge-II, Kullu and for allowing his application under Section 91 CrPC.

6. Mr. B.L. Soni, learned counsel representing the petitioner vehemently argued that the impugned order passed by learned Special Judge is not sustainable in the eye of law as such same deserves to be quashed and set aside. Referring to the reasoning assigned by learned Court below, while rejecting application preferred by petitioner-accused, Mr. Soni strenuously argued that the court below has failed to render cogent and convincing reasoning, if any, to disallow the prayer made in the application, rather the court below in a most mechanical manner proceeded to reject the prayer made by the petitioner and as such, grave prejudice has been caused to the petitioner-accused, who otherwise is facing trial under Section 20 of the Narcotic Drugs & Psychotropic Substances Act. While inviting attention of this Court to the judgment rendered by High Court of Delhi in **Suresh Kalmadi (**supra), which was also cited before learned Special Judge below, Mr. Soni contended that very purpose and object of Section 91 is to discover truth and to do complete justice to the case. While considering the prayer made under aforesaid provision of law, court is not expected to reject the application in a mechanical manner, rather accused is required to be afforded a fair opportunity to prove his innocence. While referring to the provisions contained under Section 91 CrPC, learned counsel representing the petitioner contended that the application under this provision of law can be made at any stage of trial. He further contended that the scope of Section 91 is very wide and it can neither be restricted only to the documents on which the prosecution relies nor to the stage contemplated by Section 233 or 243 of the Code. Mr. Soni further contended that Section 91 empowers a Court to ensure production of any document or other thing, "necessary or desirable", for the purpose of any investigation, inquiry, trial or other proceedings under the Code, by issuing a summons or a written order to those in possession of such materials. Therefore, *sine qua non* of an order under this Section is consideration of the Court that the production of the document concerned is desirable and necessary for the purposes of trial. But, in the case at hand, there is no attempt, if any, on the part of court below to see necessity or desirability of documents sought to be produced on record by the accused, as such, impugned order being contrary to the basic provision of law deserves to be quashed and set aside. Lastly, Mr. Soni contended that the petitioner is facing trial for an offence, which may entail him severe punishment as such court below ought to have acceded to his request and ordered for production of document as detailed in the application so that a fair opportunity is afforded to the petitioner to prove his innocence.

7. Per contra, Mr. Dinesh Thakur, learned Additional Advocate General argued that there is no illegality or infirmity in the impugned order passed by the court below, as such, same needs to be upheld. Mr. Thakur, learned Additional Advocate General, further contended that the judgment relied upon by the learned counsel representing the petitioner in support of his contention is not applicable in the present case and court below has rightly not placed reliance upon the same, while considering prayer having been made by the petitioner under Section 91. Learned Additional Advocate General, further contended that bare perusal of application under Section 91 nowhere reveals urgency or necessity, if any, for summoning call details and other documents, as such, learned court below rightly rejected the same. Mr. Thakur further contended that the application has been filed solely with a view to prolong the trial because prior to filing the application at hand, accused had examined two witnesses on 21.11.2017 and defence evidence was closed. He further contended that when matter was fixed for arguments, application under Section 91 came to be filed, which is not maintainable. While referring to earlier order dated 2.12.2017, passed by learned Special Judge, learned Additional Advocate General contended that

similar application under Section 91 CrPC was filed on same and similar grounds before the learned Special Judge and same was rejected vide order dated 2.12.2017 and as such, another application on same and similar grounds is not maintainable. Lastly, Mr. Dinesh Thakur, learned Additional Advocate General contended that the learned defence counsel specifically asked prosecution witnesses in the cross-examination that they possess mobile phones and as such, application, if any, for production of documents as mentioned in the application in question, ought to have been filed at that stage and not after closure of evidence. He further contended that otherwise also, application filed by petitioner is barred under the provisions of Sub-section 3(b) of Section 91 CrPC.

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

9. Before ascertaining correctness of impugned order passed by learned Special Judge, vis-à-vis provisions of law contained under Section 91 CrPC and exposition of law laid down by Hon'ble Apex Court, this Court wishes to observe that definitely the court below has not applied its mind before passing impugned order, rather, application has been decided in a most mechanical manner without assigning reasons. Interestingly, court below despite having taken note of judgment rendered by High Court of Delhi in **Suresh Kalmadi (**supra) has not bothered/cared to look into the observations and parameters culled out by the High Court of Delhi, for dealing with application under Section 91 CrPC. Learned Court below has simply stated in the order that there is no provision of law, where court will create evidence for the accused as such law cited by the accused is not applicable in the case. Bare observation made hereinabove by court below itself suggests that the court below has dealt with the matter at hand in a most casual manner. Had the court below bothered itself to peruse the judgment passed by High Court of Delhi, it would have definitely not recorded in the order that there is no provision of law where court will create defence evidence for the accused. Section 91 CrPC, empowers court to issue summons to produce document or other thing, whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceedings under this Code. Section 91 is reproduced herein below:

> "91. Summons to produce document or other thing.
>
> (1) Whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.
>
> (2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.
>
> (3) Nothing in this section shall be deemed-
>
> (a) to affect sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), or the Bankers' Books Evidence Act, 1891 (13 of 1891) or
>
> (b) to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority."

10. Scope of Section 91 is very wide, rather, it casts a duty upon the court to cause production of document or a thing believed to be in possession of some other person, if it considers production of such document necessary or desirable for the adjudication of the case. No doubt, court will not create evidence in favour of an accused or prosecution but, at the same time, it is bounden duty of the court to discover truth about allegations against the accused.

Issuance of direction, if any, under Section 91, whereby court enjoys power to cause production of document or a thing believed to be in possession of some person, definitely cannot be considered to be creation of evidence in favour of the accused, who makes an application under Section 91.

11. Under Section 91, court can consider production of a document through a person, in whose possession or power such documents are believed to be, if it is necessary or desirable for the purpose of trial, but, interestingly, in the case at hand, learned court below, while passing impugned order has not made any attempt /endeavour to explore necessity or desirability of the document sought to be produced by the accused with the aid of the court. In the application under Section 91, petitioner-accused has categorically stated that he has been falsely implicated in the case, as such, with a view to establish his innocence, he requires assistance of the copies of call details, location and documents given for the issuance of SIM cards of numbers detailed in the application. Petitioner has also mentioned the period i.e. 23.5.2016 to 24.5.2016, qua which call details are required. As per petitioner-accused, he was picked up on 23.5.2016 by Head Constable Vijay Kumar from Bus Stand Larji, when he was waiting for the bus alongwith Dine Ram and Sangat Ram, whereas, as per police story, petitioner-accused was nabbed by the police party at 4 am on 24.5.2016 at a place known as Dalashani. As per police version, police party consisting of ASI Ram Lal, Head Constable Mukesh Kumar No. 45, LHC Manoj Negi and HHC Dinesh Kumar etc. had laid *Naka* at Dalashani at about 4 am on 24.5.2016, petitioner came from Hurla side, on seeing the police, threw a bag on the road, which was got retrieved and *Charas* weighing 1.4 kg was recovered therefrom.

12. Accused solely with a view to prove that he was not apprehended at Dalashani on 24.5.2016, by the police party consisting of ASI Ram Lal, HC Mukesh Kumar etc. rather he was picked up from Bus Stand at Larji on 23.5.2016, sought production of call details, time and location of mobile numbers possessed by the police officials named above to prove his innocence, by way of application under Section 91.

13. PW-2 HHC Janesh Kumar No. 250 of Police Station Bhuntar, in his statement also admitted that he was not present on the spot on 24.5.2016, whereas Dine Ram testified that he was with the petitioner on 23.5.2016 at Larji when he was picked up by police officials and in these circumstances, petitioner-accused in order to prove his version, moved an application under Section 91 seeking assistance of the court for production of call details, time and location of mobile numbers of police officials namely Manoj Kumar, Mukesh Kumar, Vijay Kumar and Ram Lal (IO) between 23.5.2016 and 24.5.2016, so that their location/movement on 23.5.2016 and 24.5.2016 is ascertained.

14. At this stage, it may be noticed that the petitioner had filed similar application earlier also, averring therein that he has been falsely implicated in the case and as such, in order to establish his innocence, he requires assistance of copies of call details, location and documents given for issuance of SIM cards of Mukesh Kumar, Manoj Kumar, Vijay Kumar and Ram Lal Thakur.

15. Interestingly, in that application, prosecution had raised same defence, as has been taken in the present application. On the top of everything, learned Court below vide order dated 2.12.2017, while disposing of earlier application filed by petitioner under Section 91 also chose not to assign any reason and simply rejected the application on the ground that perusal of application shows that applicant has nowhere mentioned the date and period of each CDR and locations of aforesaid phone numbers required by him, nor had applicant shown any urgency for production of said documents in the court, when case was fixed for evidence of prosecution and as such, application was dismissed. It is quite apparent from the perusal of order dated 2.12.2017 that earlier application under Section 91 came to be filed by petitioner much prior to commencement of evidence of prosecution, but, as has been observed above, same was dismissed on the ground that the applicant has not mentioned the date and period of CDR's and location of aforesaid phone numbers.

16. Earlier application came to be rejected on 2.12.2017, whereafter immediately on 4.12.2017, another application under Section 91 came to be filed by petitioner specifically mentioning therein that CDR's qua the period i.e. 23.5.2016 and 24.5.2016, time and location of mobile numbers and identity documents furnished alongwith applications are required to be produced with the assistance of the court, as such, there appears to be no force in the contention of the learned Additional Advocate General that the application came to be filed solely with a view to prolong the proceedings, rather, petitioner taking cue from the observations made in order dated 2.12.2017 passed in earlier application, filed fresh application immediately after two days, disclosing therein better particulars to enable court to see the necessity and desirability of the documents sought to be produced with the assistance of the court. But, as has been observed herein above, there is no attempt if any, on the part of court below to ascertain necessity and desirability of documents sought to be produced on record by the petitioner with the assistance of the court.

17. Section 91 pre-supposes that when a document is not produced, process may be initiated to compel production thereof. Any document or thing as envisaged under Section can be produced if it is found that the same is necessary or desirable for the purpose of investigation, inquiry, trial or other proceedings under the Code. First and the foremost requirement of the section is of the document being necessary or desirable. Necessity or desirability would have to be seen with reference to the stage when prayer is made for the production. If any document is necessary or desirable for the defence of the accused, question of invoking Section 91 at the initial stage of framing of a charge would not arise since defence of the accused is not relevant at that stage. When this section refers to investigation, inquiry, trial or other proceedings, it is to be borne in mind that under this section a police officer may move the Court for summoning and production of a document as may be necessary at any of the stages mentioned in this Section. In so far as accused is concerned, his entitlement to seek order under Section 91 would ordinarily not come till the stage of his defence.

18. Reliance is placed upon judgment of Hon'ble Apex Court in **State of Orissa** v. **Debendra Nath Padhi**, (2005) 1 SCC 568, wherein it has been held as under:

> "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. Satish Mehra's case holding that the trial court has powers to consider even materials which accused may produce at the stage of Section 227 of the Code has not been correctly decided.
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> 24. On behalf of the accused a contention about production of documents relying upon Section 91 of the Code has also been made. Section 91 of the Code reads as under:
>
> > "Summons to produce document or other thing.(1) Whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.
> >
> > (2).....
> > (3)....."
>
> 25. Any document or other thing envisaged under the aforesaid provision can be ordered to be produced on finding that the same is 'necessary or desirable for the purpose of investigation, inquiry, trial or other proceedings under the Code'. The first and foremost requirement of the section is about the document being necessary or desirable. The necessity or desirability would have to be seen with reference to the stage when a prayer is made for the production. If any document is necessary or desirable for the defence of the accused, the question of invoking Section 91 at the initial stage of framing

of a charge would not arise since defence of the accused is not relevant at that stage. When the section refers to investigation, inquiry, trial or other proceedings, it is to be borne in mind that under the section a police officer may move the Court for summoning and production of a document as may be necessary at any of the stages mentioned in the section. In so far as the accused is concerned, his entitlement to seek order under Section 91 would ordinarily not come till the stage of defence. When the section talks of the document being necessary and desirable, it is implicit that necessity and desirability is to be examined considering the stage when such a prayer for summoning and production is made and the party who makes it whether police or accused. If under Section 227 what is necessary and relevant is only the record produced in terms of Section 173 of the Code, the accused cannot at that stage invoke Section 91 to seek production of any document to show his innocence. Under Section 91 summons for production of document can be issued by Court and under a written order an officer in charge of police station can also direct production thereof. Section 91 does not confer any right on the accused to produce document in his possession to prove his defence. Section 91 presupposes that when the document is not produced process may be initiated to compel production thereof.

26. Reliance on behalf of the accused was placed on some observations made in the case of Om Parkash Sharma v. CBI, Delhi[(2000) 5 SCC 679]. In that case the application filed by the accused for summoning and production of documents was rejected by the Special Judge and that order was affirmed by the High Court. Challenging those orders before this Court, reliance was placed on behalf of the accused upon Satish Mehra's case (supra). The contentions based on Satish Mehra's case have been noticed in para 4 as under:

> "The learned counsel for the appellant reiterated the stand taken before the courts below with great vehemence by inviting our attention to the decision of this Court reported in Satish Mehra v.

Delhi Admn. ((1996) 9 SCC 766) laying emphasis on the fact the very learned Judge in the High Court has taken a different view in such matters, in the decision reported in Ashok Kaushik v. State ((1999) 49 DRJ 202). Mr Altaf Ahmed, the learned ASG for the respondents not only contended that the decisions relied upon for the appellants would not justify the claim of the appellant in this case, at this stage, but also invited, extensively our attention to the exercise undertaken by the courts below to find out the relevance, desirability and necessity of those documents as well as the need for issuing any such directions as claimed at that stage and consequently there was no justification whatsoever, to intervene by an interference at the present stage of the proceedings.

27. In so far as Section 91 is concerned, it was rightly held that the width of the powers of that section was unlimited but there were inbuilt inherent limitations as to the stage or point of time of its exercise, commensurately with the nature of proceedings as also the compulsions of necessity and desirability, to fulfill the task or achieve the object. Before the trial court the stage was to find out whether there was sufficient ground for proceeding to the next stage against the accused. The application filed by the accused under Section 91 of the Code for summoning and production of document was dismissed and order was upheld by High Court and this Court. But observations were made in para 6 to the effect that if the accused could produce any reliable material even at that stage which might totally affect even the very sustainability of the case, a refusal to look into the material so produced may result in injustice, apart from averting an exercise in futility at the expense of valuable judicial/public time, these observations are clearly obiter dicta and in any case of no consequence in view of conclusion reached by us hereinbefore. Further, the observations cannot be understood to mean that the accused has a right to produce any document at stage of framing of charge having regard to the clear mandate of Sections 227 and 228 in Chapter 18 and Sections 239 and 240 in Chapter 19.

28. We are of the view that jurisdiction under Section 91 of the Code when invoked by accused the necessity and desirability would have to be seen by the Court in the context of the purpose investigation, inquiry, trial or other proceedings under the Code. It would also have to be borne in mind that law does not permit a roving or fishing inquiry.

29. Regarding the argument of accused having to face the trial despite being in a position to produce material of unimpeachable character of sterling quality, the width of the powers of the High Court under Section 482 of the Code and Article 226 of Constitution of India is unlimited whereunder in the interests of justice the High Court can make such orders as may be necessary to prevent abuse of the process of any Court or otherwise to secure the ends of justice within the parameters laid down in Bhajan Lal's case."

19. It is quite apparent from the aforesaid exposition of law that necessity and desirability of document sought to be produced with the assistance of the court is to be examined considering the stage when such prayer for summoning and production is made and party which makes such prayer, either police or the accused. But, definitely, application, if any, under Section 91 on the part of accused can be made at the stage of defence.

20. Ratio laid down in aforesaid judgment came to be reiterated in the recent judgment of Hon'ble Apex Court in **M/s V.L.S. Finance Ltd.** v. **S.P. Gupta and anr**, Criminal Appeal No. 99 of 2016 decided on 5.2.2016, wherein it has been held as under:

"43. Before we proceed to dwell upon the power of the Magistrate to grant permission for not pressing the application, we think it necessary to delve into legality of the direction issued by the High Court to the Magistrate to consider the documents filed by the accused persons along with the application preferred under Section 91 Cr.P.C. Section 91 Cr.P.C. reads as follows:-

"Section 91. Summons to produce document or other thing.- (1) Whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed-

(a) to affect sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), or the Bankers' Books Evidence Act, 1891 (13 of 1891) or

(b) to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority."

44. The scope and ambit of the said provision was considered in State of Orissa v. Debendra Nath Padhi[17], wherein this Court has held thus:- "The first and foremost requirement of the section is about the document being necessary or desirable. The necessity or desirability would have to be seen with reference to the stage when a prayer is made for the production. If any document is necessary or desirable for the defence of the accused, the question of invoking Section 91 at the initial stage of framing of a charge would not arise since defence of the accused is not relevant at that stage. When the section refers to investigation, inquiry, trial or other proceedings, it is to be borne in mind that under the section a police officer may move the court for summoning and production of a document as may be necessary at any of the stages mentioned in the section. Insofar as the accused is concerned, his entitlement to seek order under Section 91 would

ordinarily not come till the stage of defence. When the section talks of the document being necessary and desirable, it is implicit that necessity and desirability is to be examined considering the stage when such a prayer for summoning and production is made and the party who makes it, whether police or accused. If under Section 227, what is necessary and relevant is only the record produced in terms of Section 173 of the Code, the accused cannot at that stage invoke Section 91 to seek production of any document to show his innocence. Under Section 91 summons for production of document can be issued by court and under a written order an officer in charge of a police station can also direct production thereof. Section 91 does not confer any right on the accused to produce document in his possession to prove his defence. Section 91 presupposes that when the document is not produced process may be initiated to compel production thereof." The aforesaid enunciation of law clearly states about the scope of Section 91 Cr.P.C. and we are in respectful agreement with the same."

21. In the case at hand, admittedly, petitioner is facing trial for an offence, which may entail him punishment i.e. imprisonment for a minimum of ten years. By way of application, he is seeking production of those documents, which according to prosecution even appear to be non-existent and which he feels shall help in defending himself as such, prosecution can not be allowed to argue that he is trying to make any roving or fishing inquiry or is making a request which may be unreasonable.

22. It has been repeatedly held by Hon'ble Apex Court that in criminal trial, prosecution has to be absolutely fair and impartial because main purpose of criminal trial is not to get someone convicted rather, its object is to discover truth and punish the accused, if found guilty. Document, which petitioner cannot himself procure for the purpose of proving his defence, are certainly to be requisitioned by invoking powers under Section 91, if the court is satisfied that these are necessary or desirable.

23. Hon'ble Apex Court in **V.K. Sasikala** v. **State** (2012) 9 SCC 771, has held that the courts must ensure fairness of the investigative process so as to maintain the citizens' rights under Articles 19 and 21 and also active role of the court in a criminal trial. Hon'ble Apex Court has further held that it is responsibility of the investigating agency as well as of Court to ensure that every investigation is fair and does not erode the freedom of an individual except in accordance with law. It is also held that one of the established facets of a just, fair and transparent investigation is the right of an accused to ask for all such documents that he may be entitled to under the scheme contemplated by the Code of Criminal Procedure. Hon'ble Apex Court has held as under:

"11. The parameters governing the process of investigation of a criminal charge; the duties of the investigating agency and the role of the courts after the process of investigation is over and a report thereof is submitted to the court is exhaustively laid down in the different Chapters of the Code of Criminal Procedure, 1973 (Cr.P.C.). Though the power of the investigating agency is large and expansive and the courts have a minimum role in this regard there are inbuilt provisions in the Code to ensure that investigation of a criminal offence is conducted keeping in mind the rights of an accused to a fair process of investigation. The mandatory duty cast on the investigating agency to maintain a case diary of every investigation on a day to day basis and the power of the court under Section 172 (2) and the plenary power conferred in the High Courts by Article 226 the Constitution are adequate safeguards to ensure the conduct of a fair investigation. Without dilating on the said aspect of the matter what has to be taken note of now are the provisions of the Code that deal with a situation/stage after completion of the investigation of a case. In this regard the provisions of Section 173 (5) may be specifically noted. The said provision makes it incumbent on the Investigating agency to forward/transmit to the concerned court all documents/statements etc. on which the prosecution proposes to rely in the course of the trial. Section 173(5), however, is subject to the provisions of Section 173(6) which confers a power on the investigating officer to

request the concerned court to exclude any part of the statement or documents forwarded under Section 173(5) from the copies to be granted to the accused. The court having jurisdiction to deal with the matter, on receipt of the report and the accompanying documents under Section 173, is next required to decide as to whether cognizance of the offence alleged is to be taken in which event summons for the appearance of the accused before the court is to be issued. On such appearance, under Section 207 Cr.P.C., the concerned court is required to furnish to the accused copies of the following documents:

> "i) The police report;
>
> ii) The first information report recorded under section 154;
>
> iii) The statements recorded under sub-section (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub-section (6) of section 173;
>
> iv) The confessions and statements, if any, recorded under section 164;
>
> v) Any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of section 173."

12. While the first proviso to Section 207 empowers the court to exclude from the copies to be furnished to the accused such portions as may be covered by Section 173(6), the second proviso to Section 207 empowers the court to provide to the accused an inspection of the documents instead of copies thereof, if, in the opinion of the court it is not practicable to furnish to the accused the copies of the documents because of the voluminous content thereof. We would like to emphasise, at this stage, that while referring to the aforesaid provisions of the Code, we have deliberately used the expressions "court" instead of the expression "Magistrate" as under various special enactments the requirement of commitment of a case to a higher court (court of Sessions) by the Magistrate as mandated by the Code has been dispensed with and the special courts constituted under a special statute have been empowered to receive the report of the investigation along with the relevant documents directly from the investigating agency and thereafter to take cognizance of the offence, if so required.

13. It is in the context of the above principles of law and the provisions of the Code that the rights of the appellant will have to be adjudicated upon by us in the present case. It is not in dispute that after the appearance of the accused in the Court of the Special Judge a large number of documents forwarded to the Court by the Investigating Officer along with his report, had been furnished to the accused. Thereafter, charges against the accused had been framed way back in the year 2007 and presently the trial has reached the stage of examination of the second accused, i.e. appellant under the provisions of Section 313 Cr.P.C. At no earlier point of time (before the examination of the second accused under Section 313 Cr.P.C.) the accused had pointed out that there are documents in the Court which have been forwarded to it under Section 173 (5) and which have not been relied upon by the prosecution. It is only at such an advanced stage of the trial that the accused, after pointing out the said facts, had claimed an entitlement to copies of the said documents or at least an inspection of the same on the ground that the said documents favour the accused.

14. Seizure of a large number of documents in the course of investigation of a criminal case is a common feature. After completion of the process of investigation and before submission of the report to the Court under Section 173 Cr.P.C., a fair amount of application of mind on the part of the investigating agency is inbuilt in the Code. Such application of mind is both with regard to the specific offence(s) that the Investigating Officer may consider to have been committed by the accused and also the identity and particulars of the specific documents and records, seized in the course of investigation,

which supports the conclusion of the Investigating Officer with regard to the offence(s) allegedly committed. Though it is only such reports which support the prosecution case that are required to be forwarded to the Court under Section 173 (5) in every situation where some of the seized papers and documents do not support the prosecution case and, on the contrary, supports the accused, a duty is cast on the Investigating Officer to evaluate the two sets of documents and materials collected and, if required, to exonerate the accused at that stage itself. However, it is not impossible to visualize a situation whether the Investigating Officer ignores the part of the seized documents which favour the accused and forwards to the Court only those documents which support the prosecution. If such a situation is pointed by the accused and such documents have, in fact, been forwarded to the Court would it not be the duty of the Court to make available such documents to the accused regardless of the fact whether the same may not have been marked and exhibited by the prosecution? What would happen in a situation where such documents are not forwarded by the Investigating Officer to the Court is a question that does not arise in the present case. What has arisen before us is a situation where evidently the unmarked and unexhibited documents of the case that are being demanded by the accused had been forwarded to the Court under Section 173 (5) but are not being relied upon by the prosecution. Though the prosecution has tried to cast some cloud on the issue as to whether the unmarked and unexhibited documents are a part of the report under Section 173 Cr.P.C., it is not denied by the prosecution that the said unmarked and unexhibited documents are presently in the custody of the Court. Besides, the accused in her application before the learned Trial court(IA 711/2012) had furnished specific details of the said documents and had correlated the same with reference to specific seizure lists prepared by the investigating agency. In such circumstances, it can be safely assumed that what has been happened in the present case is that along with the report of investigation a large number of documents have been forwarded to the Court out of which the prosecution has relied only on a part thereof leaving the remainder unmarked and unexhibited.

15. In a recent pronouncement in Siddharth Vashisht @ Manu Sharma V. State (NCT of Delhi) (supra) to which one of us (Sathasivam, J) was a party, the role of a public prosecutor and his duties of disclosure have received a wide and in-depth consideration of this Court. This Court has held that though the primary duty of a Public Prosecutor is to ensure that an accused is punished, his duties extend to ensuring fairness in the proceedings and also to ensure that all relevant facts and circumstances are brought to the notice of the Court for a just determination of the truth so that due justice prevails. The fairness of the investigative process so as to maintain the citizens' rights under Articles 19 and 21 and also the active role of the court in a criminal trial have been exhaustively dealt with by this Court. Finally, it was held that it is the responsibility of the investigating agency as well as that of the courts to ensure that every investigation is fair and does not erode the freedom of an individual except in accordance with law. It was also held that one of the established facets of a just, fair and transparent investigation is the right of an accused to ask for all such documents that he may be entitled to under the scheme contemplated by the Code of Criminal Procedure. The said scheme was duly considered by this Court in different paragraphs of the report. The views expressed would certainly be useful for reiteration in the context of the facts of the present case:-

> "216. Under Section 170, the documents during investigation are required to be forwarded to the Magistrate, while in terms of Section 173(5) all documents or relevant extracts and the statement recorded under Section 161 have to be forwarded to the Magistrate. The investigating officer is entitled to collect all the material, which in his wisdom is required for proving the guilt of the offender. He can record statement in terms of Section 161 and his power to investigate the matter is a very wide one, which is regulated by the provisionsof the Code. The statement recorded under Section 161 is not evidence per se under Section

> 162 of the Code. The right of the accused to receive the documents/statements submitted before the court is absolute and it must be adhered to by the prosecution and the court must ensure supply of documents/statements to the accused in accordance with law. Under the proviso to Section 162(1) the accused has a statutory right of confronting the witnesses with the statements recorded under Section 161 of the Code thus indivisible.

217. Further, Section 91 empowers the court to summon production of any document or thing which the court considers necessary or desirable for the purposes of any investigation, inquiry, trial or another proceeding under the provisions of the Code. WhereSection 91 read with Section 243 says that if the accused is called upon to enter his defence and produce his evidence there he has also been given the right to apply to the court for issuance of process for compelling the attendance of any witness for the purpose of examination, cross- examination or the production of any document or other thing for which the court has to pass a reasoned order.

218. The liberty of an accused cannot be interfered with except under due process of law. The expression "due process of law" shall deem to include fairness in trial. The court (sic Code) gives a right to the accused to receive all documents and statements as well as to move an application for production of any record or witness in support of his case. This constitutional mandate and statutory rights given to the accused place an implied obligation upon the prosecution (prosecution and the Prosecutor) to make fair disclosure. The concept of fair disclosure would take in its ambit furnishing of a document which the prosecution relies upon whether filed in court or not. That document should essentially be furnished to the accused and even in the cases where during investigation a document is bona fide obtained by the investigating agency and in the opinion of the Prosecutor is relevant and would help in arriving at the truth, that document should also be disclosed to the accused.

219. The role and obligation of the Prosecutor particularly in relation to disclosure cannot be equated under our law to that prevalent under the English system as aforereferred to. But at the same time, the demand for a fair trial cannot be ignored. It may be of different consequences where a document which has been obtained suspiciously, fraudulently or by causing undue advantage to the accused during investigation such document could be denied in the discretion of the Prosecutor to the accused whether the prosecution relies or not upon such documents, however in other cases the obligation to disclose would be more certain. As already noticed the provisions of Section 207 have a material bearing on this subject and make an interesting reading. This provision not only require or mandate that the court without delay and free of cost should furnish to the accused copies of the police report, first information report, statements, confessional statements of the persons recorded under Section 161 whom the prosecution wishes to examine as witnesses, of course, excluding any part of a statement or document as contemplated under Section 173(6) of the Code, any other document or relevant extract thereof which has been submitted to the Magistrate by the police under sub-section (5) of Section 173. In contradistinction to the provisions of Section 173, where the legislature has used the expression "documents on which the prosecution relies" are not used under Section 207 of the Code. Therefore, the provisions of Section 207 of the Code will have to be given liberal and relevant meaning so as to achieve its object. Not only this, the documents submitted to the Magistrate along with the report under Section 173(5) would deem to include the documents which have to be sent to the Magistrate during the course of investigation as per the requirement ofSection 170(2) of the Code.

220. The right of the accused with regard to disclosure of documents is a limited right but is codified and is the very foundation of a fair investigation and trial. On such matters, the accused cannot claim an indefeasible legal right to claim every document of the police file or even the portions which are permitted to be excluded from the

documents annexed to the report under Section 173(2) as per orders of the court. But certain rights of the accused flow both from the codified law as well as from equitable concepts of the constitutional jurisdiction, as substantial variation to such procedure would frustrate the very basis of a fair trial. To claim documents within the purview of scope of Sections 207, 243 read with the provisions of Section 173 in its entirety and power of the court under Section 91 of the Code to summon documents signifies and provides precepts which will govern the right of the accused to claim copies of the statement and documents which the prosecution has collected during investigation and upon which they rely.

221. It will be difficult for the Court to say that the accused has no right to claim copies of the documents or request the Court for production of a document which is part of the general diary subject to satisfying the basic ingredients of law stated therein. A document which has been obtained bona fide and has bearing on the case of the prosecution and in the opinion of the Public Prosecutor, the same should be disclosed to the accused in the interest of justice and fair investigation and trial should be furnished to the accused. Then that document should be disclosed to the accused giving him chance of fair defence, particularly when non-production or disclosure of such a document would affect administration of criminal justice and the defence of the accused prejudicially." (emphasis supplied) (Sidhartha Vashisht v. State (NCT of Delhi), (2010) 6 SCC 1)

16. The declaration of the law in Sidhartha Vashisht (supra) may have touched upon the outer fringe of the issues arising in the present case. However, the positive advancement that has been achieved cannot, in our view, be allowed to take a roundabout turn and the march has only to be carried forward. If the claim of the appellant is viewed in context and perspective outlined above, according to us, a perception of possible prejudice, if the documents or at least an inspection thereof is denied, looms large. The absence of any claim on the part of the accused to the said documents at any earlier point of time cannot have the effect of foreclosing such a right of the accused. Absence of such a claim, till the time when raised, can be understood and explained in several reasonable and acceptable ways. Suffice it would be to say that individual notion of prejudice, difficulty or handicap in putting forward a defence would vary from person to person and there can be no uniform yardstick to measure such perceptions. If the present appellant has perceived certain difficulties in answering or explaining some part of the evidence brought by the prosecution on the basis of specific documents and seeks to ascertain if the allegedly incriminating documents can be better explained by reference to some other documents which are in the court's custody, an opportunity must be given to the accused to satisfy herself in this regard. It is not for the prosecution or for the Court to comprehend the prejudice that is likely to be caused to the accused. The perception of prejudice is for the accused to develop and if the same is founded on a reasonable basis it is the duty of the Court as well as the prosecution to ensure that the accused should not be made to labour under any such perception and the same must be put to rest at the earliest. Such a view, according to us, is an inalienable attribute of the process of a fair trial that Article 21 guarantees to every accused.

24. In the aforesaid judgment, Hon'ble Apex Court has held that certain rights of the accused flow both from the codified law as well as from equitable concepts of the constitutional jurisdiction, as substantial variation to such procedure would frustrate the very basis of a fair trial. Most importantly, Hon'ble Apex Court in the judgment referred to herein above has held that absence of any claim on the part of the accused to the said documents at any earlier point of time cannot have the effect of foreclosing such a right of the accused. Absence of such a claim, till the time when raised, can be understood and explained in several reasonable and acceptable ways. Difficulty or handicap in putting forward a defence would vary from person to person and there can be no uniform yardstick to measure such perceptions.

25. Right to defend flows from fundamental right to life and personal liberty enshrined under Article 21 of the Constitution of India, which is definitely not an illusionary right, rather, a substantive one. Parliament has given power under Section 91 to the court to discover truth and to do complete justice to the case.

26. True it is that discretion vested in the court needs to be applied judiciously keeping in view constitutional mandate and purpose of Section 91 but definitely court is not expected to deal application, if any, made under Section 91 in a mechanical manner. Definitely, court below ought to have assigned cogent and convincing reason that the documents sought to be produced seeking assistance of the court are not relevant and required, while rejecting prayer having been made by the petitioner.

27. Reliance is placed upon judgment of Delhi High Court rendered in **Suresh Kalmadi** v. **CBI**, in Crl. M.C. No. 2143/2015 decided on 22nd May, 2015, wherein it has been held as under:

> "19. In the case of G.S. Mayawala & Anr. (supra) in para 6 to 9 of the decision are read as under :
>
> > "6. According to the petitioner, the main controversy revolves regarding the cash payment of Rs.2 lakhs made by the respondent to the present petitioner. As per case of the respondent in the complaint, he had made cash payment amounting to Rs.2 lakhs to the present petitioner no.1 for petitioner no.2, but no receipt was issued by the petitioner no.2. So, it is for the respondent to prove that he had made this payment of Rs.2 lakhs in cash to the present petitioner.
> >
> > 7. Much reliance has been placed by the petitioner on one diary page filed by the respondent in the trial court. The photocopy of that diary page is at Page No.70. However, this page does not lead us anywhere. Moreover, this document has been filed by the respondent and the respondent has to prove the authenticity of this document and for that purpose there is no need for production of any other documents prayed by the petitioner.
> >
> > 8. Under Section 91 Cr.P.C., the court can consider production of any document from the person in whose possession or power such documents are believed to be, only, if it is necessary or desirable for the purposes of the trial.
> >
> > 9. Here, in the case in hand, the documents required to be produced from the power and possession of the respondent, are not at all relevant for deciding the controversy between the parties and as such the decision cited by learned counsel for the petitioner is not applicable to the facts of the present case. The present petition, under these circumstances is not maintainable and the same is hereby dismissed."
> >
> > The facts and circumstances in this case are distinct with the situation of the present case. Therefore, it does not help the case of the respondent as in the referred case the documents were filed by the respondent thus, it was rightly held that it was the duty of the respondent to prove the authenticity.
>
> 20. In the present case, the petitioner is facing trial for an offence which may entail him punishment. He is seeking production of those documents and things which according to prosecution records even appear to be inexistence and which he feels shall help him in defending himself. According to him that these documents are connected with the case in hand. Therefore, it cannot be argued straightway that he is trying for making of any roving or fishing inquiry or is making a request which may be unreasonable. It is settled law that in a criminal trial the prosecution has to be absolutely fair andimpartial. The main purposes of a criminal trial is not to get some one convicted. The object is to discover the truth and punish the accused if found guilty. The documents which he himself cannot procure for the purposes of putting his defence have to be

requisitioned by invoking Section 91 Cr.P.C., if the Court is satisfied that those are necessary or desirable for the purpose of trial.

21. The defence has to be built up from day one of the trial. The right to defend, which flows from the fundamental right to "life" and "personal liberty" enshrined in Article 21 of the Constitution of India, is not an illusionary right, but a substantive one. The tool given in the hands of the court to discover the truth of the controversy before it. The power under Section 91 Cr.P.C. to discover the truth and to do complete justice to the accused. Naturally, the discretion vested in the Court must be applied judiciously, while keeping in mind the constitutional mandate, and the purpose of Section 91 Cr.P.C. The Court is not expected to reject the application in a mechanical manner and without assigning reasons that these documents are not relevant and required, therefore, the prayer cannot be allowed. There must be finding to the effect that why these are not relevant and required."

28. Otherwise also, this Court is of the view that no prejudice, if any, would be caused to the respondent, in case prayer made in the application is accepted, rather, it would help the court below to arrive at a just and fair decision. There is no force in the submission made by the learned Additional Advocate General that the application has been filed merely to prolong the proceedings because admittedly, petitioner-accused is behind bars for the last approximately two years. Leaving everything aside, petitioner with the assistance of court would get an opportunity to prove his innocence.

29. Needless to say width of power of High Court under Section 482 CrPC and Article 226 of the Constitution of India is unlimited, whereunder in the interest of justice, High Court can prevent abuse of such process otherwise to secure ends of justice within parameters laid down in **State of Haryana and Ors.** vs **Ch. Bhajan Lal and Ors.** , 1992 Supp (1) SCC 335, and as such, with a view to do complete justice and to afford fair opportunity to the petitioner-accused to prove his innocence, this Court deems it proper to allow the application filed by the petitioner-accused under Section 91 CrPC.

30. Accordingly, present petition is allowed. Order dated 21.12.2017 passed by learned Special Judge, Kullu is set aside. Application under Section 91 CrPC as filed by petitioner is allowed. Court below is directed to summon the documents as prayed for in the application. Learned counsel representing the petitioner-accused undertakes to cause presence of the learned counsel representing the petitioner-accused before the court below on **23.4.2018**.

Pending applications if any are disposed of. Interim orders, if any, are vacated.

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

Megh Raj Dogra ...Applicant/Appellant.

Versus

Sunil Kumar and ors. ...Non-applicant/Respondent.

CMP (M) No.2002 of 2016.
Reserved on : 9.4.2018.
Date of Decision : 16.4.2018.

Limitation Act, 1963- Section 5- Condonation of delay in filing appeal against Award dated 20.1.2007 of Claims Tribunal - Award directing insurer to pay and recover- Plea of applicant/insured being that he could not file appeal earlier due to wrong legal advice- On facts, it was found that applicant/insured was a party respondent in claim proceedings before Claims

Tribunal as well as in First Original Appeal before High Court filed by Insurer – First Original Appeal was dismissed – Applicant/insured rushed to High Court by way of appeal only when execution was filed by claimant before Claims Tribunal- Held- Applicant was negligent in pursuing his cause- Delay of more than 9 years cannot be condoned- Application dismissed.

(Para-5 and 7)

For the applicant : Mr. Nimish Gupta, Advocate.
For the respondent : Mr.Jagdish Thakur, Advocate, for non-applicant No.3.
Nemo for Non-applicants No.1 & 2.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

This application has been preferred by the applicant/appellant, under Section 5 of the Limitation Act for condonation of delay of nine years, five months and twenty days in filing of the appeal. As per the applicant, after dismissal of the appeal of the insurer-respondent No.3, the claimant-respondent No.1 maintained execution petition before the learned Motor Accident Claims Tribunal, and as such, the applicant came to know that the impugned award has been allowed against him and as such, applicant immediately rushed to Shimla and contacted the learned counsel, who advised him to maintain appeal against the impugned award, dated 20.1.2007 and as such, on such legal advice sought and received by the applicant, present appeal was got drafted and is being maintained without any further delay. The delay in filing the appeal is due to the wrong legal advice sought by the applicant and due to want of proper legal advice, the applicant, who is a layman could not maintain appeal against the impugned award and thus, delay has occurred in filing the appeal. The delay in filing appeal is neither intentional, but due to the wrong legal advice received by the applicant due to which, he could not assail the impugned award before this Court. The application is duly supported with an affidavit.

2. Reply to the application has been filed by non-applicant/respondent No.3 and it has been averred that the present application is not maintainable, keeping in view the fact that the present application has been maintained to condone the delay in filing the appeal against the impugned award, dated 20.1.2007. The impugned award pay and recover rights were given to non-applicant/respondent No.3, against which appeal i.e. FAO No.143/2007, was filed by the non-applicant, which was dismissed by this Court, vide judgment dated 26.9.2014 and thereafter, filed execution petition before the learned Tribunal below. The applicant was duly represented by the learned counsel before the learned Tribunal as well as before this Court in FAO No.143/2007, which was maintained by the non-applicant/respondent No.3 and as such, the explanation which has been given by the applicant in order to get the inordinate delay condoned is nothing, but is a bundles of lies and as such, the present application deserves dismissal. It is further stated that the appeal in question is not maintainable, keeping in view the fact that the finding with respect to pay and recover has been affirmed by this Court. The present application is hopelessly time barred and the same is liable to be dismissed.

3. Learned counsel appearing on behalf of the applicant has argued that the delay is required to be condoned, as there is a sufficient reason, as explained in the application. On the other hand, learned counsel appearing on behalf of non-applicant-respondent No.3 has argued that the delay is not at all explained and was negligent, and so, not required to be condoned and prays for dismissal of the present application.

4. To appreciate the arguments of learned counsel appearing on behalf of the parties, I have gone through the entire record in detail.

5. From the perusal of record, it is seen that the impugned award was passed in this case on 20.1.2007, wherein the learned Tribunal below has passed the order, which is reproduced herein as under :

"In view of the aforesaid discussion the petition is allowed and the petitioner is awarded compensation to the tune of Rs.15,05,500/-. The petitioner shall also be entitled for interest at the rate of 9.5% from the date of petition. At first instance the amount shall be paid by the respondent No.3 who may be at liberty to recover it from the respondents No.1 and 2. Memo of costs be prepared accordingly. The file after completion be consigned to records."

6. Now, after a period of nine years, five months and twenty days, the present application has been maintained for condonation of delay. The only ground, which is taken by the applicant that after dismissal of the appeal of the insurer, the claimant has filed execution petition before the learned Motor Accident Claims Tribunal and as such, the applicant came to know that the impugned award has been passed against him and as such, he immediately rushed and contacted his learned counsel, who advised him to file appeal against the impugned award, dated 20.1.2007 and as such, on such legal advice, the present appeal got drafted and is being filed without any further delay. There is no explanation as to what the applicant was doing before filing the appeal, meaning thereby that he was negligent in pursuing his case. The law does not only help those people, who are negligent. It is seen on the record that the present applicant was respondent in FAO No.143 of 2007, which was maintained by the non-applicant-respondent No.3 and he was represented by his learned counsel. So, it cannot be said that the applicant was not having any knowledge with respect to the impugned award and so, he could not file appeal, meaning thereby that the applicant was totally negligent in pursuing his case.

7. At this moment, taking into consideration the fact that the applicant/appellant has failed to show sufficient cause whereby the delay in filing in the appeal can be condoned. This Court is left with no other option, but to dismiss the present application. Accordingly, the present application is dismissed.

8. In view of dismissal of the application, under Section 5 of the Limitation Act for condonation of delay in filing the appeal, this appeal cannot be held to be legally and validly constituted and therefore, dismissed as such leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

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

Mohd. Latif (since deceased) through LRs. ...Petitioner.

Versus

Gaffuri and others ...Respondents.

CMPMO No. 27/2015
Reserved on: 11.4.2018
Decided on : 16.4. 2018

Code of Civil Procedure, 1908- Order VI Rule 17- Proviso- as added vide **Amendment Act, 2002-** Amendment of pleadings after commencement of trial- Party is required to specifically plead that despite due diligence, amendment could not be made- Plaintiff filing application without making such averments in it- Held- Application for amendment of pleadings not maintainable. (Paras- 20 to 22)

Code of Civil Procedure, 1908- Order XVIII Rule 2**- Commencement of trial- Held-** Trial of suit commences when issues are settled and case is fixed for evidence of party having right to produce its evidence. (Para-23)

Cases referred:
Salem Advocate Bar Association versus Union of India AIR 2005 SC 3353
Chander Kanta Bansal versus Rajinder Singh Anand (2008) 5 SCC 117
Kailash versus Nanhku and others (2005) 4 SCC 480
Baldev Singh and others versus Manohar Singh and Another (2006) 6 SCC 498
Ajendraprasadji N.Pandeyand another vs Swami Keshavprakeshdasji N. and others (2006) 12 SCC 1
Mohinder Kumar Mehra vs. Roop Rani Mehra and others, (2018) 2 SCC 132

For the Petitioner(s): Mr. Karan Singh Kanwar, Advocate.
For the Respondents: Mr. R.K. Gautam, Sr. Advocate with Ms. Poonam for respondent No.1.
Mr. Rupinder Singh Thakur, Advocate for respondents No. 5, 8, 9 and 12 to 17.
Ms. Komal Chaudhary, Advocate for respondents No. 7, 10 and 11.
Ms. Ambika Kotwal, Advocate vice Mr. Desh Raj Thakur, Advocate for respondent No. 36.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge:

The petitioner was the defendant, who aggrieved by the order passed by the learned trial court, whereby he allowed the application for placing on record certified copy of the judgment and decree dated 21.6.2014 passed by the Civil Judge (Junior Division), Court No.1, Poanta Sahib and another application for amendment of the plaint, has filed the present petition.

2. In the suit initially filed by the plaintiff, she had sought declaration to the effect that being the only heir/daughter of deceased Bashiri, she is entitled to succeed to her entire suit property and the defendants have no right, title and interest in the land of Bashiri and the allegations are so contained in para 1 of the un-amended suit, which read thus:

> 1. "That Bashiri, the mother of plaintiff was the exclusive owner in possession of the land bearing khata khatauni No. 28/59, Khasra No. 271/1 measuring 2 bihga to the extent of ½ share and in khata khatauni No. 28/61, Khasra No. 268/5 bigha , situated in Mauza Jagatpur, Tehsil Poanta Sahib, hereinafter alled the suit land. The defendant No.1 fraudulently got procured power of attorney from Bashiri and started alienating her land. When she came to know about the fraudulent acts of defendant No.1, she got the power of attorney cancelled of Latif, procured by him fraudulently. Now, Smt. Bashiri has died on 8.1.2008 and the plaintiff is the only legal successor of deceased Bashiri, being the only daughter. The defendants No.1 to 3 are claiming themselves owner of the suit property on the basis of a false, fraudulent document alleging it to be the will of deceased Bashiri whereas Bashiri never executed any will in favour of defendant No.1 to 3 nor she could legally execute the will of her entire property in favour of defendants. And as such, the alleged document/will is illegal, fraudulent, got manufactured by the defendant No.1 with the connivance of witnesses and does not effect the right, title and interest of the plaintiff in the suit property, left by deceased Bashiri."

3. Now, para No.1 of the plaint is sought to be substituted as under:

> "That Rehmatullah was owner in possession of the land comprise of Khasra No.271/6 measuring 2 bigha and Khasra No. 268/5 measuring 21-8 bigha in the share of Rehmatullah situated in Mauza Jagatpurm Tehsil Poanta Sahib and he was having two wives namely Sadikan and Smt. Bashiri. The plaintiff is the daughter of Bashiri and Shakoori was daughter of Sadikan and defendant No.7

> to 19 are legal heirs of shakoori who is no more. After the death of Rehmatullahy, his property was to be inherited by Smt. Bashiri to the extent of 1/8th share and the remaining was to devolve upon Gafuri and Shakoori in equal share. But the succession of Rehmatullah on the basis of will dated 14.10.82 is illegal and fraudulent. He was not competent to disinherit his legal heirs and to bequeath his entire property/suit land in favour of Bashiri disinheriting his daughter Gaffuri and Shakoori. Therefore, the will dated 14.10.82 is illegal, void and is not binding upon the right of plaintiff and LRs of Shakoori and the subsequent mutation on the basis of will of the suit land in favour of Bashiri is illegal and void. And as such, sale made by Smt. Bashiri on the basis of said revenue entries in favour of defendants, are not binding upon the right of the plaintiffs and said sale deed in their favour are valid only to the extent of 1/8th share of Smt. Bashiri and Bashiri never executed any will of the suit land in favour of defendant No.1 to 3 nor she was competent to do so."
>
> In addition thereto, certain other amendments were also proposed.

4. The petitioner contested the application by filing reply wherein it was alleged that the litigation inter se the parties is pending since 2009 and the same is repeatedly being fixed for the evidence of the plaintiff but no evidence is being led by her. It was further contended that the amendment as sought for was well within the knowledge of the plaintiff from the very beginning and having failed to exercise due diligence, the amendment as sought for cannot be allowed.

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

6. As regards the allowing of application under order 7 rule 14 (3) of the Code of Civil Procedure (for short 'CPC') whereby the respondent has been permitted to place on record the certified copy of the judgment and decree dated 21.6.2014 passed by the Civil Judge (Junior Division), Court No.1, Poanta Sahib, no exception to the same can be taken as the certified copy is otherwise *per se* admissible even at the time of hearing of the proceedings.

7. Therefore, the order passed by the learned trial court to that extent calls for no interference.

8. Now, adverting to the order whereby the learned trial court has allowed the application for amendment, I may, at the outset observe that the manner in which the application has been disposed of leaves much to desire as the learned trial court has virtually allowed the application only because at one stage his predecessor while dismissing the application under order 23 rule 1 CPC had observed that the remedy available to the plaintiff was to resort to the provisions of amendment as also for impleading all parties, i.e. heirs of Smt. Shakuri and others by invoking the provisions of order 1 rule 10 CPC.

9. Needless to say that despite such observations, the application(s) so filed on the basis of the observations, still have to be decided in accordance with law and could not have been allowed merely on the basis of the observations, more particularly, when the provisions of order 6 rule 17 CPC have undergone sea change after the amendment carried in the Code of Civil Procedure.

10. Order 6 Rule 17 of CPC now reads thus:-

> "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."

11. It is evident from the bare perusal of the proviso that ordinarily amendment in pleadings is not allowed after the trial has commenced unless the Court is satisfied that the party concerned could not apply even after exercise of due diligence for such amendment before the commencement of trial. In other words, it was incumbent upon the petitioners to have specifically pleaded that inspite of due diligence they could not raise the matter now sought to be raised. Afterall, right to amend is not an absolute right but depends on various well settled principles. Concededly, there is not even a whisper regarding this fact in the entire application.

12. The Hon'ble Supreme Court has interpreted the proviso to be a requirement mandated to prevent frivolous applications for amendment intended, only to delay the trial.

13. In ***Salem Advocate Bar Association*** versus ***Union of India*** AIR 2005 SC 3353, it was held as under:-

> "27. Order VI Rule 17 of the Code deals with amendment of pleadings. By Amendment Act 46 of 1999, this provision was deleted. It has again been restored by Amendment Act 22 of 2002 but with an added proviso to prevent application for amendment being allowed after the trial has commenced, unless court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. The proviso, to some extent, curtails absolute discretion to allow amendment at any stage. Now, if application is filed after commencement of trial, it has to be shown that in spite of due diligence, such amendment could not have been sought earlier. The object is to prevent frivolous applications which are filed to delay the trial. There is no illegality in the provision."

14. What is due diligence has though not been defined in the Code, but has then been explained by the Hon'ble Supreme Court in ***Chander Kanta Bansal*** versus ***Rajinder Singh Anand*** (2008) 5 SCC 117 in the following terms:-

> "16. The words "due diligence" have not been defined in the Code. According to Oxford Dictionary (Edn.2006), the word "diligence" means careful and persistent application or effort. "Diligent" means careful and steady in application to one's work and duties, showing care and effort. As per Black's Law Dictionary (18th Edn.), "diligence" means a continual effort to accomplish something, care; caution; the attention and care required from a person in a given situation. "Due diligence" means the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation. According to Words and Phrases by Drain-Dyspnea (Permanent Edn.13-A) "due diligence", in law, means doing everything reasonable, not everything possible. "Due diligence" means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs."

15. It is not in dispute that the suit out of which the present proceeding arise is pending before the trial court for recording the evidence on behalf of plaintiff's witnesses and, therefore, the trial in the case had already begun.

16. In ***Kailash*** versus ***Nanhku and others*** (2005) 4 SCC 480, the Hon'ble three Judges' Bench of the Hon'ble Supreme Court while dealing with an election petition in no uncertain terms held that in a civil suit the trial begins when the issues are framed and the case is set down for recording of evidence. It is apt to reproduce the following observations: -

> "Trial" of election petition, when it commences?
>
> 13. At this point the question arises: When does the trial of an election petition commence or what is the meaning to be assigned to the word 'trial' in the context of an election petition? In a civil suit, the trial begins when issues are framed and the case is set down for recording of evidence……"

17. In ***Baldev Singh and others*** versus ***Manohar Singh and Another*** (2006) 6 SCC 498, the Hon'ble Supreme Court held that commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in a limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments, as would be evident from the following observations:

> "17. Before we part with this order, we may also notice that proviso to Order 6 Rule 17 of the CPC provides that amendment of pleadings shall not be allowed when the trial of the Suit has High Court of H.P. already commenced. For this reason, we have examined the records and find that, in fact, the trial has not yet commenced. It appears from the records that the parties have yet to file their documentary evidence in the Suit. From the record, it also appears that the Suit was not on the verge of conclusion as found by the High Court and the Trial Court. That apart, commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. As noted herein after, parties are yet to file their documents, we do not find any reason to reject the application for amendment of the written statement in view of proviso to Order 6 Rule 17 of the CPC which confers wide power and unfettered discretion to the Court to allow an amendment of the written statement at any stage of the proceedings. "

18. In ***Ajendraprasadji N.Pandeyand another*** vs ***Swami Keshavprakeshdasji N. and others*** (2006) 12 SCC 1, the Hon'ble Supreme Court after placing reliance on the judgment of Kailash (supra) reiterated that the trial is deemed to commence when the issues are settled and the case is set down for recording of evidence . This would be evident from the following observations:

> "60. The above averment, in our opinion, does not satisfy the requirement of Order 6 Rule 17 without giving the particulars which would satisfy the requirement of law that the matters now sought to be introduced by the amendment could not have been raised earlier in respect of due diligence. As held by t his Court in Kailash vs. Nankhu (2005) 4 SCC 480, the trial is deemed to commence when the issues are settled and the case is set down for recording of evidence."

19. What, therefore, can be discerned from the various judgments referred to above, is that the trial is deemed to commence when the issues are settled and the case is set down for recording of evidence. Once it is so, then in terms of proviso to rule 17 of order 6, respondent was required to show due diligence and explain the circumstances under which he could not have raised the matter before commencement of the trial.

20. The object of introducing the amendment in order 6 rule 17 CPC vide Amendment Act 46 of 1999 and further the question when trial will commence was a subject matter of recent decision of the Hon'ble Supreme Court in ***Mohinder Kumar Mehra*** vs. ***Roop Rani Mehra and others***, (2018) 2 SCC 132, wherein reiterating the ratio of the judgment as laid down in ***Salem Bar Association*** (supra), it was observed as under:

> 14. By Amendment Act 46 of 1999 with a view to shortage litigation and speed of the trial of the civil suits, Rule 17 of Order VI was omitted, which provision was restored by Amendment Act 22 of 2002 with a rider in the shape of the proviso limiting the power of amendment to a considerable extent. The object of newly inserted Rule 17 is to control filing of application for amending the pleading subsequent to commencement of trial. Not permitting amendment subsequent to commencement of the trial is with the object that when evidence is led on pleadings in a case, no new case be allowed to set up by amendments. The proviso, however, contains an exception by reserving right of the Court to grant amendment even after commencement of the trial, when it is shown that in spite

of diligence, the said pleas could not be taken earlier. The object for adding proviso is to curtail delay and expedite adjudication of the cases.

15. This Court in Salem Advocate Bar Association, T. N. Vs. Union of India, 2005 6 SCC 344 has noted the object of Rule 17 in Para 26 which is to the following effect:

> "26. Order 6 Rule 17 of the Code deals with amendment of pleadings. By Amendment Act 46 of 1999, this provision was deleted. It has again been restored by Amendment Act 22 of 2002 but with an added proviso to prevent application for amendment being allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. The proviso, to some extent, curtails absolute discretion to allow amendment at any stage. Now, if application is filed after commencement of trial, it has to be shown that in spite of due diligence, such amendment could not have been sought earlier. The object is to prevent frivolous applications which are filed to delay the trial. There is no illegality in the provision."

16. The judgment on which much reliance has been placed by learned counsel for the appellant is Rajesh Kumar Aggarwal & Ors. Vs. K. K. Modi & Ors., 2006 4 SCC 385. This Court had occasion to consider and interpret Order VI Rule 17 in Paragraphs 15 and 16, in which following has been held:-

> "15. The object of the rule is that the courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side.
>
> 16. Order 6 Rule 17 consists of two parts. Whereas the first part is discretionary (may) and leaves it to the court to order amendment of pleading. The second part is imperative (shall) and enjoins the court to allow all amendments which are necessary for the purpose of determining the real question in controversy between the parties."

17. Although Order VI Rule 17 permits amendment in the pleadings "at any stage of the proceedings", but a limitation has been engrafted by means of Proviso to the fact that no application for amendment shall be allowed after the trial is commenced. Reserving the Court's jurisdiction to order for permitting the party to amend pleading on being satisfied that in spite of due diligence the parties could not have raised the matter before the commencement of trial. In a suit when trial commences? Order XVIII of the C.P.C. deal with "Hearing of the Suit and Examination of Witnesses". Issues are framed under Order XIV. At the first hearing of the suit, the Court after reading the plaint and written statement and after examination under Rule 1 of Order XIV is to frame issues. Order XV deals with "Disposal of the Suit at the first hearing", when it appears that the parties are not in issue of any question of law or a fact. After issues are framed and case is fixed for hearing and the party having right to begin is to produce his evidence, the trial of suit commences."

21. Indubitably, there is not even a whisper in the entire application regarding the exercise of due diligence and even if the case of the respondent is taken at its best, the cause of action can be said to be arisen to file the application for amendment when her application under order 23 rule 1 CPC came to be dismissed and the court observed that she could file an application for amendment and for addition of parties. However, the present application has not been filed promptly but has been filed nearly three years after the passing of the order and came to be filed only in the year 2014.

22. Having failed to prove on record due diligence, the order passed by the learned trial court obviously is not only illegal but is perverse and cannot withstand judicial scrutiny.

23. In view of aforesaid discussion, I find some merit in this petition and, therefore, the same is partly allowed by setting aside the order passed by the trial court on the application filed by the respondent under order 6 rule 17 read with order 1 rule 10 CPC for amendment of the plaint. Whereas the petition against the order allowing the application under order 7 rule 14 (3) CPC for placing on record the certified copy of the judgment and decree dated 21.6.2014 passed by the learned Civil Judge (Junior Division), Court No.1, Poanta Sahib is dismissed, leaving the parties to bear their own costs.

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

Smt. Nidhi ..Appellant

Versus

The Punjab Roadways "PUNBUS" Roop Nagar and others ..Respondents

FAO No. 433 of 2015
Decided on: April 16, 2018

Motor Vehicles Act, 1988- Section 166- Grant of compensation- Tribunal awarded Rs.47,626/- as compensation for personal injuries suffered by claimant in motor accident- Appeal against for enhancement – Claimant claiming loss of income by alleging that she was running a tailoring shop at Chandigarh and earning Rs.20,000/- per month- No evidence adduced in that regard – Held – Tribunal was justified in not granting any compensation towards loss of income- However, compensation for pain and suffering enhanced to Rs.20,000/- in view of injuries sustained by her- Appeal partly allowed.

For the Appellant	:	Mr. Manish Kumar Gupta, Advocate.
For the Respondents	:	Mr. Pawan K. Gautam, Advocate vice Mr. Harvinder Kumar, Advocate, for respondents No.1, 3 and 4. None for respondent No.2.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

Being aggrieved and dissatisfied with the amount of compensation awarded by the learned Motor Accident Claims Tribunal-II, Chamba, District Chamba, Himachal Pradesh in MAC Petition No. 298/2013 vide award dated 22.11.2014, petitioner-claimant (hereinafter, 'claimant') has approached this Court in the instant proceedings, praying therein for enhancement of award amount.

2. Facts as emerge from the record are that the claimant filed a petition under Section 166 of the Motor Vehicles Act, claiming therein compensation to the tune of Rs. 5,15,000/- on account of injuries sustained by her in the motor vehicle accident which took place at Dhaliara, Tehsil Dehra, District Kangra, Himachal Pradesh on 12.4.2012. Claimant alleged that the accident occurred due to rash and negligent driving of respondent No. 2, who at the relevant time was driving vehicle No. PB-12J-8103 owned by respondent No. 1 i.e. Punjab Roadways "PUNBUS", Roopnagar Depot. Allegedly, respondent No. 2 drove the offending vehicle in a very rash and negligent manner, as a result of which he was unable to control the same, due to which bus fell down the road and resulted in injuries to the claimant. On account of injuries suffered by the claimant in the aforesaid accident, she had to remain admitted in Dr. Rajinder

Prasad Government Medical College, Tanda from 12.4.2012 to 16.4.2012. Claimant also remained admitted in the same hospital with effect from 23.4.2012 to 24.4.2012. Claimant stated that she was a tailor by profession and claimed that due to fracture of her ribs and chest pain, she was unable to do tailoring and had lost efficiency to earn her livelihood. Claimant claimed that she used to earn Rs. 20,000/- per month from her occupation and she incurred expenses to the tune of Rs. 15,000/- on her treatment and was likely to incur much more as her treatment was still going on. Claimant claimed compensation under various heads as under:

"Medical Expenditure including taxi & attendant charges	Rs. 30,000/-
For pain and sufferings	Rs. 25,000/-
Loss of income (past and future)	Rs. 3,50,000/-
Special diet	Rs. 10,000/-
Loss of amenities	Rs. 1,00,000/-
Total	Rs. 5,15,000/-"

3. Respondent No.1 opposed aforesaid claim of the claimant on the ground that petition is bad for non-joinder and mis-joinder of necessary parties. However, on merits, respondent No.1 admitted that on 12.4.2012, respondent No. 2 namely Jagjit Singh, driver was on duty. Learned Tribunal below on the basis of evidence led on record by claimant, held her entitled to a compensation of Rs. 47,626/-. In the aforesaid background, claimant has approached this Court in the instant proceedings, seeking therein enhancement of amount awarded by learned Tribunal below.

4. Mr. Manish Kumar Gupta, learned counsel representing the claimant vehemently argued that the amount awarded by the learned Tribunal below is not just and fair vis-à-vis injuries suffered by the claimant, on account of accident as such, impugned award being contrary to the evidence available on record deserves to be quashed and set aside. Mr. Gupta further contended that the learned Tribunal below, while awarding meager sum of Rs. 10,000/- on account of pain and suffering, failed to take note of the fact that the claimant was unable to do work of tailoring for a considerable time. Mr. Gupta further contended that the medical evidence adduced on record clearly suggests that claimant suffered fracture of ribs and as such, she became incapable of pursuing her occupation of tailoring as such, learned Tribunal below ought to have awarded a reasonable sum on account of loss of income, past and future, but in the instant case, learned Tribunal below has not awarded even a single penny to the claimant on this count and as such impugned award deserves to be quashed and set aside. Mr. Gupta, further contended that the evidence led on record by claimant in the shape of MLC's as well as bills clearly suggests that the claimant spent amount much more than the awarded amount. Lastly Mr. Gupta, contended that the claimant successfully proved on record that her monthly income from her profession was Rs. 20,000/- as such, learned Tribunal below ought to have awarded reasonable amount to her on account of loss of income.

5. Mr. Pawan K. Gautam, learned vice counsel representing respondents No.1, 3 and 4 supported the impugned award and contended that there is no illegality or infirmity in the impugned award and same deserves to be upheld. While referring to the evidence adduced on record, Mr. Pawan K. Gautam contended that the claimant was unable to prove on record that at the time of accident, she was earning more than Rs. 20,000/- per month and as such, learned Tribunal below rightly has not awarded any amount on account of loss of income, past and future. While inviting attention of this Court to the impugned award passed by the learned Tribunal below, Mr. Gautam contended that all the damages claimed by claimant under pecuniary damages stand duly awarded to her as such, there is no illegality or infirmity in the impugned award and same deserves to be upheld.

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

7. Before ascertaining correctness of the submissions having been made by the learned counsel representing the parties vis-à-vis impugned award passed by the learned Tribunal below, it may be noticed that the respondents have not laid any challenge to the impugned award and as such, same has attained finality against them.

8. Admittedly, in the case at hand, learned Tribunal below has come to the conclusion that the accident occurred due to rash and negligent driving of respondent No. 2 as such, respondent No.1 being employer is liable to pay the compensation alongwith respondent No. 2.

9. By way of instant appeal, challenge has been laid to the quantum of amount awarded by the learned Tribunal below, whereby learned Tribunal below has only awarded a sum of Rs.47,626/- to the claimant on account of medical expenses, attendant charges, special diet charges, transportation charges and, pain and suffering.

10. It emerges from the evidence adduced on record by the claimant that claimant, with a view to substantiate her claim adduced documents such as MLC, Ext. PA, Bills, Exts. PB to PG, treatment summary, Ext. PH, admission slip Ext. PJ, bills Exts. PK to PX, discharge card Ext. PO, X-ray form Ext. PP and bus ticket Ext. PZ. Apart from above, claimant also filed affidavit Ext. PW-1/A, reiterating all the averments contained in the claim petition. Claimant claimed that she was a tailor by profession and was running a tailoring shop at Chandigarh and further that her monthly income was Rs. 20,000/-. Since the factum with regard to accident as well as rash and negligent driving on the part of respondent No. 2 is not in dispute, statement made by claimant with regard to that aspect of matter needs not to be considered at this stage, rather, this Court deems it proper only to peruse the evidence, if any, led on record by the claimant to substantiate her claim that she incurred an expenditure of Rs.30,000/- on her treatment including taxi and attendant charges. Claimant stated before the learned Tribunal below that she incurred expenditure of Rs.30,000/- on her treatment including taxi charges and attendant charges, which statement of the claimant is substantiated by documentary evidence taken note herein above.

11. Though, in the case at hand, claimant claimed that she also suffered agony of pain, mental torture and suffered loss of income and loss of amenities of life, but, interestingly, in the case at hand, claimant failed to annex any certificate of tailoring alongwith the petition, rather, in her cross-examination, she categorically admitted that she has not annexed certificate of tailoring and she has learnt the tailoring work from the wife of her brother (sister-in-law), but again, petitioner has chosen not to examine her sister-in-law in support of her aforesaid contention. Bare perusal of impugned award passed by learned Tribunal below suggests that the entire claim as set up by claimant with regard to the expenditure incurred by her on her treatment, stands awarded to her i.e. Rs. 4,126 on account of medical expenses, Rs. 10,000/- on account of attendant charges, Rs. 10,000/- on account of special diet charges and Rs. 13,500/- on account of transportation charges and an addition sum of Rs. 10,000/- on account of pain and suffering.

12. After having carefully perused evidence adduced on record, this Court is unable to accept the contention of the learned counsel representing the petitioner that the petitioner successfully proved that at the time of accident, claimant was earning Rs. 20,000/- from the profession of tailoring. Claimant in support of her aforesaid claim has led no evidence. Neither the registration certificate, if any, of the shop allegedly being run by the claimant has been adduced on record nor any tailoring certificate issued by some vocational institute has been adduced on record enabling learned Tribunal below to consider and decide the prayer of the claimant for award of compensation on account of loss of income. Though, in the instant case, claimant claimed a sum of Rs. 3,50,000/- on account of loss of income, but as has been noticed herein above, no evidence is led on record by the claimant to prove that she was earning Rs.20,000/- per month from her occupation as tailor at the time of accident.

13. Though having carefully perused the evidence available on record vis-à-vis impugned award passed by learned Tribunal below, this Court finds no reason to differ with the findings returned by the learned Tribunal below but, taking note of the injury suffered by claimant in the accident and physical and mental pain suffered by her, this Court is of the view that amount awarded by the learned Tribunal below on account of pain and suffering i.e. Rs. 10,000/- is on lower side, as such, deems it fit to enhance the same to Rs.20,000/-. Accordingly, claimant is held entitled to Rs. 20,000/- on account of pain and suffering. Rest of the award is upheld. Needless to say that the claimant shall be entitled to interest on the enhanced amount at the rate of 7.5% per annum from the date of filing of petition till realization.

14. The award stands modified to the extent as stated above. The appeal is disposed of in the aforesaid terms

Pending applications, if any, are disposed of.

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

Oriental Insurance Company Limited ..Appellant

Versus

Smt. Shanti Devi and others ..Respondents

FAO(WC) No. 197 of 2013
Decided on: April 16, 2018

Workmen Compensation Act, 1923- Section 4-A(3)- Commissioner awarding compensation with interest @ 12% per annum from 19.6.2004, i.e. from period after one month of accident – Insurer in appeal and challenging payment of interest – Held- Compensation payable to employee/his legal representatives from employer becomes 'due' on date of accident and not on date of determination of claim by Commissioner - Therefore, interest on compensation is payable from date of accident – Award of commissioner upheld as he granted interest on compensation from period after accident – Appeal dismissed- Principles laid down in Pratap Narain Singh Deo v. Shrinivas Sabata and Anr, AIR 1976 SC 222 relied upon. (Para-15 and 16)

Cases referred:
Oriental Insurance Co. Ltd. v. Siby George & Ors, 2012 AIR (SCW) 438
National Insurance Co. Ltd. v. Mubasir Ahmed and Anr, (2007) 2 SCC 349
Pratap Narain Singh Deo v. Shrinivas Sabata and Anr, AIR 1976 SC 222

For the Appellant : Mr. Ashwani K. Sharma, Senior Advocate with Mr. Jiwan Kumar, Advocate.

For the Respondents : Mr. G.R. Palsra, Advocate, for respondent No. 1.
Mr. Raju Ram Rahi, Advocate, for respondent No. 2.
Mr. Vipul Sharda, Advocate vice Mr. Sunil Mohan Goel, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

Being aggrieved and dissatisfied with the amount of compensation awarded by the learned Commissioner, Employees Compensation, Court No.2, Mandi, H.P., in W.C.A No. 10/2011 vide award dated 28.2.2013, appellant-Insurance Company/respondent No. 2

(hereinafter, 'appellant-Insurance Company'), has approached this Court in the instant proceedings, seeking therein modification of the compensation amount.

2. Facts as emerge from record are that the respondents No. 1 and 2 (hereinafter, 'claimants') being legal representatives of deceased Tulsi Ram, who was an employee of respondent No.3 and had died during the course of employment, filed a claim petition under Section 22 of the Workmen's Compensation Act (hereinafter, 'Act'), seeking therein compensation to the tune of Rs. 10.00 Lakh, alongwith interest at the rate of 9% per annum, from the date of accident till the payment of the compensation amount. Claimants alleged that Tulsi Ram was working as a Driver with respondent No. 3 namely Shri Rajinder Prashad Nag and he died in a motor vehicle accident of Tempo Mazda, which took place on 19.5.2004. Claimants also claimed before the learned Commissioner below that the Tempo Mazda bearing registration No. HP-34A-2143 was insured with appellant-Insurance Company through its Branch at Akhara Bazaar, Kullu from 19.3.2004 to 18.3.2005. On 19.5.2004, deceased while returning to Kullu after unloading vegetables at Mandi, at around 11.00 pm, when reached near Banala on National Highway-21, Tempo developed sudden mechanical defect and fell down into Beas river. FIR No. 63 of 2004 dated 20.5.2004 under Sections 279 and 337 IPC came to be registered. It is also alleged in the claim petition by the claimants that deceased was earning Rs. 3500/- per month inclusive of T.A./D.A. and claimants were the dependants of deceased being widow, minor son and mother. It is also stated that deceased was hale and hearty, aged 32 years, at the time of his death.

3. Respondent No.3 (owner of Tempo) contested aforesaid claim petition by stating that the petition is not in consonance with the provisions of Workmen's Compensation Act. He further claimed that the monthly wages of deceased were Rs.2800/- inclusive of T.A./D.A. and not Rs.3500/- as claimed by the claimants. Most importantly, respondent No. 3 categorically admitted that deceased TulsiRam was engaged by him as a Driver and he died during the course of his employment.

4. Appellant-Insurance Company refuted the claim of the claimants on the ground that deceased was not having valid and effective driving licence at the time of accident and as such, claimants are not entitled to any compensation. Appellant-Insurance Company further claimed that since vehicle was being driven in violation of conditions contained in the insurance policy, claimant are not entitled to any claim. Appellant-Insurance Company also denied that the vehicle in question was insured with it and age of deceased at the time of accident was 32 years.

5. Learned Commissioner below, on the basis of pleadings adduced on record by respective parties framed following issues:

"1. Whether the deceased was workman with respondent No.1/employer with the meaning of this act? OPP

2. Whether the deceased died during the course of his employment with respondent No. 1? OPP

3. Whether the petitioners are entitled for compensation and from whom and what amount? OPP

4. Whether the vehicle was insured by the owner/respondent No.1? OPR-2

5. Whether the driver of the vehicle was having a valid and effective driving licence or not? OPR-2

6. Relief."

6. Subsequently, vide award dated 28.2.2013, learned Commissioner below decided all the issues in favour of claimants and against appellant-Insurance Company, and held claimants entitled to compensation to the tune of Rs. 4,03,320/- payable by appellant-Insurance Company alongwith interest at the rate of 12% per annum from 19.6.2004 i.e. after one month of accident till deposit of amount. In the aforesaid background, appellant-Insurance Company has approached this Court in the instant proceedings, seeking modification of award.

7. Instant appeal came to be admitted on 30.7.2013, on the following questions of law:

> "1. Whether the amount of compensation assessed and ordered to be paid to the claimants is contrary to facts and evidence on record and thereby has resulted into perversity and as such, the impugned award is liable to be modified on this count?
>
> 2. Whether interest for the period from 19.06.2004 till 28.02.2013 could be ordered to be paid to claimants by the appellant/insurer when the compensation amount due and payable to claimants was determined by Ld. Commissioner vide the impugned award dated 28.02.2013 when the claim petition was decided?"

8. Mr. Ashwani K. Sharma, learned Senior Advocate duly assisted by Mr. Jiwan Kumar, Advocate, while referring to the findings returned by the learned Commissioner below qua issue No.3 i.e. "Whether the petitioners are entitled for compensation and from whom and what amount," strenuously argued that the same is not sustainable in the eye of law because learned Commissioner below wrongly considered wages of deceased as Rs.4,000/-, because as per case set up by respondent No. 3 i.e. owner of the vehicle, monthly wages of deceased were Rs.2800/- including T.A./D.A. and not Rs.3500/- as claimed in the petition. Learned senior counsel further contended that the claimants were only entitled to compensation to the tune of Rs.2,82,324/- and not Rs. 4,03,320/-, as such, award needs to be modified suitably. Learned senior counsel further contended that it stands proved on record that at the time of accident, minimum wages of driver were fixed at Rs.88/-per day and as such, learned Commissioner below in the absence of any cogent and convincing evidence on record, ought to have applied government rates of minimum wages for the purpose of assessing compensation payable to the claimants. Lastly, Mr. Ashwani K. Sharma, learned Senior Advocate further contended that since compensation amount due and payable to the claimants was determined by the learned Commissioner below vide impugned award dated 28.2.2013 i.e. when claim petition was decided, no interest for the period from 19.6.2004 till 28.6.2013 as awarded, could be ordered to be paid to the claimants by the appellant-Insurance Company, as such, impugned award deserves to be rectified accordingly, in accordance with law.

9. Mr. G.R. Palsra and Mr. Raju Ram Rahi, learned counsel representing respondents No.1 and 2, respectively, while refuting aforesaid contention of the learned counsel representing the appellant-Insurance Company contended that there is no illegality or infirmity in the impugned award passed by the learned Commissioner below, as such, same deserves to be upheld. He further contended that bare perusal of cross-examination conducted upon the owner of offending vehicle i.e. respondent No.3, Rajinder Prashad clearly suggests that wages of deceased were between Rs.4000-4500/- per month at the time of his accident. He further contended that it has specifically come in the cross-examination of respondent No.3 that apart from monthly wages, he used to give daily wages at the rate of Rs.88/- to the deceased employee, as such, learned Commissioner below rightly took monthly wages of the workman at the rate of Rs.4,000/-. Lastly, Mr. G.R. Palsra contended that there is no illegality or infirmity in the impugned award in as much as awarding of interest on amount of compensation is concerned. He contended that the claimants have been awarded interest at the rate of 12% per annum with effect from 19.6.2004 i.e. one month after date of accident till the deposit of amount in the court below, as such, there is no scope of interference as far as awarding of interest is concerned, which is strictly in terms of settled provisions of law.

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

11. Before ascertaining the correctness of the aforesaid submissions having been made by the learned counsel representing the parties vis-à-vis impugned award passed by learned Commissioner below, it may be noticed that no specific challenge has been laid to the impugned award by the appellant-Insurance Company qua the finding returned by learned Commissioner below on the issues No. 1,2,4,5 and 6, as such, same has attained finality so far

appellant-Insurance Company is concerned. Only question, which is required to be considered by this court in the instant proceedings is that whether the learned Commissioner below rightly arrived at a conclusion that deceased was getting salary of Rs.4,000/- per month at the time of accident or not?

12. Admittedly, in the instant case, claimants by way of statement of claim before learned Commissioner below claimed that the monthly wages of the deceased was Rs.3500/- inclusive of T.A./D.A. Respondent No.3, owner of vehicle, while admitting deceased to be his employee, stated by way of written statement that he was paying monthly wages of Rs. 2800/- to the deceased but if cross-examination conducted on this witness is perused and examined in its entirety, it clearly suggests that wages of deceased at the time of accident were between Rs.4000-4500/-. Respondent No.3 in his cross-examination categorically stated that at the time of death, deceased was drawing wages to the tune of Rs.4000/- per month. It has also come in the cross-examination of this witness that apart from monthly wages of Rs. 2800/-, he was also paying daily allowance of Rs. 100/- to the deceased as such, there appears to be no illegality or infirmity in the conclusion drawn by learned Commissioner below, while ascertaining monthly wages of deceased.

13. Since claimant had specifically led on record evidence suggestive of the fact that that deceased Tulsi Ram was drawing salary of Rs. 4000/- per month at the time of accident/death, there was no occasion for the learned Commissioner below to calculate/assess compensation on the basis of minimum wages provided/prescribed by the Government at the relevant time.

14. Having carefully perused the evidence available on record, this Court is not inclined to accept the contention of the learned senior counsel that learned Commissioner below erred in calculating monthly wages of deceased workman as Rs.4,000/-, rather this Court finds from the record that learned Commissioner below rightly came to the conclusion that at the time of death, deceased was drawing salary of Rs.4,000/- and as such, there is no illegality or infirmity in the impugned award.

15. Another question, which arises for determination by this Court is that what would be the date of application of interest on the awarded amount. Hon'ble Apex Court in **Oriental Insurance Co. Ltd.** v. **Siby George & Ors**, 2012 AIR (SCW) 438, while taking into account law laid down in **National Insurance Co. Ltd.** v. **Mubasir Ahmed and Anr**, (2007) 2 SCC 349 categorically held that both the decisions were rendered in ignorance of the earlier larger Bench decisions of the Supreme court on the issue at hand. Hon'ble Apex Court held that in **Pratap Narain Singh Deo** v. **Shrinivas Sabata and Anr**, AIR 1976 SC 222, issue has been directly answered. Hon'ble Apex Court in **Oriental Insurance Co. Ltd.** vs. **Siby George & ors** (supra) has held as under:

> "2. The short question that arises for consideration in this appeal is when does the payment of compensation under the Workmen's Compensation Act, 1923 (hereinafter the Act) become due and consequently what is the point in time from which interest would be payable on the amount of compensation as provided under section 4-A (3) of the Act.
>
> 3. In this case, the Commissioner for Workmen's Compensation, Ernakulam, by his order dated November 26, 2008 in WCC No.67 of 2006 directed for payment of simple interest at the rate of 12% per annum from the date of the accident on July 12, 2006. The appellant's appeal (MFA No.172 of 2009) against the order of the Commissioner was dismissed by the Kerala High Court by order dated July 22, 2009 as barred by limitation. Against the order of the High Court the appellant filed the special leave petition (giving rise to this appeal) in which notice was issued "limited to the interest".
>
> 4. Mr. Mehra, learned counsel appearing for the appellant, submitted that the learned Commissioner was wrong in directing for payment of interest from the date of the accident and any interest on the amount of compensation would be payable only from the date of the order of the Commissioner. In support of the submission, he relied upon a

decision of this Court in National Insurance Co. Ltd. vs. Mubasir Ahmed and Anr. (2007) 2 SCC 349, in which it was held that the compensation becomes due on the basis of the adjudication of the claim and hence, no interest can be levied prior to the date of the passing of the order determining the amount of compensation. In paragraph 9 of the decision the Court held and observed as follows:-

> "9.....In the instant case, the accident took place after the amendment and, therefore, the rate of 12% as fixed by the High Court cannot be faulted. But the period as fixed by it is wrong. The starting point is on completion of one month from the date on which it fell due. Obviously it cannot be the date of accident. Since no indication is there as to when it becomes due, it has to be taken to be the date of adjudication of the claim. This appears to be so because Section 4-A (1) prescribes that compensation under Section 4 shall be paid as soon as it falls due. The compensation becomes due on the basis of adjudication of the claim made. The adjudication under Section 4 in some cases involves the assessment of loss of earning capacity by a qualified medical practitioner. Unless adjudication is done, question of compensation becoming due does not arise. The position becomes clearer on a reading of sub-section (2) of Section 4-A. It provides that provisional payment to the extent of admitted liability has to be made when employer does not accept the liability for compensation to the extent claimed. The crucial expression is "falls due". Significantly, legislature has not used the expression "from the date of accident". Unless there is an adjudication, the question of an amount falling due does not arise." (empasis added)

5. Learned counsel also invited our attention to another decision of the Court by which a number of appeals and special leave petitions were disposed of and which is reported as Oriental Insurance Company Limited vs. Mohd. Nasir and Anr. (2009) 6 SCC

> 280. In this decision the Court held that "there cannot be any doubt whatsoever that interest would be from the date of default and not from the date of award of compensation" (paragraph 47). It then went on to say that the Act does not prohibit grant of interest at a reasonable rate from the date of filing of the claim petition till an order is passed on it, adding that the higher, statutory rate of interest under sub-section (3) of section 4 would be payable in a case that attracted that provision and for which "a finding of fact as envisaged therein has to be arrived at". The Court then referred to paragraph 9 of the decision in Mubasir Ahmad (extracted above) but declined to follow it observing that the earlier decision had not considered the aspect of the matter as was being viewed in the case of Mohd. Nasir. In Mohd. Nasir the Court finally directed for payment of interest at the rate of 7½% per annum from the date of filing the application till the date of the award, further observing that thereafter interest would be payable at the rate as directed in the order passed by the Commissioner. (See paragraphs 47 to 50 of the judgment).

6. The view taken by the Court in Mohd. Nasir that the rate of interest provided under sub-section (3) of section 4-A would apply only in case the "finding of fact as envisaged therein" is arrived at by the Commissioner, it must respectfully be stated, seems to result from the mixing up of 'interest due to default in payment of compensation' and 'penalty for an unjustified delay in payment of compensation' and is based on a misreading of the sub-section (3) of section 4-A.

> Sections 4-A (1) and (3) are as under:-
>
> 4-A. Compensation to be paid, when due and penalty for default. – (1) compensation under section 4 shall be paid as soon as it falls due.
>
> (2) xxx xxx xxx (3) Where any employer is in default in paying the compensation due under this Act within one month from the date it fell due, the Commissioner shall-

> (a) direct that the employer shall, in addition to the amount of the arrears, pay simple interest thereon at the rate of twelve per cent per annum or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government, by notification in the Official Gazette on the amount due; and
>
> (b) if, in his opinion, there is no justification for the delay, direct that the employer shall, in addition to the amount of the arrears and interest thereon, pay a further sum not exceeding fifty per cent of such amount by way of penalty:
>
> Provided that an order for the payment of penalty shall not be passed under clause (b) without giving a reasonable opportunity to the employer to show cause why it should not be passed.
>
> Explanation. - xxx xxx xxx (3A) xxx xxx xxx

7. It is, thus, to be seen that sub-section (3) of section 4-A is in two parts, separately dealing with interest and penalty in clauses (a) and (b) respectively. Clause (a) makes the levy of interest, with no option, in case of default in payment of compensation, without going into the question regarding the reasons for the default. Clause (b) provides for imposition of penalty in case, in the opinion of the Commissioner, there was no justification for the delay. Before imposing penalty, however, the Commissioner is required to give the employer a reasonable opportunity to show cause. On a plain reading of the provisions of sub-section (3) it becomes clear that payment of interest is a consequence of default in payment without going into the reasons for the delay and it is only in case where the delay is without justification, the employer might also be held liable to penalty after giving him a show cause. Therefore, a finding to the effect that the delay in payment of the amount due was unjustified is required to be recorded only in case of imposition of penalty and no such finding is required in case of interest which is to be levied on default per se.

8. Now, coming back to the question when does the payment of compensation fall due and what would be the point for the commencement of interest, it may be noted that neither the decision in Mubasir Ahmed nor the one in Mohd. Nasir can be said to provide any valid guidelines because both the decisions were rendered in ignorance of earlier larger Bench decisions of this Court by which the issue was concluded. As early as in 1975 a four Judge Bench of this Court in Pratap Narain Singh Deo. Vs. Shrinivas Sabata and Anr., AIR 1976 SC 222 directly answered the question. In paragraphs 7 and 8 of the decision it was held and observed as follows:-

> "7. Section 3 of the Act deals with the employer's liability for compensation. Sub-section (1) of that section provides that the employer shall be liable to pay compensation if "personal injury is caused to a workman by accident arising out of and in the course of his employment." It was not the case of the employer that the right to compensation was taken away under sub-section (5) of Section 3 because of the institution of a suit in a civil court for damages, in respect of the injury, against the employer or any other person. The employer therefore became liable to pay the compensation as soon as the aforesaid personal injury was caused to the workman by the accident which admittedly arose out of and in the course of the employment. It is therefore futile to contend that the compensation did not fall due until after the Commissioner's order dated May 6, 1969 under Section 19. What the section provides is that if any question arises in any proceeding under the Act as to the liability of any person to pay compensation or as to the amount or duration of the compensation it shall, in default of agreement, be settled by the Commissioner. There is therefore nothing to justify the argument that the employer's liability to pay compensation under Section 3,

> in respect of the injury, was suspended until after the settlement contemplated by Section 19. The appellant was thus liable to pay compensation as soon as the aforesaid personal injury was caused to the appellant, and there is no justification for the argument to the contrary.

8. It was the duty of the appellant, under Section 4- A(1) of the Act, to pay the compensation at the rate provided by Section 4 as soon as the personal injury was caused to the respondent. He failed to do so. What is worse, he did not even make a provisional payment under sub-section (2) of Section 4 for, as has been stated, he went to the extent of taking the false pleas that the respondent was a casual contractor and that the accident occurred solely because of his negligence. Then there is the further fact that he paid no heed to the respondent's personal approach for obtaining the compensation. It will be recalled that the respondent was driven to the necessity of making an application to the Commissioner for settling the claim, and even there the appellant raised a frivolous objection as to the jurisdiction of the Commissioner and prevailed on the respondent to file a memorandum of agreement settling the claim for a sum which was so grossly inadequate that it was rejected by the Commissioner. In these facts and circumstances, we have no doubt that the Commissioner was fully justified in making an order for the payment of interest and the penalty."

9. The matter once again came up before the Court when by amendments introduced in the Act by Act No. 30 of 1995 the amount of compensation and the rate of interest were increased with effect from 15.9.1995. The question arose whether the increased amount of compensation and the rate of interest would apply also to cases in which the accident took place before 15.9.1995. A three Judge Bench of the Court in Kerala State Electricity Board vs. Valsala K., AIR 1999 SC 3502 answered the question in the negative holding, on the authority of Pratap Narain Singh Deo, that the payment of compensation fell due on the date of the accident. In paragraphs 1, 2, and 3 of the decision the Court observed as follows:

> "1.The neat question involved in these special leave petitions is whether the amendment of Ss.4 and 4A of the Workmen's Compensation Act, 1923, made by Act No.30 of 1995 with effect from 15-9-1995, enhancing the amount of compensation and rate of interest, would be attracted to cases where the claims in respect of death or permanent disablement resulting from an accident caused during the course of employment, took place prior to 15-9-1995?
>
> 2. Various High Courts in the country, while dealing with the claim for compensation under the Workmen's Compensation Act have uniformly taken the view that the relevant date for determining the rights and liabilities of the parties is the date of the accident.
>
> 3. A four Judge Bench of this Court in Pratap Narain Singh Deo v. Srinivas Sabata, (1976) 1 SCC 289: (AIR 1976 SC 222: 1976 Lab IC 222) speaking through Singhal, J. has held that an employer becomes liable to pay compensation as soon as the personal injury is caused to the workmen by the accident which arose out of and in the course of employment. Thus, the relevant date for determination of the rate of compensation is the date of the accident and not the date of adjudication of the claim.

10. The Court then referred to a Full Bench decision of the Kerala High Court in United India Insurance Co. Ltd. vs. Alavi, 1998(1) KerLT 951(FB) and approved it in so far as it followed the decision in Pratap Narain Singh Deo.

11. The decisions in Pratap Narain Singh Deo was by a four Judge Bench and in Valsala by a three Judge Bench of this Court. Both the decisions were, thus, fully binding on the Court in Mubasir Ahmed and Mohd. Nasir, each of which was heard by two Judges. But the earlier decisions in Pratap Narain Singh Deo and Valsala were not brought to the notice of the Court in the two later decisions in Mubasir Ahmed and Mohd. Nasir.

12. In light of the decisions in Pratap Narain Singh Deo and Valsala, it is not open to contend that the payment of compensation would fall due only after the Commissioner's order or with reference to the date on which the claim application is made. The decisions in Mubasir Ahmed and Mohd. Nasir insofar as they took a contrary view to the earlier decisions in Pratap Narain Singh Deo and Valsala do not express the correct view and do not make binding precedents.

16. In view of above, interest in the instant case would fall due from the date of accident and as such, appellant shall be liable to pay the interest from the date of accident. Substantial questions of law are answered accordingly.

17. Consequently, in view of detailed discussion made herein above, appeal is dismissed. Pending applications, if any, are also disposed of. Interim directions, if any, are also vacated.

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

Rohit Panwar ...Petitioner.
Versus
State of Himachal Pradesh & anr. ...Respondents.

Cr. MMO No. 377 of 2017
Reserved on :7.4.2018.
Decided on: 16th April, 2018.

Code of Criminal Procedure, 1973- Sections 320 and 482- **Indian Penal Code, 1860-** Sections 279, 337 and 338- Petition for quashing FIR and consequent criminal proceedings on ground of compromise- Held- In appropriate cases, High Court in exercise of its inherent jurisdiction may quash FIR and consequent criminal proceedings pursuant to compromise of parties, even if, offence is non-compoundable. (Para-11)

Cases referred:
B.S. Joshi and others vs. State of Haryana and another, (2003) 4 SCC 675
Preeti Gupta and another vs. State of Jharkhand and another, (2010) 7 SCC 667
Jitendra Raghuvanshi and others vs. Babita Raghuvanshi and another, (2013) 4 SCC 58

For the petitioner: Mr. Vinod Thakur, Advocate.
For the respondents: Mr. Ashwani Sharma, Additional Advocate General, for respondent No.1.
Mr. Dhananjay Sharma, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge (oral)

The present petition is maintained by the petitioner under Section 482 of the Code of Criminal Procedure (hereinafter to be called as "the Code") for quashing of F.I.R No. 28/2016, dated 5.2.2016, under Sections 279, 337, 338 of the Indian Penal code and Section 185 of the Motor Vehicles Act, registered at Police Station, Hamirpur, District Hamirpur, H.P.

2. Briefly stating the facts, giving rise to the present petition are that respondent No.2/complainant lodged FIR alleging therein that he is doing M. Tech from NIT, Hamirpur, in

Civil Trade. On 4.1.2016, respondent No.2-complainant alongwith other persons was sitting in a Car of petitioner bearing No.UK-07AF-3346 and had gone towards Jhaniari. When, they reached at Salasi, around 10:00 PM, the vehicle was in a high speed and driver, namely, Rohit Panwar-petitioner lost his control over the vehicle, due to which, the vehicle struck against the hill and rolled down, on account of which, all of them suffered injuries. Now, the parties have entered into a compromise, vide Compromise Deed, dated 11.09.2017, (**Annexure P-2)** and do not want to pursue the case against each other. Hence, the present petition.

3. Learned counsel for the petitioner has argued that as the parties have compromised the matter, vide Compromise Deed **(Annexure P-2)**, no purpose will be served by keeping the proceedings against the petitioner and the FIR/Challan, may be quashed and set aside.

4. On the other hand, learned Additional Advocate General has argued that the offence is not compoundable, so the present petition may be dismissed.

5. Mr. Dhananjay Sharma, learned counsel appearing on behalf of respondent No.2, has argued that the parties have entered into compromise and so, the proceedings pending before the learned Court below may be quashed.

6. To appreciate the arguments of learned counsel appearing on behalf of the parties, I have gone through the entire record in detail.

7. Their Lordships of the Hon'ble Supreme Court ***B.S. Joshi and others*** vs. ***State of Haryana and another***, (2003) 4 SCC 675, have held that if for the purpose of securing the ends of justice, quashing of FIR becomes necessary, section 320 would not be a bar to the exercise of power of quashing. It is well settled that the powers under section 482 have no limits. Of course, where there is more power, it becomes necessary to exercise utmost care and caution while invoking such powers. Their Lordships have held as under:

> **[6] In Pepsi Food Ltd. and another v. Special Judicial Magistrate and others ((1998) 5 SCC 749), this Court with reference to Bhajan Lal's case observed that the guidelines laid therein as to where the Court will exercise jurisdiction under Section 482 of the Code could not be inflexible or laying rigid formulae to be followed by the Courts. Exercise of such power would depend upon the facts and circumstances of each case but with the sole purpose to prevent abuse of the process of any Court or otherwise to secure the ends of justice. It is well settled that these powers have no limits. Of course, where there is more power, it becomes necessary to exercise utmost care and caution while invoking such powers.**
>
> **[8] It is, thus, clear that Madhu Limaye's case does not lay down any general proposition limiting power of quashing the criminal proceedings or FIR or complaint as vested in Section 482 of the Code or extraordinary power under Article 226 of the Constitution of India. We are, therefore, of the view that if for the purpose of securing the ends of justice, quashing of FIR becomes necessary, Section 320 would not be a bar to the exercise of power of quashing. It is, however, a different matter depending upon the facts and circumstances of each case whether to exercise or not such a power.**
>
> **[15] In view of the above discussion, we hold that the High Court in exercise of its inherent powers can quash criminal proceedings or FIR or complaint and Section 320 of the Code does not limit or affect the powers under Section 482 of the Code.**

8. Their Lordships of the Hon'ble Supreme Court ***in Preeti Gupta and another*** vs. ***State of Jharkhand and another***, (2010) 7 SCC 667, have held that the ultimate object of justice is to find out the truth and punish the guilty and protect the innocent. The tendency of implicating the husband and all his immediate relations is also not uncommon. At times, even after the conclusion of the criminal trial, it is difficult to ascertain the real truth. Experience

reveals that long and protracted criminal trials lead to rancour, acrimony and bitterness in the relationship amongst the parties. The criminal trials lead to immense sufferings for all concerned. Their Lordships have further held that permitting complainant to pursue complaint would be abuse of process of law and the complaint against the appellants was quashed. Their Lordships have held as under:

> **[27] A three-Judge Bench (of which one of us, Bhandari, J. was the author of the judgment) of this Court in Inder Mohan Goswami and Another v. State of Uttaranchal & Others, 2007 12 SCC 1 comprehensively examined the legal position. The court came to a definite conclusion and the relevant observations of the court are reproduced in para 24 of the said judgment as under:-**
>
> **"Inherent powers under section 482 Cr.P.C. though wide have to be exercised sparingly, carefully and with great caution and only when such exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the Court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the Statute."**
>
> **[28] We have very carefully considered the averments of the complaint and the statements of all the witnesses recorded at the time of the filing of the complaint. There are no specific allegations against the appellants in the complaint and none of the witnesses have alleged any role of both the appellants.**
>
> **[35] The ultimate object of justice is to find out the truth and punish the guilty and protect the innocent. To find out the truth is a herculean task in majority of these complaints. The tendency of implicating husband and all his immediate relations is also not uncommon. At times, even after the conclusion of criminal trial, it is difficult to ascertain the real truth. The courts have to be extremely careful and cautious in dealing with these complaints and must take pragmatic realities into consideration while dealing with matrimonial cases. The allegations of harassment of husband's close relations who had been living in different cities and never visited or rarely visited the place where the complainant resided would have an entirely different complexion. The allegations of the complaint are required to be scrutinized with great care and circumspection.**
>
> **36. Experience reveals that long and protracted criminal trials lead to rancour, acrimony and bitterness in the relationship amongst the parties. It is also a matter of common knowledge that in cases filed by the complainant if the husband or the husband's relations had to remain in jail even for a few days, it would ruin the chances of amicable settlement altogether. The process of suffering is extremely long and painful.**
>
> **[38] The criminal trials lead to immense sufferings for all concerned. Even ultimate acquittal in the trial may also not be able to wipe out the deep scars of suffering of ignominy. Unfortunately a large number of these complaints have not only flooded the courts but also have led to enormous social unrest affecting peace, harmony and happiness of the society. It is high time that the legislature must take into consideration the pragmatic realities and make suitable changes in the existing law. It is imperative for the legislature to take into consideration the informed public opinion and the pragmatic realities in consideration and make necessary changes in the relevant provisions of law. We direct the Registry to send a copy of this judgment to the Law Commission and to the Union Law Secretary, Government of India who may place it before the Hon'ble Minister for Law & Justice to take appropriate steps in the larger interest of the society.**

9. Their Lordships of the Hon'ble Supreme Court in ***Jitendra Raghuvanshi and others*** vs. ***Babita Raghuvanshi and another,*** (2013) 4 SCC 58, have held that criminal

proceedings or FIR or complaint can be quashed under section 482 Cr.P.C. in appropriate cases in order to meet ends of justice. Even in non-compoundable offences pertaining to matrimonial disputes, if court is satisfied that parties have settled the disputes amicably and without any pressure, then for purpose of securing ends of justice, FIR or complaint or subsequent criminal proceedings in respect of offences can be quashed. Their Lordships have held as under:

> **[13] As stated earlier, it is not in dispute that after filing of a complaint in respect of the offences punishable under Sections 498A and 406 of IPC, the parties, in the instant case, arrived at a mutual settlement and the complainant also has sworn an affidavit supporting the stand of the appellants. That was the position before the trial Court as well as before the High Court in a petition filed under Section 482 of the Code. A perusal of the impugned order of the High Court shows that because the mutual settlement arrived at between the parties relate to non-compoundable offence, the court proceeded on a wrong premise that it cannot be compounded and dismissed the petition filed under Section 482. A perusal of the petition before the High Court shows that the application filed by the appellants was not for compounding of non-compoundable offences but for the purpose of quashing the criminal proceedings.**
>
> **[14] The inherent powers of the High Court under Section 482 of the Code are wide and unfettered. In B.S. Joshi , this Court has upheld the powers of the High Court under Section 482 to quash criminal proceedings where dispute is of a private nature and a compromise is entered into between the parties who are willing to settle their differences amicably. We are satisfied that the said decision is directly applicable to the case on hand and the High Court ought to have quashed the criminal proceedings by accepting the settlement arrived at.**
>
> **[15] In our view, it is the duty of the courts to encourage genuine settlements of matrimonial disputes, particularly, when the same are on considerable increase. Even if the offences are non-compoundable, if they relate to matrimonial disputes and the court is satisfied that the parties have settled the same amicably and without any pressure, we hold that for the purpose of securing ends of justice, Section 320 of the Code would not be a bar to the exercise of power of quashing of FIR, complaint or the subsequent criminal proceedings.**
>
> **[16] There has been an outburst of matrimonial disputes in recent times. The institution of marriage occupies an important place and it has an important role to play in the society. Therefore, every effort should be made in the interest of the individuals in order to enable them to settle down in life and live peacefully. If the parties ponder over their defaults and terminate their disputes amicably by mutual agreement instead of fighting it out in a court of law, in order to do complete justice in the matrimonial matters, the courts should be less hesitant in exercising its extraordinary jurisdiction. It is trite to state that the power under Section 482 should be exercised sparingly and with circumspection only when the court is convinced, on the basis of material on record, that allowing the proceedings to continue would be an abuse of the process of the court or that the ends of justice require that the proceedings ought to be quashed. We also make it clear that exercise of such power would depend upon the facts and circumstances of each case and it has to be exercised in appropriate cases in order to do real and substantial justice for the administration of which alone the courts exist. It is the duty of the courts to encourage genuine settlements of matrimonial disputes and Section 482 of the Code enables the High Court and Article 142 of the Constitution enables this Court to pass such orders.**
>
> **[17] In the light of the above discussion, we hold that the High Court in exercise of its inherent powers can quash the criminal proceedings or FIR or complaint in appropriate cases in order to meet the ends of justice and Section 320 of the Code does not limit or affect the powers of the High Court under Section 482**

of the Code. Under these circumstances, we set aside the impugned judgment of the High Court dated 04.07.2012 passed in M.C.R.C. No. 2877 of 2012 and quash the proceedings in Criminal Case No. 4166 of 2011 pending on the file of Judicial Magistrate Class-I, Indore."

10. Thus, taking into consideration the law as discussed hereinabove, I find that the interest of justice will be met, in case, the proceedings are quashed, as the parties have already compromised the matter, as per Compromise Deed ***(Annexure P-2)***, placed on record.

11. Accordingly, looking into all attending facts and circumstances, I find this case to be a fit case to exercise jurisdiction vested in this Court, under Section 482 of the Code and accordingly F.I.R No.28/16, dated 5.2.2016, under Sections 279, 337, 338 of the Indian Penal Code and Section 185 of the Motor Vehicles Act, registered at Police Station, Hamirpur, District Hamirpur, H.P., pending before the learned Chief Judicial Magistrate, Hamirpur, District Hamirpur, in Police Challan No.131-1/2016 and Case No.188 of 2016, titled State of Himachal Pradesh vs. Rohit Panwar, is ordered to be quashed and consequently, the proceedings pending before the learned Magistrate arising out of the aforesaid FIR, are also ordered to be quashed.

12. The petition is accordingly disposed of alongwith pending applications, if any.

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

State of Himachal Pradesh .....Appellant.
Versus
Dilbag Singh alias Bagi & ors. .....Respondents.

Cr. Appeal No.215 of 2007.
Reserved on : 10.4.2018.
Date of Decision : 16.4.2018.

Indian Evidence Act, 1872 - Section 3- Appreciation of Evidence- Trial Court acquitted accused of offences punishable under Sections 323, 325, 504 and 506 of I.P.C. – Appeal against- On facts, statements of injured witnesses were found not being corroborated by independent witnesses qua alleged incident – Injuries were possible by fall- There was enmity between complainant and accused- FIR was also delayed- Held- Accused were rightly acquitted by Trial Court- Acquittal upheld. (Para-12)

Cases referred:
K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258
T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401
Chandrappa vs. State of Karnataka, (2007) 4 SCC 415

For the appellant Mr. Ashwani Sharma and Mr. P.K. Bhatti, Additional Advocate Generals.
For the respondents Mr. Ashok Kumar Sharma, 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 accused in a case, under Sections 325, 323, 427, 504, 506 read with section 34 of the Indian Penal Code, passed by the then Sub Divisional Judicial Magistrate, Jawali, District Kangra, (H.P) dated 1.1.2007, in Criminal Case No.86-II of 2002.

2. Briefly stating facts giving rise to the present appeal are that on 26.10.2001, around 8:00 PM, complainant, Inder Pal (PW-1) alongwith his brothers, Ram Pal and Shiv Kumar (PW-2) were standing outside their shop at Dhameta market, in the meanwhile, accused persons came therein, in a car bearing No.HP-38-4142 and the same was parked in front of the shop of the complainant. Accused persons were under the influence of intoxication and started filthy language to the complainant-Inder Pal (PW-1). Accused, Dilbag Singh, pelted a stone to the shop of complainant, resulting thereby breaking a show piece glass. They also inflicting fist and leg blows to the complainant, on account of which, complainant party sustained injuries on their person. During the course of investigation, statement of witnesses recorded and site plan was prepared. Thereafter, codal formalities were completed and *challan* was presented in the Court.

3. The prosecution, in order to prove its case, examined as many as nine witnesses. Statement of accused persons were recorded, under Section 313 of the Code of Criminal Procedure, wherein they have denied the prosecution case and claimed innocence. No defence evidence was led by the accused.

4. Learned Additional Advocate General appearing on behalf of the appellant has argued that the judgment of acquittal passed by the learned Court below is without appreciating the evidence correctly. He has further argued that the learned Court below has ignored the evidence of PWs,1, 2 and 9 and has acquitted the accused.

5. On the other hand, learned counsel appearing on behalf of the accused has argued that the learned trial Court has taken into consideration all the material, which has come on record, as the prosecution has failed to prove the guilt of the accused beyond reasonable doubt, so the judgment of learned trial Court needs no interference.

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. In order to prove its case, the prosecution has examined PW-1, Inder Pal, he has deposed that accused persons came on the spot in a Maruti car bearing No.HP-38-4142 and they started inflicting blows to the complainant party. He also deposed that PW-3, Sanjeev Kumar and PW-5, Sardeel Singh, came on the spot and rescued them from the clutches of accused. He has further deposed that they informed the Superintendent of Police, Kangra at Dharamshala, on the same night by 10:00 PM. He further stated that the police came to the spot and remained there till 1:00 AM. In his cross-examination, he has stated that there is an old enmity between the complainant party and accused. PW-2, Shiv Kumar, deposed that he alongwith his brother Ram Pal, Inder Pal, was sitting inside the shop. He further stated that accused persons came on the spot and they started causing beatings to the complainant party. He further stated that the police came to the spot on the same day. In his cross-examination, he has stated that they went to the spot, on the next day of occurrence at 3:00 PM. He has also stated that there is an old enmity between the complainant party and accused. PW-3, Sanjeev Kumar, eye witness of the occurrence, has deposed that he noticed that some persons entered into an arena of arguments with the complainant party. He has further stated that no scuffle took place before him. PW-4, Milkhi Ram, is a witness of seizure memo. He has deposed that nothing had happened in front of him. PW-5, Sardool Singh, another eye witness of the case has deposed that he went to the spot after hearing a noise. He further stated that accused persons were causing beatings to the complainant. In his cross-examination, he has stated that he narrated the incident to the police that the occurrence is of inside the shop. PW-6, Dr. Virender Gupta, has conducted the medical examination of PW-1, Inderpal and PW-2, Shiv Kumar and stated that the injury is possible by way of fall. PW-7, Sudershan Kumar, is a witness of seizure memo, Ex.PW7/A, by which Maruti Car bearing No.HP-54-8384, was taken into possession by the police. PW-9, Bahadur Singh, Investigating Officer, deposed that the place of occurrence is having populous vicinity. He has deposed that the stone and pieces of broken glass, Ex.P1 and Ex.P2, were sealed in a parcel.

8. At this stage, it is worthwhile to mention here that PW-3, Sanjeev Kumar, who is eye witness, has not supported the prosecution case at all, as he was the key witness, as per the prosecution, but even after declaring him hostile, nothing favourable to the prosecution has come. He has frankly denied that any scuffle took place before him. At the same point of time, PW-5, Sardeel Singh, has stated that the occurrence occurred inside the shop, but the prosecution story is otherwise different. PW-6, Dr. Virender Singh, has deposed that the injury on the person of PW-1, Inderpal and PW-2, Shiv Kumar, is possible by way of fall. In these circumstances, witnesses i.e. PW-1 and PW-2, who are the interested witnesses and their testimonies cannot be taken into consideration, as they had admitted that there was any enmity *inter se* them and accused. So, the testimonies of PW-1, Inderpal and PW-2, Shiv Kumar, is considered *viz-a-viz,* statement of other witnesses and their testimonies does not inspire any confidence, as the independent witness has not supported the prosecution case. In the present case, it has also come on record that sister-in-law of one of the complainant is working as Staff Nurse and the medical was conducted thrice, this also create a suspicion in the prosecution story. At the same point of time, delay in lodging FIR, is fatal to the prosecution case. So, this Court finds that the prosecution has failed to prove the guilt of the accused beyond the shadow of reasonable doubt.

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. In ***Chandrappa vs. State of Karnataka, (2007) 4 SCC 415,*** the Hon'ble Supreme Court has culled out the following principles qua powers of the appellate Courts while dealing with an appeal against an order of acquittal :

> ***"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:***
>
> ***(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.***
>
> ***(2) The Code of Criminal Procedure, 1873 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.***
>
> ***(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.***
>
> ***(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law.***

Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

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. Accordingly, in view of the observations and analysis, made hereinabove, there is no merit in the appeal and the same is dismissed. Record of the learned trial Court be sent back forthwith.

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

Principal Commissioner of Central Excise, Chandigarh-I. ....Petitioner.

Versus

M/s Deyam Industry ....Respondent.

CEA No. : 1 of 2016.
Decided on: 17.04.2018.

Central Excise Act, 1944- Section 11A(1)(a)- Assessee by written declaration of July, 2009 started claiming tax holiday pursuant to Government notification dated 10.6.2003 and continued in availing so till 19.4.2011 – Revenue issued notice to assessee on 19.4.2011 for recovery of amount with interest and penalty thereupon- Commissioner levying excise duty and penalty on assessee- Order of Commissioner set aside by Appellate Tribunal – Appeal against- Held- In terms of Section Section 11A(1)(a, revenue was required to take action within one year from date of clearance of goods/filing of monthly returns i.e. February, 2008- Case doesn't fall under any of exceptions laid in Section 11A(4) enabling revenue to take action against assessee within five years- Appeal dismissed.

(Paras-9 and 10)

Case referred:

Pushpam Pharmaceuticals Company Versus Collector of Central Excise, Bombay, 1995 Supp (3) Supreme Court Cases 462

For the petitioner	Mr. Rajiv Jiwan, Advocate.
For the respondent	Mr. Amar Pratap Singh and Mr. Goverdhan Lal Sharma, Advocates.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice *(Oral)*

The Revenue calls upon this Court to answer the following question of law:-

"Whether a demand cum show cause notice cannot be issued within a period of five years from the relevant date as per the provisions contained under the proviso to section 11A(1) of the erstwhile Central Excise Act, 1944, when the party has suppressed the material fact of production and clearance of excisable

goods from the department and contravened the provisions contained in the Central Excise Act, 1944, the rules made there under and the relevant notifications with an intent to evade payment of Central Excise duty;"

2. Facts leading to filing of the instant appeal under Section 35 G of the Central Excise Act (hereinafter referred to as 'Act'), are as under:-

(a) M/s. Deyam Industries, the assessee herein, is engaged in the business of manufacture of electrical goods. It has set up its Unit at Nalagarh, an industrial estate established by the Government of Himachal Pradesh, within the territorial limits of Himachal Pradesh.

(b) The Unit came into production sometime in February, 2008. In July 2009 itself, the assessee, by means of a written declaration apprised the revenue of availing benefits in terms of, and under the Notification No. 50/2003-CE dated 10.06.2003, as amended from time to time. Pursuant thereto, the assessee started availing exemption from Central Excise Duty. This process continued till 19th April, 2011, when the revenue issued a show cause notice calling upon the assessee to explain as to why such benefit be not discontinued and the amount, subject matter of exemption, be not recovered alongwith interest and penalty thereupon.

3. The assessee responded to the same. Explanation so furnished did not find favour, with the Commissioner, Central Excise & Service Tax, Chandigarh, passing an order dated 19.02.2013, confirming levy of central excise duty and imposing penalty in the following terms:-

"5.1 In view of above discussions I passed the following order:-

5.2 I confirm central excise duty amounting to Rs. 84,81,935/- (Eighty Four Lakhs eighty One Thousand Nine Hundred & thirty Five only) against the Noticees under proviso to Section 11A of the Act by invoking extended period of drop the remaining demand of Rs. 87,75,974/- (Eighty Seven Lakhs Seventy Five Thousand Nine Hundred and Seventy Four only)

5.3 I order charging of interest under Section 11AB of the Act on the amount confirmed against Sr. No. 5.2 above.

5.4 I impose penalty of Rs. 84,81,935/- (Eighty Four Lakhs eighty One Thousand Nine Hundred & thirty Five only) on the Noticees under Section 11AC of the Act."

4. Assailing the same, assessee preferred an appeal which stands decided in its favour by the Customs, Excise & Service Tax Appellate Tribunal, New Delhi, vide order dated 13.07.2015, in case titled as M/S Deyam Industry Versus CCE & ST, Chandigarh. Noticeably, the Tribunal quashed and set aside the order so impugned before it for the reason that action initiated by the revenue was beyond the period of limitation and no ground for invoking the extended period was made out by the revenue, making the case fall within the exceptions carved out for taking appropriate action, beyond the prescribed period of limitation.

5. For adjudication of the present appeal, we are concerned with the provisions of Section 11A of the Act, which we reproduce as under:-

"11A. When any duty of excise has not been levied or paid or has been short-levied or short paid or erroneously refunded, whether or not such non-levy or nonpayment, short-levy or short payment or erroneous refund, as the case may be , was on the basis of any approval, acceptance or assessment relating to the rate of duty on or valuation of excisable goods under any other provisions of this Act or the rules made thereunder, a Central Excise Officer may, within one year from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the

refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded by reason of fraud, collusion or any willful mis-statement or suppression of facts, or contraction of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this subsection shall have effect, as if, for the words "one year", the words "five years" were substituted." *(emphasis supplied)*

6. Undisputedly, the revenue has not taken action against the assessee within the period of one year from the relevant date. What is that relevant date in the given facts and circumstances, is not in dispute, for it is the date on which the goods were cleared, i.e. date of clearance of goods/filing of monthly returns. Both events incidentally fall within the same month, which in the instant case, was February, 2008. We clarify that such fact is not disputed by anyone of the parties before us. It is also a matter of record that in July, 2009 itself, the assessee had apprised the department of revenue, by way of a declaration, as envisaged under the Act/Rules/ Regulations, indicating its intent of taking benefit of Notification dated 10.06.2003.

7. Thus far, it is clear that assessee had made evident its intent of availing the benefits under the Act, in accordance with law.

8. It is also not in dispute that only after the statutory period of one year having come to an end, but prior to five years, did the revenue initiate proceedings against the assessee with the issuance of show cause notice dated 19th of April, 2011.

9. The question which needs to be examined is as to whether it was open for the revenue/authorities to have done so? Is it a case where the assessee had indulged in an act of fraud, collusion or willful mis-statement/suppression of facts or contravention of any of the provisions of the Act or rules made thereunder.

10. We find the Tribunal to have adequately taken note of the factual situation and applied the provisions of law, in arriving at its conclusion, that the revenue had failed to make out its case, falling within any one of the exceptions stipulated in the proviso to the main Section. We are in agreement with such findings.

11. We also notice that under identical circumstances, the Apex Court in case titled as **Pushpam Pharmaceuticals Company Versus Collector of Central Excise, Bombay**, 1995 Supp (3) Supreme Court Cases 462 has explained under what circumstances proviso to the Section can be invoked by the revenue, for taking benefit of the extended period of limitation up to five years. The Apex Court explained that in normal understanding, contravention of any of the provisions of the Act cannot be read separately, in isolation or differently, that of the accompanying words, such as fraud, collusion or willful default. Further, "the acts so as to constitute anyone of the exceptions must be deliberate and that in taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties omission by one to do what he might have done and not that he must have done, does not render it suppression."

12. It is under these circumstances we are not inclined to interfere with and set aside order dated 13.07.2015, passed by the Customs, Excise & Service Tax Appellate Tribunal, West Block No. 2, R.K. Puram, Principal Bench, New Delhi. Also the question of law sought to be answered is well settled and no longer *res integra.*

With the aforesaid observations, the appeal stands disposed of, so also pending miscellaneous application(s), if any.

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

Rati Ram ...Petitioner
Versus
State of Himachal Pradesh ...Respondent

Cr. Revision No. 78 of 2018
Reserved on: 05.04.2018
Decided on: 17.04.2018

Code of Criminal Procedure, 1973- Section 457- **Himachal Pradesh Excise Act, 2011**- Section 39 (1)a- Vehicle impounded by police for being used for transporting liquor without permit- Application of petitioner for its release on sapurdari dismissed 'in default' – Revision against- Plea of petitioner being that his application could not have been dismissed in default for want of prosecution- Held- Judicial Magistrate was competent to dismiss application for want of prosecution- Revision dismissed with liberty to petitioner to file another comprehensive application before Judicial Magistrate. (Para-32 to 40)

Cases referred:

State of Madhya Pradesh and others versus Madhukar Rao, (2008) 14 Supreme Court Cases 624
Madan Lal Kapoor versus Rajiv Thapar and others, (2007) 7 Supreme Court Cases 623
Sunderbhai Ambalal Desai versus State of Gujarat, (2002) 10 Supreme Court Cases 283
Uday Singh and another versus State of W.B., (2011) 15 Supreme Court Cases 520
Jatinder Singh and others versus Ranjit Kaur, (2001) 2 Supreme Court Cases 570
Associated Cement Co. Ltd. versus Keshvanand, (1998) 1 Supreme Court Cases 687
Mohd. Azeem versus A. Venkatesh and another, (2002) 7 Supreme Court Cases 726
S. Anand versus Vasumathi Chandrasekar, (2008) 4 Supreme Court Cases 67
Food Inspector versus Ch. Qadir Wani, 1996 Cr.L.J. 1618
Sita Ram son of Dhani Ram and others versus Smt. Shakuntla Devi, 1992 Cri.L.J. 2164
Mohinder Singh versus State (Chandigarh Administration), 1997 (3) Crimes 142 (P&H)
Tulsamma versus Jagannath and others, 2004 (4) Crimes 252
H. Raghavendra Rao versus Buckeye corporation (I) Ltd., 2004 Cri.L.J. 2633
Ranvir Singh versus State of Haryana and another, (2009) 9 Supreme Court Cases 642
Ram Parkash Sharma versus State of Haryana, (1978) 2 Supreme Court Cases 491
Basavva Kom Dyamangouda Patil versus State of Mysore and another, (1977) 4 Supreme Court Cases 358
Mahesh Chand versus B. Janardhan Reddy and another, (2003) 1 Supreme Court Cases 734
Poonam Chand Jain and another versus Fazru, (2010) 2 Supreme Court Cases 631
Vishnu Agarwal versus State of Uttar Pradesh and another, (2011) 14 Supreme Court Cases 813
Bindeshwari Prasad Singh versus Kali Singh, (1977) 1 Supreme Court Cases 57
State of Punjab versus Davinder Pal Singh Bhullar and others, (2011) 14 Supreme Court Cases 770
Har Deo versus State, AIR 1952 Rajasthan 148

For the petitioner: Ms. Sheetal Vyas, Advocate.
For the respondent: Mr. Shiv Pal Manhans, Additional Advocate General, with Mr. Raju Ram Rahi and Mr. Amit Kumar Dhumal, Deputy Advocate Generals.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge.

This petition has been filed assailing order, dated 22nd February, 2018 (hereinafter referred to as 'impugned order') passed by Judicial Magistrate First Class, Court No. 2, Paonta Sahib, District Sirmaur, H.P. (hereinafter referred to as 'the trial Court') in case No. 64/4 of 2018, titled as Rati Ram versus State of Himachal Pradesh, in case FIR No. 54 of 2017, dated 19th October, 2017, registered in Police Station Shillai, District Sirmaur, under Section 39(1)A of H.P. Excise Act, whereby application preferred by the petitioner under Section 457 of the Code of Criminal Procedure (hereinafter referred to as 'CrPC') for release of vehicle No. HP-18 B-0983 has been dismissed in default for want of presence of applicant (petitioner herein) or his authorized representative.

2. Petitioner is claiming himself to be purchaser of the aforesaid vehicle on the basis of agreement of sale executed between registered owner, i.e. Shri Jagdish Chand, s/o Shri Raiya Ram, r/o Village Sail, P.O. Hallan, Tehsil Shillai, District Sirmaur, H.P., and the petitioner, photocopy whereof has been placed on record.

3. It has been submitted on behalf of the petitioner that as per prosecution case, the vehicle has been impounded for illegal transportation of liquor, with further submission that even the said allegation, without conceding and admitting the same, is considered to be true, there was no consent or permission or authority or licence or direction on behalf of the petitioner to anyone to use the vehicle for transporting anything in contravention of any law and as the vehicle was used for alleged offence without any connivance, knowledge or permission of the petitioner, the vehicle deserves to be released on *supurdarinama* in favour of the petitioner in view of the ratio of law laid down by the apex Court in case titled as **State of Madhya Pradesh and others versus Madhukar Rao,** reported in **(2008) 14 Supreme Court Cases 624,** for the reason that idle parking of vehicle for a long time, during pendency of trial, that too, in open under the sun and rain etc., would definitely result into serious damages to the vehicle causing irreparable loss to the petitioner.

4. It is also canvassed on behalf of the petitioner that on account of further detention of the vehicle, it will convert into a junk and it will not be possible to ply the same on road after a prolonged detention. It is further canvassed that the vehicle is the source of earning of livelihood of the petitioner and its detention during trial amounts to infringement of fundamental right guaranteed to the petitioner under Article 21 of the Constitution of India as the petitioner is not able to ply his commercial vehicle, which is source of living for him and his family.

5. It is further contended that no fruitful purpose is going to be served by continuing the detention of vehicle in police custody.

6. Relying upon pronouncement of the apex Court in case titled as **Madan Lal Kapoor versus Rajiv Thapar and others,** reported in **(2007) 7 Supreme Court Cases 623,** it is argued that no criminal matter can be dismissed for default and every such matter must be decided on merits. It is contended that the trial Court has committed a material irregularity and illegality by passing an arbitrary and irrational order in a mechanical manner without any application of judicial mind, which has resulted into miscarriage of justice.

7. Placing reliance upon pronouncement of the apex Court in case titled as **Sunderbhai Ambalal Desai versus State of Gujarat,** reported in **(2002) 10 Supreme Court Cases 283,** it is also argued that the trial Court has failed to follow the guidelines laid down by the apex Court for exercising the power by the Magistrate under Sections 451 and 457 CrPC with regard to the disposal of mudammal articles kept in police custody during pendency of trial, wherein it has specifically been observed by the apex Court that power under Section 451 CrPC should have been exercised keeping in view various purposes required to be served under this Section, which, in present case, are as under:

"(i) Owner of the article would not suffer because of its remaining unused or by its misappropriation;

(ii) Court or the police would not be required to keep the article in safe custody; and

(iii) If the proper panchnama 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 property in detail."

8. Learned counsel for the petitioner also submits that once the application for release filed on behalf of petitioner has been decided by the trial Court by dismissing it in default, the said Court cannot review its order in view of legal impediment on account of Section 362 CrPC and, therefore, petitioner cannot file an application for restoration of the said application as it would amount altering or reviewing its own order by the trial Court.

9. It is also submitted that once the claim of the petitioner for release of vehicle has been dismissed, the petitioner cannot prefer another application in the same Court as the matter already stands decided against the petitioner and the trial Court, in view of provisions of Section 362 CrPC, is refrained from carrying out such exercise except to correct a clerical or arithmetical error and, therefore, the petitioner has no option except to approach this Court by filing present petition.

10. Lastly, it is prayed that after setting aside the impugned order, vehicle No. HP-18B-0983 be ordered to be released in favour of the petitioner for the ends of justice.

11. The main issues emerging out, in present case, for decision are:

1. Whether no criminal matter can be dismissed for default on failure of petitioner/applicant/complainant to cause appearance personally or through his duly authorized representative?
2. Whether petitioner, instead of approaching this Court directly, was having any alternative remedy, including filing of second application, before the learned Magistrate?
3. Whether learned Magistrate has committed a mistake by dismissing the application under Section 457 CrPC for default?
4. Whether, in absence of applicant/ petitioner, learned Magistrate was having any other recourse to follow, for adjudication of application?
5. Whether petitioner is entitled to relief, if any, from this Court?

12. In my opinion, plea of petitioner based upon **Madan Lal Kapoor's case (supra),** that no criminal matter can be dismissed for default, is not sustainable. The observations of the apex Court in the said case is in the context of and with reference to the adjudication of 'criminal revision' and 'criminal appeal' especially keeping in view provisions related to appeals and revisions contained in Chapters XXIX and XXX of CrPC. There may be numerous situations where the Court may not have any other option except to dismiss the petition/application/complaint for default when the petitioner/applicant/complainant or his duly authorized representative fails to appear in the Court so as to take necessary steps for proceeding further in the matter.

13. In case titled as **Uday Singh and another versus State of W.B.,** reported in **(2011) 15 Supreme Court Cases 520,** appeals filed against conviction were dismissed for default by the apex Court as nobody appeared for the appellants to argue the appeals despite repeated postings of these cases. Though, counsel for State was present and ready to argue the matter, but, the apex Court held that it would be unnecessary to hear State in absence of anybody appearing for the appellants.

14. It can be said that the apex Court in **Uday Singh's case (supra)** may have passed such orders exercising power under Article 142 of the Constitution of India. But, in Chapter XV

of CrPC, dealing with complaints to Magistrate, there are provisions which empower the Magistrate to dismiss complaint for default on the part of complainant in causing appearance in the Court.

15. Section 249 CrPC empowers Magistrate to dismiss a complaint for absence of complainant and discharge the accused where offence is lawfully compoundable or is not a cognizable offence. Section 256 CrPC also provides dismissal of complaint by Magistrate for absence of complainant in certain cases where presence of complainant is necessary, unless he thinks it proper to adjourn hearing of the case for some reason.

16. In case titled as **Jatinder Singh and others versus Ranjit Kaur,** reported in **(2001) 2 Supreme Court Cases 570,** wherein issuing of process to the accused after taking cognizance of the offence in second complaint, filed after dismissal of first complaint in default on account of absence of complainant or her Advocate, was under challenge, the apex Court has held that second complaint was maintainable after dismissal of first complaint, not on merit, but, on default of complainant to remain present in the Court. The apex Court has not held or even observed that the learned Magistrate was not empowered to dismiss the first complaint in default.

17. In cases **Associated Cement Co. Ltd. versus Keshvanand,** reported in **(1998) 1 Supreme Court Cases 687; Mohd. Azeem versus A. Venkatesh and another,** reported in **(2002) 7 Supreme Court Cases 726;** and **S. Anand versus Vasumathi Chandrasekar,** reported in **(2008) 4 Supreme Court Cases 67,** the apex Court has deprecated the practice of dismissing the complaint for single default in appearance by complainant, but, has not held the dismissal for default impermissible.

18. The Jammu and Kashmir High Court in case titled as **Food Inspector versus Ch. Qadir Wani,** reported in **1996 Cr.L.J. 1618,** has approved dismissal of complaint in summon case for want of prosecution on absence of complainant.

19. There are large number of other cases wherein the apex Court as well as various High Courts have adjudicated the issues arising out of the dismissal of criminal matter for default for want of presence of complainant or his duly authorized representative, but, in none of the cases, it has been held or even observed that those criminal complaints could not have been dismissed for default on account of absence of complainant or his duly authorized representative or for non-prosecution. *{See Sita Ram son of Dhani Ram and others versus Smt. Shakuntla Devi, 1992 Cri.L.J. 2164; Mohinder Singh versus State (Chandigarh Administration), 1997 (3) Crimes 142 (P&H); Tulsamma versus Jagannath and others, 2004 (4) Crimes 252; H. Raghavendra Rao versus Buckeye corporation (I) Ltd., 2004 Cri.L.J. 2633; and Ranvir Singh versus State of Haryana and another, (2009) 9 Supreme Court Cases 642.}*

20. Therefore, it cannot be held that no criminal matter can be dismissed for default on failure of petitioner/ applicant/complainant to cause appearance personally or through his duly authorized representative. Depending upon the given facts and circumstances of the case and also provisions of law, there may be criminal matter which may be dismissed for default on failure of petitioner/applicant/ complainant to appear personally or through his duly authorized representative.

21. Sections 451 to 459 in Chapter XXXIV of CrPC deal with provisions for disposal of property. In present case, we are concerned with Section 457 CrPC, which provides provision for disposal of property seized by any police officer, reported to a Magistrate under the provision of CrPC, but the said property is not produced before a Criminal Court during an inquiry or trial. In such a situation, it provides that Magistrate may, if he thinks fit, order disposal of such property or the delivery of such property to the person entitled to the possession thereof or if such person is not ascertainable, he can pass any order respecting the custody and production of such property. At the time of passing of the order with respect to such seized property, he has to give due consideration to the interests of justice including the prospective necessity of the production of the seized articles at the time of the trial, and if release of the property seized will, in any manner, affect or prejudice the course of justice at the time of trial, it will be a wise discretion to

reject the claim for return. As evident from bare reading of the provision for considering a case/release application under Section 457 CrPC, it is not necessary that such property must be produced before the Magistrate. The only requirement is that the seized property is reported to a Magistrate under the provisions of CrPC. *{See Ram Parkash Sharma versus State of Haryana, (1978) 2 Supreme Court Cases 491.}*

22. Sub-section (2) of Section 457 CrPC provides that if the person entitled to possession is known, the Magistrate may deliver the possession of property to him subject to certain conditions considered fit by the Magistrate and if such person is not known, Magistrate may detain property, and, in such a case, he shall issue a proclamation specifying the articles of which such property consists, requiring any person, who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation.

23. Section 458 CrPC provides procedure when no claimant appears or establishes his claim to such property within six months and if the person, in whose possession such property was found, is unable to show that it was legally acquired by him, the Magistrate may direct that the said property shall be at the disposal of State Government and may be sold by the Government. In such situation, proceeds of such sale shall be dealt with in such manner, as may be prescribed under CrPC or as directed by the Magistrate.

24. The apex Court in case titled as **Smt. Basavva Kom Dyamangouda Patil versus State of Mysore and another,** reported in **(1977) 4 Supreme Court Cases 358,** discussing the object and scheme of various provisions of CrPC, has observed that where the property, subject matter of an offence, is seized by the police, it ought not to be retained in the custody of the Court or of the police for any time longer than what is absolutely necessary. It may, particularly, be necessary where the property concerned is subject to speedy or natural decay. There may be other compelling reasons also, which may justify the disposal of property to the owner or otherwise in the interest of justice. The object seems to be that any property, which is in control of the Court, either directly or indirectly, should be disposed of by the Court and a just and proper order should be passed by the Court regarding its disposal.

25. Relying upon its pronouncement in **Smt. Basavva Kom Dyamangouda Patil's case (supra),** the apex Court in **Sunderbhai Ambalal Desai's case (supra)** reported in **(2002) 10 Supreme Court Cases 283,** has held that in a case where the vehicle is not claimed by the accused, owner, the insurance company or by a third person, then such vehicle may be ordered to be auctioned by the Court and if the said vehicle is insured with the insurance company, then the insurance company be informed by the Court to take possession of the vehicle which is not claimed by the owner or a third person and if the insurance company fails to take possession, the vehicle may be sold as per direction of the Court. It has further been held that Court would pass such order within a period of six months from the date of production of the said vehicle before it.

26. Provisions of Chapter XXXIV of CrPC, especially Section 457 CrPC read with Section 458 CrPC, do not prohibit filing of second application for release of the property seized by the police and also, there is nothing in law prohibiting the Courts from entertaining the second application/petition where previous application/petition had been dismissed for default, on failure of the applicant/ petitioner to remain present himself or through his counsel, without adjudicating the matter on merit after giving full consideration to the case.

27. Though, I could not find direct case law wherein the second application under Section 457 CPC would have been declared to be maintainable, however, law is settled on the issue that second criminal complaint is maintainable after dismissal of the first complaint in exceptional circumstances, i.e. where the previous order was passed on incomplete record or on a misunderstanding of the nature of complaint or it was manifestly absurd, unjust or foolish or where the new facts which could not, with reasonable diligence, have been brought on the record in the previous proceedings, have been adduced. However, after a decision given against the complainant upon a full consideration of his case, he or any other person should not be given another opportunity to file second complaint. In other words, where the previous complaint has

been dismissed without giving full consideration of the case, second complaint has been held to be maintainable. *{See Pramatha Nath Talukdar versus Saroj Ranjan Sarkar, AIR 1962 Supreme Court 876.}* Where the complaint was dismissed for default, but, not on merit, fresh complaint on the same facts has been held to be maintainable. *{See Jatinder Singh and others versus Ranjit Kaur, (2001) 2 Supreme Court Cases 570}.*

28. In case titled as **Mahesh Chand versus B. Janardhan Reddy and another,** reported in **(2003) 1 Supreme Court Cases 734,** fresh complaint on the same facts was held to be not barred, which was filed even after acceptance of cancellation report of the police/Investigating Officer and closure of the first protest petition/complaint of the complainant and it was further held by the apex Court that there is no statutory bar in filing a second complaint on the same facts where the previous complaint is dismissed without assigning any reason.

29. Relying upon **Pramatha Nath Talukdar's** and **Jatinder Singh's cases (supra),** the apex Court also in cases titled as **Ranvir Singh versus State of Haryana and another,** reported in **(2009) 9 Supreme Court Cases 642,** has held that filing of second complaint on the same cause of action between the same parties, when earlier complaint has been dismissed for non-filing of process fee but not on merit, is maintainable.

30. Similarly, in **Poonam Chand Jain and another versus Fazru,** reported in **(2010) 2 Supreme Court Cases 631,** the apex Court, dismissing the plea of the complainant with regard to maintainability of second complaint on almost identical facts raised in the first complaint which was dismissed on merit, has held that second complaint can be entertained only in exceptional circumstances enumerated in **Pramatha Nath Talukdar's case (supra).**

31. Like criminal complaint, there is no prohibition or statutory bar for filing second application under Chapter XXXIV of CrPC for release of property, however, certainly, such complaint can be entertained only in exceptional circumstances as enumerated by the apex Court in various pronouncements discussed above. Maintainability and entertaining of second application always depends upon the facts and circumstances of each case. It would not be possible to put all the facts and circumstances in a straight jacket formula and each and every case has to be decided in its given circumstances on the basis of settled law of the land.

32. Considering availability of option to the petitioner to file an application before the learned Magistrate for recalling impugned order, judgment in **Vishnu Agarwal versus State of Uttar Pradesh and another,** reported in **(2011) 14 Supreme Court Cases 813,** has also been referred, wherein it has been held that recalling the order of dismissal for default by the High Court, on an application preferred by the aggrieved party, does not amount to review the judgment or final order disposing of the matter under Section 362 CrPC by observing that Section 362 CrPC cannot be considered in a rigid or over-technical manner to defeat the ends of justice. It can be noticed that in the said case, the dismissal order was passed by the High Court and the High Court has inherent powers to recall its order under Section 482 CPC, which are not available with the Magistrate. As has been held by the apex Court in case titled as **Bindeshwari Prasad Singh versus Kali Singh,** reported in **(1977) 1 Supreme Court Cases 57,** the Magistrates do not have inherent powers and, thus, cannot recall order of dismissal passed for default on the part of the complainant to cause his appearance personally or through his counsel for non-prosecution of the case.

33. Issue of reviewing/altering/modifying/recalling judgment or final order, disposing of the matter, has been dealt with elaborately by the apex Court in case titled as **State of Punjab versus Davinder Pal Singh Bhullar and others,** reported in **(2011) 14 Supreme Court Cases 770,** which is as under:

> ***"III. BAR TO REVIEW/ALTER JUDGMENT***
>
> *44. There is no power of review with the Criminal Court after judgment has been rendered. The High Court can alter or review its judgment before it is signed. When an order is passed, it cannot be reviewed. Section 362 CrPC is based on an*

acknowledged principle of law that once a matter is finally disposed of by a Court, the said Court in the absence of a specific statutory provision becomes functus officio and is disentitled to entertain a fresh prayer for any relief unless the former order of final disposal is set aside by a Court of competent jurisdiction in a manner prescribed by law. The Court becomes functus officio the moment the order for disposing of a case is signed. Such an order cannot be altered except to the extent of correcting a clerical or arithmetical error. There is also no provision for modification of the judgment. (See: Hari Singh Mann v. Harbhajan Singh Bajwa, (2001) 1 SCC 169; and Chhanni v. State of U.P., (2006) 5 SCC 396.)

45. Moreover, the prohibition contained in Section 362 CrPC is absolute; after the judgment is signed, even the High Court in exercise of its inherent power under Section 482 CrPC has no authority or jurisdiction to alter/review the same. (See: Moti Lal v. State of M.P., (2012) 11 SCC 427; Hari Singh Mann (supra); and State of Kerala v. M.M. Manikantan Nair, (2001) 4 SCC 752.)

46. If a judgment has been pronounced without jurisdiction or in violation of principles of natural justice or where the order has been pronounced without giving an opportunity of being heard to a party affected by it or where an order was obtained by abuse of the process of court which would really amount to its being without jurisdiction, inherent powers can be exercised to recall such order for the reason that in such an eventuality the order becomes a nullity and the provisions of Section 362 Cr.P.C. would not operate. In such eventuality, the judgment is manifestly contrary to the audi alteram partem rule of natural justice. The power of recall is different from the power of altering/reviewing the judgment. However, the party seeking recall/alteration has to establish that it was not at fault. (Vide: Chitawan v. Mahboob Ilahi, 1970 CrLJ 378 (All); Deepak Thanwardas Balwani v. State of Maharashtra, 1985 CrLJ 23(Bom); Habu v. State of Rajasthan, AIR 1987(Raj) 83); Swarth Mahto v. Dharmdeo Narain Singh, (1972) 2 SCC 273; Makkapati Nagaswara Sastri v. S.S. Satyanarayan, (1981) 1 SCC 62; Asit Kumar Kar v. State of W.B., (2009) 2 SCC 703; and Vishnu Agarwal v. State of U.P., (2011) 14 SCC 813.)

47. This Court by virtue of Article 137 of the Constitution has been invested with an express power to review any judgment in Criminal Law and while no such power has been conferred on the High Court, inherent power of the court cannot be exercised for doing that which is specifically prohibited by the Code itself. (Vide: State v. K.V. Rajendran, (2008) 8 SCC 673).

48. In Sooraj Devi v. Pyare Lal, (1981) 1 SCC 500, this Court held that the prohibition in Section 362 CrPC against the Court altering or reviewing its judgment, is subject to what is "otherwise provided by this Code or by any other law for the time being in force". Those words, however, refer to those provisions only where the Court has been expressly authorised by the Code or other law to alter or review its judgment. The inherent power of the Court is not contemplated by the saving provision contained in Section 362 CrPC and, therefore, the attempt to invoke that power can be of no avail.

49. Thus, the law on the issue can be summarised to the effect that the criminal justice delivery system does not clothe the court to add or delete any words, except to correct the clerical or arithmetical error as specifically been provided under the statute itself after pronouncement of the judgment as the Judge becomes functus officio. Any mistake or glaring omission is left to be corrected only by the appropriate forum in accordance with law."

Therefore, in present case, application for restoration of the earlier application by recalling the order by Magistrate is not permissible under law.

34. Viewed thus, petitioner, in present case, was having two remedies: firstly, to approach this Court or Sessions Court; and secondly, to file a fresh application before the Magistrate on the same grounds.

35. Keeping in view the effect of dismissal of complaint by Magistrate for default, the apex Court in case titled as **Associated Cement Co. Ltd. versus Keshvanand,** reported in **(1998) 1 Supreme Court Cases 687,** after discussing the object and scope of Section 256 CrPC, has held that, though, the Section affords protection to an accused against dilatory tactics on the part of the complainant, but, at the same time, it does not mean that if the complainant is absent, the Court has duty to acquit the accused in invitum. It has further been held in the said judgment that the discretion under Section 256 CrPC must be exercised judicially and fairly without impairing the cause of administration of criminal justice.

36. The apex Court in case titled as **Mohd. Azeem versus A. Venkatesh and another,** reported in **(2002) 7 Supreme Court Cases 726,** also has considered dismissal of the complaint on account of one singular default in appearance on the part of the complainant as a very strict and unjust attitude resulting in failure of justice. Similar view has been taken by the apex Court in case titled as **S. Anand versus Vasumathi Chandrasekar,** reported in **(2008) 4 Supreme Court Cases 67.**

37. Detention of the property with the police amounts to handing over the custody to the Government. Government through police or otherwise may not have infrastructure to keep such properties, seized by the police, in safe custody and there may be loss of or to the property during such custody, which may result into causing financial burden upon the State in order to indemnify the owner of such property. For that reason only, as also explained by the apex Court, provisions for disposal of such property, have been provided in Chapter XXXIV of CrPC. Purpose of this Chapter is disposal of property but certainly not to detain property. Any property must reach in hand of a person legally entitled for that at the earliest except in exceptional, reasonable and justifiable circumstances warranting detention of property during trial or for specific provisions of special enactments where property is liable to be confiscated in near future.

38. As discussed above, Section 457 CrPC bestows duty upon the Magistrate to dispose of the property seized by the police as and when it is reported to him. Filing of application for release of property by a person definitely amounts to reporting of seizure of the property to the Magistrate. Therefore, after receiving such information or report, Magistrate is bound to follow the procedure provided in Section 457 CrPC and as provided in sub-section (2) of this Section, he may order delivery of property to a person entitled for that, if such person is known and in case such person is unknown, Magistrate may detain the same, but, it has further been provided that in such situation, he shall issue a proclamation specifying the article of which such property consists, requiring any person, who may have a claim thereto, to appear before him and establish his claim within six months from the date of proclamation.

39. The words in Section 457 CrPC '*if such person is unknown, Magistrate may detain the property*' can be interpreted in other words to mean that Magistrate has the power to reject the application filed by a person, if he is not found entitled for the same or where the entitled person is not before the Magistrate. Thus, power to reject the application and to detain property also includes the power to dismiss the application for release of the property for default on the part of applicant either for presence or for taking effective steps for adjudication of the said application. But, such an order must be followed by action as required to be taken on the part of the Magistrate as per relevant provisions of law discussed above.

40. Further, immediately on receiving an application for release of property, seizure of the said property is reported to the Magistrate. In any case, whether the application for release of property has been dismissed for default or rejected for other reasons resulting into detention of the property, relevant provisions of the CrPC, in unambiguous terms, cast a duty upon the Magistrate to proceed further for disposal of the property in terms of Sections 457 (2) and 458 CrPC. The intent of legislature is clear from the fact that for detention, the words *'Magistrate may*

detain' have been used and immediately thereafter, the word *'shall'* has been used stating that *'Magistrate may detain it and shall, in such case, issue a proclamation'* and after proclamation, procedure under Sections 458 and 459 CrPC, according to the facts and circumstances, is to be followed.

41. No doubt, in certain cases, Magistrate has power to dismiss the application/complaint for default in appearance on the part of applicant/complainant in the given facts and circumstances of the said case, but, such power must be exercised sparingly with great care and caution keeping in view the far reaching effect of such dismissal. Power of such dismissal does not mean that the Magistrate is bound to dismiss the application/complaint on a singular default on the part of applicant/complainant. The default in appearance may be for so many genuine reasons which can be explained by the applicant/ complainant on the next date of hearing as the Magistrate has power to adjourn the hearing of the application/ complaint even in absence of applicant/complainant for the next date. Power to dismiss for default should be resorted to in those cases where it would have been impossible to adjourn or proceed further.

42. Thus, as discussed above, the Magistrate may have competence and mandate to dismiss the application under Section 457 CrPC, but for consequences ensuing dismissal for default of application, discussed hereinabove, and also ratio of law laid down by the apex Court, the Magistrate should not have dismissed the application for singular default on the part of the applicant-petitioner in appearing in the Court either in person or through his counsel.

43. In view of above discussion, with due regards to the learned Judge, I find it difficult to agree with the judgment passed by Rajasthan High Court in **Har Deo versus State,** reported in **AIR 1952 Rajasthan 148,** wherein it has been held that Magistrate has not been given any power in CrPC to dismiss an application for release of property filed by the claimant for default.

44. Prayer of the petitioner, that instead of relegating the petitioner to the Magistrate by permitting to file second application for release of the vehicle, the same may be ordered to be released in favour of the petitioner in present revision petition, cannot be acceded to for want of sufficient material before this Court. The entire record so as to assess all facts and circumstances in which application of petitioner was dismissed by the trial Court is not on record. Copy of FIR or any other material of the case under investigation, in which the vehicle has been seized by the police, is also not before this Court. Though, ownership and possession of the vehicle has been claimed on the basis of agreement of sale, photocopy of which, attested to be true copy by the learned counsel, has been placed on record, but, no other document is available to ascertain the veracity of claim of the petitioner that vehicle in question is registered in the name of Shri Jagdish Chand, s/o Shri Raiya Ram, as claimed in para 3 of the petition, and that detention of the said vehicle is no more required by the investigating agency. All these facts can properly and effectively be assessed by the Magistrate on the basis of material placed before him by the petitioner as well as respondent-State.

45. The application of petitioner was dismissed by the learned Magistrate for default for want of representation on behalf of the petitioner either in person or through counsel despite calling the case repeatedly on 22nd February, 2018. In petition preferred in this Court, not even a single word has been uttered by the petitioner so as to explain any plausible reason for his absence or non-appearance of counsel on his behalf before the learned Magistrate on 22nd February, 2018 when the Magistrate was constrained to dismiss the application for default. For this reason also, I am not inclined to set aside the impugned order.

46. All the issues framed hereinabove are decided accordingly.

47. Therefore, present petition is disposed of in aforesaid terms with liberty to the petitioner to file a fresh comprehensive application before the Magistrate for release of vehicle in question, which shall be considered by the learned Magistrate on its own merit, without being influenced by any observation made by this Court, with regard to claim of petitioner to the

vehicle, in present petition, and shall be disposed of in accordance with law, especially, as per procedure provided under Chapter XXXIV of CrPC.

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

CrMP(M) Nos. 386 and 387 of 2018
Decided on April 17, 2018

1. CrMP(M) No. 386 of 2018

Ravinder Chauhan ... Petitioner
Versus
State of Himachal Pradesh ... Respondent

2. CrMP(M) No. 387 of 2018

Rajeev Mahajan ... Petitioner
Versus
State of Himachal Pradesh ... Respondent

Code of Criminal Procedure, 1973- Section 439- **Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 as amended vide Act 1 of 2016-** Section 3(1)(r)(s)- On facts, involvement of only one of accused was found during investigation- Charge-sheet stood filed against him- Regular bail granted subject to conditions. (Para-11)

Cases referred:
Sanjay Chandra versus Central Bureau of Investigation (2012)1 Supreme Court Cases 49
Prasanta Kumar Sarkar versus Ashis Chatterjee and another (2010) 14 SCC 496

For the petitioner(s) : Mr. Nitin Thakur, Advocate.
For the respondent : Mr. Dinesh Thakur, Additional Advocate General with Mr. Vikrant Chandel, Deputy Advocate General.
ASI Bhagat Singh, Police Station Paonta Sahib, District Sirmaur, Himachal Pradesh.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Since both the bail petitions arise out of same FIR, both were taken up together for being disposed of by this common judgment.

2. Bail petitioners named herein above approached this Court in the instant proceedings praying therein for grant of regular bail in connection with FIR No. 524/2017 dated 24.12.2017, under Section 506 and Section 3(1)®(s) of Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 registered at Police Station Paonta Sahib, District Sirmaur, Himachal Pradesh.

3. Sequel to order dated 2.4.2018, ASI Bhagat Singh has come present with the record. Mr. Dinesh Thakur, Additional Advocate General has also placed on record status report, prepared on the basis of investigation carried out by the investigating agency. Record perused and returned.

4. Mr. Dinesh Thakur, learned Additional Advocate General, on instructions of the Investigating Officer, who is present in the Court, fairly stated that both the bail petitioners have

joined the investigation in terms of order dated 2.4.2018 and they are fully cooperating. While inviting attention of this Court to the status report, learned Additional Advocate General fairly admitted that no case, if any, is made out against bail petitioner namely Ravinder Chauhan, whereas *Challan* has been filed against another bail petitioner namely Rajeev Mahajan. Learned Additional Advocate General further contended that since bail petitioners have joined investigation, their custodial interrogation is not required at this stage and they may be directed to make themselves available for investigation and trial as and when called by investigating agency.

5. Needless to say, guilt if any, of the bail petitioner is yet to be proved in accordance with law by the investigating agency by leading cogent and convincing evidence, as such, this Court is inclined to accept the prayer having been made on behalf of bail petitioner for grant of bail. Otherwise also, investigation in the case is complete, save and except result of SFSL Junga is awaited.

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

> "2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.
>
> 3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.
>
> 4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by

incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons."

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

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

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

9. The Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496**,** has laid down the following principles to be kept in mind, while deciding petition for bail:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(xv) reasonable apprehension of the witnesses being influenced; and

(xvi) danger, of course, of justice being thwarted by grant of bail.

10. In view of above, bail petitioners have carved out a case for grant of bail and as such, orders dated 2.4.2018 are made absolute. Petitioner in CrMP(M) No. 388 of 2018, namely Rajeev Mahajan is directed to furnish fresh bail bonds in the sum of Rs.25,000/- with one local surety in the like amount, to the satisfaction of the trial Court, besides the following conditions:

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

(b) He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

(c) He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and

(d) He shall not leave the territory of India without the prior permission of the Court.

(e) He shall surrender passport, if any, held by her.

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

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

The petitions stand accordingly disposed of.

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

Ajay Kumar ....Petitioner.

Vs.

Bhakra Beas Management Board (BBMB) and others .....Respondents.

CWP No.: 7870 of 2012
Reserved on: 05.04.2018
Date of Decision: 18.04.2018

Constitution of India, 1950- Articles 14 and 16- Right to be considered for promotion to higher post subject to eligibility and being in zone of consideration, is a fundamental right of an employee under Article 16. (Para-6 to 8)

Bhakra Beas Management Board Class-III and IV Employees (Recruitment and Condition of Service) Regulations, 1994- 'Promotion' to post of 'Foreman all trades' from feeder categories of 'Welder Grade-I' and 'Crane Operator Grade-I' – Petitioner was 'Welder Grade-I' whereas respondents No.4 to 7 'Crane Operators Grade-I' – Petitioner though senior to respondents No.4 to 7 was 'not considered' for promotion to post of 'foreman all trades' on ground that post of

'foreman all trade' was not vacated by person belonging to Welder Grade-I- Held- Regulations governing promotion to post of foreman all trades do not provide any quota for different feeder categories in which they are to be promoted to said post- Further, respondents No.4 to 7 were found promoted against vacancies vacated by persons belonging to other trades other than Crane Operator Grade-I- Held- Petitioner had a right to be considered for promotion before respondents No.4 to 7- Writ Petition allowed with direction to consider and confer promotion to petitioner against post of 'foreman all trades' from date when respondents No.4 to 7 were promoted.

(Para-14 and 15)

Cases referred:

Ajit Singh and others (II) Vs. State of Punjab and others, (1999) 7 Supreme Court Cases 209
Badrinath Vs. Government of Tamil Nadu and others, (2000) 8 Supreme Court Cases 395
Union of India and others Vs. Sangram Keshari Nayak, (2007) 6 Supreme Court Cases 704
Hardev Singh Vs. Union of India and another, (2011) 10 Supreme Court Cases 121
Major General H.M. Singh VSM Vs. Union of India and another, (2014) 3 SCC 670

For the petitioner:	Mr. Deven Khanna, Advocate, vice Mr.Manish Sharma, Advocate.
For the respondents:	Mr. N.K. Sood, Senior Advocate, with Mr. Aman Sood, Advocate, for respondents No. 1 to 3. Mr. Anoop Rattan, Advocate, for respondents No. 4 to 7. Mr. M.K. Kapoor, Additional Superintending Engineer, BBMB, is present alongwith the record.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

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

"(i) To consider the case of promotion of present petitioner as Foreman from the date earlier to the promotion of respondents No. 4 to 7 vide order dated 28.12.2011 (Annexure P-2);

(ii) The petitioner may be held entitled to all consequential benefits like arrears of salary and seniority as Foreman w.e.f. the date prior to the promotion of respondents No. 4 to 7 vide order dated 28.12.2011 (Annexure P-2);

(iii) That any other relief deemed fit and proper in the facts and circumstances of the case may also be granted."

2. Petitioner joined the services of the respondent-Board as Welder Grade-II on 13.08.1993. He was promoted as Welder Grade-I w.e.f. 12.10.1998. Respondents No. 4 to 7 joined the respondent-Board as Crane Operators Grade-I on 14.10.1994. Respondent-Board has framed Bhakra Beas Management Board Class III &IV Employees' (Recruitment & Conditions of Service) Regulations, 1994. As per these Regulations, there is post of "Foreman all Trades", which is filled up 33% by way of direct recruitment from amongst three year diploma holders in specified technical trade and 67% by way of promotions from respective trades, which so stand mentioned in the said Regulations. These Regulations are appended with the petition as Annexure P-1, perusal thereof demonstrates that the post of Welder Grade-1 as well as Crane Operator Grade-1 are feeder category posts for promotion to the post of "Foreman all Trades". As per the Regulations, Welder Grade-1 becomes eligible for promotion to the post of "Foreman all Trades" after completion of eight years service, whereas Crane Operator Grade-1 gains eligibility after putting in twelve years service. As already mentioned above, petitioner was promoted as Welder Grade-1 w.e.f. 12.10.1998. Thus, after completion of eight years of service, he became eligible for promotion to the post of "Foreman all Trades" w.e.f. 12.10.2006. On the other hand, private respondents, who were appointed as Crane Operators Grade-1 on 14.10.1994 gained eligibility for promotion to the post of Foreman all Trades after putting in twelve years service as Crane

Operator Grade-1 w.e.f. 14.10.2006. Grievance of the petitioner is that despite his having gained eligibility before the private respondents, promotion to the post of Foreman Grade-1 vide impugned office order Annexure P-2, dated 28.12.2011, private respondents were promoted to the post in issue ignoring his seniority, which act of the respondents, as per the petitioner, was in violation of the 1994 Regulations, as also arbitrary and illegal, as the petitioner has been denied promotion for no fault of his, because it was not the case of the respondent-Board that the petitioner was not eligible for promotion to the post in issue. It is in this background that the petitioner has filed the writ petition praying for the reliefs already mentioned above.

3. Respondent-Board though has not disputed the factual matrix of the case. However, they have justified their act on the ground that as per the 1994 Regulations, the promotional post was "Foreman all Trades" and feeder category from which promotion was to be made comprised of various Trades, therefore, promotions were made by the Board not only on the basis of seniority of eligible candidates, but by also taking into consideration that all Trades were equally represented for the purpose of promotion.

4. I have heard learned counsel for the parties and have also gone through the pleadings.

5. It is settled law that though an employee does not has a fundamental right for promotion, however, he has a fundamental right of being considered for promotion.

6. In ***Ajit Singh and others (II)*** Vs**.** ***State of Punjab and others***, (1999) 7 Supreme Court Cases 209, Hon'ble Supreme Court has held as under:

> *".....Articles 14 and 16(1) : is right to be considered for promotion a fundamental right 22. Article 14 and Article 16(1) are closely connected. They deal with individual rights of the person. Article 14 demands that the "State shall not deny to any person equality before the law or the equal protection of the laws". Article 16(1) issues a positive command that "there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State".*
>
> *It has been held repeatedly by this Court that clause (1) of Article 16 is a facet of Article 14 and that it takes its roots from Article 14. The said clause particularises the generality in Article 14 and identifies, in a constitutional sense "equality of opportunity" in matters of employment and appointment to any office under the State. The word "employment" being wider, there is no dispute that it takes within its fold, the aspect of promotions to posts above the stage of initial level of recruitment. Article 16(1) provides to every employee otherwise eligible for promotion or who comes within the zone of consideration, a fundamental right to be "considered" for promotion. Equal opportunity here means the right to be "considered" for promotion. If a person satisfies the eligibility and zone criteria but is not considered for promotion, then there will be a clear infraction of his fundamental right to be 41 considered" for promotion, which is his personal right. "Promotion" based on equal opportunity and "seniority" attached to such promotion are facets of fundamental right under Article 16(1).*
>
> *23. Where promotional avenues are available, seniority becomes closely interlinked with promotion provided such a promotion is made after complying with the principle of equal opportunity stated in Article 16(1). For example, if the promotion is by rule of "seniority-cum-suitability", the eligible seniors at the basic level as per seniority fixed at that level and who are within the zone of consideration must be first considered for promotion and be promoted if found suitable. In the promoted category they would have to count their seniority from the date of such promotion because they get promotion through a process of equal opportunity. Similarly, if the promotion from the basic level is by selection or merit or any rule involving consideration of merit, the senior who is eligible at the*

basic level has to be considered and if found meritorious in comparison with others, he will have to be promoted first. If he is not found so meritorious, the next in order of seniority is to be considered and if found eligible and more meritorious than the first person in the seniority list, he should be promoted. In either case, the person who is first promoted will normally count his seniority from the date of such promotion. (There are minor modifications in various services in the matter of counting of seniority of such promotees but in all cases the seniormost person at the basic level is to be considered first and then the others in the line of seniority.) That is how right to be considered for promotion and the "seniority" attached to such promotion become important facets of the fundamental right guaranteed in Article 16(1).

Right to be considered for promotion is not a mere statutory right.

24. The question is as to whether the right to be considered for promotion is a mere statutory right or a fundamental right.

25. Learned Senior Counsel for the general candidates submitted that in Ashok Kumar Gupta v. State of U.P. ((1997) 5 SCC 201 : 1997 SCC (L&S) 1299) it has been laid down that the right to promotion is only a "statutory right" while the rights covered by Articles 16(4) and 16(4-A) are "fundamental rights". Such a view has also been expressed in Jagdish Lal (Jagdish Lal v. State of Haryana, (1997) 6 SCC 538 : 1997 SCC (L&S) 1550) and some other latter cases where these cases have been followed. Counsel submitted that this was not the correct constitutional position.

26. In this connection our attention has been invited to para 43 of Ashok Kumar Gupta ((1997) 5 SCC 201 : 1997 SCC (L&S) 1299). It reads as follows : (SCC p. 239)

"43. It would thus be clear that right to promotion is a statutory right. It is not a fundamental right. The right to promotion to a post or a class of posts depends upon the operation of the conditions of service. Article 16(4-A) read with Articles 16(1) and 14 guarantees a right to promotion to Dalits and Tribes as fundamental right where they do not have adequate representation consistently with the efficiency in administration. ... before expiry thereof (i.e. 5 years rule), Article 16(4-A) has come into force from 17-6-1995. Therefore, the right to promotion continues as a constitutionally guaranteed fundamental right."

A similar view was expressed in Jagdish Lal (Jagdish Lal v. State of Haryana, (1997) 6 SCC 538 : 1997 SCC (L&S) 1550) and followed in some latter cases. In the above passage, it was laid down that promotion was a statutory right and that Articles 16(4) and 16(4-A) conferred fundamental rights.

27. In our opinion, the above view expressed in Ashok Kumar Gupta ((1997) 5 SCC 201 : 1997 SCC (L&S) 1299) and followed in Jagdish Lal (Jagdish Lal v. State of Haryana, (1997) 6 SCC 538 : 1997 SCC (L&S) 1550) and other cases, if it is intended to lay down that the right guaranteed to employees for being "considered" for promotion according to relevant rules of recruitment by promotion (i.e. whether on the basis of seniority or merit) is only a statutory right and not a fundamental right, we cannot accept the proposition. We have already stated earlier that the right to equal opportunity in the matter of promotion in the sense of a right to be "considered" for promotion is indeed a fundamental right guaranteed under Article 16(1) and this has never been doubted in any other case before Ashok Kumar Gupta ((1997) 5 SCC 201 : 1997 SCC (L&S) 1299) right from 1950."

7. In ***Badrinath*** Vs. ***Government of Tamil Nadu and others***, (2000) 8 Supreme Court Cases 395, Hon'ble Supreme Court has held as under:

"47. Every officer has a right to be considered for promotion under Article 16 to a higher post subject to eligibility provided he is within the zone of consideration. But the question is as to the manner in which his case is to be considered. This aspect is a matter of considerable importance in service jurisprudence as it deals with 'fairness' in the matter of consideration for promotion under Article 16. We shall therefore refer to the current legal position."

8. Hon'ble Supreme Court in ***Union of India and others*** Vs. ***Sangram Keshari Nayak,*** (2007) 6 Supreme Court Cases 704 has held as under:

"11. Promotion is not a fundamental right. Right to be considered for promotion, however, is a fundamental right. Such a right brings within its purview an effective, purposeful and meaningful consideration……."

9. Hon'ble Supreme Court in ***Hardev Singh*** Vs. ***Union of India and another***, (2011) 10 Supreme Court Cases 121 has held as under:

"17. It cannot be disputed that no employee has a right to get promotion; so the appellant had no right to get promotion to the rank of Lieutenant General but he had a right to be considered for promotion to the rank of Lieutenant General and if as per the prevailing policy, he was eligible to be promoted to the said rank, he ought to have been considered. In the instant case, there is no dispute to the fact that the appellant's case was duly considered by the SSB for his promotion to the rank of Lieutenant General."

10. In ***Major General H.M. Singh VSM*** Vs. ***Union of India and another***, (2014) 3 SCC 670, Hon'ble Supreme Court has held as under:

"28. The question that arises for consideration is, whether the non-consideration of the claim of the appellant would violate the fundamental rights vested in him under Articles 14 and 16 of the Constitution of India. The answer to the aforesaid query would be in the affirmative, subject to the condition that the respondents were desirous of filling the vacancy of Lieutenant-General, when it became available on 1.1.2007. The factual position… he most definitely had the fundamental right of being considered against the above vacancy, and also the fundamental right of being considered against the above vacancy, and also fundamental right of being promoted if he was adjudged suitable. Failing which, he would be deprived of his fundamental right of equality before the law, and equal protection of the laws, extended by Article 14 of the Constitution of India. We are of the view that it was in order to extent the benefit of the fundamental right enshrined under Article 14 of the Constitution of India, that he was allowed extension in service on two occasions, firstly by the Presidential Order dated 29.2.2008, and thereafter, by a further Presidential Order dated 30.5.2008…

30. Besides the above, we are also of the considered view, that consideration of the promotional claim of the seniormost eligible officer, would also fall in the parameters of the rule providing for extension, if the exigencies of service so require. It would be a sad day if the armed forces decline to give effect to the legitimate expectations of the highest ranked armed forces personnel. Specially when blame for delay in such consideration rests squarely on the shoulders of the authorities themselves. This would lead to individual resentment, bitterness, displeasure and indignation. This could also undoubtedly lead to outrage at the highest level of the armed forces. Surely, extension of service, for the purpose granted to the appellant, would most definitely fall within the realm of Rule 16-A of the Army Rules, unless of course, individual resentment, bitterness, displeasure and indignation, of army personnel at the highest level is of no concern to the authorities. Or alternatively, the authorities would like to risk outrage at the highest level, rather than doing justice to a deserving officer. Reliance on Rule 16-

A, to deprive the appellant of promotion, to our mind, is just a lame excuse. Accordingly, extension in service granted to the appellant, for all intents and purposes, in our considered view, will be deemed to satisfy the parameters of exigency of service, stipulated in Rule 16-A of the Army Rules.

31. .....This because of denial of due consideration to the appellant, who was the seniormost eligible serving Major-General, as against the claim of others who were junior to him. And specially when the respondents desired to fill up the said vacancy, and also because the vacancy had arisen when the appellant still had 14 months of remaining Army service. Surely it cannot be overlooked that the Selection Board had singularly recommended the name of the appellant for promotion, out of a panel of four names. In such an eventuality, we would have no other alternative but to strike down the action of the authorities as being discriminatory and violative of Article 16 of the Constitution of India."

11. It is not in dispute that the promotional post in issue is a non-selection post and is to be filled in on the basis of seniority-cum-merit, as is also evident from the reply so filed by the respondents. At this stage, it is pertinent to point out that out of four private respondents, Raman Kumar and Pawan Kumar have already superannuated during the pendency of this petition.

12. When it comes to promotion to a non-selection post, the principle which governs the field is that promotion is to be made on the basis of seniority, subject to rejection of an unfit candidate.

13. Coming to the facts of this case, the respondent-Board has tried to justify its act of not promoting the petitioner against the post of "Foreman all Trades" when the private respondents, who acquired eligibility after him, were considered and promoted to the said post on the ground that as per the Regulations which governs promotion, because the promotion had to be made from respective Trades from the feeder categories mentioned therein, therefore, the petitioner could have been promoted only if there was a post of Foreman all Trades vacated by a person, who was from the same Trade, as the petitioner. In other words, as per the respondent-Board, had the post of "Foreman all Trades" being vacated by a person who was promoted as such from Welder Grade-1, then the petitioner was eligible for promotion to the said post.

14. In my considered view, there is no merit in the contention of the respondent-Board. This is for the reason that the Regulations which govern promotion to the post of Foreman all Trades do not provide any quota for different categories which find mention therein which are feeder categories for promotion to the post of Foreman all Trades. Even otherwise, it is well settled law that when there are more than one sources of recruitment which also includes promotion to a post in issue, then after persons are appointed to that particular post from various sources, they lose their birth mark. Now incidentally, though on one hand the stand of the respondent-Board is that the petitioner was denied promotion because there was no vacancy of Foreman all Trades vacated by a person who was promoted to the said post from the category of Welder Grade-1, but when we peruse the Order vide which the private respondents were promoted to the post(s) in issue, the same demonstrates that private respondents, who otherwise belonged to the feeder category of Operators Grade-1 were promoted against the vacant post of Foreman Special Instrument Repair, Foreman Special Rigging, Foreman Penstock and Foreman Tractor Repair, respectively. This in fact demolishes the very edifice of the case of the respondent-Board, because the promotion order of the private respondents is self speaking that it is not as if promotions from various feeder categories to the post of Foreman all Trades were made only against "respective Trades" Therefore, in my considered view, act of the respondent-Board of denying promotion to the petitioner when persons like the private respondents were promoted to the post of Foreman all Trades, ignoring the fact that the petitioner had eligibility to be promoted to the post of "Foreman all Trades", before private respondent is arbitrary, discriminatory and violative of fundamental right of consideration for promotion of the petitioner.

15. Accordingly, this writ petition is allowed and the respondent-Board is directed to consider and confer promotion to the petitioner against the post of Foreman all Trades as from the date when the private respondents were promoted to the said posts and in the seniority list place the petitioner above the private respondents. It is clarified that the petitioner shall be entitled to deemed promotion, with benefits, which shall also be deemed and actual benefits including promotional and monetary shall accrue upon the petitioner as from the date of passing of this judgment.

16. Petition stands disposed of in above terms. Miscellaneous applications, if any, also stand disposed of.

****

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

Arshad Ahmed (since deceased) through his legal heirs
.....Appellant/ Plaintiff.

Versus

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

RSA No. 25 of 2005 along
with RSA No. 49 of 2005.
Reserved on : 7th April, 2018.
Decided on : 18th April, 2018.

Specific Relief Act, 1963- Section 34- Suit for declaration – **Himachal Pradesh Nautor Land Rules, 1968**- Rules 24 and 25- Land in suit granted to plaintiff by State as nautor on 21.5.1977 with rider that grantee was not competent to sell it for fifteen years- Plaintiff contending that on complaint of defendants No.2 and 3, Deputy Commissioner cancelled grant on 21.4.1994 after seventeen years without holding inquiry nor heard vendees, defendants No.4 and 5 – Plaintiff challenging order of cancellation of grant- Contesting defendants resisted suit on ground that period of fifteen years was enhanced to twenty years and grant was rightly cancelled- Vendees raised plea of bona fide purchasers – Suit dismissed by trial court- Plaintiff and vendees filing appeal, which were also dismissed by Appellate Court- Regular Second Appeal – Appellant contending that DC not being 'commissioner' was not competent to cancel grant- Held - In view of Rules 24 and 25 of H.P. Nautor Land Rules Deputy Commissioner had jurisdiction to recall/cancel grant – Statutory provisions duly complied with before order of cancellation of grant- Suit rightly dismissed- Judgments and decrees of lower courts upheld. (Para-13 to 15)

Case referred:
Mangheru Etc. vs. The State of Himachal Pradesh & another, AIR 1982 HP 1

For the Appellant(s):	Mr. Prashant Sharma, Advocate vice to Mr. Rajiv Jiwan, Advocate.
For Respondent No.1:	Mr. Mr. Hemant Vaid, Addl. A.G.
For Respondents No.2 &3:	Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Since, both the aforesaid appeals stand directed against a common judgment, hence, they are being disposed of by a common verdict.

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

3. Briefly stated the facts of the case are that the plaintiff instituted a suit for declaration and permanent injunction against the respondents. It was alleged by the plaintiff that he was owner in possession of suit land comprised in khasra No.839/780 min, 830/78 min, new khasra Nos. 162 and 163, measuring 352.10 sq. decimeters. It has been pleaded that the plaintiff applied for the grant of Nautor land as landless persons and he was granted land measuring 5.1 bighas by Tehsildar vide his order dated 21.5.1977. The plaintiff was put in possession, who become the owner of the land. The suit land was not to be sold for a period of 15 years. A revision petition was filed by defendants No.2 and 3 after 17 years of grant before Deputy Commissioner, who vide his order of 21.04.1994, set aide the order of grant without conducting any enquiry. Defendants No. 4 and 5 to whom land was sold by plaintiff were never heard by the Deputy Commissioner and as the order passed by the Deputy Commissioner was illegal, the suit is liable to be decreed.

4. The defendants contested the suit and filed separate written statements. Defendant No.1, State of H.P. in its written statement has taken preliminary objections inter alia maintainability, jurisdiction, valuation etc. On merits, they pleaded that the condition of sale stood raised from 15 years to 20 years, and therefore, the sale in favour of defendants Nos. 4 and 5 was contrary to the scheme. It was pleaded that the order passed by Deputy Commissioner was legal and as such the grant was rightly cancelled.

5. Defendants No. 2 and 3, in their written statement pleaded that the grant was rightly cancelled and sale in favour of defendants No.4 and 5 was wrong, and, therefore, the suit was liable to be dismissed.

6. Defendants No.4 and 5, who purchased the suit land from the plaintiff pleaded that they purchased the land after valid enquiry and a valid sale deed was executed in their favour, and, as such, the suit is liable to be decreed.

7. The plaintiff filed replication to the written statement(s) of the defendant(s), wherein, he denied the contents of the written statement(s) and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the order dated 21.4.1994 passed by the Deputy Commissioner, Bilaspur is wrong, illegal and without jurisdiction, as alleged?OPP.
2. Whether the plaintiff is entitled to the relief of permanent prohibitory injunction, as prayed for? OPP.
3. Whether the present suit is not maintainable, as alleged?OPD-1.
4. Whether this Court has no jurisdiction to entertain and try this suit, as alleged?OPD-1.
5. Whether the suit has not been properly valued for the purpose of court fee and jurisdiction, as alleged? OPD-1.
6. Whether the plaintiff has sold a part of the suit land to defendants No.4 and 5, as alleged, if so, to what effect?OPP.
7. Relief.

9. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiff/appellant herein. In appeals, preferred therefrom by the plaintiff/appellant herein as also by defendant No.4 Bimla, before, the learned First Appellate Court, the latter Court dismissed both the appeals, and, affirmed the findings recorded by the learned trial Court.

10. Now the plaintiff/appellant herein, now substituted by his legal heirs, has instituted the instant Regular Second Appeals, before, this Court, wherein he assails the findings, recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeals came up for admission, this Court, on 24.06.2005, admitted the appeals instituted by the plaintiff/appellant, against, the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial question of law:-

> (21) Whether the learned Courts below have gravely erred in holding that the Deputy Commissioner had jurisdiction to entertain a revision petition under paragraph 9-A of H.P. Grant of Nautor Land to Landless Persons and other Eligible Persons Scheme, 1975 against the settled position of law as laid down by this Hon'ble Court in CWP No.362 of 1995 captioned Nant Ram and others versus State of H.P. and others, 2003 SLC (II) page 205 while interpreting the aforesaid scheme?

Substantial question of Law No.1.

11. The learned counsel appearing, for, the appellant, has contended with vigour (i) that with this Court, making a pronouncement, upon, a case titled as Nant Ram & others vs. State of H.P. & others reported in 2003 (2), Shim. L.C. 205 qua apposite Rule 30, borne in the Himachal Pradesh Nautor Land Rules, 1968 as amended upto December, 1988, provisions whereof stand extracted hereinafter:-

> "**30. Revision** —(1) The Financial Commissioner may at any time call for the record of any case pending before, or disposed off by any officer subordinate to him.
>
> (2) The Commissioner may at any time call for the record of any case pending before or disposed off by any officer subordinate to him.
>
> (3) If, in any case, in which the Commissioner has called for the record, he is of the opinion that the proceeding taken order made should be modified or reversed, he shall report the case with his opinion thereon for the orders of the Financial Commissioner.
>
> (4) The Financial Commissioner may in any case called for by himself under sub rule (I) or reported to him under sub-rule (iii) pass such order as he thinks fit.
>
> Provided that he shall not under this rule pass any order reversing or modifying any proceedings or orders of the subordinate Revenue Officer without giving the parties concerned an opportunity of being heard.

solitarily empowering, the Financial Commissioner to render a revisional order vis-a-vis recalling, of, grant of land by way of nautor vis-a-vis the grantee, (ii) hence, any exercise, of, revisional jurisdiction, by the Deputy Commissioner concerned, under the mandate embodied in paragraph 9-A of the H. P. Grant of Nautor Land to Landless Persons and other Eligible Persons Scheme, 1975, (hereinafter referred to as the Scheme of 1975), hence wanting in legal efficacy, (iii) besides extantly with the Deputy Commissioner concerned, hence, also, while under Ex. PE rescinding the grant, his rather deriving powers, from, para 9-A of the Scheme, thereupon, his verdict is also rendered to be wanting in jurisdiction, (iv) and the order making the apposite cancellation of grant being vitiated, (v) thereupon, he reiteratedly contends, with, hereat also alike therewith revisional jurisdiction being inaptly exercised by the Deputy Commissioner, purportedly under paragraph 9-A, of, the Scheme of 1975, whereas, the aforesaid jurisdiction, is solitarily, under Rule 30 of the Himachal Pradesh Nautor Land Rules, 1968, rather vested vis-a-vis the Financial Commissioner, hence, with hereat, an alike factual scenario emerging, vis-a-vis the pronouncement recorded by this Court, in Nant Ram's case (supra), empowers this Court, to, answer the substantial question of law vis-a-vis the appellant.

12. Before proceeding to dwell, upon, the applicability of the law laid down, by this Court, in Nant Ram's case (supra), it is to be borne in mind, (a) that paragraph 9-A, occurring, in the apposite Scheme of 1975, standing promulgated in the year 1975, apparently, hence under apposite paragraph 9-A, the apt jurisdiction, for, validly making an order qua recall, of grant, hence vested in the Commissioner, after, his evidently meteing compliance(s), with, all the procedures laid therein. (b) Since, the phrase "Commissioner" is undefined in the apposite scheme, hence, for lack of phrase "Commissioner", being defined in the apposite scheme, (c) thereupon, it is to be concluded of import thereof, being vis-a-vis the designation, of, Deputy Commissioner, and, also the Deputy Commissioner concerned, falling within the ambit of parlance borne, by the coinage "Commissioner", occurring, in, paragraph 9-A, of, the apposite Scheme. However, hereat, the apt proceedings, for cancellation of the grant, rather occurred in the year 1994, whereat, hence, the amended provisions vis-a-vis the Nautor Land Rules, 1968 came into being w.e.f. December, 1988, (d) thereupon hence with prevalence, of, the aforesaid rules vis-a-vis, the, time of launching, of, extant proceedings, by the Deputy Commissioner concerned, (c) renders, the mandate enshrined therein, to, warrant an allusion thereto, besides the apt provisions borne therein, whereunder, the Deputy Commissioner, is, empowered to resume possession of land , provisions whereof occur in Rule 25 of H.P. Nautor Land Rules, are also enjoined to be alluded to, provisions where of stand extracted hereinafter:

> "25. Deputy Commissioner to pass orders regarding Resumption of possession-The Deputy Commissioner, may, on receipt of a report submitted to him under Sub-Rule (b) of the last foregoing rules, pass such orders as he deems fit after giving an opportunity to the person affected to be heard."

Moreover, the exercise, of, powers borne in the aforestated provisions, would assume an aura, of, validation, upon theirs evidently standing exercised, after compliance(s), being evidently meted by him vis-a-vis the mandate enshrined in Rule 24 of the H.P. Nautor Land Rules, provisions whereof stand extracted hereinafter:-

> "24. Report by the Range Forest Office regarding Defaulter to be called before resumption- When the Sub-Divisional Officer (Civil) is satisfied that a grantee has committed a breach of the conditions of his grant, he shall before ordering resumption under these rules, give the grantee an opportunity to appear and state his objections to the cancellation and resumption, and having recorded the statement, he may either (a) extend the period for the fulfillment of the conditions of the grant by one year for valid reasons to e recorded in writing or (b) recommend to the Deputy Commissioner that a longer extension be condoned with or without payment of penalty, or that the grant may be resumed."

Apparently, a close studied cumulative perusal, of, the aforesaid provisions, and, of Ex. PE, for hence discerning qua apposite statutory compliance(s) being evidently embodied therewithin, (i) makes disclosures that the Deputy Commissioner, while, exercising jurisdiction, for recalling the order granting land, by way nautor vis-a-vis grantee, his being enjoined to, prior thereto, hence, rather within, the ambit of Rule 24 of the H.P. Nautor Land Rules, elicit the apposite report(s), pointedly, from, the SDO concerned, (ii) nowat in consonance therewith, revelations occur therein qua apparent breaches being committed vis-a-vis the conditions, of patta, as issued by the competent authority vis-a-vis the grantee also qua the grantee, despite, his being ineligible for grant, and, his rather by practising proactive *suggetio falsi and suppresio veri*, hence, obtaining grant of nautor land. (iii), and, also echoings occur therein, qua evident meteings, of, aforesaid mandatory compliances by the Deputy Commissioner, especially preceding his, pronouncing Ex.PE, echoings whereof, are, not concerted to be wanting in efficacy, (c) nor the report(s) relied by him, are concerted to be belied, wherein, the apposite breaches, are, apparently unraveled. Consequently, for, lack of apposite onslaught(s) being cast, by the appellant vis-a-vis, apt evident breaches being made by the grantee, and, also qua the apt recitals borne therein, qua his hence being ineligible for the grant, (d) rather constrains a conclusion, of, per se the grant of nautor

land vis-a-vis the appellant hence wanting in efficacy, and, its grant vis-a-vis him, being a sequel of his actively committing vices of *suggestio falsi and supressio veri*.

13. Be that as it may, with, hence visibly hereat, for all the reasons aforestated, rather the mandate of Rule 25 of H.P. Nautor Land Rules, holding prevalence at the time, of, making of an apposite pronouncement, borne in Ex. PE, and, also compliances of mandates thereof, being apparently meted, (a) thereupon, any nomenclatuing in Ex.PE, of, the Deputy Commissioner concerned, while making the apposite verdict, his exercising jurisdiction under paragraph 9-A, of, the apposite scheme of 1975, cannot be construed to be stripping him, of, jurisdiction bestowed upon him, under, the apt Rules, as were in force, at the apposite time, especially the ones' borne in Rules 24 and 25, (b) besides even if assumingly, paragraph 9-A of the apposite Scheme of 1975, is inaptly quoted in Ex.PE, to be the source of derivation, of, jurisdiction, of, recall, of grant, by the Deputy Commissioner, thereupon, also when as aforestated, it stands concluded, that, the designation 'Commissioner" occurring in paragraph 9-A of the apposite scheme, being not construable to be holding any import, of it bearing any connectivity with the designation, of, Financial Commissioner, (c) thereupon, this Court re-emphasisingly, makes a conclusion, of the Deputy Commissioner also falling, within, the connotation ascribable vis-a-vis phrase 'Commissioner', occurring, in Rule 9-A, (d) whereupon, the exercise of jurisdiction under Rule 9-A, by the Deputy Commissioner, in, his making a pronouncement, borne in Ex. PE, cannot be, concluded to be vitiated, even if assumingly, it was not in force and rather Rules 24, and 25 were in force, in contemporaneity vis-a-vis his making the relevant orders, of recalling the order of the apposite grant.

14. Be that as it may, the effect of the aforesaid conclusion, is of any purported, mis-nomenclaturing, in Ex. PE, of, the Deputy Commissioner, hence deriving his powers under Rule 9-A of the apposite Scheme of 1975, even if, it was not in prevalence thereat, being of no consequence, for the reason(s) (a) given any inapt reference therein, of the source of derivation, of, power by the Deputy Commissioner concerned, while, his making the apposite order, being subsumed, by his evidently meteing compliance(s), with the mandate of Rules 24 and 25, of the Nautor Land Rules, rules whereof were thereat prevalent, and, also held clout, (b) Source, of derivation(s), of power(s) by the Deputy Commissioner concerned, is legally more worthwhile, than, any misnomenclaturing in Ex.PE, of, the apt source wherefrom, the jurisdiction of recall, hence stood assumed, more so, when the source is embedded in the apt thereat applicable rules, vires whereof remains intact, hence is an undefiled source.

15. Furthermore, the effect, of, the aforesaid inference, are, (a) of this Court hence being inclined, to not, apply hereat the pronouncement recorded by a co-ordinate Bench of this Court in Nant Ram's case (supra), reported in 2003(2) Shim. L.C. 205, rendered, upon, a fragmentary reading(s) of Rule 30, whereunder the power of revision, is solitarily vested in Financial Commissioner, (ii) more so, when in Nant Ram's case (supra), it stands, concluded of the revisional jurisdiction, as exercised therein by the authority concerned, being not exerciseable by it, hence it concomitantly concluded of the order of recall being vitiated. (iii) Emphasisingly also the pronouncement made by a co-ordinate bench of this Court in Nant Ram's case (supra), arises, for reasons aforesaid, from misreading(s) of applicability, at the relevant time, of the apposite rules, and, also arises from, thereupon, its relegating into insignificance, of apt redundancy(s), of, mis-nomenclaturing, of, derivation of powers by the authorities concerned, in resuming or recalling the grant, (iv) whereupon hence rather it ipso facto inaptly concluded, qua hence the source, of, derivation of powers, hence also becoming eroded, (v) thereupon, rather its emphasising upon the mis-nomenclaturing, in the apt orders, the source of derivation, of the apt powers, appears to lead the coordinate bench, of, this Court, conclude, of, hence the apposite order being vitated.(vi), whereas, when the exercise, of, powers hereat, are, rested upon evident compliance(s) being demonstrably meted, with, thereat applicable provisions, especially vis-a-vis the one(s) in operation in contemporaneity vis-a-vis the renditions, of, apposite orders of recall. (vii) AND hence visibly, thereupon, rather the source of derivations, of, powers being intact, contrarily the co-ordinate bench of this Court, has rather meted reverence, to, Rule 30, which

though solitarily vests the jurisdiction, of, revision vis-a-vis the Financial Commissioner, (viii) yet with the Deputy Commissioner, hereat rather validly making the apposite order of recall, upon his exercising powers derived from a tenanble source, thereupon, his verdict is unvitiated, (ix) especially when the powers exercised by him, though, is reflected to arise from a purportedly misnomenclatured source, misnomenclatruring whereof is rendered redundant, given the existence thereat of a valid source, of, derivation, of, powers, source whereof is borne in Rules 24 and 25 of the H.P. Nautor Land Rules, AND also when compliance(S), wherewith, were, meted in the strictest terms, by the authority, while its pronouncing Ex.PE. Consequently, this Court, dis-concurs with the pronouncement recorded, by a co-ordinate bench of this Court, in Nant Ram's case (supra).

16. The learned counsel appearing, for the appellant, has contended that with the Full Bench, of, this Court, in, paragraph No.21, of, case titled as ***Mangheru Etc. vs. The State of Himachal Pradesh & another***, reported in ***AIR 1982 HP* 1**, paragraph No.21 whereof stand extracted hereinafter, hence making conclusion(s) (i) of the apposite powers being exerciseable, within, a reasonable time, hence, with much time elapsing since the grant of nautor land, thereupon, infraction occurring vis-a-vis the mandate of paragraph No.21, of Mangheru's case (supra). Paragraph No.21 of Mangheru's case supra reads as under:-

> "21. Now, there is no dispute that the peculiar facts and circumstances of each case should determine 'a reasonable time'. For example, if a grantee has suppressed material facts or has obtained the allotment by playing a fraud or a deception 'the reasonable time' will have to be determined with reference to the time when the fraud or deception came to light. Various cases where a party had concealed material facts and succeeded in obtaining the allotment have come to our notice. We cannot allow a party to reap the fruits of his deception or fraud simply on the ground that it had successfully kept them concealed over a sufficient long period of time. However, one the fraud is uncovered then action is required to be taken within a reasonable time thereafter. Article 56 of the Limitation Act lays down a limitation of three years from the date of the knowledge of fraud, and we are of the opinion that it will be reasonable to lay down that ordinarily within a period of three years from the date of knowledge of fraud the suo motu powers can be exercised."

However, the aforesaid submission is erroneously made, (i) as therein it is encapsulated, that, the reasonable time wherewithin the apposite orders of recall, can be validly made by the authority concerned, being fathomable from the time when, the apposite fraud, and, deception comes to light. Since, the apposite fraud and deception, in the instant case, came to light, only some time prior to the recording of Ex.PE, hence, the factum of apt powers, being under Ex.PE, henceexercised with an inordinate delay, is inconsequential, also hence no support can be derived, from the aforesaid decision of the Full Bench of this Court, rendered in Mangheru's case (supra).

17. The above discussion, unfolds, that the conclusions as arrived by the learned first Appellate Court as also by the learned trial Court, being based, upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court, have not excluded germane and apposite material from consideration. Accordingly, the substantial question of law is answered in favour of the defendant(s)/respondent(s) and against the appellant(s)/plaintiff(s).

18. In view of the above discussion, there is no merit in the present Regular Second Appeal, and, it is dismissed accordingly. In sequel, the judgements and decrees rendered by both the learned Courts below are affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

Gauri Dutt & Ors. .....Petitioners/Plaintiffs.
Versus
Sewak Ram .....Respondent/defendant.

CMPMO No. 155 of 2017
Reserved on : 12th April, 2018
Date of Decision: 18th April, 2018.

Code of Civil Procedure, 1908- Order XXXIX Rules 1 and 2- Temporary Injunction- Plaintiff alleging that his predecessor 'H' being non-occupancy tenant had become owner of suit land under H.P. Tenancy and Land Reforms Act- Revenue entries showing defendant as owner and consequent sale of such land by him, if any, was void – Plaintiff seeking temporary injunction against interference of defendant and also for restraining him from creating charge over land – Trial court dismissed his application – Appeal also dismissed – Petition – Held- Revenue entries prior to 1976 consistently show 'H' as non-occupancy tenant in suit land – Presumption of truth attached with these entries is not rebutted simply because 'H' never assailed such sale deeds during his life time- Principle of estoppel has not applicability- Petition allowed- Parties directed to maintain status quo qua nature and possession with respect to suit land during pendency of suit. (Paras-4 to 6)

For the Petitioners: Mr. Sudhir Thakur, Advocate.
For the Respondent: Mr. P.S. Goverdhan, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiffs/petitioners herein instituted, a suit for declaration, and, for permanent prohibitory injunction, and therein claimed rendition, of, a declaratory decree (a) of the revenue records vis-a-vis the suit land, as, prepared after 1975-76 being wrong, and, illegal, and, the sanctioning of mutation No. 475 of 24.03.1976 being also declared as null and void (b) besides claimed rendition of a decree vis-a-vis sale deed executed qua khasra No. 39, measuring 8-6 bighas and khasra No.45/40 min, measuring 19-19 bighas, total 28-5 bighas, being quashed, on the ground, that, the predecessor-in-interest of the plaintiffs, one Hans Raj being immediately, on coming into force of Himachal Pradesh Tenancy and Land Reforms Act, 1972, rather standing entitled to automatic conferment of proprietary rights, thereupon, (c) accural of rights whereof ensued vis-a-vis him, given his, in the jamabandi(s) prior thereto, hence, standing recorded therein as gair maurusi, reiteratedly thereupon, the sale deeds, if any, executed vis-a-vis the aforesaid khasra numbers, being declared to be null, and, void, and, the apposite mutation in consonance therewith bearing No. 475 of 24.03.1976 , being also declared to be wrong, illegal, null and void.

2. The defendant, resisted, the suit of the plaintiff and claimed, that, under a relinquishment deed, the father of the defendant Shri Sada Nand, rather relinquishing in favour of the defendant/respondent herein, 1/6 share in the land bearing Khata/Khatauni No.1/1 to 1/9, total kitas 40 measuring 352-10 bighas, qua which mutation No.471 of 21.03.1966 stood attested. Since, the Assistant Collector 1st Grade, Kasauli, in case No.21A/9 of 2012, under, orders recorded on 27.08.2014, upon apposite motions made before him, by the concerned, hence ordered for dismemberment of the suit land, thereupon, the application, cast under the provisions of Order 39, Rules 1 and 2 of the CPC, instituted by the plaintiffs/petitioners herein, before, the learned trial, wherein, they claimed ad interim injunction, for restraining the defendant, from, causing any interference in, and, over the suit property, and, from making any

type of interference, dispossessing the applicants/petitioners, or creating any charge or loan over the suit land, or changing the nature of the suit land, and, from alienating the suit land, and, initiating partition proceedings on the basis of wrong, and, illegal entries in favour of the respondent/defendant till the decision of the suit, rather hence entailing dismissal. The learned trial Court, upon, considering the respective pleadings set up, by the parties, declined the relief to the petitioners herein/applicants. In an appeal carried therefrom, before the Appellate Court, the latter Court also proceeded to dismiss the appeal, and, recorded findings in affirmation vis-a-vis the order recorded by the learned trial Court. Being aggrieved, therefrom, the petitioners herein institute the instant petition.

3. Both the learned Courts below had, upon, applying vis-a-vis the germane material(s), hence, the trite triplicate tests, to be borne in mind, while deciding a application, cast under Order 39, Rules 1 and 2 of the CPC, tests whereof are comprised, in, (i) of a prima facie case existing, (ii) and no irreparable loss or injury being caused to the plaintiffs in case relief is declined and (c) balance of convenience being loaded vis-a- the plaintiffs/applicants, rather hence rendered findings adversarial vis-a-vis the plaintiffs. The anchor of the aforesaid dis-affirmative findings concurrently, recorded by both the learned Courts below qua the material on record, hence not justifying the affording of relief to the plaintiff, stood rested upon, (i) the factum of one Hans Raj, during, his life time not challenging the apposite sale deed, and, rather after 41 years elapsing therefrom, his successors rearing a challenge thereupon, (ii) hence, the plaintiffs being nowat estopped, to cast any challenge qua the validity of the sale deed. (iii) in making the aforesaid conclusion, both, the learned courts below, apparently slighted, the impact of the apposite sale deed, being, registered on 27.01.1976, however, prior thereto, the H.P. Tenancy and Land Reforms Act, rather coming into force, with statutory contemplation(s) occurring therein, vis-a-vis automatic bestowment, of proprietary rights, upon, Hans Raj, the vendee of the apposite sale deed. Nowat, hence, for, making a befitting conclusion, that whether the predecessor-in-interest of the plaintiffs, one Hans Raj, was, prior to coming into force of the Himachal Pradesh Tenancy and Land Reforms Act, hence, evidently recorded in the apposite jamabandis, to be gair maurusi, an allusion to the jamabandis, for the year 1951-52, 1955-56, 1958-59, 1963-64 and 1968-69, is imperative, (iv) allusion(s) thereto, denote, of reflections being held therewithin qua the predecessor-in-interest of the plaintiffs, being recorded, as gair maurusi vis-a-vis the suit khasra numbers. However, though the aforesaid reflection hence occurred, in jamabandis appertaining vis-a-vis the apposite reckonable period, especially the one immediately prior to coming into force of H.P. Tenancy and Land Reforms Act, whereupon, though hence Hans Raj stood prima facie entitled vis-a-vis automatic statutory conferment of proprietary rights qua the suit khasra numbers, (v) yet no apposite order of mutation, whereby, proprietary rights stood sanctioned in his favour, came to be attested by the Revenue Officer concerned, (vi) contrarily in the year 1976, he executed a sale deed vis-a-vis the vendors constituted therein. The learned Courts below, on anvil, of principle of estoppel, arising from, the plaintiffs' making a belated challenge vis-a-vis the validity, of, sale deed executed inter se their predecessor vis-a-vis the vendors constituted in the apposite sale deed, rather concluded of thereupon, the plaintiffs being baulked to espouse their claim, and, rather hence declined relief to the plaintiffs, (vii) estoppel whereof reiteratedly stood concluded to arise, from, a procrastinated period of 41 years hence elapsing since the execution of the sale deed, besides reiteratedly with the predecessor-in-interest of the plaintiffs, during, his life time never claiming automatic vestment of statutory proprietary rights vis-a-vis the suit khasra numbers, and, thereupon they concluded that the triplicate aforesaid trite tests, remaining unsatiated, hence, declined relief to the plaintiff.

4. This court, however, dis-concurs with the concurrent findings recorded by both the learned courts below, and, the reason for making dis-concurrence(s), is embodied in (a) of with prima facie the jamabandis appertaining, vis-a-vis the apt immediately prior to, hencecoming into force of H.P. Tenancy and land Reforms Act, and, theirs rather prima facie making a clear depiction(s) of, one Hans Raj, the predecessor-in-interest of the plaintiffs, being reflected as a gair maurusi vis-a-vis the suit khasra numbers, (b) thereupon, probative vigour thereof was enjoined to be imputed sanctity, (c) especially at the stage of any pronouncement

being made upon an application, cast under the provisions of Order 39, Rules 1 and 2 of the CPC, (d) conspicuously, when thereat the presumption of truth gathered by them remained uneroded, and, was erodable only upon apposite cogent, rebuttal evidence thereto, being adduced by the defendant, during, the course of progress of trial, of the suit (e) and also, with, the provisions of the Himachal Pradesh Tenancy and Land Reforms Act, coming into force, importantly prior to the execution of the apposite sale deed, and, when in contemporaneity thereof, the conferment of proprietary rights upon the predecessor-in-interest, of, the plaintiffs, namely, one Hans Raj, was, automatic, dehors no order of mutation being recorded by the Revenue Officer concerned, (f) thereupon, when the predecessor-in-interest, of the plaintiffs, hence, acquired automatic statutory proprietary rights vis-a-vis the suit kahsra numbers, and, with one Phoola Ram, Ghan Shayam and Sada Nand and Om Prakash, rather, subsequent hereto, executing a sale deed vis-a-vis him, vis-a-vis the same suit khasra numbers, (g) thereupon, any attraction, of, the principle of estoppel, and, the embargo of estoppel, for hence baulking the plaintiffs, to cast a challenge vis-a-vis the suit khasra numbers, sparked, by the predecessor-in-interest of the plaintiffs, during, his life time hence not making any challenge vis-a-vis the sale deed, and, a challenge rather being made belatedly after 41 years elapsing, since its execution, rather contrarily hence being, nowat, neither attractable nor its fettering effects, vis-a-vis no challenge being made vis-a-vis the validity, of the sale deed, was, enjoined to be encumbered upon plaintiffs. Predominantly, with, prima facie, the predecessor-in-interest, of, the plaintiffs, acquring, by operation of law, right, title or interest vis-a-vis the suit khasra numbers, rendered hence the vendors, of the apposite sale deed, to, be prima faice disempowered, to receive the sale consideration from him, and, to also execute a registered deed, of, conveyance with one Hans Raj. In sequel, the operation of or the applicability hereat of the principle of estoppel, by the courts below, is both, an erroneous, and, a fallacious approach, adopted by them, for forestalling relief upon the apposite application vis-a-vis the plaintiffs, and, also, hence, in the learned Courts below recording dis-affirmative findings vis-a-vis the afore extracted triplicate tests, governing the declining or affording of relief of ad interim injunction, apparently hence mis-manoeuvred themselves, besides visibly rendered both inapt besides insagacious verdicts.

5. Imminently, (a) the learned Appellate Court, has over emphasized upon the principle, of, estoppel, arising from a procrastinated challenge being made vis-a-vis the apposite sale deed, hence, has misdirected itself, whereas, the vigour of the aforeaid principle was both blunted, and, subsumed, by the preeminent principle, of , their being no estoppel against operation, of, law, and, of statutes, especially also, of, predominant prevalence, of statutes, carrying a concomitant, effect, of, hence disabling the vendors, of the apposite sale deed, to make its execution vis-a-vis one Hans Raj. (b) thereupon prima facie with the sale deed being vis-a-vis part, of, suit khasra numbers, hence, at its inception, rather being afflicted with a vice of fictitiousness, (c) whereupon also upon detections thereof, even, if belatedly, the suit may be prima facie maintainable.

6. Be that as it may, for not disturbing equities, till a pronouncement is made, upon, the apposite Civil Suit, it is deemed fit, just, and, appropriate, and, in the interest of justice, that the parties be directed to maintain status quo qua nature and possession of the suit land till the final disposal of the main suit, and, also the undivided nature of the suit property shall remain intact, till the final disposal of the suit. Consequently the instant petition is allowed and the impugned orders are set aside. In sequel, the plaintiffs'/petitioners' application, cast under the provisions of Order 39, Rules 1 and 2 CPC, is allowed, and, the parties are directed to, maintain status quo qua nature, and, possession of the suit land till the final disposal of the main suit, also, the undivided nature of the suit property shall remain intact, till the final disposal of the suit. The parties are directed to appear, before, the learned trial Court on 8th May, 2018. However, it is made clear that the observations made hereinabove shall have no bearings on the merits of the case. No order as to costs. All pending applications also stand disposed of . Records be sent back forthwith.

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

ICICI Lombard General Insurance Company Ltd. ....Petitioner.
Versus
Smt. Pammi Devi and others ...Respondents.

CMPMO No.: 264 of 2017.
Reserved on : 14.03.2018
Decided on: 18.04.2018.

Motor Vehicles Act, 1988- Section 166- **Code of Civil Procedure, 1908-** Section 151- Additional Evidence – Insurer filing an application for adducing additional evidence to prove that driving licence of driver was fake – Claims Tribunal dismissing application on ground that such evidence not relevant as insurer cannot avoid its liability qua third parties, even if licence is fake – Petition against- Held- Claims Tribunal pre-judged liability of insurer without adjudication- Effect of judgment of Apex Court, if any, in given case is to be seen at final stage - Application for additional evidence found not belated- Order of Claims Tribunal set aside and application of Insurer allowed. (Para-9)

For the petitioner : Mr. Jagdish Thakur, Advocate.
For the respondents : Respondents No. 1 and 2 *Ex parte*.
:M/s. B.S. Negi and Ashwani Negi, Advocates for respondent No. 3.
:Mr. Romesh Verma, Advocate, for respondent No. 4.

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 prayed for the following relief:-

> *"It is, therefore, respectfully prayed that this petition may very kindly be allowed and the impugned award dated 5.5.2017 passed by the learned Motor Accident Claims Tribunal, Kinnaur at Rampur Bushahr, District Shimla, H.P. in CMP No. 96-R/6 of 2017 in Case No. 111-R/2 of 2009, may very kindly be quashed and set aside thereby allowing the application filed by the petitioner to lead the additional evidence in support of its defence with respect to the driving licence of the driver or the Hon'ble Court may please to pass any such or further award which may be deemed just and proper in the facts and circumstances of the case."*

2. Case of the petitioner is that respondents No. 1 and 2 have filed a claim petition under Section 166 of the Motor Vehicles Act on the ground that deceased Rajesh Kumar, husband and son of respondents No. 1 and 2 respectively was travelling in a vehicle bearing Registration No. HP-02-3029 on 15.10.2009 when the said vehicle met with an accident near Nitther, resulting in death of Rajesh Kumar. According to the claimants, the accident took place on account of rash and negligent driving of driver, namely, Ram Sarar, who also died in the said accident.

3. The claim petition was contested by the present petitioner *inter alia* on the ground of maintainability as also on the grounds that the vehicle was being driven in violation of terms and conditions of the insurance policy.

4. Upon completion of pleadings, issues were framed by the learned Tribunal. Parties led their evidence. At that stage, the present petitioner could not lead evidence with respect to driving licence of the person who was driving the ill fated vehicle and when verification report with respect to driving licence was received in the second week of November, 2011, it was

found that the drivng licence was fake. In this background, an application was filed i.e. application dated 03.12.2011, Annexure P-3, under Section 151 of the Code of Civil Procedure by the present petitioner before the learned Motor Accident Claims Tribunal for grant of permission to lead additional evidence in support of its defence. This application was resisted by the claimants.

5. By way of impugned order dated 5.5.2017, the application so filed by the petitioner before the learned Tribunal has been dismissed by the learned Tribunal *inter alia* on the ground that in view of the case law laid by Hon'ble Supreme Court in Pepsu Road Transport Corporation v. National Insurance Company, 2013 AIR SCW 6505, even if the application filed by the present petitioner was allowed and even if the petitioner Insurance Company succeeded in proving that at the relevant time, deceased driver was not possessing valid driving licence, the company could not wriggle out of its liability to pay compensation to the third party.

6. Feeling aggrieved, the petitioner-Insurance Company has filed the present petition.

7. I have heard learned Counsel for the parties and gone through the impugned order as well as the pleadings of the respective parties.

8. A perusal of the application so filed by the petitioner praying for permission to lead additional evidence demonstrates that it intended to examine official witness from the office of RTO, Agra, UP to demonstrate that the driver of the ill fated vehicle, namely, Ram Saran was not possessing a valid driving licence, as the verification of driving licence of said Ram Saran so received demonstrated that driving licence was fake one. In the said application itself, it has been clearly mentioned that the officials witnesses were examined by the petitioner Insurance Company on 12.10.2011. This means that the application to lead additional evidence was not filed at a belated stage or with undue delay, as has been tried to portrayed by learned Counsel for the respondents before this Court. Further a perusal of the impugned order demonstrates that what weighed with the learned Tribunal was that even if the application of the petitioner was allowed and it succeeded in proving that the driving licence possessed by driver of ill fated vehicle in issue was a fake one, even then Insurance Company could not wriggle out from its liability to compensate the third party. In order to come to the said conclusion, learned Tribunal has relied upon the judgment of Hon'ble Supreme Court mentioned above. In my considered view, learned Tribunal could not have had dismissed the application so filed by the present petitioner to lead additional evidence on the ground that even if it succeeded in proving that the driving licence was fake, then also it could not wriggle out of its liability to compensate the third party. Returning such findings by the learned Tribunal on an application so filed to lead additional evidence, in my considered view, amounts to pre-judging of the issue of the liability of Insurance Company. Learned Tribunal erred in not appreciating that the effect of the judgment of the Hon'ble Supreme Court, referred to supra, was to be gone into by it only at the time of final adjudication of the claim petition. Not only this, as the application to lead additional evidence was not filed at a belated stage, it would have been in the interest of justice, had the same been allowed by the learned Tribunal and after taking the evidence on record, it thereafter could have had adjudicated upon all the issues including the issue of liability of the Insurance Company to indemnify the third party.

9. In view of above, this appeal succeeds. Impugned order dated 05.05.2017 passed by learned Motor Accident Claim Tribunal, Kinnaur at Rampur Bushahr is set aside and application so filed for leading additional evidence is allowed and learned Tribunal is directed to permit the petitioner/Insurance Company to lead additional evidence in support of its defence with regard to driving licence of the driver, subject to payment of cost of Rs.2,000/- which shall be paid by the petitioner to respondents/claimants No. 1 and 2.

With the aforesaid observations, the petition stands disposed of. Pending miscellaneous application(s), if any, also stand disposed of.

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

Mahavir ....Appellant.
Versus
State of H.P. ....Respondent.

Cr. Appeal No. 33 of 2016.
Reserved on : 11th April, 2018.
Date of Decision: 18th April, 2018.

Indian Penal Code, 1860- Section 307- Attempt to murder- On facts, accused found giving stab blow on stomach of victim – Injuries on his body were found corroborated by medical evidence – Accused got recovered knife - weapon of offence, pursuant to his disclosure statement – Accused was identified in Court by one of witnesses to whom he was previously known – Conviction proper – Appeal dismissed.

For the Appellant: Mr. Inderjeet Singh Narwal, Advocate.
For the Respondent: Mr. Hemant Vaid, Addl. A.G., with Mr. Y.S. Thakur, Dy. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal stands directed against the judgment rendered on 10.04.2015 by the learned Sessions Judge (Forest), Shimla, H.P. in Sessions trial RBT No. 34-S/7 of 2013, whereby, the learned trial Court, convicted the accused /appellant herein, for his committing an offence punishable under Section 307 of the IPC, and, sentenced him to undergo rigorous imprisonment for five years, and, to pay a fine of Rs.20,000/- and in default of payment of the fine amount, his further undergoing simple imprisonment for one year.

2. The facts relevant to decide the instant case are that the police was set in motion in pursuant to recording of statement of Jagdish Chand under Section 154 of the Cr.P.C., alleging that he is working in Shop No.3, situated at New Bus stand Tuti Kandi, Shimla as Salesman along with Chirag. On 30.04.2012, the complainant along with Chirag closed the outlets at about 10.30 p.m. and at that time one Anurag, who was working as security guard at ISBT, also joined them. They went o Local Bus Terminal and found that last bus towards Shimla town had already departed. As such, al of them started proceeding towards Shimla town on foot via Tutikandi crossing. At about 11.35 p.m., when they reach near RTO Office, he saw a car going towards Shimla, they signalled it to stop but the car did not stop and at the same time a white coloured vehicle car from Shimla side and stopped near him. The driver of the said vehicle came out and started kicking him by asking him why they were stopping the vehicles in the middle of the road. In the meanwhile, other occupants of the vehicle also came out and on seeing them, complainant and Chirag started running away, but the accused persons caught hold of Anurag and gave beatings to him. Thereafter, they boarded in the same vehicle and fled away from the spot. When the complainant and Chirag came towards Anurag, he while crying disclosed that the persons who gave beatings to him also stabbed him on the stomach. The blood was oozing out from the stomach of Anurag and the food pipe was also came out. He requested his maternal uncle to inform 108 Ambulance. After sometime, police Ambulance came to the spot and Anurag was brought to IGMC, Shimla. The accused persons, who gave beatings are not known to him and to Chirag. They also did not notice the number of the vehicle but he could recognize those persons by face. Neither he, nor Chirag sustained any injuries in this occurrence. Only Anurag sustained stab injuries on his stomach. Had the Chirag not been brought immediately tot he hospital, he would have died. On the aforesaid statement of the complainant, FIR was lodged in the police station concerned. Thereafter police completed all the codel formalities.

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

4. The accused stood charged by the learned trial Court, for, theirs committing offence(s) punishable under Sections 326, 307 read with Section 34 of the IPC. In proof of the prosecution case, the prosecution examined 18 witnesses. On conclusion of recording of the prosecution evidence, the statements of the accused under Section 313, of, the Code of Criminal Procedure, were, recorded by the learned trial Court, wherein, the accused claimed innocence and pleaded false implication in the case.

5. On an appraisal of the evidence on record, the learned trial Court, recorded findings of conviction only against the accused/appellant herein, whereas, it acquitted other co-accused.

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, 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 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, rather standing based, on a mature and balanced appreciation, by it, of the evidence on record, and, theirs not necessitating any interference, rather theirs meriting vindication.

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

9. PW-12, Dr. Sandeep Kaushik, who subjected one Anurag to medical examination, upon stepping into the witness box, has, proven the apposite MLC, borne in Ex.PW12/B. He has testified of the injuries noticed by him, to be occurring, on the person of the injured, injuries whereof stand borne in Ex.PW12/B, being causable with a blow of knife, knife whereof also stood shown to him in Court. He denied the suggestion put to him, by the defence counsel, while holding him, to cross-examination, of the injuries borne in Ex.PW12/B, being causable by fall, on some sharp edged object. However, the testification of the doctor, who examined injured/victim Anurag, is also enjoined to be lent corroboration, by the eye witnesses, to the occurrence. The eye witnesses to the occurrence, are, PW-1 Jagdish Chand, and, PW-3 Chirag. Both of whom in their respectively rendered testifications, make, articulations, bereft, of any inter se or intra se contradictions, thereupon, with theirs rendering unblemished, and, untainted versions, qua the occurrence, thereupon, sanctity is enjoined to be imputed vis-a-vis their respective testifications. However, the learned counsel appearing for the appellant has contended (a) that, with, occurrence(s), in the testifications of PW-1, and, of PW-3, of, a communication, that during the course of theirs being belaboured by the accused, one Anurag making intervention(s), whereupon, the accused directing their assault upon Anurag, and, whereafter both aforesaid fleeing from the spot. (b) Thereupon, the trite factum of the occurrence being eye witnessed by PW-1 and PW-3, is obviously hence belied (c) whereupon, he canvasses, of the charge vis-a-vis the accused, with, respect to his delivering, upon, one Anurag, the injuries borne in Ex.PW12/B also remaining unproven. However, the effect, of any, of the aforesaid espousal is countervailed, by the factum of, one, Anurag immediately subsequent, to his being delivered a knife blow, on his stomach, by the accused, his fleeing upto Shiv temple, whereat, both PW-1 and PW-3 were sitting, wheretowhom, he disclosed the aforesaid factum. The aforesaid unfoldment, by, one Anurag vis-a-vis PW-1, and, PW-3, rather hence occurring in quick spontaneity vis-a-vis his receiving stab of knife on his stomach, and, stabbing whereof is testified to be meted by the accused, remains

unshattered, by any effective suggestion, being put, by the learned defence counsel, while holding the aforesaid prosecution witnesses, to cross-examination, and, with clear and candid echoing(s) therein, (d), of, at the relevant spot, after departure therefrom, of PW-1 and PW-3, persons other than the accused, being present thereat, and, theirs rather inflicting a knife blow, on the stomach of one Anurag. Absence of meteing(s), of, the aforesaid suggestions, by the learned defence counsel, while holding the eye witnesses vis-a-vis the occurrence, to cross-examination, rather renders all disclosure(s) occurring therein, especially qua immediately subsequent to the departure from the relevant site, of PW-1, and, of PW-3, the narrations, of, apposite incriminatory ascriptions vis-a-vis the accused being rendered, qua them, by one Anurag, (e) hence beget(s) a conclusion, of, despite, the aforesaid trite factum remaining not eye witnessed, by PW-1 and PW-3, yet ascription by Anurag, of apposite guilt vis-a-vis the appellant/accused herein, hence acquiring a profound aura of credibility.

10. Aggravated momentum, to the aforesaid inference, is lent by knife, Ex.P-3 being efficaciously proven to be recovered, in the legally ordained manner, pointedly, under memo borne in Ex.PW5/C, preceding whereto, a disclosure statement, of the accused/appellant herein, borne in Ex.PW5/A, was recorded, by the Investigating Officer concerned. The effect of an efficacious recovery of knife Ex.P-3, being, hence made by the Investigating Officer, is of it comprising a valuable, besides the strongest piece of incriminatory evidence, against, the accused/appellant herein, also, efficacious recovery of knife, Ex.P-3, under memos Ex.PW5/A and Ex.PW5/C also effaces, the effect, if any, of the aforesaid witnesses, being previously, not known, to the accused.

11. Be that as it may, the identification in Court of accused Mahavir Singh by PW-3, even without prior thereto, no valid test identification parade hence being conducted by the Investigating Officer concerned, also assumes probative tenacity, given it being testified, by PW-2, of accused Mahavir being previously known to him, (i) whereupon, he stood empowered to identify him in Court, (ii) and also hence there being no peremptory obligation cast upon the Investigation Officer to hold a valid test identification parade. (iii) More so, when the aforesaid testification, of, PW-2 vis-a-vis the accused being previously known to him, remained unshattered, of its efficacy.

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

13. Consequently, the instant appeal is dismissed and the judgment of conviction is affirmed and maintained. However, keeping in view the facts and circumstances of the case and fact that the accused/convict/appellant is of a young age and is also a first offender, hence, the sentence imposed upon the accused/appellant by the learned trial Court is modified, and, the convict/accused/appellant is sentenced to undergo rigorous imprisonment for three years, for his committing an offence punishable under Section 307 of the IPC, and, he shall pay a fine of Rs.25,000/- and in default of payment of fine amount, he shall further undergo simple imprisonment for one year. A sum of Rs.25,000/-, as compensation, if recovered as fine imposed on the convict be paid to the injured Anurag. The period already undergone by the accused/convict/appellant herein either in police or in judicial custody is ordered to be set off, from, the sentences awarded against him. Since, the accused/appellant is already in jail, hence, a fresh jail warrant carrying modification therein, in the aforesaid manner, vis-a-vis the sentence imposed upon the accused/convict/appellant herein be hence issued. Records be sent back forthwith. All pending applications also stand disposed of.

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

Randhir Singh and another ....Petitioners.
Versus
Santosh Kumari and others. ... Respondents.

CMPMO No. 288 of 2017
Reserved on 28.3.2018
Decided on: 18.4.2018

Code of Civil Procedure, 1908- Order 1 Rule 10- Order XXII Rules 3 to 5- Determination of legal representation thereunder- Plaintiffs including one 'K' (P-4) filed suit for declaration and injunction against defendants - 'K' died on 10.7.2016 – Other co-plaintiffs filed an application under Order 1 Rule 10 for deletion of her name on ground of deceased having executed Will on 31.5.2016 in favour of one of co-plaintiff - Application contested by defendants on ground that legal heirs of 'K' were not correctly mentioned in application- However, Senior Civil Judge allowed application of plaintiffs and ordered deletion of 'K'- Lateron, sons and grandsons of 'K' also filed an application for bringing them on record as her legal representatives - This application was also dismissed by Trial Court- Petition against- Held- Determination of legal representation of deceased party is only for bringing them on record, so that legal proceedings are conducted further – Any such determination does not operate as res-judicata inter se rival representatives – Dispute as to Succession inter se legal representatives of deceased, if any, is to be independently adjudicated upon by way of separate suit –Order of Senior Civil Judge dismissing application of sons and grandsons of 'K' for bringing them on record as her legal representatives, set aside with direction to re-hear parties. (Para-13)

Case referred:
S. Charanjit Singh and another Vs. Bharatinder Singh and others, AIR 1988 Punjab and Haryana 123

For the petitioners. Mr. R.P. Singh, Advocate.
For respondents Mr. Mehar Chand Thakur, Advocate for respondents No. 1 to 3.
None for other respondents.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.

By way of this petition filed under Article 227 of the Constitution of India, petitioners have prayed for quashing of orders dated 10.2.2017 and 8.5.2017 passed by the Court of learned Senior Civil Judge, Una, District Una, H.P. in CMA No. 43-VI-17 and CMP No.634/17 in Civil Suit No. 7/14/04 titled as Shamsher Singh etc. Vs. Daulat Ram etc.

2. Facts as they emerge from the petition are that Kewal Devi who was the mother of the petitioners and proforma respondents was joint owner in possession of certain properties i.e., land comprised in Khewat No. 32min, khatauni No. 55, khasra No.1221, 2115, 2116, 2117, 2118, 2133, 2134, kita 7 situated at village Bharolian Khurd, Tehsil and District Una, H.P. The said land was acquired by Himachal Pradesh Housing and Urban Development Authority, Shimla. After the award was passed by Land Acquisition Collector, it transpired that ownership of the said land stood conferred upon the tenants i.e., Daulat Ram and others under Section 104 of the H.P. Tenancy and Land Reforms Act and these persons had become owner thereof and the same stood recorded in the revenue records. Real owners of the land filed a civil suit for declaration that the entries appearing in the names of said tenants were wrong, illegal, void, ineffective, inoperative and against the exclusive rights of the plaintiffs. The suit was registered as Civil Suit No.

07/14/04, titled as Shamsher Singh etc. Vs. Daulat Ram etc. Smt. Kewal Devi was arrayed as plaintiff No.4 in the said civil suit. She was being represented through her real nephew, namely, Shamsher Singh, who was her General Power of Attorney. According to the petitioners, neither they nor the proforma respondents were aware about the pendency of the civil suit. The General Power of Attorney holder of Kewal Devi, namely, Shamsher Singh, who was himself a plaintiff in the said suit, died in the year 2012. After the death of Shamsher Singh, his legal heirs were substituted as plaintiff No.1 (a) to 1(d). His widow Santosh Kumari who stood arrayed as plaintiff No.1(a) took Kewal Devi to Una and there Kewal Devi appointed Rajinder Singh son of late Shamsher Singh as her General Power of Attorney on 25.4.2011. Rajinder Singh also died in the year 2015. Thereafter on 10.6.2015 Santosh Kumari again took Kewal Devi to Una where she got another General Power of Attorney prepared from Deed Writer, Deepak Kumar at Una in favour of her younger son Rippan Kumar i.e., son of Santosh Kumari. As per petitioners, in the garb of preparation of the General Power of Attorney, a Will was also got executed fraudulently by present respondents No.1 to 3 from their deceased mother qua the parental property of their mother. Both the General Power of Attorney as well as Will so executed were entered into register maintained by Deepak Kumar, Deed Writer at Sr. No. 170 and 171, respectively.

3. On 17.3.2016 Kewal Devi executed a Will out of her free will and volition with respect to her entire movable and immovable properties in favour of her both sons, namely, Darshan Singh and Randhir Singh and grandsons, namely, Surinder Pal and Baljit Singh sons of her late son Gurbax Singh. This Will was scribed by Faquir Chand, Deed Writer, at Una and was got registered in the office of Sub Registrar, Una on 17.3.2016. It was mentioned in this Will that in case any other Will had been got inadvertently executed from Kewal Devi, then the same be treated as cancelled. A copy of the Will stands appended with the present petition as Annexure P-7.

4. Kewal Devi died on 10.7.2016. After her death, an application was filed under Order 1 Rule 10 of CPC by respondents No.1 to 3, namely, Santosh Kumari, Avtar Singh and Jangbahadur in civil suit, supra along with the copy of the unregistered Will dated 31.5.2016, which allegedly was executed by Kewal Devi. A prayer was made in the application that in view of the Will so executed by late Kewal Devi in favour of the applicants therein, her name be deleted from the array of plaintiffs, as her legal heirs were already on record in the suit.

5. Defendants in the said suit when called upon to file reply to the said application objected the application filed under Order 1 Rule 10 of CPC on the ground that the names of the legal heirs were incorrectly mentioned as deceased Kewal Devi had executed a Will in favour of her sons and grandsons. Present petitioners were neither aware of pendency of the said suit nor the application. Thereafter Santosh Kumari filed a civil suit i.e. Civil Suit No. 3/2017 for declaration and injunction against present petitioners titled as Santosh Kumari Vs. Darshan Singh and others claiming the entire estate of Kewal Devi on the strength of Will dated 11.6.2015. In the meanwhile, application so filed under Order 1 Rule 10 of CPC by Santosh Kumari and others was allowed by the learned court below, vide order dated 10.2.2017. Another similar application filed by petitioners under Order 1 Rule 10 of CPC was rejected by the learned trial court on 8.5.2017.

6. Feeling aggrieved, the petitioners has filed this petition.

7. Learned counsel for the petitioners has argued that the impugned orders were not sustainable in the eyes of law because if the said orders are permitted to remain on record, the same will amount to travesty of justice, as it will be peculiar situation where the real sons and grandsons of deceased Kewal Devi would not be in a position to contest a suit which so stood filed in the name of Kewal Devi alongwith other plaintiffs and persons, who have got themselves impleaded as legal representatives of Kewal Devi by wrongly getting the name of Kewal Devi deleted from the array of plaintiffs by representing themselves to be her legal representatives on the strength of Will which was procured by playing fraud would continue to represent her estate in the *lis*.

8. On the other hand learned counsel for the respondents No. 1 to 3 has argued that the orders passed by learned court below were fair and just orders passed taking into consideration the material which was available before the learned court below and the same do not call for interference.

9. I have heard learned counsel for the petitioners as also learned counsel for respondents No.1 to 3.

10. In my considered view, the impugned orders so passed by learned court below are not sustainable. The application which was so filed by respondents No.1 to 3 under Order 1 Rule 10 of CPC for deleting the name of Kewal Devi could not have been disposed of in the mode and manner in which it was done by the learned court below, vide impugned order dated 10.2.2017. This is for the reason that when an objection was taken by the non applicant therein that description of legal representatives was not correctly mentioned in the application and in fact the deceased had bequeathed her property by way of a registered Will in favour of her sons and grandsons, then in my considered view, in the interest of justice it was incumbent upon learned court below to have had issued notices to the sons and grandsons of the deceased, before it could have passed any order on the application filed under Order 1 Rule 10 of CPC by present respondents No.1 to 3.

11. Similarly, the application filed later on by present petitioners under Order 1 Rule 10 of CPC could also not have been disposed of in the mode and manner in which it has been done by learned court below, simply by holding that as there already was a suit pending with regard to Will of Kewal Devi so controversy *inter se* Santosh Kumari and present petitioners if when settled would take care of their respective rights.

12. Learned court below while rejecting the application of the present petitioners held that after the death of Kewal Devi, they never came forward to show that they were representatives of Kewal Devi and they came at the stage when the name of Kewal Devi stood deleted. While doing so, learned court below erred in not appreciating that when the petitioners were not in the knowhow of the pendency of the civil suit in which their mother was arrayed as plaintiff and they were not in the knowhow that an application stood filed on the strength of an unregistered Will by Santosh Kumari, allegedly executed by their mother then how they could have had approached the learned court for substituting them as the legal representatives of late Kewal Devi. When this issue was before the learned trial court by way of an application so filed under Order 1 Rule 10 of CPC by the present petitioners, it was incumbent upon the learned trial court to have had adjudicated upon the same in view of the peculiar facts of the case and more so keeping in view the fact that applicants before it were none other than the sons and grandsons of the deceased. Learned trial court having failed to do so has indeed gravely prejudiced the case of the present petitioners and in view of above, the impugned orders are not sustainable and are liable to be quashed and set aside.

13. At this stage, it is pertinent to mention that the factum of determination as to who is the legal representative of deceased plaintiff or defendant under Order 22 Rule 5 of CPC is only for the purposes of bringing such legal representatives on record for the purpose of the conduct of the legal proceedings only. Who is brought on record does not in itself operate as a *res judicata* with regard to *inter se* dispute between the rival legal representatives and said dispute has to be independently tried and adjudicated upon in separate proceedings. In a case where facts were quite similar to the present petition, the Hon'ble Punjab and Haryana High Court in S. Charanjit Singh and another Vs. Bharatinder Singh and others, **AIR 1988 Punjab and Haryana 123** held that in such like circumstance, proper course to follow is to bring all legal representatives on record, so that they vouchsafe the estate of the deceased for ultimate benefit of the real legal representatives and the same would avoid delay in disposal of the suit. This Court concurs with the above view.

In view of above discussion, this petition succeeds. Both the impugned orders dated 10.2.2017 and 8.5.2017 passed by learned Senior Civil Judge, Una District Una, H.P. in

CMA No. 43-VI-17 and CMP No.634/17 in Civil Suit No. 7/14/04 titled as Shamsher Singh etc. Vs. Daulat Ram etc. are set aside and learned trial court is directed to rehear and re-adjudicate upon both the applications so filed under Order 1 Rule 10 of the CPC by present petitioners as well as respondents No.1 to 3 and pass orders on the same in accordance with law after affording an opportunity to the parties of being heard. Represented parties through their leaned counsel are directed to appear before the learned trial court on 5th May, 2018.

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

Cr. Appeal No. 322 of 2006
along with Cr. Appeal No. 382of 2006.
Reserved on: 10th April, 2018.
Date of Decision: 18th April, 2018.

1. Cr. Appeal No. 322 of 2006.

Ravinder Kumar & Ors .....Appellants.
Versus
State of H.P. ....Respondent.

2. Cr. Appeal No. 382 of 2006

Vijay Kumar and others .....Appellants.
Versus
State of H.P. .....Respondent.

Code of Criminal Procedure, 1973- Section 374- **Indian Penal Code, 1860**- Sections 147, and 307, 323, 506/149 – Appellants/accused was convicted and sentenced for said offences by trial court- Appeal against- Plea of accused being that evidence has been misread by trial court- Investigation was faulty and no test identification parade was got conducted – Therefore, identification of accused in court not relevant – On facts, statements of victim and one eye witness were found consistent – Material clearly suggesting presence of accused on spot- Injuries corroborated by medical evidence- Brick used in inflicting injuries was got recovered by one of accused pursuant to disclosure statement- Held- Accused rightly convicted by trial court for said offences.

(Para-10 and 11)

Code of Criminal Procedure, 1973- Section 374- Modification of sentence- However, accused first offenders and of young age - Sentence reduced. (Para-13)

For the Appellants: Mr. Rajesh Mandhotra, Advocate in both appeals.
For the Respondent(s): Mr. Hemant Vaid, Addl. Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Both the aforesaid appeals are being disposed of by a common verdict, since they arise from a common judgment.

Both the aforesaid appeals stand directed by the appellants/accused, against, the judgment rendered on 31.03.2004, by the learned Addl. Sessions Judge, Fast Track Court, Kangra at Dharamshala, H.P. in S.T. No. 37/2005, whereby, he convicted and sentenced the appellants/accused, for, theirs committing offences punishable under Sections 307, 323, 506, 147, and, Section 149 of the IPC.

2. The facts relevant to decide the instant case are that the accused after forming an unlawful assembly in prosecution of common object of such assembly went to the school at Paprola known as Government Senior Secondary School, Paprola and asked one Jony Kumar, who was studying in that school to play Murga (a corporal punishment given whereby one is to pick his ears after crossing the hands from beneath the legs making shape of Murga/Cock). It has been alleged that Jony Kumar refused to oblige them thereby the accused administered him beatings. After they left, Jony Kumar revealed the occurrence to his brother namely Parveen Kumar and thereafter, he went to the Principal and revealed the facts of the incident. The Principal asked him to give in writing. Thereby he gave in writing. The Principal again asked him to bring some elder from his house. Thereby he took his father namely Piar Chand to the school, who was advised by the Principal to take the complaint to the police station. As per the allegations made when Piar Chand accompanied by is son was proceeding to the police station and reached near Paprola Bazar on a traffic chowk known as Mejherena Chowk, all the accused in furtherance of their common object administered him beatings. A-1 Vijay Kumar gave hit of brick on his head, on account of which he fell unconscious, on account of the injuries suffered, he fell on the road and in the meantime when alarm was raised a traffic constable arranged for his transport to the nearby hospital. The accused could not be over powered by the traffic constable. Thereafter intimation was sent to the police station. From Police station, the police officials proceeded to the spot. However, on the way, they met injured and other people carrying him to the hospital, whereby information was received and statement of one son of Piar Chand was recorded which was sent for the registration of FIR. The FIR was registered. The injured was firstly taken to Ayurvedic Hospital at Paprola, from where he was referred to Zonal Hospital, Dharamshala and from Dharamshala he was referred to PGI, Chandigarh. After the treatment he was taken back to Paprola. It has been alleged that as per the evidence regarding medical treatment and injured was found having suffered grievous injuries which were sufficient to cause death. The police carried and concluded all the investigation(s) 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/appellants herein stood charged by the learned trial Court, for, theirs committing offences, punishable under Sections 323, 307, 325, 506/149 and Section 147 of the IPC. In proof of the prosecution case, the prosecution examined 24 witnesses. On conclusion of recording, of, the prosecution evidence, the respective statement(s) of the accused, under, Section 313 of the Code of Criminal Procedure, were, recorded by the learned trial Court, wherein, each of the accused claimed innocence, and, pleaded false implication in the case. However, they have examined, only, one witness, in their defence.

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

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

7. On the other hand, the learned Addl. Advocate General has with considerable force and vigour, contended qua the findings of conviction recorded by the learned trial Court, rather standing based, on a mature and balanced appreciation, by 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. PW-1 Dr. Anil Sood, who issued MLC Ex. PW-1/B, has, during the course of his testification, hence, proven all the recitals borne therein, besides has rendered, a testification, of his, at the time of subjecting the victim to medical examination, his noticing blood occurring on his clothes, and, also therein, he makes a disclosure, of the injuries noticed by him, to be occurring on the person of the victim, being causable by blow of brick on the head, and, other injuries being causable with fist blows, thereupon, medical evidence bears consonance, with, the genesis of the occurrence, borne in the apposite FIR.

10. The purported independent witnesses, to the occurrences, PW-4 and PW-5, resiled from their respectively recorded previous statements, and, even upon theirs being subjected, to cross-examination, by the learned Public Prosecutor, upon an apposite permission being granted to him, by the learned trial Court, they did not make any testification, for hence sustaining the charge. Moreover, the victim PW-13, in his testification, has, made articulations, bearing consonance with the recitals, borne in the apposite FIR. His testification is lent succor by PW-14. Nonetheless, in his cross-examination, he acquiesces to a suggestion, of, his recording in the apposite FIR, the names, of, only those accused, with whose names, he was familiar, and, of, his holding the ability to recognise other co-accused, his being familiar with their characteristic(s), physical feature, (a) thereupon, it is contended that hence, with, the Investigating Officer, not, holding any valid test identification parade, for enabling PW-13 and PW-14, to identify all the accused, thereupon, the identification of the accused, in Court, by PW-13 and PW-14, being insignificant. However, the effect of the aforesaid acquiescence besides effect of non holding, of, any valid test identification parade, by the Investigating Officer, for hence enabling PW-13 and PW-14, to identify the accused, besides concomitantly the identification of the accused, only, in Court, by PW-13 and PW-14, (a) is yet not stripped, of, its evidentiary worth, nor the apposite identification, only in Court by aforesaid, of, the accused, is unworthwhile, (b) given the learned defence counsel while holding PW-14 to cross-examination, his meteing, an affirmative suggestion, of, after completion of quarrel, PW-13 falling down, whereto a compatible affirmative echoing rather ensued from PW-14, (c) besides thereafter, with the learned defence counsel also meteing disaffirmative suggestions of no beating being given by the accused, besides no kick and fist blows being delivered by them upon the victim, whereto an apposite denial occurred, hence begets effects, (i) of the aforesaid suggestion(s) whereto apposite affirmative answers stood meted, qua thereupon the defence rather acquiescing of a scuffle, occurring, at the relevant site of occurrence, (ii) and, preponderantly, with disaffirmative suggestions, being put by the defence counsel, to PW-14, of the accused, not, belabouring PW-13, whereto a denial occurred, (iii) whereas, the apposite meteable suggestion was comprised, in, PW-13 being not belaboured by the accused, given theirs being unavialable at the site of occurrence, (iv) rather other persons being available thereat, suggestions' whereof, remained unpurveyed to PW-14, (v) non purveying(s) whereof, garners an inference of the defence acquiescing, to, the role(s) of the accused in the relevant incident, besides also acquiescing vis-a-vis their presence at the site of occurrence (vi) more so, when the affirmative suggestion put to PW-14, of his father after the scuffle, falling down, stood meted a compatible therewith affirmative answer, and, therein occurring no articulation, of except the persons, named in the FIR, other accused being falsely arraigned, (vii) thereupon, all the aforesaid inferences rather beget a concomitant inference, of, the prosecution hence proving the presence of the accused at the site of occurrence and also sustaining the charge, (viii) predominantly with the injuries sustained upon the person of PW-13, standing not, concerted to be explicated by the defence counsel, while, his holding PW-14 to cross-examination. For alike reasons also this Court imputes probative vigour, to the corroborative testification(s) of PW-16 vis-a-vis the testification of PW-14. (ix) whereupon, the enfeebling effects, if any, of the aforestated espousals, of the, counsel for the appellant, obviously stand withered.

11. Further corroboration, to, the testification(s), of the victims, as also to the testification of PW-1, is evidently meted by Ex.PW0/A, whereunder clothes, of victim, stood hence

recovered, clothes whereof gathered stains of blood, as oozed, from the apposite injuries hence caused with the blow of brick, on his head, by the accused. Witness thereto, one, PW-10 Ranjit Singh, while testifying, as PW-10 has efficaciously proven contents thereof, (i) and, with the learned defence counsel, while subjecting him to cross-examination, rather omitting to mete apposite suggestion(s) vis-a-vis the clothes recovered, under Ex.PW10/A, not appertaining, to the complainant rather recovery thereof being invented, (ii) hence, it has to be concluded, of recovery(ies), of blood stained clothes, of victim Piar Chand being efficaciously effectuated. Even Ex.PW3/A whereunder recovery of brick, was, effectuated by the Investigating Officer, in pursuance, to, a disclosure statement borne in Ex.PW12/A, disclosure statement whereof stood made by accused Vijay Kumar, before him, during, the course of his subjecting him, to, custodial interrogation, (iii) does, on its incisive reading, unfold, of the investigating Officer concerned, effectuating recovery of brick, at the instance accused Vijay Kumar, Even though witnesses, to the aforesaid disclosure statement, borne in Ex.PW12/A, and, vis-a-vis recovery memo borne in Ex.PW3/A, namely, one Ajay Kumar, and, one Raj Kumar Sharma, though resiled, from their respectively recoded previous statements in writing. However, when both admitted their respective signatures, on Ex.PW12/A, Ex.PW3/A, and, in Ex.PW3/B, thereupon the factum of theirs admitting their signatures, on the aforesaid memos, cannot be overlooked, (iv) whereupon, they, as mandated by the provisions of Section 91 and 92 of the Indian Evidence Act, stood, interdicted, besides forbidden, to depose in variance therefrom, rather with theirs being interdicted, by the statutory mandate engrafted, in the afore-referred apposite provisions, of, the Indian Evidence Act, (v) reiteratedly they by admitting their signatures existing thereon, hence impute conclusive proof qua all the recitals, occurring therein, (vi) significantly on occurrence of unflinching evidence qua their signatures existing thereon, irrefragable evidence whereof stands evinced, by theirs admitting, the prime factum of the apposite memo, rather holding their signatures, hence, when their apposite admission, sequelly statutorily belittles, the effect of theirs deposing orally in variance or in detraction thereto, (vii) naturally when they rather emphatically prove the recitals comprised in the apposite memo, thereupon it is neither appropriate nor tenable for this Court, to conclude of the recorded recitals, borne in Ex.PW12/A,Ex.PW3/A, and, in Ex.PW3/B holding no evidentiary clout nor it is legally apt for this Court, to outweigh, the creditworthiness of the testimonies, of ocular witnesses.

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

13. Consequently, both the appeals are dismissed. In sequel, the findings of conviction recorded against the accused/appellant herein is affirmed. However, taking into consideration the facts and circumstances of the case and the fact that the accused/appellants herein are first offenders besides are of young age, hence, the sentence as imposed upon them is on higher side and it is modified as under:-

All the accused/convicts are sentenced to undergo simple imprisonment for two years each and to pay a fine of Rs.20,000/- each, and, in default to undergo simple imprisonment for one year each for their committing an offence punishable under Section 307 of the IPC. They are further sentenced to simple imprisonment for three months and to pay a fine of Rs.1,000/- each, and, in default to under go simple imprisonment for one month each for theirs committing offence punishable under Section 323 of the IPC. They are further sentenced to undergo simple imprisonment for three months each, and, to pay a fine of Rs.1,000/- each and in default to undergo simple imprisonment for one month each for theirs committing offence punishable under Section 506 of the IPC. They are further sentenced to undergo simple imprisonment for three months, and, to pay fine of Rs.1,000/ each, and, in default to undergo simple for one month each for theirs committing offence punishable under Section 147 of the IPC. However, all the sentences awarded shall run concurrently. The fine on realization shall be paid as compensation to injured Piar Chand. The period already undergone by the accused/convicts/appellants herein either in

police or in judicial custody is ordered to be set off from the sentences awarded against them. All pending applications also stand disposed of. The learned trial Court is directed to forthwith execute the sentence imposed, upon, the accused/appellants herein. Records be sent back forthwith.

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

Ravinder Kumar ....Petitioner.

Versus

Union of India and others. ... Respondents.

CWP No. 1540 of 2010.
Decided on: 18.4.2018

Industrial Disputes Act, 1947- Section 25-H- Termination/retrenchment of services of petitioner- Department engaged one 'M' against that vacancy without offering an opportunity to petitioner to re-join his duties- However, reference to Labour Court simply involved issue as to termination of services of petitioner and not as to validity or otherwise of engagement of 'M' – Held- Labour Court could not have rendered findings beyond reference made to it on engagement of 'M' without offering opportunity to petitioner to re-join his duties - Petition dismissed with liberty to raise dispute afresh in accordance with law. (Para-5)

For the petitioner. Mr. Subhash Sharma, Advocate.

For respondents. Mr. Vir Bahadur Verma, Central Government Counsel for respondents No.1 and 2.
Respondent No.3 ex parte.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J *(Oral)*

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

"i) In view of the peculiar protracted litigation and the petitioner being under severe duress, the above noted matter is the one where an early possible adjudication thereof is prayed for.

ii) Record of the Industrial Tribunal-Labour Court may kindly be summoned for the kind perusal as how learned Labour Court erred to conclude and pass the impugned award on the basis of selective record full of discrepancies and contradictions.

iii) That a writ in the nature of certiorari may kindly be issued to the respondents concerned and impugned award dated 4.8.2009 may kindly be quashed/set aside and respondent department may kindly be directed to reinstate the petitioner with all consequential service benefits including seniority benefit.

iv) That the respondent department may be directed to pay back wage along with wage due to him on account of earned wages and wages for over time and weekly rests legally admissible to the petitioner along with rate of interest who has been daily rated Mazdoor being lowest paid workman and has been suffering financial hardship on account of loss of job due to careless and in compassionate conduct in respect of petitioner by not producing the relevant record of attendance of petitioner maintained by his immediate superior officer, i.e. Telephone Mechanic/Lineman

and concealing facts of continuous working of petitioner but also producing some selective record which is full of discrepancies and contradiction and not producing best evidence of Muster Rolls of petitioner which was admittedly with respondent department.

v) Any compensation as this Hon'ble Court may kindly consider just for lowest paid workman who suffered mental agony for the loss of his livelihood and for forced litigation due to careless and in compassionate attitude of the concerned officers of respondent department."

2. Grievance of the petitioner is that reference which stood made by the appropriate Government to the learned Labour Court has been wrongly answered against the workman and the findings returned by learned Labour Court to the effect that the termination of the workman was not in violation of the Industrial Disputes Act are perverse. In order to substantiate his contention, Mr. Sharma has submitted that after the services of the petitioner were terminated, respondents engaged one Mahesh Kumar and this act of the respondents of engaging a fresh hand i.e., Mahesh Kumar without first exhausting the provisions of 25H of the Industrial Disputes Act i.e., without first giving an opportunity to the petitioner by way of an offer as to whether he intended to rejoin his duties or not was against the provisions of Industrial Disputes Act.

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

4. Having perused the reference made to the learned Labour Court, as also the pleadings so filed by the respective parties, in my considered view, no fault can be found with the award so passed by the learned Labour Court. This I say so for the reason that the reference which was so made by the appropriate Government to the learned Labour Court was as to whether the action of the management in terminating the services of Ravinder Kumar was legal and justified or not. The reference was not as to whether the engagement of Mahesh Kumar was in violation of the provisions of 25H of the Industrial Disputes Act. Accordingly, thus as the learned Tribunal could not have had returned findings by transgressing the reference so made to it, I do not find any merit in the contentions so made by learned counsel for the petitioner.

5. At this stage, learned counsel for the petitioner prays that as probably an incorrect reference was made by the appropriate Government to the learned Labour Court without actually appreciating the issue raised by the workman, it will be in the interest of justice in case the workman is permitted to raise the dispute afresh in accordance with law. He further submits that as the workman was diligently pursuing his cause in the Court of law, therefore, delay and laches/limitation should not come in his way for pursuing his cause afresh. Liberty granted, as prayed for.

Accordingly this petition is disposed of without interfering with the award so passed by learned Labour Court, with liberty to the petitioner, as prayed for, in the interest of justice.

Pending miscellaneous applications, if any also stand disposed of.

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

Rupa alias Balia (since deceased) through is legal heirs
.....Appellant/defendant.

Versus

Suri Mansha Rama .....Respondent/Plaintiff.

RSA No. 175 of 2006

Reserved on : 9th April, 2018.
Decided on : 18th April, 2018.

Specific Relief Act, 1963- Section 34- Suit for declaration and injunction- Plaintiff claiming suit land in joint ownership and possession with defendant and alleging revenue entries as wrong – Also seeking permanent injunction against dispossession from joint possession- Defendant denying plaintiff's case- Suit decreed by trial court- Appeal of defendant dismissed by First Appellate Court- Regular Second Appeal – On facts, plaintiff found to have admitted in writing that suit land was in exclusive possession of defendant and he (plaintiff) never cultivated it- Authenticity of this written admission not disputed – Held- Lower courts failed in appreciating this piece of evidence correctly- Plaintiff's joint possession not proved - Plaintiff not entitled for decree of declaration and injunction- Regular Second Appeal allowed- Judgments and decrees of lower courts set aside- Suit dismissed. (Para-9 to 11)

Indian Evidence Act, 1872- Section 18- Admission- Effect of – Held – Admission of a party against its own interest is substantive evidence and cannot be ignored. (Para-10)

For the Appellant(s): Mr. Bhupender Gupta, Senior Advocate with Ms. Rinki Kashmiri, Advocate.
For Respondent: Mr. Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

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

2. Briefly stated the facts of the case are that the plaintiff claims himself to be in joint possession of the suit land earlier as tenant since the land is stated to be with the plaintiff and defendant under tenancy on payment of gall batai to the owners. It has been averred that during settlement operation in the village the entries coming in the record of the rights, in the name of the plaintiff, reflecting the plaintiff to be tenant were moved illegally and the defendant was earlier shown as co-owner in possession of the suit land, but thereafter only the defendant has been shown to be owner. The defendant taking the undue advantage of the entries made in the possessory column of jamabandi preferred an application before the Settlement Collector, Dharamshala, claiming that he was the sole tenant over the suit land and that for the plaintiff was not impleaded as party. The Collector passed order as per the prayer made by the defendant which order is illegal, collusive and liable to be set aside. It has also been averred that he plaintiff was in possession as co-owner and in the month of September, 1994, the defendant threatened to cultivate the land to the exclusion of the plaintiff on which the revenue record was checked and it was found that the name of the plaintiff had been deleted from the entries in the record of rights. It has also been averred that an application was earlier moved by the plaintiff before the Land Reforms Officer for correction of entries in the revenue record, who vide order dated 6.1.1991, advised the plaintiff to get remedy in some competent Court. Thereby after disposal of this application of 6.1.1998 the plaintiff had cause of action to file the suit in the civil court.

3. The defendant contested the suit and filed written statement, wherein, he has taken preliminary objections inter alia maintainability, locus standi, limitation, valuation jurisdiction as well as non joinder of necessary parties. It has been pleaded that the defendant has become owner of the entire land and the proprietary rights has been conferred in his favour. He has also averred that the entires are coming in possession of defendant which were in the know of the plaintiff. Hence the suit ought to have been filed within time. The suit is time barred. It has also been averred that the suit is not maintainable and be dismissed.

4. The plaintiff filed replication to the written statement of the defendant(s), wherein, he denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the plaintiff is joint possession of the suit land, as co-owner?OPP.
2. Whether the revenue entries showing the defendant to be in possession of the suit land are wrong, illegal, contrary to the spot position and result of collusion and mis-representation, as alleged?OPP.
3. Whether the mutation No.150 sanctioned on January 5, 1978 and order dated June 5, 1986 passed by the Settlement Collector, Kangra at Dharamshala in Case No. 24/86/90 have no binding effect on the plaintiff's right, title and interest in the suit land?OPP.
4. Whether the order dated Jan.7, 1998 passed by LRO-cum-A.C. 1st Grade/Tehsildar, Dharamsala in the case No.13/1997 (titled as Mansa Ram vs Rupa) is wrong and liable to be declared as such?OPP.
5. Whether the plaintiff is entitled to the relief of permanent injunction as he prayed for?OPP.
6. Whether the plaintiff has no cause of action, as alleged?OPP.
7. Whether the plaintiff has no locus standi to sue?OPD.
8. Whether the suit is not maintainable, as alleged?OPD.
9. Whether the suit is barred by time?
10. Whether the suit has not been properly valued for the purpose of court fee and jurisdiction?OPD.
11. Whether this Court has no jurisdiction to entertain the suit?OPD.
12. Whether the suit is bad on account of non joinder of necessary parties? OPD.
13. 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 latter Court dismissed the appeal and affirmed the findings recorded by the learned trial Court.

7. Now the defendant/appellant herein, has instituted the instant Regular Second Appeal, before, this Court, wherein he assails the findings, recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, this Court, on 01.08.2006, 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 question of law:-

a) Whether the two Courts below have committed illegality in holding that Ex.DW-2/A is not proved to be the statement(admission) of respondent-plaintiff Mansha Ram and not using the said statement as a piece of substantive evidence?

Substantial question of Law No.1

8. The learned trial Court decreed, the plaintiff's suit for declaration besides for permanent prohibitory injunction. In the apposite civil suit, the plaintiff, espoused, relief for setting aside the order recorded on 6.1.1998, rendered, in Case No. 13/1997, titled as Mansha Ram vs. Rupa besides claimed rendition of a declaratory decree qua conferment of proprietary rights vis-a-vis the defendants, made under mutation No. 150, sanctioned on 5.1.1978, being

quashed, and, set aside and his being declared as co-owner in possession, along with the defendant, in equal share vis-a-vis the suit suit khasra number(s).

9. As aforestated, under concurrent verdicts pronounced by the learned Courts below, the plaintiff's suit was decreed. Since, the substantial question of law aforesaid is alone, required to be adjudicated upon, (i) thereupon, the conclusive binding effect, if any, of admission of the plaintiff, borne in Ex.DW2/A, and, concomitant effect of its comprising, a substantive piece of evidence, is also required to be dwelt into besides adjudicated upon (a) given both the learned Courts below dispelling its vigour, on anvil of (a) DW-2, who tendered and enabled its exhibition, rather during the course of his testification, occurring in his cross-examination, making an echoing of the presence of plaintiff one Mansha Ram being not elicited, under summons, (b) and his being unaware of the identity of Mansha Ram; (c) Mansha Ram remaining unidentified by any personal familiar with his identity. In aftermath, the learned courts below, hence, denuded the probative vigour, of the purported statement of one Mansha Ram, borne in Ex.DW2/A, wherein, he makes an admission of his, not, cultivating the suit land, rather the suit land being cultivated by the defendant, and, in sequel whereto, through an order, borne in Ex.P-6, the apposite corrections, were mandated to be incorporated in the relevant column of the jamabandi apposite to the suit land. Of course, if, the aforesaid admission, borne in Ex. DW2/A is proven to be validly made, and, it being also proven to carry the signatures of the plaintiff, one Mansha Ram, thereupon, it would comprise potent evidence, of his admitting, one Rupa rather cultivating the suit land also thereupon orders, borne in Ex.P-6, would acquire an aura of authenticity. Before proceedings to accept the aforesaid grounds meted by both the learned Courts below, for discountenancing, the statement of one Mansha Ram occurring in Ex.DW2/A, it is imperative to bear in mind, (i) that the best documentary evidence for tearing apart, the probative vigour of Ex.DW2/A, and, also for aptly enabling, Courts of law, to construe of the communications borne thereunder, hence, suffering from any malady of fictitiousness, rather was obviously comprised in the report of the handwriting expert concerned. However, the learned counsel appearing for the plaintiff, while, subjecting DW-2 to cross-examination has, apart from his putting affirmative suggestions to him (a) qua one Mansha Ram remaining not summoned, (b) DW-2 being unaware of the identity of one Mansha Ram, and, (c) no person familiar with the identity of Mansha Ram, proceeding to identify him, during, the course of recording of his statement before the Collector concerned, affirmative suggestions whereof, sequeled apposite affirmative answers, being rendered thereon by DW-2, (d) rather omitted to put the best befitting suggestion vis-a-vis DW-2, of it, not carrying the authentic signature(s), of one, Mansha Ram nor meted any apposite suggestion qua the purported signatures of one Mansha Ram borne in Ex.DW2/A being fictitious. Furthermore, omission of the aforesaid apposite suggestions being put to DW-2, by the plaintiff's counsel, while, holding him to cross-examination, garners an inference of the plaintiff acquiescing, of his purported signatures borne in Ex.DW2/A, rather belonging to him. Even if, assumingly, the aforesaid inference of the plaintiff hence, making, the apposite acquiescences, being not erectable, even for want of the aforesaid apt suggestion(s) being put either to the defendant or to DW-2, by the counsel for the plaintiff, while holding each to cross-examination, (e) yet the counsel for the plaintiff, did not also make any concerted endeavour for belying, the occurrence of signatures, of, plaintiff Mansha Ram on Ex.DW2/A, whereas, the apposite efforts, in the aforesaid regard, were, comprised in his instituting an application cast, under the provisions of Section 45 of the Indian Evidence Act, before the learned trial Court or before the learned first Appellate Court, with leave being sought therein, for sending for comparison vis-a-vis the Handwriting Expert concerned, the disputed signatures of the plaintiff occurring on Ex.DW2/A or on original thereof vis-a-vis his admitted handwritings or signatures, (f) for hence enabling the expert concerned, to render his apposite opinion qua inter se similarities or variances occurring inter se the disputed signatures, and, the admitted specimen handwritings, of one Mansha Ram. Corollary of the aforesaid omission, is of the aforesaid inference erected by this Court, arising from, omission(s) of the counsel for the plaintiff, omitting to put the apt suggestion to DW-2, nor to the defendant, while holding them to cross-examination, especially, the one appertaining to the signatures of the plaintiffs, not occurring, on Ex.DW2/A, rather reiteratedly, hence garnering immense strength, imminently vis-a-vis hence, the plaintiff

acquiescing, to his authentic signatures, occurring on Ex.DW2/A, more so, when without demur, its exhibition was permitted by the plaintiffs' counsel.

10. Be that as it may, the further effect of the aforesaid omission, is of hence the grounds meted, by the learned courts below, for dispelling the vigour, of Ex.DW2/A obviously, hence capsizing, (i) thereupon, it is to be invincibly concluded that hence, Ex.DW2/A comprises, the scribed admission of the plaintiff vis-a-vis, the recitals borne therein, also it comprise a formidable piece of substantive evidence vis-a-vis the facts disclosed therein, whereupon, hence, the order rendered in Ex.P-6 acquires an aura of authenticity. Whereupon, it is to be concluded of the plaintiff being estopped to claim a declaratory decree as staked in the suit, and, the concurrent judgment(s) and decrees pronounced vis-a-vis the plaintiff rather warranting their reversal.

11. The above discussion, unfolds, that the conclusions as arrived by the learned first Appellate Court as also by the learned trial Court, being not based, upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court, have excluded germane and apposite material from consideration. Accordingly, the substantial question of law is answered in favour of the appellant(s)/defendant(s), and, against the respondent(s)/plaintiff(s).

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

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

Sant Ram & Ors ....Appellants/plaintiffs.

Versus

Jangan Nath (deleted on 2.2.2013) & Ors. ....Respondents/defendants.

RSA No. 386 of 2003.
Reserved on : 10th April, 2018.
Decided on : 18th April, 2018.

Specific Relief Act, 1963- Section 34- Suit for declaration – Plaintiffs claiming that their father 'Nanku' was tenant qua share of 'Ugnu' in suit land and after death of 'Nanku' they inherited tenancy – Also alleging of their having become owner of share of 'Ugnu' by operation of law and in alternative claiming ownership by way of adverse possession qua share of 'Ugnu'- Plaintiffs further assailing partition orders dated 28.7.1974 and 8.1.1974 of A.C. 1st Grade obtained by defendants on basis of revenue entries existing in their favour - Defendants contested suit by pleading that Ugnu died issueless and her estate was inherited jointly by 'Nanku' and 'Devi Ram' their father- Trial court decreeing suit – Appellate court allowed appeal and as consequence dismissed suit- Regular Second Appeal – Held - Suit of plaintiffs basically for claim of ownership by way of adverse possession, which plea can be raised in defence only – Further Held- In absence of pleading, no declaration can be given that after death of Ugnu which took place in 1955-56, tenancy of 'Nanku' and thereafter of plaintiffs, is still continuing- Regular Second Appeal dismissed. (Para-7 to 9)

For the Appellants: Mr. Bhupender Gupta, Senior Advocate with Mr. Ajit Jaswal, Advocate.

For Respondent No.1 to8: Mr. K.D. Sood, Senior Advocate with Mr. Rajnish K. Lal, Advocate.

For other Respondents: Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiffs' suit for rendition of a decree, for permanent prohibitory injunction besides for rendition of a decree, for declaration, stood decreed by the learned trial Court. In an appeal carried therefrom, before the learned First Appellate Court, by the defendants, the latter Court allowed his appeal besides obviously reversed the trial Court's judgment and decree.

2. Briefly stated the facts of the case are that the plaintiffs filed a suit for declaration and permanent prohibitory injunction in respect of the land comprising khasra Nos. 8,23, 36, 29, 59, 60,61, 100, 101, 106, 118, 130, 4, 5, 6, 125, 56 and 85, situated in Village Dati, Pargana Dhar, Tehsil Arki, District Solan, on the averments that late Sh. Sita Ram and one Smt. Uganu were the owners of the suit land in equal share. Sita Ram had two sons Sh. Nanku and Sh. Devi Ram and the plaintiffs are successors of late Sh. Nanku, while the defendants are the successors of late Sh. Devi Ram and the land of Sh. Sita Ram was inherited in equal share by Sh. Nanku and Devi Ram. Smt. Uganu had inducted Sh. Nanku as tenant qua the half share in the said land and since then the plaintiffs have been coming in exclusive possession of the land qua the share of Smt. Uganu and as such they have become owners in possession of the same by operation of law and in the alternative the plaintiff claimed adverse possession after death of late Smt. Uganu, the plaintiffs being in exclusive possession as right openly, peacefully and continuously to the knowledge of all including the defendants and further the said tenancy of Sh. Nanku was never terminated legally or otherwise but the revenue agency has wrongly passed the mutation dated 15.4.1956 behind the back of the plaintiffs and on the basis of the wrong mutation in subsequent jamabandis Sh. Devi Ram and the defendants have been wrongly shown as joint owners in possession of the land of which Smt. Uganu was owner and taking undue advantage of the wrong entries, the defendants filed an application for partition before the Assistant Collector, which was objected by the father of the plaintiff and after his death by the plaintiff and that Sh. Nanku died on 26.1.1977 and the application for partition was allowed by the Assistant Collector vide his order dated 28.8.1974 and 8.10.1974 which orders were challenged upto the Financial Commissioner but all the revenue courts wrongly relied upon the revenue entries and ordered the partition without jurisdiction as the land in suit is not joint as the partition in respect of the other property and the land inherited from Sh. Sita Ram by the parties have taken place about 39 years ago and since then they are living separately without any joint status in any respect as the Assistant Collector has ordered to deliver the possession of the land to the defendants as per the order of partition, whereas, the defendants have no right, title, or interest over the land in suit and the plaintiffs are the absolute owners in possession of the same and the defendants have threatened to dispossess the plaintiffs and in that eventuality, they would cause an irreparable loss or injury.

3. The defendants contested the suit and filed written statement, wherein, they have taken preliminary objections of jurisdiction, limitation, cause of action, valuation etc. On merits, it is contended that though Nanku and Devi Ram were real brothers, who had inherited the property of deceased Sh. Sita Ram in equal share and Smt. Uganu died issueless in the year 1955-56 and her property was inherited by Nanku and Devi Ram in equal share and mutation No.175 of 15.4.1956 was rightly attested in favour of both real brothers and Sh. Nanku, the father of the plaintiffs was never inducted as a tenant by deceased Smt. Uganu and the property was joint Hindu Co-oparcenary property and Smt. Uganu had no right to alienate the property without the consent of Devi Ram, who was the presumptive reversioner and the land in question was cultivated by the plaintiffs and defendants jointly. So, the revenue Court has rightly allowed the parties and the plaintiffs have not challenged the final order of the Financial Commissioner within the period of limitation nor this Court has jurisdiction to decide the partition proceedings. They have also denied that there was any private partition between the parties.

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

1. Whether the plaintiffs have become the owners in possession of the share of late Sh. Devi Ram by way of adverse possession, as alleged?OPP.

2A. Whether the father of the plaintiffs was tenant of late Smt. Uganu, as alleged, if so its effect?OPP.

2. Whether the suit is not within limitation?OPD.

3. Whether the suit is not maintainable in the present form?OPD.

3A. Whether the plaintiffs are estopped by their acts, conducts etc. to file the suit as alleged? OPD.

3B. Whether mutation No.175 has been wrongly attested and the subsequent entries in the revenue record are wrong, as alleged?OPP

3C. Whether the partition of land inherited from Sita Ram had already taken place 39 years ago, if so, its effect?OPP.

4. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiffs/appellants herein. In an appeal, preferred therefrom, by the defendants/respondents herein before the learned First Appellate Court, the latter Court allowed the appeal and reversed the findings recorded by the learned trial Court.

6. Now the plaintiffs/appellants herein, have instituted the instant Regular Second Appeal before this Court, wherein they assail the findings recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, on 25.07.2005, 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 question of law:-

a) Whether the first Appellate Court erred in law and fact that on the death of a widow tenancy created by her comes to an end?

b) Whether the findings of the learned first Appellate Court are dehors the pleadings and evidence on record?

Substantial questions of Law No.1 and 2:

7. One Smt. Uganu, whereunder whom one Nanku, the predecessor-in-interest of the plaintiffs was a tenant, expired in the year 1955-56. The contest, reared, by the learned counsel appearing for the plaintiffs/appellants vis-a-vis the findings recorded by the learned Appellate Court, is confined to the latter irrevering the mandate, of, Section 11 of the Himachal Pradesh Abolition of Big Landed Estates and Land Reforms Act, 1953 (hereinafter referred to as the Act, relevant provisions whereof stand extracted hereinafter:

> "11. (1) Notwithstanding any law, custom or contract to the contrary a tenant other than a sub-tenant shall on application made to the compensation officer at any time after commencement of this Act, be entitled to acquire, on payment of compensation, the right, title or interest of the landowner in the land of the tenancy held by him under the landowner;
>
> Provided that a tenant not having a right of occupancy shall not be entitled to acquire the right, title and interest of the landowner in the land of the tenancy from which he is liable to ejectment under clause (d) or clause (f) or clause (g) of sub section (1) of Section 54.
>
> (2) Nothing contained in sub-section (1) shall apply to a landlord, if he has no other means of livelihood and is a minor, widow or a person suffering from physical or mental disability incapable of earning his livelihood. In the case of a minor, sub-section (1) shall not apply during his minority and in other cases for his life time.

(3). The application referred to in sub-section (1) shall be made in writing to the compensation officer who shall thereupon determine the amount of compensation payable to the landowner in respect of the land in accordance with the provisions of Sections 12 and 13.

4....."

(i) and thereupon contends, that, even though a specific statutory bar stands embodied in subsection (2) thereof, against a tenant, staking any claim for vestment of proprietary rights, (ii) on anvil of his being recorded as a tenant vis-a-vis th suit khasra numbers, (iii) especially with its being evidently invincible , from, the apposite revenue records, of his holding tenancy under a minor, widow or a person suffering from physical or mental disability incapable of earning his livelihood, (iv) and hence he accept(s) that thereupon the predecessor-in-interest of the plaintiffs, given his evidently holding tenancy under one Uganu, uncontrovertedly a widow, rather being estopped or statutorily barred to, on demise of Uganu, stake any claim for statutory vestment of proprietary rights, (v) yet he proceeds to contend that the aforesaid statutory bar is limited (a) only vis-a-vis the tenant staking vestment of proprietary rights, (b) whereas, there is no statutory bar, against, the predecessor-in-interest of the plaintiffs, and, thereafter the plaintiffs hence making a valid claim, for bestowment, of, tenancy(ies), vis-a-vis the suit khasra numbers, tenancy whereof existed inter se one Nanaku, and, deceased Uganu, and, the aforesaid claim also surviving beyond the life time of one Uganu, and, also hence a concomitant pronouncement being made upon the defendants, for, accepting the plaintiffs, as tenants vis-a-vis the suit khasra numbers. The aforesaid submission addressed before this Court, by the learned counsel appearing for the plaintiffs/appellants, would acquire leverage, upon, the pleadings cast in the plaint hence rather evidently bearing consonance with his submissions. However, an incisive perusal of the pleadings, unfolds of the plaintiffs, claiming rather a declaratory decree being rendered vis-a-vis theirs being pronounced to be owners in possession, of, the suit khasra numbers. The anvil of the plaintiffs' claim for rendition(s) of a declaratory decree, qua theirs being pronounced to be owners in possession of the suit land, is embodied, in their predecessor-in-interest, one Nanku holding with an *animus possidendi hence* possession thereof, besides his possession being open, peaceful, and, to the knowledge of one Devi Ram, and, thereafter on demise of Nanku, the possession of the suit khasra numbers being held, by the plaintiffs with an alike *animus possidendi*, and, also its being open, peaceful, and, to the knowledge of the defendants. Apparently, hence, the aforesaid staking(s), of, rendition of a declaratory decree, is visibly embodied in besides is squarely rested, upon, the plaintiffs hence propagating acquisition of title by prescription vis-a-vis the suit khasra numbers. The aforesaid mode of an affirmative staking by the plaintiffs, of, acquisition of title vis-a-vis the suit khasra numbers, is squarely blunted, by a catena of decision(s) recorded, by the Hon'ble Apex Court, with, clear expostulations occurring therein, of, the plea of acquisition of title, by adverse possession, being a plea rearable only in defence, and, the plaintiff(s) being barred to rear it, in the affirmative. In aftermath, the manner and the mode of acquisition title, vis-a-vis the suit khasra numbers, as, propagated by the plaintiffs, hence disempower(s) them, to seek rendition of any declaratory decree qua of theirs being pronounced, to be owners in possession of the suit land, besides obviously the aforesaid conclusion per se, negatives, the aforesaid espousal of the counsel, for the appellants.

8. Be that as it may, as aforestated, for the plaintiffs, to succeed qua for theirs, not falling, within the ambit, of, the statutory bar constituted under Section 11 of the Act, and, rather theirs, on demise of one Uganu, hence being declared as tenants vis-a-vis the suit khasra numbers, predominantly given, one Nanku holding tenancy, under one Uganu, and, the aforesaid status subsequently thereafter continuing even vis-a-vis the extant landowners, rather, is also a plea which is neither founded nor is rested upon apposite pleadings. For want of the aforesaid espousal made before this Court, hence, remaining unrested upon apposite therewith pleadings, rather with the plaintiffs' claim vis-a-vis the suit khasra numbers hence being anchored upon an unespousable plea, (i) thereupon, the submission made before this Court, by the learned counsel appearing for the plaintiff qua the plaintiffs, being declared to be holding rights of tenancy vis-a-vis the suit khasra numbers, even qua the extant landowners, given their predecessor-in-interest

evidently, holding tenancy rights, vis-a-vis the suit kahsra numbers, under one Uganu, and, hence thereafter tenancy being declared to be continuing under the extant landowners, rather hence cannot be come to be accepted.

9. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court being 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. Substantial questions of law are answered in favour of the respondent(s) and against the appellant(s).

10. In view of above discussion, there is no merit in the instant appeal and it is dismissed accordingly. Consequently, the judgment and decree rendered by the learned First Appellate Court in Civil Appeal No. 6-S/13 of 2001 is affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

State of H.P. ....Appellant.
Versus
Dhani Ram & another ....Respondents.

Cr. Appeal No. 676 of 2008.
Reserved on: 11th April, 2018.
Date of Decision: 18th April, 2018.

Code of Criminal Procedure, 1973- Section 378- **Indian Penal Code, 1860-** Sections 323, 325, 341, 504/34- Appeal against acquittal – Allegations against accused are that they gave beatings with dandas and stones to complainant and her sisters when they were working in field- Accused acquitted by trial court- Appeal against- State contending gross misappreciation of evidence by trial court – On facts, two separate FIRs in respect of same incident were filed by both parties – Complainant party also chargesheeted and tried for same incident on FIR of accused, but acquitted by trial court- Held- Genesis of case thus suppressed – Evidence of witnesses contradictory-Acquittal proper- Appeal dismissed. (Paras-11 and 12)

For the Appellant: Mr. Hemant Vaid, Addl. A.G. with Mr. Y.S. Thakur, Dy. A.G.
For the Respondents: Mr. G. S. Rathore, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed by the State of Himachal Pradesh against the judgment rendered on 22.7.2008 by the learned Judicial Magistrate 1st Class, Court No. III, Hamirpur, H.P., in Police Challan No. 22-I-2004, RBT 82-II-2004, whereby, he acquitted, the accused for theirs allegedly committing offences punishable under Sections 341, 325, 323 and 504, IPC read with Section 34 of the IPC.

2. The facts relevant to decide the instant case are that on 5.6.2003, when S.I. Des Raj was on routine patrol at Bhota Chowk then complainant Meera Devi got her statement recorded with him. It was revealed by the complainant that on the same day at about 7.00 p.m., she was working with her sisters Sunita Devi and Maya Devi in the fields. Dhani Ram and his wife Parveena Kumari came to her and started abusing her. They started saying that they would not allow them to pass through the path which has been going through their land. Dhani Ram as

also Parveena Kumari gave beatings to her along with her two sisters with 'dandas' and stones. It was also revealed by the complainant that one of her teeth has been broken and that she wants to get medical examination done. On the basis of this statement, an FIR was recorded in the police station concerned. Thereafter, the police completed all 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 341, 325 and 323 IPC read with Section 34 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, wherein, the accused claimed innocence, and, pleaded false implication, and, tendered in evidence Ext. D-1 and Ex. D-7.

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

6. The State of H.P., stands aggrieved, by the judgment of acquittal recorded in favour of the accused/respondents, by the learned trial Court. The learned Addl. 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 rather standing based on a mature and balanced appreciation, by it, of the evidence on record, and, theirs not necessitating any interference, rather theirs meriting vindication.

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

9. Initially upon Police Challan No.22-I-2004, RBT 82-II-2004, the learned trial Court had pronounced an order of conviction upon the accused. However in an appeal carried therefrom, by the accused/respondents herein, before the learned Sessions Judge, Hamirpur, the latter, on anvil of MLC Mark-X authored by PW-9, Dr. Chaman Lal, remaining unproved besides unexhibited, especially during the course of the trial,hence, he ordered for recalling of PW-9, for, his hence proving mark-X. Consequently, also the learned Sessions Judge, Hamirpur on 9.1.2008, ordered for a denovo trial, by the learned trial Court, from, the stage subsequent, to the re-examination of the aforesaid PW-9, Dr. Chaman Lal. Moreover, the learned Sessions Judge, Hamirpur, set aside the judgment of conviction, and, sentence pronounced, on 28.8.2006, by the learned trial magistrate, hence, made an order of remand, upon, the learned trial Court. The learned trial Court, upon, receiving police challan No. 22-I/2004, RBT No.82-II/2004, upon, its remand vis-a-vis him, rendered finding of acquittal thereon vis-a-vis the accused/appellants herein.

10. The learned Additional Advocate General has contended with vigour, that with the order of remand pronounced upon the learned trial Court, being, confined only vis-a-vis proof, being adduced qua the authorship of MLC Mark-X, thereupon, in the learned trial Court, rather further proceeding to record an order of acquittal, after, receiving the apposite police challan, on remand, from the learned Sessions Judge, has hence inaptly effaced all the effect(s) of proper befitting appraisal, of evidence, as previously done, by the learned trial Court. However, the aforesaid submission made by the learned Additional Advocate General, is bereft of any tenacity,

given the order of remand, made, upon the learned trial Court, by the learned Sessions Judge, Hamirpur, also carrying a clear mandate qua the conviction, and, sentence recorded, on 28.8.2006, by the learned trial Court, being quashed and set aside, and, thereupon it was permissible vis-a-vis the trial Court, to reappraise evidence, and, to record a fresh verdict, upon, the apposite police challan.

11. Uncontrovertedly, in respect of the incident, of 5.6.2003, which occurred at about 7.00 p.m. at place Nahalwin, the accused, had alike, the complainant(s), hence, instituted an FIR exhibited therein, as Ex.PW1/A. Upon the aforesaid exhibit being put to trial, by the learned Additional chief Judicial Magistrate, the latter proceeded to record, an order of acquittal, upon the accused therein, who are victims/complainants, in the instant FIR. The learned Additional Advocate General had made an intimation, to this Court, that, the State has not preferred any appeal, against the order of acquittal pronounced by the learned Additional Chief Judicial Magistrate, upon, police challan No. 11/I/2004/15-II-2007, challan whereof appertains, to an incident, alike the one, appertaining to the extant FIR. The effect of the conclusivity(ies) hence enjoyed by the verdict pronounced, by the learned Addl. C.J.M. in police challan No. 11/I/2004/15-II-2007, especially, when pointedly, and candidly the incident borne therein, directly appertains to an incident, alike the one carried, in the extant FIR, (a) is, of, obviously its carrying a profound implication, of the incident which is borne in the extant FIR, not, carrying the entire truth of the incident reported therein, rather, the genesis of the incident, borne, in the extant FIR being a sequel, of, *suggestio falsi and suppresio veri,* (b) whereupon, hence, a concomitant conclusion, is drawable of the version testified by the victims/complainants qua the contents of the extant FIR, especially when no independent witness besides them, stood associated by the Investigating Officer, rather being a sequel, of, sheer contrivance or an invention, (c) thereupon, any contrived or suppressed version vis-a-vis the genesis of the incident, borne in the extant FIR, hence cannot be imputed any sanctity.

12. Be that as it may, even if assumingly, dehors the aforesaid inferences drawn by this Court, the evident lack of inter se or intra se contradiction, in the respective testifications, of, PW-1, PW-4, and, PW-5, does hence constrain this Court, to impute sanctity vis-a-vis their respective testifications. Nonetheless, with, the complainant PW-1, making a testification of the victims being belaboured with dandas, and, stones, (i) thereupon, for hence the aforesaid factum, to marshal truth, hence, enjoined the Investigating Officer concerned, to make lawful efficacious recoveries thereof, (ii) whereupon, alone hence ascription(s) of quilt by PW-5 vis-a-vis the accused, would rather acquire an aura of credibility, (iii) whereas, the investigating officer concerned, not ensuring any efficacious recoveries, of, either dandas or of stones, though testified by PW-5 to be wielded by the accused, and, with user whereof they inflicted injuries, upon, the respective persons of the complainant party, (iv) does hence constrain a conclusion of their testification vis-a-vis the occurrence, rather not carrying any aura of truth. Further sequel thereto, (v) when entwined, with conclusivity hence enjoyed by the verdict pronounced upon FIR Ex.PW1/A, borne in Police Challan No. 11/I/2004/15-II-2007, (vi) FIR whereof appertains, to an incident alike the one borne in the extant FIR, and, when thereupon this Court has hence concluded, of the version borne in the extant FIR, being, a sequel of *suggestio falsi and suppresio veri*, (vii) thereupon, it is befitting, to conclude of the verdict of acquittal, recorded by the learned trial Court, hence not, warranting any interference.

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 a gross perversity or absurdity of mis-appreciation and non appreciation of evidence on record.

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

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

State of H.P. .....Appellant.
Versus
Sandeep Thakur & another ....Respondents.

Cr. Appeal No. 773 of 2008
Reserved on: 12th April, 2018
Date of Decision: 18th April, 2018.

Punjab Excise Act, 1914 as Applicable to State of H.P.- Section 61(i)(a)- Alleged recovery of 108 bottles of IMFL in nine cartons from vehicle occupied by accused without permit - Police took samples only from four bottles - Trial Court acquitted accused of said offence- Appeal against- On facts, statements of witnesses were contradictory to recitals made in recovery memo- Assuming recovery of four bottles to be from accused still they can be said to be possessing two bottles each, which is legally permissible to carry without permit – No charge is made out- Appeal dismissed. (Para-10 to 13)

For the Appellant: Mr. Hemant Vaid, Additional Advocate General
For the Respondents: Mr. Vinay Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed by the State of Himachal Pradesh against the judgment rendered on 29.09.2008 by the learned Judicial Magistrate 1st Class, Court No. II, Roharu, District Shimla, H.P. in Case No. 32/3 of 2007, whereby, he acquitted, the accused for theirs allegedly committing an offence punishable under Section 61(i)(a) of Punjab Excise Act as applicable to the State of H.P. (hereinafter referred to as the Act).

2. The facts relevant to decide the instant case are that on 13.1.2007, at about 9.20 p.m., a police party headed by H.C. Yash Pal, No.94 along with other police officials, was present at paurital near Mehandli when a vehicle bearing No. HP-03-4174 came from Hatkoti side. The said vehicle was stopped. It was occupied by one Sandeep Thakur being its driver and other occupant was also named as Sandeep Thakur @ Bittu. On search of such vehicle, nine cases of old Monk XXX Rum were found kept on rear seat of the vehicle. Both the accused failed to produce any permit/licence for possession such liquor. Out of the recovered liquor, four bottles were segregated from the four cases as sample. The sample bottles were sealed with seal bearing inscription 'A'. Specimen of seal were also taken separately on a cloth piece. Thereafter, the police completed all the codal 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 Section 61(1)(a) of the Act. In proof of the prosecution case, the prosecution examined 8 witnesses. On conclusion of recording of the prosecution evidence, the statements of the accused, under, Section 313 of the Code of Criminal Procedure, were, recorded by the learned trial Court, wherein, the accused claimed innocence, and, pleaded false implication.

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

6. The State of H.P., stands aggrieved, by the judgment of acquittal recorded in favour of the accused/respondents, by the learned trial Court. The learned Addl. 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 rather standing based on a mature and balanced appreciation, by it, of the evidence on record, and, theirs not necessitating any interference, rather theirs meriting vindication.

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

9. 108 bottles of Old Monk XXX Rum, carried in 9 boxes, were, recovered under memo Ex.PW4/A, from vehicle bearing No. HP-03-4174, vehicle whereof, at the relevant time stood occupied by accused No.1 Sandeep Thakur, and, also by another Sandeep Thakur alias Bittu (accused No.2). Since, the accused failed to produce the relevant permit hence in the FIR, offences punishable under Section 61(1)(a) of the Act , stood constituted against the accused.

10. In respect of recovery of the aforesaid bottles, memo Ex.PW4/F was prepared, and, from amongst the aforesaid cache of liqour, four bottles were segregated, as samples, sample bottles whereof were sent to CTL, Kandaghat, whereon, the latter pronounced, an affirmative opinion, embodied in Ex. PW5/D. Even though, the learned trial Court has discounted the vigour of the testifications of the officials witnesses, on the score of, despite, as testified by PW-2, in his cross-examination, of, his at 10.15, p.m., boarding, a vehicle for carrying the rukka to the police station, (i) thereupon, with occupants thereof, being obviously available for theirs being associated as independent witnesses, vis-a-vis the recovery of cache of liquor, from, the vehicle occupied by the accused, and, yet the Investigating Officer failing to associate them as independent witnesses, hence constrained it to disimpute vigour vis-a-vis the testifications of officials witnesses. However, the discountenancing of the testifications of the officials witnesses, on the score, aforesaid rather is legally frail, (ii) given the arrival of the vehicle aforestated, not being formidably pronounced, to be occurring in contemporaneity, to the alleged seizure, rather when the alleged seizure occurred prior thereto, at 9.20 p.m., hence, obviously the subsequent arrival, of the vehicle aforestated, at the site of occurrence, especially when thereat the relevant proceedings were concluded, (iii) hence did not enjoin the Investigating Officer, to associate occupants thereof, as independent witnesses vis-a-vis the relevant proceedings, nor their non association by the Investigating Officer, renders errectable any inference, of the testifications rendered by the official witnesses, being either discountable or discardable, as inaptly done by the learned trial Court.

11. Be that as it may, an ingrained infirmity pervading the prosecution case, is, comprised in the factum of PW-5, the Investigating Officer, PW-6 and PW-7, in their respective testifications, rather making unanimous echoings (i) qua non appending of seals, on any of the boxes containing bottles of liquor, (b) besides they unanimously testify, of, no specific identification mark being embossed, upon, any of the boxes, containing bottles of liquor. The Investigating Officer concerned, though was enjoined to on all the boxes holding therewithin bottles of liquor, hence affix specific identification marks besides was enjoined, to, emboss seals thereon, and, was also enjoined to make apposite concurring therewith, reflections, in the relevant seizure memo, Ex.PW4/F, (c) yet neither the seizure memo, carries any recitals, of the Investigating Officer concerned, embossing any specific identification marks vis-a-vis four boxes, holding therewithin liquor nor also there occurs any echoing therein of any seal impression(s), being embodied thereon, (d) wherefrom, it is apt to conclude of the Investigating Officer

concerned, failing to ensure, adduction of potent proof, vis-a-vis the trite factum of the bottles recovered under memo Ex.PW4/F, being at the time of their production in Court, hence standing pointedly linked vis-a-vis their recovery in the manner disclosed, in the apposite FIR. The further effect thereof (e) is that for lack of occurrence, of, imminent connectivity inter se the purported recovery of four boxes holding therewithin liquor, from, the manner encapsulated in the FIR vis-a-vis the stage of their production in Court, rather hence garnering an inference of the prosecution omitting to assuredly, prove qua all the boxes of liquor, as stood recovered under memo Ex.PW4/F, hence standing squarely connected therewith or vis-a-vis Ex.PW5/D. Furthermore, the cache of the liquor at the stage of preparation of Ex.PW4/F, was carried in card board boxes, whereas, PW-6, in his cross-examination, has, testified that at the time, of, the case porperty being shown in Court, to him, thereat from amongst four card board boxes, two rather being were contrarily carried in a white coloured gunny bag, (f) thereupon, the effect thereof, when is entwined, with, the aforesaid lack of identification marks being carried, upon, 4 card board boxes, purportedly holding therewithin liquor, recovery whereof stood effectuated under memo Ex.PW4/F, (g) is of hence a part, of the case property at the time of its production in Court being produced in a manner contradistinct vis-a-vis the manner of its recovery, hence, being effectuated under memo Ex.PW4/F. (vi) With a further corollary of this Court being constrained to conclude of the production, of case property in Court, not, being formidably linked with memo Ex.PW4/F, rather the prosecution failing to adequately, and, convincingly connect, the recovery of liquor under memo Ex.PW1/D vis-a-vis its production in Court. Further concomitant effect thereof, is that benefit of doubt accrues vis-a-vis the accused.

12. A further perusal of the record, reveals, that (iv) 108 bottles were carried in four cartons/boxes of liquor, and, from amongst 108 bottles, four bottles were segregated as samples, and, were sent to the CTL Kandaghat, and, the latter rendered thereon its affirmative opinion qua contents thereof, opinion whereof is borne in Ex.PW5/D. The learned defence counsel, yet, did not make any effort, for the four bottles sent to CTL, Kandaghat, being ordered to be produced in Court for his thereafter making, a valid projection before the learned trial Court, that, with thereon also the Investigating Officer, hence, failing to emboss the appropriate seals, nor seals, if any, embossed thereon not bearing any similarity with the recitals carried in seizure memo, (i) whereupon, only upon theirs being produced in Court, also theirs, making, revelations in support of the learned defence counsel's espousal, it was befitting to discard the report borne in Ex. PW5/D, reiteratedly, failure aforesaid, of the learned defence counsel, contrarily constrains a conclusion, of the four bottles retrieved, from, amongst 108 bottles of liquor carried in four carton boxes, in the manner disclosed in the FIR, being properly sealed, and, also samples retrieved therefrom, whereon, an affirmative opinion borne, in Ex.PW5/D was pronounced by the CTL concerned, rather enjoying both tenacity as well as evidentiary worth. The further concomitant effect, of the aforesaid inference is hence qua the defence also conceding of four bottles holding therewithin liquor.

13. Be that as it may, even if the aforesaid conclusion is recorded by this Court, its effect stands blunted, by the factum of the opinion of CTL, Kandaghat, borne in Ex.PW5/D, being only pronounced with respect to four bottles, and, when the charge was framed against two accused, thereupon, when vis-a-vis each, from, amongst four bottles, two bottles are distributed inter se both the accused, thereupon, when it is legally permissible, for each of the accused to carry two bottles, without any valid permit or licence issued by any authority, hence, the charge is not made out against them.

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

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

Sunil Kumar & Ors. ... Appellants
Versus
Jhomphi Ram ... Respondent

RSA No. 137 of 2008
Reserved on: 13.04.2018
Date of decision: 18.04.2018

Transfer of Property Act, 1882- Section 106- Termination of tenancy- Plaintiff's suit for possession of a shop by ejectment of defendants decreed by Trial Court by holding that tenancy stood validly terminated – Appeal of defendants dismissed by Additional District Judge - Regular Second Appeal – On facts, disputed shop was found built over government land – Proceedings under Section 163 of H.P. Land Revenue Act were initiated and eviction order was passed against defendants – Held- Plaintiff not being owner of land over which disputed shop was built upon, not entitled for its possession- Appeal allowed and decrees of Lower Courts set aside. (Para-18)

For the appellants: Mr. R.K. Sharma, Senior Advocate, with Ms. Anita Parmar, Advocate.
For the respondent: Mr. K.B. Khajuria, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. (Oral):

By way of this appeal, appellants have challenged the judgment and decree passed by the Court of learned Additional District Judge-I, Kangra at Dharamshala in Civil Appeal No. 98-P/04, vide which learned Appellate Court while dismissing the appeal so filed by the present appellants upheld the judgment and decree passed by the Court of learned Civil Judge (Junior Division) Court No. 2, Palampur in Civil Suit No. 93/2000 dated 30.06.2004, whereby learned trial Court had decreed the suit of the plaintiff therein, in the following terms:-

> "In view of the detailed discussions and the reasons specified, the suit of the plaintiff deserves to be decreed and is accordingly, decreed with cost. The plaintiff is granted a decree of possession of shop situate in Khata No. 637 min, khatoni No. 1250, khasra No. 2675, land measuring 0-00-28 Hects., situate in Mohal Ghuggar, Tehsil Palampur, Distt. Kagra (H.P.) by ejectment of the defendants from the same. Decree be drawn accordingly. The file after it's due completion be consigned to record room."

2. Brief facts necessary for adjudication of the present appeal are that respondent/plaintiff hereinafter referred to as the plaintiff filed suit for possession of shop comprised in Khata No. 637 min, Khatoni No. 1250, Khasra No. 2675 measuring 0-00-28 Hects. situated in Mohal Ghuggar Ram Chowk, Tehsil Palampur, District Kangra, i.e. suit premises, by way of ejectment of the defendants on the ground that the shop in issue was rented out to late Narayan Bos, husband of defendant No. 1 and father of other defendants by the plaintiff, who was owner of the same. According to the plaintiff, his son was unemployed and thus the shop was required for his use. Further, as per the plaintiff, defendants were serving in different departments and the shop in fact was locked since the death of Narayan Bos. Plaintiff served a notice under Section 106 of Transfer of Property Act and terminated the tenancy of the defendants. Notice was duly received by defendant No. 5 but the other defendants refused to receive the same. It was further case of the plaintiff that the defendants were not paying rent, which was due from the defendants since January, 1998. On these basis, he had prayed for decree of possession of the suit premises by ejectment of the defendants.

3. The suit was contested by the defendants, who inter alia, took the stand that Narayaan Bos was not a tenant in the shop of the plaintiff and that it were defendants No. 1 to 4 who were in possession of the shop which was constructed by the predecessor-in-interest of the replying defendants more than 30 years ago. According to the defendants, the plaintiff had nothing to do with the suit premises and he had no right, title or interest over the same as defendants were not his tenants. According to the defendants, the claim of the plaintiff was false and frivolous.

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

"1. Whether plaintiff is entitled to the decree of possession of shop by ejectment, as alleged? ... OPP

2. Whether suit of the plaintiff is not maintainable? ... OPD

3. Whether plaintiff has no locus standi? ... OPD

4. Whether plaintiff is estopped by his act and conduct from filing the present suit? ... OPD

5. Whether plaintiff has no cause of action? ... OPD

6. Relief.

5. On the basis of evidence led on record by the respective parties, learned trial Court returned the following findings to the issues so framed:-

Issue No. 1	:	Yes.
Issue No. 2	:	No.
Issue No. 3	:	No.
Issue No. 4	:	No.
Issue No. 5	:	No.
Relief.	:	The suit of the plaintiff is decreed with costs as per operative part of this judgment.

6. Learned trial Court held that the evidence on record demonstrated that the plaintiff was the owner of the suit premises and defendants were in possession of the same whose tenancy stood terminated by the plaintiff by issuance of a proper notice under Section 106 of the Transfer of Property Act. Accordingly it decreed the suit. It is pertinent to mention that while decreeing the suit, an observation was made by learned trial Court that a perusal of Ext. P-1 i.e. copy of Jamabandi for the year 1997-98 demonstrated that Khasra No. 2675 was owned by the Government of Himachal Pradesh and possession thereof was shown to be with Kahana.

7. Feeling aggrieved by the judgment so passed by learned trial Court, defendants therein filed an appeal.

8. Learned Appellate Court while dismissing the appeal, held that the evidence demonstrated that the plaintiff was owner of the suit premises and the same was in possession of the defendants as tenants. Learned Appellate Court negated the plea of the appellants therein that the suit land was not situated on Government land.

9. Feeling aggrieved, they have filed this appeal, which was admitted on 13.08.2008 on the following substantial question of law:-

"When the defendants have been ordered to be ejected under Section 163 of the HP Land Revenue Act from the shop in Khasra No. 2674, whether the Ld. Courts below are justified to hold that the very shop is in Khasra No. 2675 owned by the plaintiff?"

10. During the pendency of the present appeal, on 23.11.2016, this Court had passed the following order:-

> "When this case was called for arguments today, Mr. Sharma learned Senior Counsel appearing for the appellants/defendants pointed out that the perversity with the judgments and decrees passed by both learned courts below was that both learned courts below erred in not appreciating that the suit property i.e. the shop was situated at Khasra No. 2674 which is Government land and not on Khasra No. 2675, as was pleaded by the respondent/plaintiff. Mr. Sharma further submits that in fact in this regard proceedings stood initiated against the appellants/ defendants under the provisions of Section 163 of H.P. Land Revenue Act and ejectment orders also have been passed by the appropriate authority against him. Mr. Khajuria learned counsel for respondent/plaintiff submitted that probably these contentions are not now available to the appellants because no evidence was led by the appellants before learned trial court to substantiate its contention that the shop in question was not situated on the private land of the plaintiff but was situated on the Government land. Be that as it may, in order to ascertain this, let Tehsildar Palampur, District Kangra demarcate the area where the shop in dispute is situated by issuing advance notices in this regard to the respective parties and submit its report to the Court. Demarcation of the land in issue shall be carried out by Tehsildar Palampur within three weeks from today and report thereof be furnished to this Court within a week thereafter. It shall be specified in the report that the shop in dispute is upon which particular khasra number and who is the owner of said khasra number. Learned Deputy Advocate General is requested to convey the order to Tehsildar and ensure compliance of the same. Appellants shall deposit an amount of Rs. 5,000/- with Tehsildar Palampur to meet expenses to be incurred in the course of demarcation within one week from today. List on 30.12.2016."

11. Pursuant thereto, Local Commissioner (Tehsildar, Palampur), submitted his report which reads as under:

> "The Hon'ble High Court of Himachal Pradesh in RSA No. 137/2016 titled as Sh. Sunil Kumar & others versus Sh. Jhomphi Ram on 23.11.2016 pleased to direct to undersigned to demarcate the area where shop was situated i.e. whether the shop was situated in Khasra No. 2674, which is Govt. Land and not on 2675 as pleaded by parties with special mention in the report that shop in dispute is upon which Khasra Number and who is owner of said Khasra Number.
>
> In compliance to the directions of Hon'ble High Court, I visited the spot first on 14.12.2016 alongwith Field Kanungo and Patwari, PC Aima (Incharge P.C. Chowki) in Mohal Ghuggar, P.O. Chowki, Tehsil Palampur, Distt. Kangra, H.P. Both the parties were informed in advance. Appellants were issued notices on the addresses as mentioned in RSA No. 137. But the processing agency reported that the applicants were not residing at Holta Camp Tehsil Palampur, Distt. Kangra, (H.P.) Sh. Jhomphi Ram received the notice personally.
>
> Anyhow, on spot appellant No. 1 Sh. Sunil Kumar and Sh. Shekhar Pal s/o Sh. Vinod Kumar (appellant No. 4) and respondent Sh. Jhomphi Ram appeared on 14.11.2016. Sh. Sunil Kumar and Shekhar Pal S/o Vinod Kumar stated that they could not produce copy of Mussavi and requested that demarcation be fixed for 18.11.2016 and they will produce other appellants themselves and also copy of Mussavi. Respondent Sh. Jhomphi Ram also stated that appellants had not produced copy of Mussavi and so he will appear on spot on 18.12.2016. So, demarcation was fixed for 18.12.2016.
>
> On 18.12.2016, I reached on spot in Mohal Ghuggar, Tehsil Palampur, Distt. Kangra, (H.P.) alongwith Patwari Halqa Aima (Incharge P.C Chowki).

Appellants namely Sh. Sunil Kumar, Sh. Jonsar Pal, Sh. Anil Pal and Sh. Vinod Kumar sons of Sh. Narain Swaroop residents of Lohna, Tehsil Palampur were present on spot. Respondent Sh. Jhomphi Ram S/o Sh. Kahna Ram resident of Mohal Ghuggar was also present on spot. The order of Hon'ble High Court was explained to them in vernacular.

First of all the accuracy of measuring chain was ascertained with the help of Paimana Pital. Thereafter, parties were asked to tell permanent points of their satisfaction and belief. They told that structures/shops constructed over Khasra No. 2672 to 2679 were permanent and undisturbed since settlement and therefore, the demarcation be done from any of these Khasra numbers and they would have no objection.

Khasra No. 2671 in front of Khasra No. 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679 is owned by State of H.P. and in possession of Public Works Department and classified as Gair Mumkin Sarak. So, Khasra No. 2671 is road and on Palampur Dharamshala via Nagri road. Opposite to Khasra No. 2672 to 2679 i.e. on other side of road, there are buildings/shops. Behind Khasra No. 2674 to 2679, Khasra No. 2865/2680, 2867/2680 have been allotted and there are also constructions almost.

Therefore, demarcation was started from Khasra No. 2679. This No. Khasra is entered in ownership of State of H.P. and in the column of possession Jagdish s/o Dharmu is recorded as X. From Point A to B, 4 meters were measured reaching the dividing line of Khasra No. 2679 and 2678. Khasra No. 2678 is also owned by State of H.P. and in cultivation column, it is recorded as Udmi s/o Darshanu X. Parties present on spot admitted point 'B' as correct and it also conformed the revenue record. From point B to C, 3 meters were measured and it also conformed the revenue record. Point C is dividing point of Khasra No. 2677 and 2678. Parties and other inhabitants present on spot admitted it correct. From point C to D, 3 meters were measured, which conformed the revenue record. Parties again admitted this point as correct. Point D is dividing line of Khasra No. 2676 and 2675. Khasra No. 2677 is also owned by State of H.P. and in cultivation column, it is recorded as Sh. Jonsar s/o Darshanu X. Khasra No. 2676 is also recorded in the ownership of State of H.P. and in cultivation column, Swaru r/o Bhikhu X. Now demarcation was advanced further measuring 4 meters from point D to 'E', which conformed the revenue record. Point E is dividing line of Khasra No. 2675 and 2674. Both the parties admitted it correct. So, Khasra No. 2675 is recorded in the ownership of State of H.P. and in the column of possession, it is recorded as Kahna s/o Sita s/o Johri X. Now from point E to 'F', 4 meters were measured, which conformed the revenue record. Both the parties and other inhabitants persons on spot admitted it correct. Line DE is road side front of Khasra No. 2675 and line EF is road side from of Khasra No. 2674. Khasra No. 2674 is recorded in the ownership of State of H.P. and in the possession of Van Vibhag Tave Bartan Bartandaran and classified as Jangal Mehfuja Gair Mehduda. To check the correctness of Point F, the demarcation was proceeded further measuring 7 meters upto point G, which is dividing point of Khasra No. 2673 and 2672, which conformed the revenue record. Khasra No. 2673 is also entered in the ownership of State of H.P. and in possession of Van Vibhag Tave Bartan Bartandaran and classified as Jangal Mehfuja Gair Mehduda. This point was admitted correct by both the parties. Khasra No. 2673, 2674, 2675 are constructed and behind these No. Khasra, also there are constructions. So, to check other dimensions of Khasra No. 2674, 2675 the measurement was taken on slab. Point E to X, 7 meters were measured, which conformed the revenue record and was admitted correct by the parties. Points X to Y, 4 meters were measured, which conformed the revenue record and was admitted correct by parties. Point Y was joined to point E

measuring 7 meters, which conformed the revenue record and was admitted as correct by both the parties. This way demarcation of Khasra No. 2674 was completed. Now from point Y to Z, 4 meters were measured, which conformed the revenue record and admitted correct by both the parties. Now point Z was joined to point D measuring 7 meters, which conformed the revenue record and admitted correct by the parties. This way demarcation of Khasra No. 2675 was completed.

After conducting demarcation in aforesaid manner, the concluding submissions are as under:-

1. The shop in dispute is situated in Khasra No. 2674 area measuring 0-00-28 hect. The land is entered in the ownership of State of H.P. and in the possession of Van Vibhag Tave Bartan Bartandaran and classified as Jangal Mehfuja Gair Mehduda situated in Mohal Ghuggar, Tehsil Palampur, Distt. Kangra, (H.P.)

2. In Khasra No. 2675 area measuring 0-00-28 hect, there is also shop. This land is also entered in ownership of State of H.P. and in cultivation column these is entry of Kahna S/o Sita S/o Johari local resident X and classified as Gair Mumkin Dukan.

Copy of Mussavi is annexed herewith as annexure A, Copy of Jamabandi of Khasra No. 2674 as annexure B, Copy of Jamabandi of Khasra No. 2675 as Annexure C statements of parties dated 14.12.2016, as Annexure D/1, D/2, statements of parties dated 18.12.2016 as annexure E/1, E/2, E-3, notice Annexure F/1, F-2.

Hence report is submitted please."

12. Objections to the demarcation report so carried by the Tehsildar stands filed by the respondent.

13. As agreed, objections so filed by the respondent, were heard alongwith the main appeal.

14. A perusal of Local Commissioner's report demonstrate that the shop in dispute is situated in Khasra No. 2674 which land is entered in the ownership of State of Himachal Pradesh and in the possession of Forest Department. It is further mentioned in Local Commissioner's report that upon Khasra No. 2675 which land is also entered in ownership of State of Himachal Pradesh, there exists another shop and in the cultivation column, entry is in favour of Kahna son of Sita and the same is classified as Gair Mumkin Dukan.

15. During the course of arguments, upon the objections so filed to the demarcation report, veracity of the said report could not be impeached by learned counsel for the respondent as it was not disputed that the demarcation was carried out by the Tehsildar not only in the presence of parties but also strictly inconsonance with the provisions dealing with the demarcation of land. Local Commissioner's report further demonstrates that the demarcation was carried out by fixing permanent points which were not objected to by either of the parties.

16. When it is apparent from the demarcation report so submitted by Tehsildar, Palampur that the disputed land is not owned by the represented/plaintiff but the same is constructed over the land owned by the State of Himachal Pradesh, judgments and decrees passed by both learned Courts below to the contrary are not sustainable in the eyes of law. In fact evidence to this effect on record has been completely ignored by the learned Courts below. Objections so filed to the demarcation report are also without any merit and the same are accordingly dismissed.

17. Now, when it has come on record that the respondent/plaintiff is not the owner of the land over which the disputed shop is constructed, both learned Courts below have definitely erred in decreeing the suit in favour of the plaintiff for possession of shop by

ejectment of the defendants. Taking into consideration the fact that the plaintiff is not owner of the land over which the disputed shop stood constructed, he was not entitled for decree of possession as has been granted in his favour by learned trial Court and upheld by learned Appellate Court. Substantial question of law stand answered accordingly.

18. In view of the above discussion, this appeal succeeds and the judgment and decree passed by learned trial Court in Civil Suit No. 93/2000 and upheld by learned Appellate Court in Civil Appeal No. 98-P/04, whereby decree of possession was passed in favour of the respondent/ plaintiff, is set aside and the suit filed by the plaintiff is ordered to be dismissed. However, taking into consideration the fact that the appellants are in possession of Government land, it is observed that this judgment shall not come in the way of the State of Himachal Pradesh from evicting the defendants from the said land in accordance with law. Miscellaneous application(s) pending, if any, stand disposed of. Interim order, if any, also stand vacated.

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

Mahesh C. Puri ...Decree-Holder.

Versus

State of Himachal Pradesh ...Judgment Debtor.

Execution Petition No. 23 of 2011
Date of decision: 20.04.2018

Arbitration and Conciliation Act, 1996- Section 21- Commencement of arbitral proceedings - Execution of Award- Petitioner sought execution of award dated 27.10.2011 passed by Adjudicator – Terms of contract inter se parties provided that award of adjudicator could be agitated before 'sole arbitrator' appointed with their mutual agreement- Department writing a letter to petitioner of its intention to challenge award of adjudicator, and also requesting him to suggest name of 'arbitrator'- Petitioner did not respond to letter of Department at all- Held- Award of adjudicator had not attained finality and thus was unexecutable- Execution petition dismissed. (Para-13)

Interpretation of Contracts- Held- Business contracts must be interpreted in sense they are understood by business world in the usual course of dealings- Intent and objective sought to be sub-served by use of particular terminology in contracts, are relevant. (Para-8)

For the Decree Holder: Mr. J.S. Bhogal, Senior Advocate, with Mr. Parmod Negi, Advocate.

For the Judgment Debtor: Mr. Ashok Sharma, Advocate General, with Mr. Sudhir Bhatnagar, Addl. A.G., Mr. J.S. Guleria and Mr. Bhupinder Thakur, Dy. Advocate Generals.

The following judgment of the Court was delivered:

***Tarlok Singh Chauhan, Judge* (Oral)**

This execution petition has been filed by the decree holder seeking execution of an award made by the Adjudicator on 27.10.2011 ostensibly on the ground that the said award has attained finality.

2. The judgment debtor has filed the reply/objection to the execution petition wherein preliminary submission regarding the very maintainability of the execution petition has been raised. It has been averred that the execution petition is not maintainable as the arbitration

proceedings have already commenced in this case as per the provisions of Section 21 of the Arbitration and Conciliation Act, 1996 (for short 'Act'). The Adjudicator adjudicated the dispute on 27.10.2011 and further issued corrigendum on 31.10.2011. This was challenged by the judgment debtor vide his communication dated 29.10.2011 to the Chief Engineer, Mandi Zone, HPPWD, Mandi with a copy thereof to the petitioner. The copy of this letter was sent to the decree holder on his address which was given at the time of tender as well as on the address which has been given in the judgment sought to be executed. Therefore, the execution petition is not maintainable as the notice for the appointment of arbitrator was served upon the decree holder within 28 days. Consequently, the Chief Engineer, Mandi Zone, appointed an arbitrator with copy to the decree holder. The decree holder not only objected to such appointment, but gave three names which were not acceptable to the judgment debtor. Since the sole arbitrator could not be appointed with the mutual consent of the parties within 15 days, the matter was referred to the Secretary General Indian Road Congress, New Delhi for appointment of an arbitrator as per terms and conditions of the agreement which appointment is still awaited.

3. The decree holder has filed rejoinder to the reply wherein it has been denied that arbitration proceedings have commenced under Section 21 of the Act. It has further been averred that after the decision of the Adjudicator on 27.10.2011, the competent authority to challenge the same was the Employer i.e. the Chief Engineer and the writing of the letter by the Executive Engineer did not amount to a challenge to the said decision. It has been averred that in terms of the agreement between the parties, the challenge, if any, had to be laid by the Employer and that also by suggesting a panel of persons from whom a mutually agreeable arbitrator could be appointed. This was also required to be done within 28 days which was never done by the respondent. It has been averred that the letter dated 4.11.2011 written by the Executive Engineer was addressed to the Chief Engineer for appointing an arbitrator, but the Chief Engineer did not have any authority under the contract to unilaterally appoint an arbitrator as he had to be appointed by mutual consent of the parties. It was further averred that the unilateral appointment of the arbitrator made by the Chief Engineer vide its letter dated 3.11.2011 was in fact objected to by the decree holder vide his letter dated 9.11.2011 vide which the decree holder had also suggested the names of a few persons from whom the arbitrator could be mutually selected. The respondent, however, chose not to respond to the same within the stipulated period of 28 days and thus have lost the right to refer the matter to the arbitrator as per the provisions of Clause 25.2 and 25.4 of the agreement between the parties. It has further been clarified that the copy of letter dated 17.11.2011 was never received by the decree holder and this aspect was also pointed out by him to the Chief Engineer vide his letter dated 28.11.2011. Lastly it has been averred that as per the admitted case of the respondents themselves, the first reference to the Secretary General of the Indian Roads Congress was made by the judgment debtor only on 9.12.2011 and, that too, was not in order since the appointment of the arbitrator had to be made by the Chairman of the Executive Committee of the Indian Roads Congress as per the requirements of Clause 25.4 of the agreement between the parties. Therefore, the respondents have lost their right to refer the matter to the arbitrator and the decision of the Adjudicator has attained finality under the provisions of Clause 25.2 of the Contract.

4. I have heard Mr. J.S. Bhogal, learned Senior Counsel assisted by Mr. Parmod Negi, Advocate, learned counsel for the decree holder and the learned Advocate General assisted by Mr.J.S. Guleria, learned Deputy Advocate General, for the judgment debtor and have gone through the material placed on record.

5. Evidently, the only dispute in this case is whether the award passed by Adjudicator on 27.10.2011 has attained finality and is thus required to be executed?

6. Clause 24 of the agreement deals with the Disputes and reads thus:

> *"24.1. If the Contractor believes that a decision taken by the Engineer was either outside the authority given to the Engineer by the Contractor or that the decision was wrongly taken, the decision, shall be referred to the Adjudicator within 14 days of notification of the Engineer's decision. Performance under the contract shall*

continue notwithstanding the reference to the Adjudicator, and payments by the Employer to the Contractor will not be withheld unless they are the subject matter of dispute."

7. Clause 25 sets-out the procedure for Resolution of Disputes and as regards the instant case, it is only Clauses 25.1, 25.2 and 25.4 that are relevant for our purpose and reproduced as under:

"25.1. The Adjudicator shall give a decision in writing within 28 days of receipt of a notification of a dispute.

25.2. The Adjudicator shall be paid daily at the rate specified in the Contract Data together with reimbursable expenses to the types specified in the Contract Data and the cost shall be divided equally between the Employer and the Contractor, whatever decision is reached by the Adjudicator. Either party may refer a decision of the Adjudicator to Arbitration within 28 days of the Adjudicator's written decision. Arbitration shall be under the Arbitration and Conciliation Act, 1996. If neither party refers the dispute to Arbitration within the above 28 days, the Adjudicator's decision will be final and binding.

25.4. Where the Initial Contract Price as mentioned in the Acceptance Letter is Rs.5 Crore and below, disputes or differences in which an Adjudicator has given a decision shall be referred to a sole Arbitrator. The Sole Arbitrator would be appointed by the agreement between the parties; failing such agreement within 15 days of the reference to arbitration, by the appointing authority, namely the Chairman of the Executive Committee of the Indian Roads Congress."

8. It is more than settled that a business like interpretation of contractual provisions must be adopted in construing contracts entered into by persons of business to govern business dealings. The Court is required to ensure that interpretation of law in commercial cases must not be disjointed from the intent and object which those having business dealings seek to subserve. Therefore, unless interpretation of contracts effectuates a business meaning for persons of business, the law will not fulfill its purpose and object of being a facilitator for business and providing a structure of ordered certainty to those who carry on business here.

9. Now adverting to the different Clauses of the agreement, it would be noticed that the procedure for resolution of disputes has been provided in Clause 25 (supra) wherein as per Clause 25.1 the Adjudicator to whom the Engineer's decision has been referred is required to give his decision in writing within 28 days of receipt of a notification of a dispute. The Adjudicator in the instant case has announced his award on 27.10.2011 and copy thereof admittedly delivered to both the parties on the same day. The decision of the Adjudicator could be referred to the arbitration by either of the parties within 28 days of the Adjudicator's written decision and if neither party refers the dispute to arbitration within the above 28 days, then the Adjudicator's decision was deemed to be final and binding.

10. In the instant case, the respondent vide its letter dated 3.11.2011 had appointed the Superintending Engineer Arbitration Circle, HPPWD, Solan to decide and make his award regarding the claims/disputes given by the decree holder. However, the decree holder vide his letter dated 9.11.2011 had reservation to the arbitrator suggested by the respondent/judgment debtor and he, in turn, suggested three names with a further request to appoint anyone of the three persons as an arbitrator. The respondent/ judgment debtor did not accede to this request and in turn requested the decree holder to consider the name of the five persons to be appointed as arbitrator as communicated vide letter dated 17.11.2011. Even though the receipt of this letter has been denied by the decree holder, but then this letter was followed by another letter dated 24.11.2011 whereby the decree holder was again requested to intimate the name of the persons to be appointed as arbitrator as was earlier intimated to him on 17.11.2011. The receipt of this letter has been duly acknowledged and admitted in the letter written by the decree holder on 28.11.2011, meaning thereby, that the decree holder very well knew that it was required to

suggest the name of the arbitrator as is borne out from the letter dated 24.11.2011, which is reproduced in its entirety as under:

"HIMACHAL PRADESH

PUBLIC WORKS DEPARTMENT

No. PW-CE(MZ)-CTR-II-HP-08-05/11-16916-18 Dated 24.11.2011

From *Chief Engineer (MZ).*

To

M/S S.R.M. Constructions,
Sukhdham Dhingra Estate,
Boileauganj, Shimla.

Subject: *C/O Hanogi to Bandhi road Km 0/0 to 15/0 (SH:- F/C 5/7 mtr. Wide including R/Wall, Essential soling, CD work and C/O Parapets, Logo Boards km stone and setting out etc. under World Bank Funding Phase-II Package No. HP-08-05).*

Please refer to the Executive Engineer Padhar Division, HPPWD, Padhar letter No. PW-PD-AB-HP-08-05/11-13440-42 dated 17.11.2011 addressed to this office and copy endorsed to the Superintending Engineer, Joginder Nagar Circle, HPPWD, Joginder Nagar as well as to your office on the above cited subject.

You are requested to intimate the name of person to be appointed as Arbitrator as shown by the Executive Engineer, Padhar Division vide his letter referred above to this office immediately so that further action in the matter shall be taken accordingly.

Chief Engineer (MZ),
HPPWD, Mandi.

Copy to the Superintending Engineer, Joginder Nagar Circle, HPPWD, Joginder Nagar for information w.r.to above.

Copy to the Executive Engineer, Padhar Division, HPPWD, Padhar for information w.r.to above.

Sd/-
Chief Engineer (MZ)
HPPWD, Mandi."

11. That being the factual position, the contention of the decree holder that the award has attained finality under the provisions of Clause 25.2 of the contract for want of appointment of arbitrator in terms of Clause 25.4 within the stipulated period of 15 days of the reference to arbitration, by the appointing authority to the Chairman of the Executive Committee of the Indian Roads Congress made by the respondent, holds no water. As per Clause 25.4, the sole arbitrator was to be appointed by the agreement between the parties; failing such appointment within 15 days of the reference to arbitration by the appointing authority, namely the Chairman of the Executive Committee of the Indian Roads Congress.

12. This Clause clearly suggests that the sole arbitrator was to be appointed by the agreement between the parties and it was only failing such agreement that a reference to arbitration by the appointing authority namely the Chairman of the Executive Committee of the Indian Roads Congress, was required to be made within 15 days of the reference.

13. The decree holder having deliberately chosen not to respond to the letter of the judgment debtor dated 24.11.2011 whereby he was requested to intimate the name of the persons to be appointed as arbitrator, cannot claim that the award has attained finality for want

of appointment of arbitrator or else that would be permitting the decree holder to take advantage of his own wrong. What in fact was required is that the parties should have been ad idem on the appointment of the arbitrator which obviously had to be a "conscious act" and not an act of "default" and it was only failing which the sole arbitrator was to be appointed within 15 days of the reference to the arbitration by the appointing authority, namely the Chairman of the Executive Committee.

14. Evidently, none of the conditions as stipulated in Clause 25 is attracted and, therefore, the award of the Adjudicator cannot be said to have attained finality as alleged by the decree holder. Consequently, this execution petition is totally misconceived and is dismissed as such, leaving the parties to bear their own costs.

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

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

Cr.MP(M) No. 407 of 2018
Decided on: 20.4.2018

Code of Criminal Procedure, 1973- Section 438- **Indian Penal Code, 1860-** Sections 420, 467, 468 and 471- **Pre-arrest Bail-** On facts, accused-applicant found to have joined investigation and his custodial interrogation was not required by Investigating Agency- Accused admitted on pre-arrest bail subject to conditions. (Paras-2 and 10)

Cases referred:
Sanjay Chandra versus Central Bureau of Investigation (2012)1 Supreme Court Cases 49
Manoranjana Sinh Alias Gupta versus CBI 2017 (5) SCC 218
Prasanta Kumar Sarkar v. Ashis Chatterjee and Another (2010) 14 SCC 496
Umarmia Alias Mamumia v. State of Gujarat, (2017) 2 SCC 731

For the Petitioner : Mr. Anupinder Rohal, Advocate.
For the Respondent : Mr. Dinesh Thakur, Additional Advocate General and Mr. Vikrant Chandel, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Sequel to order dated 6.4.2018, whereby petitioner was enlarged on interim bail in connection with FIR No. 145 of 2015 dated 10.8.2015, under Section 420, 467, 468 and 471 of the IPC registered at P.S. Rampur, District Shimla, H.P., ASI Ram Singh,P.P. Takdech, P.S. Rampur, District Shimla, H.P., has come present along with records. Record perused and returned. Mr. Dinesh Thakur, learned Additional Advocate General, has also placed on record status report prepared on the basis of investigation carried out by the Investigating Agency.

2. Mr. Dinesh Thakur, learned Additional Advocate General, on instructions from Investigating Officer, who is present in Court, fairly stated that petitioner has joined the investigation in terms of order dated 6.4.2018 and his custodial interrogation, is not required. He on the instructions of Investigating Officer also stated that State has no objection in case,

petitioner is ordered to be enlarged on bail subject to condition that he shall always make himself available as and when required by the Investigating Agency.

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

4. The Hon'ble Apex Court in ***Sanjay Chandra versus Central Bureau of Investigation*** (2012)1 Supreme Court Cases 49; held as under:-

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

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

> ***" This Court in Sanjay Chandra v. CBI, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive or preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him to taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care ad caution by balancing the valuable right of liberty of***

an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and the grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

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

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail.

7. Reliance is placed on judgment passed by the Hon'ble Apex Court in case titled ***Umarmia Alias Mamumia v. State of Gujarat***, **(2017) 2 SCC 731**, relevant para whereof has been reproduced herein below:-

"11. This Court has consistently recognised the right of the accused for a speedy trial. Delay in criminal trial has been held to be in violation of the right guaranteed to an accused under Article 21 of the Constitution of India. (See: Supreme Court Legal Aid Committee v. Union of India, (1994) 6 SCC 731; Shaheen Welfare Assn. v. Union of India, (1996) 2 SCC 616) Accused, even in cases under TADA, have been released on bail on the ground that they have been in jail for a long period of time and there was no likelihood of the completion of the trial at the earliest. (See: Paramjit Singh v. State (NCT of Delhi), (1999) 9 SCC 252 and Babba v. State of Maharashtra, (2005) 11 SCC 569).

8. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr.,** decided on 6.2.2018, has categorically held that a fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. Hon'ble Apex Court further held that while considering prayer for grant of bail, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Hon'ble Apex Court further held that if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimized, it would be a factor that a judge would need to consider in an appropriate case. The relevant paras of the aforesaid judgment are reproduced as under:

"2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific

offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.

3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.

4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons.

9. Consequently, in view of the above, order dated 6.4.2018 passed by this Court, is made absolute, subject to the following conditions:

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

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

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

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

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

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

The bail petition stands disposed of accordingly.

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

Suresh Kumar Chopra .....Appellant
Versus
Jog Raj and Ors. .....Respondents.

FAO No. 242 of 2012
Date of Decision: 20.4.2018

Motor Vehicles Act, 1988- Section 149(2)(a)(ii) and 166- Claims Tribunal fastening part liability on Insured/owner and absolving insurer on ground that driver was not holding a valid and effective driving licence – Appeal by Insured/owner- On facts, insured never took plea in his pleadings that he had authorized driver to ply vehicle only after examining his driver licence and found it valid – Insured also didn't examine himself in evidence- Driving licence was not produced and placed on record of Tribunal – Held- Onus to prove that driver of offending vehicle was not holding valid and effective driving licence shifts to insurer only when insured pleads and proves basic facts that driver of offending vehicle was authorized by him to drive only after perusing of his driving licence and found it valid at relevant time – Plea of insured declined - Pappu and Ors. v. Vinod Kumar Lamba and Anr", (2018) 3 SCC 208 relied upon. (Paras-12 to 15)

Motor Vehicles Act, 1988- Section 166- Contributory negligence- Deceased riding on motorcycle was found negligent in driving and also having contributed in occurrence of accident- Tribunal reducing compensation by 30% - In appeal, compensation further reduced by 50% by High Court. (Para-16 and 17)

Cases referred:

National Insurance Company Ltd. v. Sawarn Singh and Ors, (2004) 3 SCC 297
Assurance Company Ltd., v. Mangala and Ors., (2009) Acci. C.R. 816 (Bom.)
Pappu and Ors. v. Vinod Kumar Lamba and Anr", (2018) 3 SCC 208
Company v. Bimla Devi and Ors, Latest HLJ 2005 (HP) 160

For the Appellant: Mr. M. L. Sharma, Advocate.
For the respondents: Mr. K.B. Khajuria, Advocate, for respondents No. 1 to 3-claimants.
Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Being aggrieved and dis-satisfied with the impugned award dated 30.4.2012, passed by the learned Motor Accident Claims Tribunal-II, Kangra at Dharamshala, in MAC Petition No. 59-P/2006, whereby learned tribunal below, while holding the respondents/claimants No. 1 to 3, (herein after referred to as claimants), entitled to compensation to the tune of Rs. 8,10,000/-, held the present appellant i.e owner of the vehicle, liable to pay sum of Rs. 5,82,000/- alongwith 7.5 % p.a., from the date of filing of the petition till its realization, appellant has approached this Court in the instant proceedings, praying therein for setting aside the aforesaid impugned award.

2. For having bird's eye view, facts necessary for adjudication of the case are that claimants filed a petition under Section 166 of Motor Vehicles Act, seeking therein compensation to the tune of Rs. 16 lacs on account of death of Banti, who at that relevant time, was serving in Indian Army. Claimants, who claim themselves to be dependent upon deceased Banti, stated before the tribunal below that deceased, who was 24 years of age at that relevant time, was earning Rs. 8,000/- p.a. Allegedly, on 6.2.2006, Banti, while coming on Scooter met with an accident with a truck bearing No. PB-07-A-9237, being driven by Yashbir Pal, who has since expired. Claimants alleged that accident occurred on account of rash and negligent driving of the aforesaid driver and as such, they are entitled to be compensated.

3. Present appellant, who was respondent No.1, before the Tribunal below, refuted the aforesaid claim of the claimants and claimed that accident occurred on account of rash and negligent driving of the deceased and as such, claimants are not entitled to compensation as claimed in the petition. Respondent Insurance Company refuted the claim of the claimants on the ground that driver of offending truck was not having valid and effective licence to drive the vehicle and as such, it is not liable to pay any compensation to the claimants. Insurance company also submitted before the learned tribunal below that accident occurred on account of negligence on the part of the driver of the said scooter. On merits, insurance company also denied that deceased, at that relevant time, was working in Indian Army and was earning income @ Rs. 8,000/-.

4. On the basis of aforesaid pleadings adduced on record by the respective parties, Tribunal framed following issues:-

1. ***Whether the deceased Banty has died in an accident with the offending vehicle bearing registration No. PB-07A-9235 on 6.2.2006 at place Menjha, Tehsil Palampur, Distt. Kangra, H.P.? OPP.***
2. ***If issue No.1 is proved in affirmative to what amount of compensation the petitioners are entitled and from whom? OPP.***
3. ***Whether the driver of the offending vehicle was not holding valid and effective driving licence at the time of accident?OPR.***
4. ***Whether the offending vehicle was no insured at the time of accident?OPR***
5. ***Whether the vehicle was being plied without fitness certificate, route permit and registration certificate and thereby violated the terms and conditions of the insurance policy?OPR***
6. ***Whether the driver of the scooter has contributed towards the accident?OPR.***
7. ***Whether the petition is bad for non-joinder of necessary parties?OPR.***
8. ***Wehther the petition is not maintainable, as alleged?OPR.***
9. ***Relief.***

5. Learned tribunal below on the basis of evidence adduced on record by the respective parties, held the appellant liable to pay 70% of the compensation amount determined by it. In total, tribunal below awarded a sum of Rs. 8,10,000/- in favour claimants, but on account of contributory negligence committed on the part of the deceased Bunty, deducted 30 % amount i.e. Rs. 2,43,000/-. After aforesaid deduction, Tribunal held present appellant liable to pay a sum of Rs. 5,82,000/-alognwith interest 7.5% p.a.

6. Mr. M.L. Sharma, learned counsel for the appellant, while refuting the correctness of impugned award passed by the learned tribunal below, strenuously argued that finding returned by the Tribunal below qua issues No. 3 and 5, is contrary to the evidence available on record and as such, same deserves to be quashed and set-aside. Mr. Sharma, while referring to the zimini orders, passed by the learned tribunal, also contended that during pendency of the claim petition, fitness certificate, route permit and registration certificate, were placed on record and as such, learned tribunal below ought not have returned finding that the vehicle in question was plied without fitness certificate, route permit and registration certificate. He further contended that even otherwise, onus to prove this issue was upon the Insurance Company not upon the appellant-owner. He further contended that finding returned by the Tribunal below qua issue No. 3 is also contrary to the law laid down by the Hon'ble Apex Court in judgment titled " ***National Insurance Company Ltd. v. Sawarn Singh and Ors, (2004) 3 SCC 297***, wherein it has been specifically held that Insurance Company is not entitled to take defence that at the time of accident, driver was not having valid licence. Lastly, Mr. Sharma, contended that even during pendency of the present appeal, factum with regard to the placing of documents i.e. fitness certificate, route permit and registration certificate, was brought to the notice of this Court and this Court had specifically directed the Insurance Company to ascertain the correctness of the same, but despite there being specific direction, no steps were taken by the Insurance Company to verify the correctness and as such, adverse inference is required to be drawn against the Insurance Company. Mr. Sharma, also placed reliance upon the judgment passed by the High Court of Bombay in case titled New India ***Assurance Company Ltd., v. Mangala and Ors., (2009) Acci. C.R. 816 (Bom.),*** to contend that since driver of the vehicle had expired on 16.5.2006, i.e. before filing of the claim petition, plea of driver's having no valid licence, was not available to Insurance Company, because presumption of absence of driving licence would have been available only to Insurance Company, in case driver was alive and he had come to the witness box.

7. Mr. G.C. Gupta, Senior Advocate, duly assisted by Ms. Meera Devi, Advocate, representing respondent No.5, supported the impugned award passed by the tribunal below and contended that finding returned by the learned tribunal below qua issue Nos. 3 and 5 is strictly in consonance with material adduced on record as well as law laid down by the Hon'ble Apex Court and as such, present appeal deserves to be dismissed being devoid of any merits. While refuting the arguments advanced by Mr. M. L. Sharma, learned counsel representing the appellant that plea of driver's having no valid licence is/was not available to Insurance Company in terms of judgment rendered by the Hon'ble Apex Court in ***Sawaran Singh***'s case supra, Mr. Gupta, contended that onus was upon the appellant, who happened to be owner of the offending vehicle, to prove that driver of offending vehicle was having valid license at the time of the accident. While inviting attention of this Court to the written statement filed by the appellant to the claim petition filed by the claimants, Mr. Gupta, contended that no defence to the effect that driver of offending vehicle was not having valid licence at the time of accident, was taken, rather only defence taken was that accident occurred on account of rash and negligent driving of the deceased Banty. In support of his aforesaid argument, Mr. Gupta, invited attention of this Court to the judgment passed by the Hon'ble Apex Court in case titled "***Pappu and Ors. v. Vinod Kumar Lamba and Anr"***, (2018) 3 SCC 208, and contended that Insurance Company is entitled to take the defence that offending vehicle was being driven by an unauthorized person or that person driving vehicle did not have a valid driving licence. He further stated that onus is shifted only after owner of offending vehicle pleads and proves basic facts within his knowledge that driver of offending vehicle was authorized by him to drive vehicle and was having a valid driving

licence at that relevant time. Lastly, Mr. Gupta, contended that no much reliance can be placed upon the judgment rendered by the Hon'ble High Court of Bombay, because in terms of aforesaid judgment passed by the Hon'ble Apex Court, onus to prove that driver of the offending vehicle was having licence, is /was on the owner of the vehicle.

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

9. Primarily, appellant is aggrieved with the finding returned by the learned tribunal qua issues No. 3 and 5, whereby Tribunal below has come to a conclusion that at the time of accident, driver was not having valid licence and vehicle in question, was being plied in contravention of terms and conditions contained in the policy given by the Insurance company qua the offending vehicle. Before ascertaining the correctness of aforesaid rival contentions having been made by the learned counsel representing the parties, it may be noticed that though zimini orders passed by the learned tribunal suggests that documents i.e. fitness certificate, route permit and registration certificate, were placed on record by the appellant, but having perused record, this Court finds considerable force in the argument of learned Senior Counsel that no application, if any, for leading additional evidence, was ever filed by the appellant and as such, mere placing of documents, may not be sufficient to conclude that at the time of accident, vehicle in question was not being plied in contravention of the terms and conditions of the Insurance policy. It also emerges from the orders passed in the instant proceedings that factum qua placing of documents referred herein above, was brought to the notice of this Court and in response thereto, learned Senior Counsel had taken time to verify the correctness of the same, but this Court is of the view that once documents placed or intended be placed on record, were not proved in accordance with law, no benefit, if any, can be drawn/taken from the same by the appellant.

10. Reliance is placed on judgment titled National Insurance ***Company v. Bimla Devi and Ors, Latest HLJ 2005 (HP) 160***, relevant para whereof, is reproduced herein below:

> ***"7. It is a cardinal, basic and established principle of evidence law that documents, other than public documents are tendered in evidence through witnesses who, after taking oath prove the documents appropriately as well as the contents of the documents, by way of leading direct evidence. Actually documents are produced and proved through witnesses and their contents also established and proved either by way of primary evidence or secondary evidence but in any event the established and accepted mode of proving documents is by production of witnesses in the court who testify about the correctness, genuineness and authenticity of the documents as well as they contents, mostly through the medium of proving them as and by way of, primary evidence and in certain given situations through the medium of secondary evidence. The purpose of course is twofold; firstly that such a witness appearing in the court is sworn and under oath testifies about a particular document, its genuineness and authenticity as well as its correctness and secondly once under oath and examination, this witness is subject to cross-examination by the opposite party so that the opposite party through the mechanism of cross examination of such a witness can elicit appropriate information concerning the document itself with respect to its veracity, truthfulness, background, correctness etc. Enough indication of such requirement of law is found in Section 62 of the Evidence Act which refers to the documents as primary evidence and clearly suggests that such documents can be produced for the inspection of the court meaning thereby that through witnesses alone the documents have to be brought on record of the courts. Similarly under Section 63 of the Evidence Act, 'secondary evidence' has been defined and reading together these two Sections, it can be safely said that documents, either by way of 'primary evidence' or otherwise have to be appropriately and***

properly proved by their production in the courts through witnesses alone."

11. There is no dispute that driving licence, if any, possessed by the driver of the offending vehicle was not produced on record. Interestingly, in the case at hand, appellant neither specifically pleaded in his written statement that driver of truck at the time of accident was having valid and effective licence, nor he categorically stated that he had ascertained the correctness of the driving licence possessed by the driver engaged by him on his truck. If written statement filed by the appellant is perused in its entirety, only defence taken by the appellant owner is that accident occurred on account of rash and negligent driving of the deceased Banti.

12. Having carefully perused judgment passed by the Hon'ble Apex Court in **Pappu's case** supra, wherein admittedly reference has been made by the Hon'ble Apex Court to its earlier judgment passed in Sawaran Singh's case, this Court is inclined to agree with the contention of learned Senior Counsel representing the Insurance company that onus would only shift on the insurance-company, if owner of offending vehicle pleads and proves basic facts within his knowledge that driver of offending vehicle was authorized by him to drive vehicle and was having a valid driving licence at that relevant time. In the case at hand, there is no specific pleading that driver was having valid licence, moreover, appellant chose not to examine himself in the witness box to state that driver of offending vehicle was having valid licence and vehicle in question was not being plied in violation of terms and conditions of the policy. In the judgment referred herein above, Hon'ble Apex Court, following Sawarn Singh (supra), has categorically held that insurance company is entitled to take a defence that offending vehicle was driven by an unauthorized person or that person driving vehicle did not have a valid driving licence. It is profitable to take note of following para of aforesaid judgment passed by the Hon'ble Apex Court here in below:-

"11. The question is: whether the fact that the offending vehicle bearing No.DIL-5955 was duly insured by respondent No.2 Insurance Company would per se make the Insurance Company liable?

12.This Court in the case of National Insurance Co. Ltd. (supra), has noticed the defences available to the Insurance Company under Section 149(2)(a)(ii) of the Motor Vehicles Act, 1988. The Insurance Company is entitled to take a defence that the offending vehicle was driven by an unauthorised person or the person driving the vehicle did not have a valid driving licence. The onus would shift on the Insurance Company only after the owner of the offending vehicle pleads and proves the basic facts within his knowledge that the driver of the offending vehicle was authorised by him to drive the vehicle and was having a valid driving licence at the relevant time.

13.In the present case, the respondent No.1 owner of the offending vehicle merely raised a vague plea in the Written Statement that the offending vehicle DIL-5955 was being driven by a person having valid driving licence. He did not disclose the name of the driver and his other details. Besides, the respondent No.1 did not enter the witness box or examine any witness in support of this plea. The respondent No.2 Insurance Company in the Written Statement has plainly refuted that plea and also asserted that the offending vehicle was not driven by an authorised person and having valid driving licence. The respondent No.1 owner of the offending vehicle did not produce any evidence except a driving licence of one Joginder Singh, without any specific stand taken in the pleadings or in the evidence that the same Joginder Singh was, in fact, authorised to drive the vehicle in question at the relevant time. Only then would onus shift, requiring the respondent No.2 Insurance Company to rebut such evidence and to produce other evidence to substantiate its defence. Merely producing a valid insurance certificate in respect of the offending Truck was not enough for

the respondent No.1 to make the Insurance Company liable to discharge his liability arising from rash and negligent driving by the driver of his vehicle. The Insurance Company can be fastened with the liability on the basis of a valid insurance policy only after the basic facts are pleaded and established by the owner of the offending vehicle - that the vehicle was not only duly insured but also that it was driven by an authorised person having a valid driving licence. Without disclosing the name of the driver in the Written Statement or producing any evidence to substantiate the fact that the copy of the driving licence produced in support was of a person who, in fact, was authorised to drive the offending vehicle at the relevant time, the owner of the vehicle cannot be said to have extricated himself from his liability. The Insurance Company would become liable only after such foundational facts are pleaded and proved by the owner of the offending vehicle.

14. In the present case, the Tribunal has accepted the claim of the appellants. It has, however, absolved the respondent No.2 Insurance Company from any liability for just reasons. The High Court has also affirmed that view. It rightly held that there can be no presumption that Joginder Singh was driving the offending vehicle at the relevant time."

13. Having perused aforesaid judgment passed by the Hon'ble Apex Court, there appears to be no illegality and infirmity in the findings returned by the learned Tribunal below qua issues No. 3 and 5 and as such, same deserves to be upheld.

14. As far as reliance placed by the learned counsel for the appellant on the judgment passed by the High Court of Bombay in ***Assurance Company Ltd., v. Mangala and Or's,*** is concerned, this Court is of the view that same is not applicable in the present facts and circumstances of the case, especially in view of the aforesaid law laid down by the Hon'ble Apex Court in Pappu's case supra.

15. True it is that in the aforesaid judgment passed by the High Court of Bombay, it has held that presumption of absence of driving licence would have been available only in the event of driver was alive. No doubt, in the case at hand, as clearly emerges from the record, driver of offending vehicle had expired prior to the commencement of proceedings under MV Act, but as has been noticed above, onus to prove that driver of the offending vehicle was not having valid licence, at that relevant time, would have only shifted to the insurance company, had owner of the offending vehicle pleaded and proved basic facts that driver of the offending vehicle was authorized by him to drive vehicle and was having a valid driving licence. But unfortunately, in the case at hand, neither there is a plea to this effect nor appellant has examined himself in the witness box to prove aforesaid fact, if any.

16. In the instant case, learned Tribunal below on the basis of evidence available on record, came to the conclusion that accident in question occurred on account of contributory negligence of driver of truck owned by the appellant and deceased Banti, who at that relevant time, was driving the scooter and as such, this Court is persuaded to agree with the contention of Mr. Sharma, learned counsel for the appellant that Tribunal below ought to have apportioned liability equally between owner of the vehicle and the deceased, who died in accident and as such, tribunal below has erred in holding the deceased Bunti, liable to the extent of 30 % instead of 50 %. Accordingly, this Court deems it fit to modify the award to the aforesaid extent only.

17. Consequently, in view of the above, present appeal is partly allowed to the aforesaid extent and appellant is held liable to pay 50 % of the award amount i.e. Rs. 4,05,000/- + Rs. 10,000/-(loss of estate) + Rs. 5,000/- (funeral expenses) total Rs. 4,20,000/- plus interest along with interest. Rest of the award is upheld. In view of the aforesaid modification, respondent insurance company shall be depositing the aforesaid award, with the registry of this Court, within a period of six weeks. Needless to say amount, if any, deposited by the appellant-owner would be

released in favour of the claimants and same would be adjusted towards the liability of the insurance company. Pending applications also stand disposed of, if any.

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

Cr.MP(M) Nos. 389 and 390 of 2018
Decided on: 20.4.2018

1. **Cr.MP(M) Nos. 389 of 2018**
Yunus .....Petitioner
Versus
State of Himachal Pradesh .....Respondent
2. **Cr.MP(M) Nos. 390 of 2018**
Saif Maluk .....Petitioner
Versus
State of Himachal Pradesh .....Respondent

Code of Criminal Procedure, 1973- Section 438- **Indian Penal Code, 1860-** Sections 323, 324, 451/34- Anticipatory bail - Grant of – Accused duly joined investigation – No recovery to be effected from him - Investigation complete – Accused granted conditional pre-arrest bail. (Para-8)

Case referred:
Sanjay Chandra versus Central Bureau of Investigation (2012)1 Supreme Court Cases 49

For the Petitioner(s) : Mr. N.K. Thakur, Senior Advocate with Mr. Divya Raj, Advocate.
For the Respondent(s) : Mr. Dinesh Thakur, Additional Advocate General and Mr. Vikrant Chandel, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Bail petitioners, named herein above, apprehending their arrest in connection with FIR No. 108/17, under Sections 325, 451, 323 and 34 of IPC registered at PS. Chowari, District Chamba, H.P., have approached this Court in the instant proceedings, seeking therein their pre-arrest bail.

2. Sequel to order(s) dated 2.4.2018, ASI Shashi Pal, P.P. Sihunta, District Chamba, HP., has come present along with records. Record perused and returned. Mr. Dinesh Thakur, learned Additional Advocate General, has also placed on record status report prepared on the basis of investigation carried out by the Investigating Agency.

3. Mr. Dinesh Thakur, learned Additional Advocate General, on instructions from Investigating Officer, who is present in Court, fairly stated that both the bail petitioners have joined the investigation in terms of order(s) dated 2.4.2018 passed by this Court and they are fully cooperating with the Investigating Agency. Mr. Thakur, further contended that investigation in the case is almost complete and at this stage nothing is required to be recovered from the bail petitioners. He on the instructions of Investigating Officer also stated that State has no objection in case, petitioners are ordered to be enlarged on bail subject to condition that they shall always make themselves available for investigation as well as trial as and when called/required by the Investigating Agency. Mr. Thakur, further contended that since both the petitioners hail from

State of Punjab, they may be put to stringent conditions so that they may not flee from the justice.

4. Having heard the learned counsel for the parties, this Court finds from record that main accused namely Anwar Ali Khan, has been already enlarged on bail by the Investigating Officer and this Court sees no occasion for the custodial interrogation of the present bail petitioners, who have otherwise joined the investigation in terms of order(s) passed by this Court, as has been fairly admitted by the learned Additional Advocate General.

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

6. The Hon'ble Apex Court in ***Sanjay Chandra versus Central Bureau of Investigation*** (2012)1 Supreme Court Cases 49; held as under:-

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

7. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr.,** decided on 6.2.2018, has categorically held that a fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. Hon'ble Apex Court further held that while considering prayer for grant of bail, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Hon'ble Apex Court further held that if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimized, it would be a factor that a judge would need to consider in an appropriate case. The relevant paras of the aforesaid judgment are reproduced as under:

> ***"2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent***

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

3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.

4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons.

8. Consequently, in view of the above, order(s) dated 2.4.2018 passed by this Court, is/are made absolute, subject to their furnishing personal bonds in the sum of Rs. 1,00,000/- with one local surety each in the like amount to the satisfaction of concerned Chief Judicial Magistrate/trial Court, with following conditions:

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

b. ***They shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;***

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

d. ***They shall not leave the territory of India without the prior permission of the Court.***

9. It is clarified that if the petitioners misuse his liberty or violate any of the conditions imposed upon them, the investigating agency shall be free to move this Court for cancellation of the bail.

10. Any observations made hereinabove shall not be construed to be a reflection on the merits of the cases and shall remain confined to the disposal of this applications alone.

The bail petitions stand disposed of accordingly.

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

Hoshiar Singh .....Petitioner

Versus

State of Himachal Pradesh .....Respondent

Cr.MP(M) No. 444 of 2018
Decided on: 23.4.2018

Code of Criminal Procedure, 1973- Section 438- **Indian Penal Code, 1860-** Section 376(2)(n)- Prosecutrix alleged that accused had been sexually exploiting her on pretext of marrying her– Further on 10.4.2018 accused came to her shop and raped her- Pre-arrest bail sought on ground that relationship, if any, was consensual – Application contested by State on plea of seriousness of offence- Held- Prosecutrix and accused were known to each other for almost twelve years and had intimate relations- She remained silent during this period- Though correctness and otherwise of allegations yet to be decided by trial court- On facts, applicant/accused is held entitled to pre-arrest bail subject to conditions. (Paras-6, 8 and 19)

Cases referred:

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

Manoranjana Sinh Alias Gupta versus CBI 2017 (5) SCC 218

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

For the Petitioner : Mr. B.C. Negi, Senior Advocate with Mr. Vijay K. Verma, Advocate.

For the Respondent : Mr. Dinesh Thakur, Additional Advocate General and Mr. Vikrant Chandel, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

By way of instant petition filed under Section 438 of Cr.PC., a prayer has been made on behalf of the petitioner for grant of pre-arrest bail in connection with FIR No. 44 of 2018 dated 10.4.2018, under Section 376(2)(n) of the IPC, registered at Police Station Padhar, District Mandi, H.P.

2. Sequel to order dated 13.4.2018, passed by this Court, whereby petitioner was enlarged on interim bail, ASI Kulmesh Singh, I/o P.S. Padhar, District Mandi, H.P., has come present along with records. Record perused and returned. Mr. Dinesh Thakur, learned Additional Advocate General, has also placed on record status report prepared on the basis of investigation carried out by the Investigating Agency, perusal whereof suggests that complainant-prosecutrix vide report dated 10.4.2018, alleged that bail petitioner on the pretext of marriage sexually assaulted her for almost 12 years. She categorically stated that on 9.4.2018, bail petitioner was compelling her to visit his house but since she refused to come to the house of the bail petitioner, bail petitioner on 10.4.2018, came to her shop and sexually assaulted her against her wishes. In the aforesaid background, aforesaid FIR came to be lodged against the bail petitioner, who is a government employee.

3. Mr. B.C. Negi, learned Senior Advocate, duly assisted by Mr. Vijay K. Verma, Advocate, representing the bail petitioner, while referring to the record/status report, vehemently argued that no case, if any, is made out under Section 376, against the petitioner, because it clearly emerges from the record that the complainant-prosecutrix and bail petitioner were known to each other for quite considerable time and during this period, they had developed intimate relationship. Mr. Negi, further contended that there is nothing on record to suggest that in the last 12 years, complaint, if any, was ever lodged by the complainant against the bail petitioner, which fact itself clearly suggests that she of her own volition had joined the company of the bail petitioner.

4. Mr. Dinesh Thakur, learned Additional Advocate General, while opposing aforesaid prayer having been made on behalf of the petitioner, contended that keeping in view the gravity of offence allegedly committed by the petitioner, he does not deserve to be enlarged on bail, rather he is required to be dealt with severely. He further stated that true it is that in the investigation, it has come that the complainant had been meeting the bail petitioner for the last 12 years, but that cannot be a ground to release the bail petitioner on bail when she categorically alleged that on 10.4.2018, bail petitioner sexually assaulted her against her wishes.

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

6. True, it is that the complainant in her report dated 10.4.2018, categorically reported that the bail petitioner sexually assaulted her on 10.4.2018, against her wishes but close scrutiny of her statement made to the police, on the basis of which, formal FIR came to be registered, against the bail petitioner, clearly suggests that bail petitioner and complainant were known to each other for almost 12 years and during this period, they developed physical relations. No doubt, allegations against the bail petitioner are of serious nature but same relate back to year, 2005, but there is no explanation rendered on record by the prosecutrix for remaining silent for such a long period, which certainly creates suspicion with regard o the correctness of the allegation leveled against the bail petitioner. Though, aforesaid aspects of the matter are to be considered and decided by the court below on the basis of material adduced on record, by the prosecution, but having regard to the nature of allegation and delay in reporting the matter to police, this Court sees no reason for custodial interrogation of the bail petitioner, who has otherwise joined investigation in terms of order passed by this Court. Mr. Dinesh Thakur, learned Additional Advocate General, on instructions, of Investigating Officer, who is present in Court, fairly stated that petitioner has joined the investigation in the case at hand and

nothing is required to be recovered from the bail petitioner, who is a government employee and shall always remain available for investigation as well as trial.

7. Recently, Hon'ble Apex Court in ***Shivashankar @ Shiva v. State of Karnataka and Anr.,*** passed in Criminal Appeal No. 504 of 2018 (arising out of SLP (Crl.) No. 454 of 2017), while dealing with allegation made by the complainant that person with whom she lived for past eight years, sexually assaulted her against her wishes, concluded that it is difficult to sustain the charges leveled against the appellant, who may have possibly, made a false promise of marriage to the complainant, in the face of complainant's own allegation that they lived together as man and wife. Relevent paras of the aforesaid judgment are reproduced hrein below:-

> "***The gravamen of the charge against the appellant-accused is that he has raped respondent no.2-complainant. We find from the complaint filed by the complaint that respondent no.1-complainant has lived with the appellant for period of about eight years.***
>
> ***Further, respondent no.2-complainant has stated that the appellant "pretended to have loved me" on the promise of marriage, that he applied the Kumkum on her forehead, and tied the Arishina thread to her neck. She further stated that she has been treating the appellant as her husband for the past eight years, and now he is trying to escape from her and cheat her.***
>
> ***Through we are not here concerned with the question whether the appellant and the complainant-respondent no.1 were, in fact, married, we have no doubt that they lived together like a married couple even according to the complainant.***
>
> ***In the facts and circumstances of the present case, it is difficult to sustain the charges leveled against the appellant who may have possibly, made a false promise of marriage to the complainant.***
>
> ***It is, however, difficult to hold sexual intercourse in the course of a relationship which has continued for eight years, as 'rape' especially in the face of the complainant's own allegation that they lived together as man and wife"***

8. In the present case also, complainant has herself stated that bail petitioner sexually assaulted her for the last 12 years on the pretext of marriage, but as has been observed above, during this period, complainant never lodged complaint, if any, against the bail petitioner being aggrieved of his illegal act.

9. Needless to say, guilt, if any, of the bail petitioner is yet to be proved in accordance with law by the prosecution by leading cogent and convincing evidence. It is well settled that till the time a person is not found guilty, one is deemed to be innocent. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr.,** decided on 6.2.2018, has categorically held that a fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. Hon'ble Apex Court further held that while considering prayer for grant of bail, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Hon'ble Apex Court has further held that if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimized, it would be a factor that a judge would need to consider in an appropriate case. The relevant paras of the aforesaid judgment are reproduced as under:

> ***"2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific***

offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.

3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.

4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons.

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

11. The Hon'ble Apex Court in ***Sanjay Chandra versus Central Bureau of Investigation*** (2012)1 Supreme Court Cases 49; held as under:-

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

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

> ***" This Court in Sanjay Chandra v. CBI, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive or preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him to taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care ad caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and the grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."***

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

(ix) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(x) nature and gravity of the accusation;

(xi) severity of the punishment in the event of conviction;

(xii) danger of the accused absconding or fleeing, if released on bail;

(xiii) character, behaviour, means, position and standing of the accused;

(xiv) likelihood of the offence being repeated;

(xv) reasonable apprehension of the witnesses being influenced; and

(xvi) danger, of course, of justice being thwarted by grant of bail.

14. Consequently, in view of the above, order dated 13.4.2018 passed by this Court, is made absolute, with following conditions:

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

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

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

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

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

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

The bail petition stands disposed of accordingly.

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

Roshani Devi .....Appellant.

Versus

Kanta Devi .....Respondent.

RSA No. 492 of 2007
Date of Decision: 23.4.2018.

Specific Relief Act, 1963- Section 34- Suit for declaration and injunction- Plaintiff claiming ownership and possession over disputed land- And also challenging gift deed purportedly executed by her on grounds of fraud and misrepresentation – Defendant denied allegations and claimed her own possession pursuant to gift deed- Suit as well as appeal of plaintiff dismissed by

lower courts - Regular Second Appeal- On facts defendant was brought up since childhood by plaintiff and her husband, plaintiff got defendant married and she was residing with defendant of and on after death of her husband - Plaintiff also executing will of entire property in favour of defendant - No evidence on record qua allegations of fraud and misrepresentation- Held- Suit as well as appeal were rightly dismissed by lower courts- Regular Second Appeal also dismissed. (Para- 6 and 17)

Code of Civil Procedure, 1908- Section 100- Regular Second Appeal - Re-appreciation of evidence - Held- Concurrent findings of fact not to be interfered with in second appeal unless same are perverse or based on no evidence. (Para-16)

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

For the appellant: Mr. V.S. Chauhan and Ajay Singh Kashyap, Advocates.
For the respondent: Mr. Suneet Goel, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Appellant (herein after referred to as the plaintiff), filed a suit for declaration and injunction against respondent (hereinafter referred to as the defendant), to the effect that she is owner in possession of the suit land as described in impugned judgments and decrees passed by the court below and the gift deed 13.4.1999 Ext.D1, registered with Sub-Registrar, Solan, qua the suit land, is totally wrong, illegal, null and *void abinitio* as the same is result of fraud and misrepresentation.

2. In nutshell, case of the plaintiff as projected in the plaint was that she intended to execute a gift deed in favour of the defendant to the extent of five biswas of land only, whereas defendant in connivance with her husband scribe and marginal witnesses, fraudulently and deceitfully got the gift deed, executed qua land measuring 11 bighas 12 biswas. Defendant while refuting aforesaid claim of the plaintiff claimed that since her parents had died in her childhood, she was brought up by the plaintiff and her husband. Defendant further claimed that her marriage was solemnized with Narayanu Ram by the plaintiff and husband. Defendant further claimed that after the death of husband of the plaintiff, plaintiff remained with her and out of love and affection, she executed gift deed (Ext.D1), in her favour bequeathing land measuring 11 bighas 12 biswas situated at mauza khair, pargana Bharoli, Tehsil and District Solan. Defendant further claimed that gift deed Ext.D1 was executed by the plaintiff in sound state of mind in the presence of scribe and the marginal witnesses and same was subsequently registered in the office of Sub-Registrar, Solan. Defendant categorically denied that gift deed is result of fraud and misrepresentation and physical possession of the suit land was never delivered to her at the time of execution of the gift deed. Defendant claimed that since she has been in the physical possession of the suit land, there is no question of causing interference to the suit land as alleged by the plaintiff. On the basis of aforesaid pleadings, following issues came to be framed:

1. ***Whether the plaintiff had adopted one Shri Prem Chand of Village Khair and who is managing the whole affairs of the plaintiff, as alleged?OPP***
2. ***Whether the plaintiff is owner in possession of the suit land, as alleged? OPP.***
3. ***Whether the gift deed dated 13.4.1999 registered with Sub Registrar, Solan as document No. 279 is wrong, illegal, null and void abinitio, as alleged ? OPP***
4. ***Whether the revenue entries including mutation No. 135 dated 28.5.1999 are also wrong, illegal, null and void abinition?OPP***

5. ***Whether the plaintiff has no locus-standi and cause of action to file the suit against the defendant ?OPD***

6. ***Whether the suit is not properly valued for the purpose of court fees and jurisdiction?OPD***

7. ***Whether the suit is not maintainable in the present form?OPD***

8. ***Relief.***

3. Subsequently, learned trial Court on the basis of evidence led on record by the respective parties, dismissed the aforesaid suit filed by the plaintiff and held gift deed dated 13.4.1999, to be legal and binding upon the parties. Plaintiff, being aggrieved and dissatisfied with the judgment and decree passed by the learned trial Court, filed an appeal in the court of learned District Judge, Solan, which also came to be dismissed vide judgment dated 4.7.2007. In the aforesaid background, plaintiff has approached this Court in the instant proceedings, laying therein challenge to the impugned judgments and decrees passed by the courts below.

4. This Court vide order dated 11.7.2008, admitted the instant appeal on the following substantial questions of law Nos. 1 and 2.

"1. In the absence of specific evidence or non examination of Sub-Registrar regarding execution of Gift Deed Ext.D-1, whether the defendant is entitled for the benefit of presumption of section 60 of Registration Act.

2. Whether the statement of witness DW3 in whose presence neither, the alleged Gift Deed D-1 was presented, endorsed and attested nor registered can be relied upon especially in the circumstances when its execution is disputed.

5. Having heard learned counsel representing the parties and perused the record, this Court is not inclined to agree with contention of learned counsel for the appellant that defendant was not able to prove on record that gift deed Ext.D1, was not a result of fraud and collusion, rather this Court having carefully examined evidence led on record by the defendants, has no hesitation to conclude that defendant successfully proved on record that plaintiff of her own volition and without there being external pressure, executed the gift deed No. 279 dated 13.4.1999, in sound state of mind in favour of the defendant bequeathing land measuring 11 bighas 12 biswas.

6. In the case at hand, this is none of the case of the plaintiff that she had not executed any gift deed in favour of the defendant, rather her case is that she was taken to the office of Tehsildar by the defendant and her husband for execution of gift deed with regard to 5 biswas of land, whereas defendant by mis-representation obtained the gift deed qua the land measuring 11 bighas 12 biswas fraudulently and deceitfully. There appears to be no dispute, rather stands duly admitted by the plaintiff that defendant was brought-up from the age of 3 years by the plaintiff and her husband. Similarly, there is no dispute that the plaintiff got defendant married to one Narayanyu Ram. It also emerges from the evidence available on record that after the death of her husband, plaintiff had been residing with the defendant of and on and she on two occasions, had executed two wills i.e. one in favour of the defendant and one in favour of the present appellant, in the year 1991. It also emerges from the evidence available on record that subsequent to execution of aforesaid two wills, plaintiff executed another will in favour of the defendant bequeathing her entire property, both the wills were duly registered.

7. In the present case, defendant with a view to prove execution of gift deed by the deceased Laxmi Devi in her favour examined attesting witness namely Yoginder Singh as DW2, DW3 Kirpa Ram, Senior Assistant in the office of Sub-Registrar, DW4 Chinta Mani, stamp vender and DW 5 Veena Sharma, scribe. DW2, who happened to be grandson of the plaintiff categorically, stated that plaintiff of her own volition and without there being any external pressure executed gift deed in favour of the defendant. He categorically stated that the plaintiff executed gift deed qua 11 bighas 12 biswas of land in favour of the defendant. It has also come

in his statement that at the time of registration of gift deed, enquiry was also conducted by the Sub-Registrar from the executor as to the nature of the document. He further stated that gift deed Ext.D-1, was executed by the plaintiff in his as well as Narayanu Ram's presence. This witness during his cross-examination categorically admitted his relationship with defendant and stated that gift deed was executed in his presence and he had put his signatures on the alleged gift deed.

8. DW3 Kirpa Ram, Senior Assistant in the office of Sub Registrar, Solan, who had brought the record pertaining to gift deed No. 279 dated 13.4.1999 also proved will No. 70 Ext.D1, registered with office of Sub-Registrar, having endorsement Ext.DW3/F. He categorically stated that on 30.4.1999, plaintiff had executed gift deed in favour of Balwinder Singh and Roshni Devi. This witness also proved endorsement on the back side of the gift deed i.e. Ext.DW3A to Ext.DW 3D.

9. DW4, Chinta Mani, stamp vender also stated that on 9.4.1999, Laxmi Devi, widow of Chandanu Ram, had bought stamp papers wroth Rs. 2,000/- and he had made an endorsement Ext.DW1/A, on the back side of the stamp paper. DW4 also stated that he had sold stamp papers of Rs. 1950 to Laxmi Devi on 12.4.1999. He stated that though she was not personally known to him, but she had purchased the stamp papers for the purpose of gift deed.

10. DW5, Veena Sharma, document writer, also stated that she scribed the gift deed as per instructions imparted to her by the plaintiff Laxmi Devi.

11. Another defendant witness namely Adv. S.K. Pandit, also stated that in the year, 1982, he started practice at District Courts Solan and on 18.7.1993, he had issued notice Ext.DW5/A on the instructions of Laxmi Devi.

12. It is quite apparent from the record that at the time of registration of the gift deed, inquiry was conducted by Sub-Registrar, from the executor as to the nature of the document she proposed to execute. Defendant by way of leading cogent and convincing evidence has successfully proved on record that gift deed Ext.D1 is not the result of fraud or misrepresentation, rather same has been executed by the plaintiff in favour of the defendant in sound state of mind. It has specifically come in the statement of defendant witnesses that at the time of registration of gift deed, inquiry was conducted by the sub-registrar from the executor as to the nature of the document. This Court is not persuaded to agree with the contention of the learned counsel for the plaintiff that no reliance, if any, could be placed on the version of aforesaid defendant witnesses. Since defendant with a view to prove execution of gift deed in her favour not only examined marginal witnesses, rather examined DW3, DW4 and DW5, and as such, omission, if any, to examine Sub-Registrar, who registered the gift deed, cannot be a basis/ground to hold that defendant was not able to prove valid execution of the gift deed.

13. Needless to say, once defendant successfully proved that will was not the result of fraud or misrepresentation, defendant is/was entitled to benefit of Section 60 of the Registration Act, which specifically proves that document signed, sealed and dated by the registering officer shall be admissible for the purpose of proving that the document stands duly registered in manner provided under the Registration Act, 1908.

14. Having carefully perused impugned judgment and decree passed by the learned court below vis-a vis evidence adduced on record, this Court is not persuaded to agree with the contention of learned counsel for the plaintiff that court below placed undue reliance upon the statement of DW3, who stated that gift deed was presented, endorsed and attested by the sub-registrar Solan. Similarly, this Court also finds no force in the argument of leaned counsel for the plaintiff that no reliance, if any, could be placed upon the statement of DW3, because at the time of registration of gift deed, he was not present. Careful perusal of impugned judgment and decree passed by the learned court below clearly suggests that it is not only the statement of DW3 Kirpa Ram, Senior Assistant in the office of sub-Registrar, Solan, which weighed with the learned court below to conclude that plaintiff had executed the gift deed Ext.D1, in favour of the defendant bequeathing thereby 11 bighas 12 biswas of land in favour of the defendant, rather court below

taking note of statements of other witnesses i.e. DW2 Yoginder Singh, DW4 Chinta Mani, stamp vender and DW5 Veena Sharma, scribe, rightly came to conclusion that gift deed in question was executed by the plaintiff with her own volition in sound state of mind. DW3 Kirpa Ram Senior Assistant while proving registration of the gift deed categorically stated that on 30.4.1999, Laxmi Devi had executed a gift deed in favour of Balwinder Singh and Roshani Devi. He also proved endorsement on the back side of the gift deed. It also emerges from the record that the Laxmi Devi had some dispute with the appellant Roshni Devi and she had got issued legal notice to them through Advocate namely S.K. Pandit (DW5) on 8.7.1993, specifically informing therein with regard to the execution of registered will in favour of the defendant. Plaintiff has been also not able to dispute that Laxmi Devi had made another will in 1998 in favour of defendant bequeathing whole of her property and as such, there appears to be no force in the contention of the learned counsel for the plaintiff that defendant is a stranger to Laxmi Devi. This Court finds considerable force in the argument of learned counsel for the defendant that gift Deed Ext.D1 was executed by the Laxmi Devi in a sound state of mind bequeathing therein 11 bighas and 12 biswas in favour of the defendant and as such, finds no reason to differ with the finding returned by the courts below, which otherwise appears to be based upon proper appreciation of evidence available on record. Substantial questions of law are answered accordingly.

15. Now this Court deems it proper to deal with another contention put forth by the learned counsel representing the defendant that in view of the concurrent finding recorded by the court below, this court has very limited jurisdiction to re-appreciate the evidence. It is well settled by now that concurrent finding of fact and law, recorded by the courts below cannot be interfered unless finding so recorded are shown to be perverse. In this regard, reliance is placed on the judgment passed by the Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others, (2015) 4 SCC 264,*** relevant para whereof reads as under:-

> ***"16. Based on oral and documentary evidence, both the courts below have recorded concurrent findings of fact that plaintiffs have established their right in 'A' schedule property. In the light of concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for re-appreciation 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 plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100 C.P.C., 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."***

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

17. In the facts and circumstances discussed above, this Court is of the view that findings returned by the trial Court below, which were further upheld by the first appellate Court, do not warrant any interference of this Court as findings given on the issues framed by the trial Court below as well as specifically taken up by this Court to reach the root of the controversy appear to be based on correct appreciation of oral as well as documentary evidence. Hence, the appeal fails and dismissed accordingly. There shall be no order as to costs.

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

M/s. Mahindra & Mahindra Financial Services Limited ...Applicant.

Versus

Butta Singh & another

...Non-applicant.

Cr. MP(M) No. 1468 of 2016
Reserved on: 09.04.2018
Decided on: 24.04.2018

Negotiable Instruments Act, 1881- Section 138- **Code of Criminal Procedure, 1973-** Section 378(3)- Dismissal of complaint by trial Court- Leave to file appeal – Grant of – Complainant/financer alleging that cheque was issued by accused to discharge vehicle loan due till date of issuance – However, complaint was dismissed by trial court- On facts, complainant failed to show that amount in question was due on date of issuance of cheque – Accused also proving settlement deed between them and financer vide which various vehicle loans including loan in question, were settled – Held- complainant/financer failed in proving that cheque was issued in its favour to discharge loan- Complaint was rightly dismissed by trial Court- Leave declined. (Paras-9 and 10)

For the applicant: Mr. G.C. Gupta, Sr. Advocate, with Ms. Meera Devi, Advocate.
For the non-applicants: Mr. V.D. Khidta, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present application is maintained by the applicant/complainant (hereinafter referred to as "the complainant") under section 378(3) Cr.P.C. for grant of leave to file an appeal against the judgment, dated 27.10.2016, passed by the learned Additional Chief Judicial Magistrate, Court No. 2, Shimla, in Criminal Case No. 1439-3 of 2014/2013, whereby his complaint, filed under Section 13 of the Negotiable Instruments Act, against the non-applicants/accused (hereinafter referred to as "the accused") was dismissed.

2. The key facts necessary for disposal of the present application can tersely be summarized thus:

The complainant-company, being Non-Banking company, duly registered under the Indian Companies Act, 1956, approached the learned Trial Court by filing a complaint alleging that accused No. 1, who is the proprietor of M/s Singh Motors (accused No. 2), took loan of Rs.20,00,000/- (rupees twenty lac) from the complainant for purchase of tipper AMW 2518. It was further averred that the total value of loan amount is Rs.24,17,400/- (Rs.20,00,000/- as loan amount and Rs.4,17,400/- as financial charges) and accused No. 1 was to repay the loan amount in 36 monthly installments of Rs.67,150/- each. It was further contended in the complaint that the loan was not paid regularly according to the terms and conditions of the loan agreement. Accused No. 1, on behalf of accused No. 2, issued cheque No. 026709 amounting to Rs.18,09,010/- drawn on Punjab National Bank, Bilaspur, however, the same was returned to the complainant, through memo dated 15.01.2013, with remarks, unpaid due to insufficient funds. Thus, the complainant sent legal notice, dated 22.01.2013, alongwith acknowledgment, but the same were not received back. The complainant further contended that the accused failed to pay the cheque, so he filed a complaint against the accused under Section 138 of the Negotiable Instruments Act, which was dismissed by the learned Trial Court, hence the present application seeking leave to file appeal against the impugned judgment.

3. The learned Senior Counsel for the applicant (complainant) has argued that as the appeal raises substantial questions of law, the application for leave to appeal be allowed. He has further argued that the learned Trial Court found sufficient material, so accused No. 1 was summoned. There existed *prima facie* case against him, thus notice of accusation was put against him. He has further argued that subsequently the parties led their evidence and after hearing the learned Trial Court, vide judgment dated 27.10.2016 wrongly acquitted accused No. 1. Conversely, the learned counsel for the non-applicants (accused) has argued that accused No. 1 has been rightly acquitted and the complaint, so filed by the complainant under Section 138 of the Negotiable Instruments Act, has been rightly dismissed. He has further argued that there is no illegality in the judgment rendered by the learned Trial Court, so no substantial question of law exists in the present case. The learned Trial Court considered all the aspects of the case and passed the impugned judgment after appreciating the evidence correctly and to its true perspective, so the application for granting leave to appeal be dismissed.

4. In order to appreciate the rival contentions of the parties, I have gone through the record in detail.

5. Shri Mohinder Gautam (Complainant, applicant herein) examined himself as CW-1. As per his deposition, in July, 2011, the accused took loan amounting to Rs.20,00,000/- for purchasing an AMW tipper. He has further deposed that financial charges on the loan were Rs.4,17,400/-, thus the total value of agreement was Rs.24,17,400/-. The total loan amount was to be repaid in 36 monthly installments of Rs.67,150/- and an agreement was also executed to this effect. As the accused failed to repay the loan amount, so a cheque, Ex.CW-1/B, qua unpaid installments was issued, but the same was dishonored vide memo, Ex. CW-1/C. Subsequently, a legal notice, Ex. CW-1/D, was sent to the accused. As per this witness, accused No. 1 issued the cheque, being the proprietor and authorized signatory of his firm (accused No. 2). He has also proved the postal receipts etc. This witness, in his cross-examination has denied that cheques were taken as security. He has further deposed that an amount of Rs.9,14,350/- has been paid by the accused. He has admitted that there is nothing to show that accused did not pay the installments or cheque amount of Rs.18,09,010/- was outstanding as on 18.12.2012. He feigned his ignorance that the complainant-company has arrived on a settlement with the accused on 12.03.2013. He deposed that in the case in hand the accused had deposited Rs.2,50,000/- on 08.03.2013. He has admitted that after the payment by the accused, he is not liable to pay the cheque amount

6. The accused examined five witnesses. DW-1, Shri Devinder Verma, Collection Manager, Mahindra & Mahindra, Khalini Shimla, deposed that on 08.03.2013, through receipt No. 918024443, an amount of Rs.2,50,000/- was deposited by accused No. 1 in account No. 16380003. Likewise, on the same day, through receipt No. 918024444, same amount had been deposited by him in account No. 1637936. On 09.03.2013, an amount of Rs.2,50,000/- was also deposited in account No. 1638026, through receipt No. 17633254. As per the deposition of this witness, an amount of Rs.2,50,000/- was deposited in the account No. 1620416 of Shri Bhawneet Singh, through receipt No. 17633255. On 29.03.2013, through receipts No. 918383151, 918383150 and 918383149, amounts of Rs.60,000/- Rs.60,000/- and Rs.80,000/-, respectively, were deposited in accounts No. 1638026, 1638003 and 1637936. This witness, in his cross-examination, has deposed that any person could deposit money in the account of the loanee. DW-2, Shri Ram Rattan, deposed that Shri Butta Singh is the proprietor of Singh Motors and he has account in his bank (Punjab National Bank) bearing No. 3382002100091618 and payments have been made to the complainant-company from this account. This witness got proved the statement of account, Ex. DW-2/A and also proved the entries therein, whereby payments have been made to the complainant-company. This witness, in his cross-examination, has deposed that statement of account, Ex. DW-2/A, does not bear his signatures. He has further deposed that Ex. DW-2/A was signed by the Manager and he is conversant with his signatures. As per this witness, the amounts have been sent to Mahindra & Mahindra Company. He has deposed that there is no entry qua cheque, Ex. CW-1/B, in the statement of account, Ex.

DW-2/A. However, he has voluntarily deposed that as the cheque was dishonored, so entry qua the same has not been shown in the statement of account.

7. DW-3, Shri Anurag Sharma, Legal manager of complainant-company, deposed that he had executed a final settlement, which is Ex. DW-3/A, with the accused and the settlement bears his signatures. This witness, in his cross-examination, has deposed that settlement letter, Ex. DW-3/A, was given to accused No. 1 by hand. As per this witness, Ex. DW-3/A was executed in presence of accused No. 1. He has further deposed that three loans were taken in the name of the accused and one in the name of Bhawneet. The accused also made payment of installments of the loan which was on the name of Bhawneet. DW-4, Abhishek Chauhan (witness from ASIX Bank, Kasumpati Shimla), deposed that accused No. 1 has account No. 910010037660111 in AXIS Bank, Mohali. On 29.06.2012 a demand draft of Rs.2,01,500/-, copy whereof is Ex. DW-4/A, drawn from the account of accused No. 1 was paid to Mahindra & Mahindra Finance Service. Likewise, on 29.06.2012, a sum of Rs.55,200/- was received by the complainant-company and copy of statement in this regard is Ex. DW-4/B. This witness, in his cross-examination, could not depose through which loan accounts these payments were made.

8. DW-5, Shri Opil Kumar, Civil Ahalmad from the office of Additional District & Sessions Judge, Fathebad Haryana, deposed that the complainant-company has maintained an execution of arbitration award in the Court qua loan agreement No. 1638026, dated 19.07.2011, wherein award, dated 11.03.2014, was passed by arbitrator Rajesh Kaushik. As per this witness, award of Rs.18,06,109/- is payable alongwith interest @ 3%. This witness, in his cross-examination, has deposed that the accused did not deposit any amount in the execution.

9. The case of the complainant is that cheque, Ex. CW-1/B, amounting to Rs.18,09,010/- was issued for the liability, which was outstanding against the accused upto November, 2012. The statement of account qua agreement No. 16380003, Ex. CW-1/G, demonstrates that the accused have paid a sum of Rs.8,72,950/- upto 20.07.2012 and thereafter no payment was made by the accused. Admittedly, agreement was for Rs.24,17,400/-, so as on 20.04.2013 the accused was only liable to pay Rs.15,44,450/-. Now, if penalty charges are included, then also it cannot be said that the accused are liable to pay the cheque amount of Rs.18,09,010/-. Thus, the claim of the complainant that cheque, Ex. CW-1/B, was issued for outstanding liability, stands disproved by complainant's own document, i.e., Ex. CW-1/G. The accused examined Shri Anurag Sharma (DW-3), who is an employee of complainant's company. This witness admitted the execution of settlement deed with accused No. 1, which is Ex. DW-3/A. Ex. DW-3/A demonstrates that settlement was arrived at qua four loan accounts. He has further deposed that the accused have taken loan for four vehicles and loan of three vehicles was taken in the name of the accused and one loan was taken in the name of one Bhavneet. He has admitted that installments of the loan of Bhavneet were also paid by the accused.

10. In the above backdrop, this Court finds that the complainant has failed to prove the guilt of the accused beyond the shadow of reasonable doubt, so the findings of acquittal, as recorded by the learned Trial Court, are the result of proper appreciation of the evidence to its true and correct perspective. Thus, no interference is required in the well reasoned judgment of the learned Trial Court.

11. After elaborately discussing the material, which has come on record, this Court finds that the appeal raises no substantial questions of law, so the application seeking leave of this Court for filing the appeal against the impugned judgment of the learned Trail Court, sans merits, deserves dismissal and is accordingly dismissed. Pending application(s), if any, also stand(s) disposed of.

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

Hari Ram & others ....Petitioners.
Versus
Smt. Dropti Devi ....Respondent.

CMPMO No.331 of 2016
Date of Decision: April 25, 2018.

Code of Civil Procedure, 1908- Section 47- **Limitation Act, 1963-** Article 136- Decree of mandatory injunction for demolition of overhanging encroachment of defendant- Execution thereof- Judgment debtor contending that execution was barred by limitation- Executing Court dismissing objections of J.D.- Petition against – Held - Decree was passed by trial court on 1.4.2008 and appeal of J.D. against it was decided on 5.8.2013- Execution application was filed on 11.5.2011- Held- Article 136 of Limitation Act provides twelve years period for execution of decree- Execution application thus was not barred by limitation- Petition dismissed and order of executing court upheld.

Cases referred:
M.J. Simon v. Special Grade Panchayat, Athirampuzha, AIR 2001 Kerala 132
Sargunam v. Duraisamy, 2007 (2) MadLJ 746
Bhawanipur Banking Corporation Ltd. v. Gouri Shankar, AIR 1950 SC 6
Sardarsing Amarsing Gaherwal v. Ramkaran Ramnath Upadhaya & others, AIR 1960 Bombay 15
Pasani Ramachandraiah v. Daggupati Seshamma, AIR 1978 Andhra Pradesh 342
Collector of Customs, Calcutta v. East India Commercial Co. Ltd., Calcutta, AIR 1963 SC 1124

For the Petitioners Mr. Naresh Sharma, Advocate.
For the Respondent Mr. G.D. Verma, Senior Advocate, with Mr. Romesh Verma, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice

In the present petition, filed under Article 227 of the Constitution of India, petitioners, who are the Judgment Debtors, lay challenge to the order dated 20.5.2016, passed by Civil Judge (Junior Division), Court No.6, Shimla, Himachal Pradesh, in Case No.6-10 of 2011, titled as *Dropti Devi v. Hari Ram & others*, rejecting the objections filed in the Execution Petition.

2. On 1.4.2008, suit filed by the plaintiff was decreed by the Civil Judge (Junior Division), Court No.3, Shimla. It is a decree for prohibitory and mandatory injunction. Undisputedly, the said judgment has attained finality.

3. The Decree Holder filed a petition, seeking execution of the said decree, way back in the year 2011, in which the Judgment Debtors filed an application, under Section 47 of the Code of Civil Procedure, resisting execution of the decree.

4. Noticeably, execution of the decree is resisted on six grounds, which the Court below has referred to and dealt with in the impugned order.

5. Before this Court, Judgment Debtors argue that the decree cannot be executed, for being barred by limitation. In support, learned counsel for the Judgment Debtors seeks reliance on *M.J. Simon v. Special Grade Panchayat, Athirampuzha,* AIR 2001 Kerala 132 (Para-5); and *Sargunam v. Duraisamy,* 2007 (2) MadLJ 746 (Para-9).

6. Section 3 of the Limitation Act, 1963 (hereinafter referred to as the Limitation Act) mandates that every application, which, in the instant case, is the one for execution, made after the prescribed period, shall be dismissed, despite the fact that limitation is not set up as a defence.

7. The periods of limitation are prescribed in the Schedule to the Limitation Act. We are concerned with Clause-136, dealing with the execution of decree, which reads as under:

136.	For the execution of any decree (other than a decree granting a mandatory injunction) or order of any civil court.	Twelve years	[When] the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, when default in making the payment or delivery in respect of which execution is sought, takes place: Provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation.

8. This Court is of the considered view that in the given facts and circumstances, the question of limitation does not apply at all. Trial Court passed the judgment and decree on 1.4.2008. Appeal thereof was preferred on 25.5.2008, which was decided by the District Judge only on 5.8.2013. Much prior thereto, the Decree Holder had filed the Execution Petition on 11.5.2011, objections thereto were filed only in the year 2014, which stand partly allowed by the Executing Court, in terms of the impugned order.

9. The Judgment Debtors have been directed to demolish the construction, overhanging over the plaintiff's (Decree Holder's) land, comprising in Khasra Nos.262/1 and 263/1, situate at Mauza Chalonthi, Tehsil and District Shimla, Himachal Pradesh.

10. Decisions in *M.J. Simon (supra)* and *Sargunam (supra)* are thus not applicable to the given facts.

11. The starting point of limitation would be the date on which the appeal stands decided. (*Bhawanipur Banking Corporation Ltd. v. Gouri Shankar,* AIR 1950 SC 6; *Sardarsing Amarsing Gaherwal v. Ramkaran Ramnath Upadhaya & others,* AIR 1960 Bombay 154; and *Pasani Ramachandraiah v. Daggupati Seshamma,* AIR 1978 Andhra Pradesh 342).

12. It is a settled principle of law that with the passing of appellate order, decree of the lower Court merges into decree of the Appellate Court. (*Collector of Customs, Calcutta v. East India Commercial Co. Ltd., Calcutta,* AIR 1963 SC 1124; and Civil Revision No.68 of 1990, titled as *Hari Krishan and others v. Bachittar Singh,* decided by the High Court of Himachal Pradesh on 18.12.1992).

13. Hence, the impugned order cannot be said to be unreasonable, illegal or perverse, warranting interference by this Court.

14. For all the aforesaid reasons, present petition, devoid of merit, is dismissed.

15. Any observation made hereinabove shall have no bearing whatsoever on the merits of the main case. Parties, through their learned counsel, are directed to appear before the Court below on 14.5.2018.

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

****

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

Sh. Madan Swaroop & Anr. ...Appellants

Versus

Sh. Nand Lal & Ors. ...Respondents

RFA No. 899 of 2012
Reserved on:10.04.2018
Decided on: 26.04.2018

Code of Civil Procedure, 1908- Section 96- First Appeal- Jurisdiction of First Appellate Court is like that of trial court- Therefore, it is open to appellant to assail findings of trial court rendered on facts or law. (Para-10)

Code of Civil Procedure, 1908- Order VIII Rules 3 to 5 - Held - Denial of facts pleaded in plaint must be specific and unambiguous – Vague and evasive denial of fact in written statement is no denial and can be taken to be an admission by necessary implication- Defendant not denying in his written statement – Sale deeds relied upon by plaintiff - Held- Sale deeds can be taken to have been admitted by defendant. (Para- 64 and 65)

Indian Evidence Act, 1872- Sections 61 and 62- Objection as to mode of proof of a document- Needs to be taken when document is sought to be tendered – Copies of sale deeds were exhibited in evidence without any objection as to mode of proof – Held- Objection as to mode and method of proof cannot be taken at appellate stage – R.V.E. Venkatachala Gounder vs. Arulmigu Viswesaraswami & V.P. Temple and another (2003) 8 SCC 752 relied upon. (Para-69 to 77)

Himachal Pradesh Land Revenue Act, 1954- Section 32- Record of rights- Entries are recorded in revenue papers for fiscal purposes- These are not conclusive proof of title. (Para-80)

Cases referred:

Shasidhar and others versus Ashwini Uma Mathad and another, (2015) 11 SCC 269

Arulvelu and another vs. State Represented by the Public Prosecutor and another (2009) 10 SCC 206

Rubi Sood and another vs. Major (Retd.) Vijay Kumar Sud and others, I L R 2015 (III) HP 771

Damodar Lal vs.Sohan Devi and others (2016) 3 SCC 78

Badat and Co. Bombay vs. East India Trading Co. AIR 1964 SC 538

M. Venkatramana Hebbar (Dead) by LRs. vs. M. Rajagopal Hebbar and others (2007) 6 SCC 401

Muddasani Venkata Narsaiah (dead) through LRs. vs. Muddasani Sarojana (2016) 12 SCC 288

Jaspal Kaur Cheema and another vs. Industrial Trade Links and others (2017) 8 SCC 592

R.V.E. Venkatachala Gounder vs. Arulmigu Viswesaraswami & V.P. Temple and another (2003) 8 SCC 752

Dayamathi Bai (Smt.) vs K.M. Shaffi (2004) 7 SCC 107

Jattu Ram vs. Hakam Singh and other AIR 1994 SCC 1653

Suraj Bhan and other vs. Financial Commissioner and other (2007) 6 SCC 186).

For the appellants: Mr. G.C. Gupta, Sr. Advocate, with Ms. Meera Devi, Advocate.
For the respondents: Mr. Bimal Gupta, Sr. Advocate, with Mr. Vineet Vashisht, Advocate, for respondents No. 1 to 6.
Mr. G.D. Verma, Sr. Advocate, with Mr. B.C. Verma, Advocate, for respondents No. 7 and 8.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge

Appellants are the defendants who aggrieved by the judgment and decree passed by the learned District Judge, Sirmaur District at Nahan, whereby the suit of the plaintiffs/respondents No. 1 to 6 has been decreed, have filed the instant appeal under Section 96 of the Code of Civil Procedure read with Section 21 of the H.P. Courts Act, 1976.

2. Respondents No. 1 to 6 (plaintiffs) filed a suit for declaration, confirmation of possession and for permanent prohibitory injunction against the appellants and respondents No. 7 to 14 with respect to the property comprised in Khewat No. 4-min, Khatauni No. 10, Khasra Nos. 6 to 13 and plots 8, measuring 703.71 sq. mts., as per the Jamabandi for the year 1997-1998, situated at Mauza Ranital, Pargana Pahar, District Sirmaur, H.P., on the allegations that the land was purchased by respondent No. 1 and predecessor-in-interest of respondents No. 2 to 6 vide registered sale deed dated 30.09.1961 from one Shri Prem Chand, who had purchased the same vide registered sale deed dated 09.01.1960 from one Col. Hira Singh, who had already purchased the same from Shri Niranjan vide sale deed dated 04.02.1952. Shri Niranjan was stated to have purchased the property as proprietor of M/s Himachal Rasayan Shala from predecessor-in-interest of the appellants and respondents No. 9 to 14 vide registered sale deed dated 28.05.1949. The plaintiffs as such, pleaded that after 30.09.1961, respondent No. 1 and predecessor-in-interest of respondents No. 2 to 6, namely, Shri Rameshwar Dass became owners in possession of the suit property in equal shares and Shri Atma Ram and his heirs and successors have no right, title and interest in the property after it was sold to Shri Niranjan. It was further alleged by the plaintiffs that the appellants and respondents No. 1 to 9 and their predecessor-in-interest in connivance with the revenue authorities, got their names incorporated in the Jamabandi for the year 1997-98 and the predecessor-in-interest of respondents No. 1 to 6 were recorded only in possession of the land as they went out of Nahan. It has further been alleged by respondents No. 1 to 6 that after the purchase, they installed a factory over the suit property, however, the same could not be properly looked after and run into losses and, in fact, it was ultimately closed down and the property thereafter started deteriorating due to vagaries of weather and its built up structure started falling down.

3. That respondents No. 1 to 6 further alleged that the settlement in the town was carried on twice and in the settlement, they were wrongly and illegally entered as in possession of the property and the names of the appellant and Brij Bhushan were illegally entered in the revenue records as owners. No notice of the entries was given to them by the Settlement Department and the entries were made without any verification and, as such, they are not bound by the same. In addition to this, the respondents No. 1 to 6 have made other allegations in the plaint with a view to support their case.

4. That on the basis of the wrong revenue entries, the appellant No. 2, as General Power of Attorney holder of appellant No. 1 sold the property to respondents No. 7 and 8 vide two separate registered sale deeds for a total consideration of Rs.13.00 lacs duly registered before the Sub Registrar, Nahan on 19.11.2003 and on the basis of the said registered sale deeds, mutation Nos. 455 and 456 were wrongly and illegally allotted on 12.12.2003 on the basis of illegal sale deeds, respondents No. 7 and 8 illegally asserting their rights over the property and started threatening the plaintiffs to dispossess them from the suit property. The plaintiffs on these allegations filed a suit for declaration that they are owners in possession of the property and the sale deeds executed by the appellants are wrong, illegal and non-est and not binding upon them

and have prayed for possession in case they were found to be out of possession of the suit property. The plaintiffs also prayed for permanent prohibitory injunction restraining the appellants and other respondents from interfering in their possession.

5. That the respondents No. 9 to 16 did not contested the suit and were proceeded against ex-parte. The appellants as well as respondents No. 7 and 8 filed separate written statements and contested the suit on the grounds that the land was never sold to anyone by late Shri Atma Ram and the execution of the sale deed to different persons were denied. The possession of the plaintiffs and establishment of factory over the suit property was also denied. The sale deeds executed by the appellants in favour of the respondents No. 7 and 8 were alleged to be legal and binding upon the plaintiffs. The allegations regarding connivance with the revenue staff and having recorded themselves as owners of the suit property were also denied by the appellants. The sale in favour of the respondents No. 7 and 8 was admitted by the appellants for the consideration mentioned therein. The respondents No. 7 and 8 also in their written statement denied the claim of the plaintiffs and further pleaded that they were bonafide purchaser.

6. On the pleadings of the parties, this Court where the suit was initially filed, framed the following issues on 11.08.2008:-

1. Whether the plaintiffs are entitled to a decree of declaration that they are owners in possession of land comprised in Khewat No. 4min, Khatauni No. 10, Khasra No. 6 to 13, Plots 8, measuring 703 sq. meters, situated in Mauja Ranital, Pargana Pahar, District Sirmaur, H.P.? OPP

2. Whether the plaintiffs are entitled to decree of possession of the suit land? OPP

3. Whether the plaintiffs are entitled to decree for permanent prohibitory injunction, as prayed for? OPP

4. Whether sale deeds No. 516, 517 dated 18.1.2003, registered before Sub Registrar, Nahan, are illegal, void and not binding on the plaintiffs, as alleged?OPP

5. Whether the suit is not maintainable in the present form and does not disclose any legally enforceable right or of cause of action against the defendants? OPD 1 to 4

6. Whether suit is not properly valued for the purpose of court fee and jurisdiction? OPD 1 to 4

7. Whether suit is barred by limitation? OPD 1 to 4

8. Whether suit is bad for mis-joinder of parties? OPD 1 to 4

9. Whether the suit is not verified by a person authorised by law? OPD 1 to 4

10. Whether defendants 3 and 4 are in possession of the suit land, as alleged? OPD 3 to 4

11. Whether defendants No. 3 and 4 are bonafide purchasers for consideration? OPD 3 to 4

12. Relief.

7. After recording the evidence and evaluating the same, the learned trial Court decided issue Nos. 1, 4, 10 and 11 in favour of the plaintiffs and other issues were decided against the appellants. On the basis of the findings on issues No. 1, 4, 10 and 11, the learned trial Court decreed the suit of the plaintiffs and also passed a decree for declaration, declaring the plaintiffs/respondents No. 1 to 6 as owners in possession of the land and that the sale deeds executed by the appellants in favour of the respondents No. 7 and 8 are wrong, illegal, and non-est and not binding on the plaintiffs. A decree for permanent prohibitory injunction was also granted in favour of the plaintiffs/respondents No. 1 to 6.

8. Aggrieved by the judgment and decree passed by the learned trial Court, the appellants/defendants have filed the instant appeal on the ground that the learned trial Court has erred in deciding issue Nos. 1, 4, 10 and 11 in favour of the plaintiffs. These issues were based entirely on documents, which the appellants have failed to prove in accordance with law.

9. The respondents have failed to lead evidence to establish that Shri Atma Ram had executed a sale deed in favour of Himachal Rasayan Shala and further there is no proof that Shri Atma Ram, in fact, was the absolute owner of the property. That apart, even the subsequent sale deed in favour of Shri Niranjan and finally in favour of Shri Nand Lal and Shri Rameshwar Dass has not been proved in accordance with law. The suit otherwise was barred by limitation. And lastly, in short it is contended that the findings recorded by learned Court are perverse and, therefore, the judgment and decree so passed in favour of the respondents deserves to be set aside.

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

10. Admittedly, this is a first appeal and the jurisdiction of this Court while hearing the same is very wide like the learned trial Court and it is open to the defendants to attack all findings on fact and/or on law in the first appeal and would have to be decided on the basis of following exposition of law as propounded by the Hon'ble Supreme Court in ***Shasidhar and others*** *versus* ***Ashwini Uma Mathad and another***, ***(2015) 11 SCC 269***, wherein it was observed 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.*

13. In Santosh Hazari vs. Purushottam Tiwari (Deceased) by L.Rs. (2001) 3 SCC 179, this Court held as under: (SCC pp. 188-89, para 15)

> *"15.....the appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court.....while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it."*

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 & Anr., (2005) 12 SCC 303, while considering the scope of Section 96 of the Code this Court observed as follows: (SCC p.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 & Anr. 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 3-5)

> *"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, 2014(12) Scale 171."

11. What is 'perverse' was considered by the Hon'ble Supreme Court in a detailed judgment in ***Arulvelu and another*** *vs.* ***State Represented by the Public Prosecutor and another (2009) 10 SCC 206*** wherein it was held as under:-

"*26. In M. S. Narayanagouda v. Girijamma & Another AIR 1977 Kar. 58, the Court observed that any order made in conscious violation of pleading and law is a perverse order. In Moffett v. Gough, (1878) 1 LR 1r 331 the Court observed that a perverse verdict may probably be defined as one that is not only against the weight of evidence but is altogether against the evidence. In Godfrey v. Godfrey 106 NW 814, the Court defined `perverse' as turned the wrong way, not right; distorted from the right; turned away or deviating from what is right, proper, correct etc.*

27. The expression "perverse" has been defined by various dictionaries in the following manner:

1. Oxford Advanced Learner's Dictionary of Current English Sixth Edition

PERVERSE:- Showing deliberate determination to behave in a way that most people think is wrong, unacceptable or unreasonable.

2. Longman Dictionary of Contemporary English - International Edition

PERVERSE: Deliberately departing from what is normal and reasonable.

3. The New Oxford Dictionary of English - 1998 Edition

PERVERSE: Law (of a verdict) against the weight of evidence or the direction of the judge on a point of law.

4. New Webster's Dictionary of the English Language (Deluxe Encyclopedic Edition)

PERVERSE: Purposely deviating from accepted or expected behavior or opinion; wicked or wayward; stubborn; cross or petulant.

5. Stroud's Judicial Dictionary of Words & Phrases, Fourth Edition

PERVERSE: A perverse verdict may probably be defined as one that is not only against the weight of evidence but is altogether against the evidence.

28. In Shailendra Pratap & Another v. State of U.P. (2003) 1 SCC 761, the Court observed thus: (SCC p.766, para 8

> *"8…We are of the opinion that the trial court was quite justified in acquitting the appellants of the charges as the view taken by it was reasonable one and the order of acquittal cannot be said to be perverse. It is well settled that appellate court would not be justified in interfering with the order of acquittal unless the same is found to be perverse. In the present case, the High Court has committed an error in interfering with the order of acquittal of the appellants recorded by the trial court as the same did not suffer from the vice of perversity."*

29. In Kuldeep Singh v. The Commissioner of Police & Others (1999) 2 SCC 10, the Court while dealing with the scope of Articles 32 and 226 of the Constitution observed as under: (SCC p.14, paras 9-10)

> *"9. Normally the High Court and this Court would not interfere with the findings of fact recorded at the domestic enquiry but if the finding of "guilt" is based on no evidence, it would be a perverse finding and would be amenable to judicial scrutiny.*
>
> *10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."*

30. The meaning of 'perverse' has been examined in H. B. Gandhi, Excise and Taxation Officer-cum- Assessing Authority, Karnal & Others v. Gopi Nath & Sons & Others 1992 Supp (2) SCC 312, this Court observed as under: (SCC pp. 316-17, para 7)

> *"7. In the present case, the stage at and the points on which the challenge to the assessment in judicial review was raised and entertained was not appropriate. In our opinion, the High Court was in error in constituting itself into a court of appeal against the assessment. While it was open to the respondent to have raised and for the High Court to have considered whether the denial of relief under the proviso to Section 39(5) was proper or not, it was not open to the High Court re-appreciate the primary or perceptive facts which were otherwise within the domain of the fact-finding authority under the statute. The question whether the transactions were or were not sales exigible to sales tax constituted an exercise in recording secondary or inferential facts based on primary facts found by the statutory authorities. But what was assailed in review was, in substance, the correctness - as distinguished from the legal permissibility - of the primary or perceptive facts themselves. It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law." '*

12. What is 'perverse' has further been considered by this Court in ***RSA No.436 of 2000***, titled ***'Rubi Sood and another*** *vs.* ***Major (Retd.) Vijay Kumar Sud and others***, decided on 28.05.2015 in the following manner:-

> *"25..... A finding of fact recorded by the learned Courts below can only be said to be perverse, which has been arrived at without consideration of material evidence or such finding is based on no evidence or misreading of evidence or is grossly erroneous that, if allowed to stand, it would result in miscarriage of justice, is open to correction, because it is not treated as a finding according to law.*
>
> *26. If a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or even the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then the finding is rendered infirm in the eye of the law.*
>
> *27. If the findings of the Court are based on no evidence or evidence, which is thoroughly unreliable or evidence that suffers from vice of procedural irregularity or the findings are such that no reasonable persons would have arrived at those findings, then the findings may be said to be perverse.*
>
> *28. Further if the findings are either ipse dixit of the Court or based on conjectures and surmises, the judgment suffers from the additional infirmity of non application of mind and thus, stands vitiated."*

13. What is 'perversity' recently came up for consideration before the Hon'ble Supreme Court in ***Damodar Lal*** *vs.****Sohan Devi and others (2016) 3 SCC 78*** wherein it was held as under:-

> *"8. "Perversity" has been the subject matter of umpteen number of decisions of this Court. It has also been settled by several decisions of this Court that the first appellate court, under Section 96 of The Civil Procedure Code, 1908, is the last court of facts unless the findings are based on evidence or are perverse.*
>
> *9. In Krishnan v. Backiam (2007) 12 SCC 190, it has been held at paragraph-11 that: (SCC pp. 192-93)*
>
> > *"11. It may be mentioned that the first appellate court under Section 96 CPC is the last court of facts. The High Court in second appeal under Section 100 CPC cannot interfere with the findings of fact recorded by the first appellate court under Section 96 CPC. No doubt the findings of fact of the first appellate court can be challenged in second appeal on the ground that the said findings are based on no evidence or are perverse, but even in that case a question of law has to be formulated and framed by the High Court to that effect."*
>
> *10. In Gurvachan Kaur v. Salikram (2010) 15 SCC 530, at para 10, this principle has been reiterated: (SCC p. 532)*
>
> > *"10. It is settled law that in exercise of power under Section 100 of the Code of Civil Procedure, the High Court cannot interfere with the finding of fact recorded by the first appellate court which is the final court of fact, unless the same is found to be perverse. This being the position, it must be held that the High Court was not justified in reversing the finding of fact recorded by the first appellate court on the issues of existence of landlord-tenant relationship between the plaintiff and the defendant and default committed by the latter in payment of rent."*
>
> *11. In the case before us, there is clear and cogent evidence on the side of the plaintiff/appellant that there has been structural alteration in the premises rented out to the respondents without his consent. Attempt by the respondent-defendants to establish otherwise has been found to be totally non-acceptable to the trial court as well as the first appellate court. Material alteration of a property is not a fact*

confined to the exclusive/and personal knowledge of the owner. It is a matter of evidence, be it from the owner himself or any other witness speaking on behalf of the plaintiff who is conversant with the facts and the situation. PW-1 is the vendor of the plaintiff, who is also his power of attorney. He has stated in unmistakable terms that there was structural alteration in violation of the rent agreement. PW-2 has also supported the case of the plaintiff. Even the witnesses on behalf of the defendant, partially admitted that the defendants had effected some structural changes.

12. Be that as it may, the question whether there is a structural alteration in a tenanted premises is not a fact limited to the personal knowledge of the owner. It can be proved by any admissible and reliable evidence. That burden has been successfully discharged by the plaintiff by examining PWs-1 and 2. The defendants could not shake that evidence. In fact, that fact is proved partially from the evidence of the defendants themselves, as an admitted fact. Hence, only the trial court came to the definite finding on structural alteration. That finding has been endorsed by the first appellate court on re-appreciation of the evidence, and therefore, the High Court in second appeal was not justified in upsetting the finding which is a pure question of fact. We have no hesitation to note that both the questions of law framed by the High Court are not substantial questions of law. Even if the finding of fact is wrong, that by itself will not constitute a question of law. The wrong finding should stem out on a complete misreading of evidence or it should be based only on conjectures and surmises. Safest approach on perversity is the classic approach on the reasonable man's inference on the facts. To him, if the conclusion on the facts in evidence made by the court below is possible, there is no perversity. If not, the finding is perverse. Inadequacy of evidence or a different reading of evidence is not perversity.

13. In Kulwant Kaur v. Gurdial Singh Mann (2001) 4 SCC 262, this Court has dealt with the limited leeway available to the High Court in second appeal. To quote para 34: (SCC pp.278-79)

> *"34. Admittedly, Section 100 has introduced a definite restriction on to the exercise of jurisdiction in a second appeal so far as the High Court is concerned. Needless to record that the Code of Civil Procedure (Amendment) Act, 1976 introduced such an embargo for such definite objectives and since we are not required to further probe on that score, we are not detailing out, but the fact remains that while it is true that in a second appeal a finding of fact, even if erroneous, will generally not be disturbed but where it is found that the findings stand vitiated on wrong test and on the basis of assumptions and conjectures and resultantly there is an element of perversity involved therein, the High Court in our view will be within its jurisdiction to deal with the issue. This is, however, only in the event such a fact is brought to light by the High Court explicitly and the judgment should also be categorical as to the issue of perversity vis-à-vis the concept of justice. Needless to say however, that perversity itself is a substantial question worth adjudication — what is required is a categorical finding on the part of the High Court as to perversity. In this context reference be had to Section 103 of the Code which reads as below:*
>
> ***'103. Power of High Court to determine issues of fact.**- In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal,—*
>
> > *(a) which has not been determined by the lower appellate court or by both the court of first instance and the lower appellate court, or*

> *(b) which has been wrongly determined by such court or courts by reason of a decision on such question of law as is referred to in Section 100."*
>
> *The requirements stand specified in Section 103 and nothing short of it will bring it within the ambit of Section 100 since the issue of perversity will also come within the ambit of substantial question of law as noticed above. The legality of finding of fact cannot but be termed to be a question of law. We reiterate however, that there must be a definite finding to that effect in the judgment of the High Court so as to make it evident that Section 100 of the Code stands complied with."*

14. In S.R. Tiwari v. Union of India (2013) 6 SCC 602, after referring to the decisions of this Court, starting with Rajinder Kumar Kindra v. Delhi Administration, (1984) 4 SCC 635, it was held at para 30: (S.R.Tewari case[6], SCC p. 615)

> *"30. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality. If a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with. (Vide Rajinder Kumar Kindra v. Delhi Admn. [(1984) 4 SCC 635 : 1985 SCC (L&S) 131 : AIR 1984 SC 1805] , Kuldeep Singh v. Commr. of Police [(1999) 2 SCC 10 : 1999 SCC (L&S) 429 : AIR 1999 SC 677] , Gamini Bala Koteswara Rao v. State of A.P. [(2009) 10 SCC 636 : (2010) 1 SCC (Cri) 372 : AIR 2010 SC 589] and Babu v. State of Kerala[(2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179] .)"*
>
> *This Court has also dealt with other aspects of perversity."*

14. In order to judge whether the findings recorded by the learned trial Court are perverse, it would be first necessary to refer to the oral evidence and thereafter documentary evidence led by the parties.

15. PW1 Shri Narinder Kumar is Record Keeper of Judicial Record Room, Nahan, who produced the original record of Civil Suit No. 60/1 of 1994, titled as Madan Swaroop vs. Rameshwar Dass and others and proved on record copy of plaint Ext.PW1/A.

16. PW2 Shri Dharam Singh, Junior Assistant in the office of Sub Registrar, Nahan, produced the records of the sale deeds that were registered in the office of Sub registrar and not the original record of the registration as mentioned by the learned trial Court. (Yet, it needs to be noticed that no objection has been taken by the defendants to the production of the sale deeds and rather a positive suggestion has been given to this witness by defendants No. 1 and 2 to the effect that Ext.PW2/A as transcribed in Bahi No. 1 that the land has been sold by Shri Atma Ram to Himachal Rasayan Shala through Shri Niranjan Dass.) He proved on record copy of sale deed executed by Shri Atma Ram in favour of Shri Niranjan Singh Ahluwalia Ext.PW2/A recorded in Bahi No. 1 at page 30. Copy of sale deed executed by Shri Niranjan Singh Ahluwalia in favour of Col. Hira Singh Baam Ext.PW2/B recorded in Bahi No. 1 at page 30/34 and copy of sale deed executed by Col. Hira Singh Baam in favour of Shri Prem Chand Ext.PW2/C and entered in Bahi No. 1 at page 28. Lastly, sale deed dated 30.09.1961 Ext.PW2/D was executed by Shri Prem Chand, son of Shri Sadhu Ram in favour of Shri Rameshwar Dass was entered at page 35 of Bahi No. 1.

17. PW4 Shri Phul Singh, Reader to Tehsildar, Nahan, produced the original record and proved the copy of letter dated 09.12.2003 Ext.PW4/A sent by Tehsildar, Nahan to Shri Prem Sagar, copy of letter dated 10.12.2003 Ext.PW4/B sent by Tehsildar, Nahan to Shri M. K. Jain, Advocate and copy of letter dated 27.11.2003 Ext.PW4/C from Prem Sagar to Tehsildar, Nahan.

18. PW5 Shri Ram Krishan Verma was posted as SDO, I & PH Department at Nahan and produced the record of water connection and stated that water connection was installed in the Shivalik Metal Industries on 11.04.1962 and the same was subsequently disconnected on 09.02.1976 on account of non-payment of water connection consumption charges. He also proved on record the extract of the water connection register Ext.PW4/A.

19. PW7 Shri Jai Pal, Stenographer to the Assistant Commissioner, Excise and Taxation, Nahan stated that M/s Shivalik Industries was registered in their department under the H.P. General Sales Tax Act, 1968 and further stated that the business of the factory was shifted to Paonta Sahib on 27.08.1969 and certificate to that effect was Ext. PW7/A.

20. PW8 Shri Prem Sagar is plaintiff No. 2, in his affidavit Ext. PW8/A, affirmed on oath all material averments made in the plaint and asserted that the plaintiffs are owner in possession of the suit land. He also stated that he had sent an application Ext.PW8/A to the Tehsildar and letters Ext. PW8/B, Ext. PW8/D and Ext.PW8/E were signed by him whereas letter Ext. PW8/C was signed by his younger brother. In cross-examination, this witness denied that Shri Atma Ram never sold this property to Shri Niranjan Singh nor this property was acquired by the plaintiffs through successive sales which have been relied upon by them.

21. PW9 Prem Chand, in his affidavit Ext.PW9/A has testified that he had purchased the suit property from Col. Hira Singh for a sale consideration of Rs. 5000/- vide sale deed dated 09.01.1960 and same remained in his possession till the time he sold it to S/Shri Rameshwar Dass and Nand Lal for a sum of Rs.9000/- vide sale deed dated 30.09.1961 and also delivered the possession thereof to the vendees. In cross-examination, he denied that Col. Hira Singh had no title to the suit land and as such he could not pass any title to his vendee.

22. PW10 Shri Satinder Thakur, Senior Assistant in the office of Tehsildar, Nahan, produced the original record of registration and stated that up to 30 to 40 years ago the registration Clerk prepared the copy of the registered document by copying the same from the original document and thereafter he pasted the same in Bahi No. 1. He further stated that copies of sale deed No. 36, Ext.PW2/A, sale deed No. 15, Ext. PW2/B, sale deed No. 3 Ext. PW2/C and sale deed No. 61 Ext. PW2/D were true copies of the original and all of these copies had been issued from their office.

23. PW11 Shri Nand Lal is plaintiff No. 1, who appeared as witness in rebuttal evidence to prove the possession of the plaintiffs. He further stated that after purchasing the suit property he set-up Shivalik Metal Industries over the same in the year 1961. The inauguration of this factory was done by the then Lt. Governor of H.P. He further stated that in the beginning he personally looked after the factory and thereafter he employed his brother-in-law Shri Ramesh Chand to look after the same. The factory remained on the suit property up to 1969 and was thereafter shifted to Paonta Sahib. He got the Shivalik Industries registered for the purpose of sales tax and also got electricity, water and telephone connections installed in this factory. He further stated that after shifting the factory from the suit property the same was being looked after by the aforesaid Ramesh Chand who had been running motor workshop on the said property. In cross-examination, he denied that he never remained in possession of the suit property nor installed any factory over the same.

24. PW12 Shri Ramesh Chand is brother-in-law of PW11 and stated that he was employed by the plaintiffs in Shivalik Industries from the year 1962 to 1968. He further stated that after the said industry was shifted by the plaintiffs from Nahan to Paonta Sahib in the year 1969, he ever since then had been looking after this property. According to him, he was using a portion of the suit property measuring 100 feet as his residence and on another portion of this property he had been running a motor workshop. In cross-examination, he denied that he was

never employed by the plaintiffs to look after the property nor the plaintiffs ever remained in possession of this property.

25. Adverting to the documentary evidence produced by the plaintiffs, Ext.PW1/A is copy of plaint of Civil Suit No. 60/1 of 1994 that was filed by defendant No. 1 against the plaintiff and Shri Rameshwar Dass predecessor-in-interest of plaintiffs Nos. 2 to 6, in which he had sought declaration to the effect that he was owner in possession of the suit property and other property and the revenue entries showing the plaintiffs in possession of the suit property were wrong, illegal, null and void.

26. Ext.PW1/B is copy of judgment dated 26.02.1998 in Civil Suit No. 61/1 of 1994, whereby the suit filed by defendant No. 1 was decreed against the plaintiffs ex-parte.

27. Ext.PW1/C is copy of application dated 26.02.1998 moved by plaintiff Nand Lal under Order 9 Rule 13 CPC for setting aside ex-parte decree.

28. Ext.PW1/D is the copy of application filed by the plaintiff for condonation of delay under Section 5 of the Limitation Act.

29. Ext.PW1/E is copy of reply filed by defendant No. 1 to the said application.

30. Ext.PW1/F is copy of order dated 09.12.1999 whereby application filed by the plaintiff under Order 9 Rule 13 CPC (Ext.PW1/C) was allowed and the ex-parte decree dated 26.02.1998 was set aside.

31. Ext.PW1/G is copy of order dated 07.03.2000 whereby Civil Suit No. 60/1 of 1994 filed by defendant Shri Madan Swaroop was dismissed as withdrawn.

32. Ext.PW2/A is copy of sale deed No. 36 dated 28.05.1949 executed by Shri Atma Ram in favour of Shri Niranjan Singh whereby he sold land bearing Khasra No. 350/2, measuring 865 sq. Yards and 6 ½ Girah for sale consideration of Rs.2000/- and the possession thereof was also delivered to the vendee.

33. Ext.PW2/B is copy of sale deed No. 15 dated 04.05.1952 executed by Shri Niranjan Singh in favour of Shri Hira Singh Baam whereby he sold the land purchased by him from Shri Atma Ram alongwith the flour mill installed by him over the land for consideration of Rs.12,000/- and delivered the possession of this property to the vendee.

34. Ext.PW2/C is copy of sale deed dated 09.01.1960 executed by Col. Hira Singh Baam in favour of Shri Prem Chand whereby he sold the property purchased by him from Shri Niranjan Singh after removing the flour mill for a sale consideration of Rs.5000/- and also delivered the possession of this property to the vendee.

35. Ext.PW2/D is copy of sale deed dated 30.09.1961 executed by Shri Prem Chand in favour of Shri Rameshwar Dass and Shri Nand Lal for consideration of Rs.9000/-.

36. Ext.PW4/A is copy of letter dated 9.12.2003 sent by Tehsildar, Nahan to plaintiff Prem Sagar wherein he informed him that entries in favour of defendant No. 1 were incorporated on the basis of decree of civil Court and he could pursue the remedy in the civil Court.

37. Ext.PW4/C is copy of application dated 27.11.2003 moved by the plaintiff Shri Prem Sagar to Tehsildar, Nahan wherein he had informed that defendant No. 1 had wrongly and illegally transferred the suit property in favour of defendants No. 3 and 4 and requested him to mutate this property in favour of the plaintiffs.

38. Ext.PW5/A is copy of the extract of water connection Register which shows that water connection was installed in the Shivalik Industries on 11.04.1962 and was subsequently disconnected on 09.02.1976 on account of non payment of water connection consumption dues.

39. Ext.PW7/A is certificate issued by Assistant Excise and Taxation Commissioner, Nahan, District Sirmaur which shows that M/s Shivalik Industries, Ranital, Nahan was issued registration certificate under the Central Sales Tax Act, 1956, vide letter dated 13.12.1961 and

the said industry was issued registration certificate under H.P. General Sales Tax, Act, 1968 vide letter dated 02.07.1969. The certificate further recites that the business of the aforesaid concern was shifted to Paonta Sahib on 27.08.1969.

40. Ext.PW8/B and Ext.PW8/C are copies of letters sent by the plaintiff No. 2 to Secretary, Municipal Council, Nahan, in response to some notices issued by the Municipal Council, Nahan to the plaintiffs.

41. Ext. PW8/D is copy of letter sent by plaintiff No. 2 to Secretary, Municipal Council, Nahan whereby he requested to transfer the ownership of 1/2 share of Shivalik Industries in favour of the LRs of deceased Shri Rameshwar Dass.

42. Ext.PW8/E is copy of complaint made by plaintiff No. 2 to the Secretary, Municipal Council, Nahan against unathorised 'chhajja' constructed by the owner of the adjoining owner near the Shivalik Industries.

43. Ext.PX is a copy of Misal Hakiyat of the suit land for the year 1973-74 in which the suit land has been recorded in the ownership of the defendants No. 1, 6 to 8 and Shri Brij Bhushan Lal and in possession of Shri Rameshwar Dass and Shri Nand Lal and it further shows that Khasra Nos. 1096 to 1104, measuring 691.89 sq. mts. were carved out of old Khasra No. 350.

44. Ext.PX/1 is copy of Missal Hakiyat Bandobast Jadid which shows the suit property to be recorded in ownership of defendants No. 1, 6 to 8 and Shri Brij Bhushan Lal and in the possession of Shri Rameshwar Dass and Shri Nand Lal and Khasra Nos. 6 to 13 measuring 703.71 and it further shows that Khasra Nos. 6 to 13 and measuring 703.71 sq. mts. to have been carved out of old Khasra No. 350.

45. Ext.PX/3 is copy of jamabandi for the year 1997-98 wherein the suit property has been recorded in ownership of defendant Nos. 1, 6 to 8 and Shri Brij Bhushan Lal and shown to be in possession of Shri Rameshwar Dass and Shri Nand Lal, whereas in column of remarks a note had been appended that vide mutation No. 273, dated 25.09.1998 the suit land has been recorded in the ownership and possession of defendant No. 1 Shri Madan Swaroop.

46. Ext.PX/5 is the copy of mutation No. 776, dated 10.07.1974, whereby the mutation of inheritance of Shri Atma Ram, who died on 01.05.1958 was attested in favour of defendant Nos. 1, 6 to 8 and Shri Brij Bhushan Lal.

47. Ext.PX/6 is copy of mutation No. 683, dated 29.11.1973, whereby the mutation of inheritance of Smt. Har Devi, who died 80 years ago, was sanctioned in favour of Shri Atma Ram, grand father of defendant o. 1.

48. Ext.PX/7 is copy of mutation No. 685, dated 29.11.1973 whereby the property inherited by Shri Atma Ram from Smt. Har Devi was mutated in the names of Shri Brij Bhushan Lal on the basis of Will dated 28.04.1957.

49. Lastly, Ext.PWX/8 is copy of mutation dated 29.11.1973, whereby the estate of one Shri Bul Chand, who died 50 years back was sanctioned in the name of Shri Atma Ram.

50. Now, adverting to the evidence led by the defendants, It would be noticed that they examined two witnesses and in relation to relied upon certain documents.

51. DW1 Shri Punit Sharma is defendant No. 2, son and General Power of Attorney of defendant No. 1, in his affidavit Ex.DW1/A, has affirmed on oath all material averments made by defendants No. 1 and 2 in the written statement and denied that Shri Rameshwar Dass and Shri Nand Lal became owners in possession of the suit property in equal shares as alleged by the plaintiffs. He further stated that it was defendants Nos. 1 and 2 who are the title holder of the suit property and as such have every right to sell the same in favour of defendant Nos. 3 and 4 and, therefore, the sale deeds No. 516 and 517 were lawfully and had been rightly executed by defendant No. 1 in favour of defendants No. 3 and 4.

52. In his cross-examination on behalf of defendants No. 3 and 4, he denied that the suit property had been sold to these defendants for a sum of Rs.30,75,000/- but stated that the same had, in fact, been sold for Rs.13,30,000/-. He admitted that the suit property was sold by them after holding that they were owner in possession of the same.

53. In cross-examination by the plaintiffs, he stated that his father was unable to move due to pain in his knees but added that he was mentally alert. He showed his inability to produce any mutation whereby any property was mutated prior to the year 1970. He also feigned ignorance about any ex-parte decree passed in favour of his father and the proceedings conducted in that suit. He denied that he sold the suit property to defendant Nos. 3 and 4 by keeping them in dark about the title of this property and two days after execution of the sale deeds when these defendants i.e. defendant Nos. 3 and 4 had come to know about this forgery they had approached them and upon this defendant Nos. 1 and 2 had issued them cheques for Rs.10,00,000/-, but stated that they had come to Solan to his father after 4-5 days and told him that the suit property was not required by them as such the sale deeds be cancelled. He also denied that they told defendant Nos. 3 and 4 that they should pay Rs.10,00,000/- to Shri Nand Lal so that he may sell the suit property. He feigned ignorance that the suit property was entered in the names of the plaintiffs in the records of the municipality. He denied that after sale of the suit property in the year 1949, the defendants and their successor never remained in possession of the suit property.

54. DW2 Shri Rajesh Bansal, defendant No. 3, who alleged to be subsequent purchaser, in his affidavit Ext.DW2/A, wherein he affirmed on oath all the material averments made by defendant Nos. 3 and 4 in the written statement and stated that they had purchased the suit property from defendant Nos. 1 and 2 vide sale deeds Nos. 516 and 517, dated 18.11.2003 and 19.11.2003 for a total consideration of Rs. 30,75,000. He further stated that he alongwith his brother were bonafide purchaser for consideration.

55. In his cross-examination on behalf of defendant Nos. 1 and 2, he admitted his signature on the sale deed Ext.DW1/A as vendee. He denied that sale deed Ext.DW1/A was executed for sale consideration of Rs.7,40,000/- and other sale deed Ext.DW1/B was executed for sale consideration of Rs.5,90,000/-, but stated that the sale consideration of both the sale deeds was Rs.30,75,000/-. He denied that they had approached defendants No. 1 and 2 and informed that the suit property was not required by them and as such the sale deeds be cancelled. He also denied that defendant Nos. 1 and 2 had paid Rs.10,00,000/- to them. He further denied that before purchasing the suit property they made complete inquiry about the suit property.

56. In his cross-examination on behalf of the plaintiffs, he admitted that there were three old rooms in the suit property situated besides the road. He also admitted that on the next day of the execution of the sale deeds, they came to know that the suit property belonged to the plaintiffs, as such they visited defendant Nos. 1 and 2 at Solan. He denied that defendant No. 1 returned Rs.10,00,000/- to them by saying that they should pay this amount to plaintiff Shri Nand Lal. He feigned ignorance that the suit property was entered in the names of the plaintiffs in the municipal record. He further admitted that these days the workshop of Shri Ramesh Chand is running in the suit property.

57. Now, coming to the documentary evidence produced by the defendants, it would be noticed that defendants have only produced on record sale deed Ext.DW1/A that was executed between defendant Nos. 1 and 2 in favour of defendants No. 3 and 4 for sale consideration of Rs.7,40,000/-.

58. Ex.DW1/B is the second sale deed executed by defendant Nos. 1 and 2 in favour of defendant Nos. 3 and 4 for the sale consideration of Rs.5,90,000/-.

59. This is the entire oral as well as documentary evidence led by the parties.

60. It is vehemently contended by the learned counsel for the appellants that the learned trial Court has completely ignored the provisions of the Evidence Act, more particularly,

Sections 61 to 65 thereof, as it has exhibited the sale deed without the original having been produced on record. Once it is so, then there is virtually no proof on record which may even remotely indicate, much less, establish that the property once owned by Shri Atma Ram, who executed the sale deed in favour of M/s Himachal Rasayan Sahala and eventually the property had been sold and thereafter resold time and again and lastly sold to the defendants. He further contends that once he is able to establish on record that there was no valid sale deed executed by Shri Atma Ram, then, obviously the respondents can claim no title. There can be no dispute that, in case, Shri Atma Ram is not held to be the owner of the property or held to be not sold the property in favour of M/s Himachal Rasayan Shala, then it would be difficult for the respondents, if not impossible, to establish the subsequent sale deed in their favour.

61. However, at this stage, one needs to advert to the pleadings of the parties.

62. The plaintiffs, in the suit filed by them, have set out in detail, as to how they have become the owners of the property as would be evident from paras 3 and 4 thereof, which reads thus:-

> *"3. That the suit property was earlier part of Khasra No. 350/2, measuring 865 sq. yards and 6 ½ ghiras and was owned by Atma Ram, predecessor-in-interest of defendants 1, 2 and 5 to 8. Atma Ram vide registered sale deed dated 28.05.1949 sold the suit property to Naranjan Singh, proprietor of Himachal Rasayan Shala. Naranjan Singh vide registered sale deed dated 04.02.1952 sold the suit property in favour of Col. Hira Singh Bam, who in turn vide registered sale deed dated 09.01.1960 sold the suit property to Prem Chand. Prem Chand vide registered sale deed dated 30.09.1961 sold the suit property to Rameshwar Dass and Nand Lal, both sons of Jhandu Lal and handed over its possession to Rameshwar Dass and Nand Lal. In this way, Rameshwar Dass and Nand Lal in equal shares became exclusive owner with possession of the suit property. The intimation of the purchase of the suit property by Rameshwar Dass and Nand Lal was given to revenue authorities, but it appears that no action was taken by them for mutating the property in favour of Rameshwar Dass and Nand Lal. Atma Ram and his heirs, successors had left no right, title and interest in the suit property when it was sold by Atma Ram to Naranjan Singh, as stated above.*
>
> *4. That Rameshwar Dass and Nand Lal after purchasing the suit property had installed a factory at the site of the suit property. This factory was registered before various authorities and remained in production for some years. Rameshwar Dass and Nand Lal, owners of the factory had business at Jagadhari also. The factory situate at the site of the suit property could not be looked after properly and it started running into losses and ultimately it was closed. The suit property, however, since its purchase continuously remained in exclusive ownership and possession of Rameshwar Dass and Nand Lal in equal shares."*

63. In written statement filed on behalf of defendants No. 1 and 2 I.e. appellants herein, the only contention put-forth is that "it is specifically denied that Shri Atma Ram, Niranjan Singh, Col. Hira Singh and Shri Prem Chand were the predecessor-in-interest of the property in dispute but nowhere the defendants/appellants specifically denied that the sequence of events regarding execution of various sale deeds as mentioned herein as would be evident from paras 3 and 4 of the written statement, which reads thus:-

> *"3. Contents of Para-3 of the plaint are also specifically denied being wrong and incorrect. It is specifically denied that Atma Ram, Niranjan Singh, Col. Hira Singh and thereafter Prem Chand were predecessor-in-interest of the property in dispute. It is further specifically denied that Prem Chand sold the land in question in favour of plaintiff No. 1 and Sh. Rameshwar Dass. It may not be out of place to submit here that if plaintiff No. 1 and Shri Rameshwar Dass had purchased this property in the year 1961, mutation must have been effected in favour of plaintiff No. 1 and*

Shri Rameshwar Dass by the Revenue Authorities. However, plaintiff may be put to the strict proof of the averments made in this para.

4. Contents of Para-4 of the plaint are also specifically denied being wrong and incorrect. It is specifically denied that plaintiff No. 1 and Rameshwar Dass either purchased the property in question or after its purchase installed a factory on the property in question. Rest of the contents of this para are also specifically denied being wrong and incorrect."

64. It is more than settled that evasive or vague denial of facts in the written statement may in a given case be taken to be an admission of facts. Reference in this regard can conveniently be made to the judgment of the Hon'ble Supreme Court in ***Badat and Co. Bombay vs. East India Trading Co. AIR 1964 SC 538***, wherein it was observed as under:-

[11] Order VII of the Code of Civil Procedure prescribes, among others, that the plaintiff shall give in the plaint the facts constituting the cause of action and when it arose, and the facts showing that the court has jurisdiction. The object is to enable the defendant to ascertain from the plaint the necessary facts so that he may admit or deny them. Order VIII provides for the filing of a written-statement, the particulars to be contained therein and the manner of doing so; Rules 3, 4 and 5 thereof are relevant to the present enquiry and they read :

> *Order VIII Rule 3. It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.*
>
> *Rule IV. Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. Thus if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances.*
>
> *Rule V. Every allegation of fact in the plaint, if not denied specifically, or by necessary implication or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability.*

Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

These three rules form an integrated code dealing with the manner in which allegations of fact in the plaint should be traversed and the legal consequences flowing from its non-compliance. The written-statement must deal specifically with each allegation of fact in the plain and when a defendant denies any such fact, he must not do so evasively, but answer the point of substance. If his denial of a fact is not specific but evasive, the said fact shall be taken to be admitted. In such an event, the admission itself being proof, no other proof is necessary. The first paragraph of R. 5 is a re-production of O. XIX R. 13 of the English rules made under the Judicature Acts. But in mofussil Courts in India, where pleadings were not precisely drawn, it was found in practice that if they were strictly construed in terms of the said provisions, grave injustice would be done to parties with genuine claims. To do justice between those parties, for which Courts are intended, the rigor of R. 5 has been modified by the introduction of the proviso thereto. Under that proviso the Court may, in its discretion, require any fact so admitted to be proved otherwise than by such admission. In the matter of mofussil pleadings, Courts,

presumably relying upon the said proviso, tolerated more laxity in the pleadings in the interest of justice. But on the Original Side of the Bombay High Court, we are told, the pleadings are drafted by trained lawyers bestowing serious thought and with precision. In construing such pleadings the proviso can be invoked only in exceptional circumstances to prevent obvious injustice to a party or to relieve him from the results of an accidental slip or omission, but not to help a party who designedly made vague denials and thereafter sought to rely upon them for non-suiting the plaintiff. The discretion under the proviso must be exercised by a Court having regard to the justice of a cause with particular reference to the nature of the parties, the standard of drafting obtaining in a locality, and the traditions and conventions of a Court wherein such pleadings are filed. In this context the decision in Tildesley v. Harper, (1878) 7 Ch D 403 will be useful. There, in an action against a lessee to set aside the lease granted under a power, the statement of claim stated that the donee of the power had received from the lessee a certain sum as a bribe, and stated the circumstances; the statement of defence denied that that sum had been given, and denied each circumstance, but contained no general denial of a bribe having been given. The Court held, under rules corresponding to the aforesaid rules of the Code of Civil Procedure, that the giving of the bribe was not sufficiently denied and therefore it must be deemed to have been admitted. Fry, J. posed the question thus : What is the point of substance in the allegations in the statement of claim ? and answered it as follows :

> *"The point of substance is undoubtedly that a bribe was given by Anderson to Tildesley, and that point of substance is nowhere met....no fair and substantial answer is, in my opinion, given to the allegation of substance, namely, that there was a bribe. In my opinion it is of the highest importance that this rule of pleading should be adhered to strictly, and that the Court should require the Defendant, when putting in his statement of defence, and the Plaintiff, when replying to the allegations of the Defendant, to state the point of substance, and not to give formal denials of the allegations contained in the previous pleadings without stating the circumstances. As far as I am concerned, I mean to give the fullest effect to that rule. I am convinced that it is one of the highest benefit to suitors in the Court".*

It is true that in England the concerned rule is inflexible and that there is no proviso to it as is found in the Code of Civil Procedure. But there is no reason why in Bombay on the original side of the High Court the same precision in pleadings shall not be insisted upon except in exceptional circumstances. The Bombay High Court, in Laxminarayan v. Chimniram Girdhari Lal, ILR 41 Bom 89 at p. 93 : (AIR 1916 Bom 103 at p. 104) construed the said provisions and applied them to the pleadings in a suit filed in the Court of the Joint Subordinate Judge of Ahmednagar. There, the plaintiffs sued to recover a sum of money on an account stated. For the purpose of saving limitation they relied in their plaint upon a letter sent by the defendant firm. The defendants in their written statement stated that the plaintiff's suit was not in time and that "the suit is not saved by the letter put in from the bar of limitation". The question was raised whether in that state of pleadings, the letter could be taken as admitted between the parties and, therefore, unnecessary to be proved. Batchelor, Ag. C. J. after noticing the said provisions, observed :

> *"It appears to us that on a fair reading of paragraph 6, its meaning is that though the letter put in by the plaintiffs is not denied; the defendants contend that for one reason or another its effect is not to save the suit from the bar of limitation. We think, therefore, that.....the letter, Exhibit 33, must be accepted as admitted between the parties, and therefore, unnecessary to be proved."*

The written statement before the High Court in that case was one filed in a court in the moffusil; yet, the Bombay High Court applied the rule and held that the letter need not be proved aliunde as it must be deemed to have been admitted in spite of the vague denial in the written statement. I, therefore, hold that the pleadings on the original side of the Bombay High Court should also be strictly construed, having regard to the provisions of Rule 3, 4 and 5 of Order VIII of the Code of Civil Procedure, unless there are circumstances wherein a Court thinks fit to exercise its discretion under the proviso to Rule 5 of Order VIII.

[13] The defendants, adverting to the said allegations dealt with them in paragraphs 7 and 8 of their written statement. The said paragraphs read.

> *"7. With reference to paragraph 2 of the plaint the defendants deny that they at any time entered into any contract with the plaintiffs as alleged in the said paragraph or otherwise. The defendants deny that they at any time signed or were bound to sign a standard form of contract issued by the American Spice Trade Association."*
>
> *"8. With reference to paragraph 3 of the plaint, the defendants deny that they at any time agreed to do any business or enter into any contract with the plaintiffs as alleged therein or otherwise. The defendants say (sic deny) that they did at any time sign nor were they bound to sign the said American Spice Trade Association Contract and that they are not therefore bound by or concerned with the terms and/or conditions of the said contract. The defendants deny the rest of the statements contained in the said paragraph."*

It will be seen from the said paragraphs that though the defendants denied that at any time they entered into a contract with the plaintiffs as alleged in the plain or otherwise, they have not denied that the letters particularized in the plaint passed between the parties. Learned Solicitor General relied upon the expression "as alleged" in paragraphs 7 and 8 of the written statement and contended that the said words implied necessarily that the defendants denied the passing of the correspondence. No such necessary implication can arise from the use of the said expression. That expression is consistent with the admission by the defendants of the passing of the letters mentioned in paragraphs 2 and 3 of the plaint, coupled with a denial that such correspondence does not constitute a binding contract between them. Indeed, Rr. 3 and 4 of O. VIII are aimed at such general allegations in written statements. Rule 3 demands that each allegation of fact made in the plaint must specifically be denied and R. 4 emphasizes that such a denial shall be of the point of substance and shall not be vague. Here, in the plaint the contents of the letters dated September 7, 1948, September 13, 1948, March 8, 1949 and March 9, 1949 are given and it is specifically stated that they passed between the parties. Nowhere in the written statement there is a denial as regards the passing of the letters or the contents of those letters. The general and vague allegations in the written statement cannot possibly be construed, expressly or by necessary implication, as a denial of the specific allegations in the plaint in regard to the said correspondence. On this aspect of the case, to some extent, there is unanimity between Mody J. and the learned Judges of the Division Bench of the Bombay High Court. Adverting to para. 7 of the written statement, Mody J. Says :

> *"In my opinion, paragraph 7 of the written statement does not at all, directly or indirectly, specifically or by implication, deal with any of the said three statements of facts. A denial of a contract is not a denial of the receipt or of the contents of the said letter dated 7th September 1948 or the writing of the letter dated 13th September 1948. The defendants can conceivably admit the said three statements of fact but still deny that any contract resulted*

thereby. Therefore the said three statements of facts must be deemed to have been admitted."

Dealing with para 8 of the written statement, the learned Judge says that these two statements of facts have not been pleaded to in the written statement and must, therefore, be deemed to have been admitted. But having gone so far, the learned Judge rules against their admissibility on the ground that there are no allegations that the defendants wrote the letters attributed to them and that there is no description of the contents of the letters. This, if I may say so, is rather hypercritical. The allegations in para 2 of the plaint in express terms say that the letters emanated from the defendants and also give their gist. The Division Bench of the High Court in the context of the said denials said :

"Therefore, there is no denial of this correspondence. Indeed there could not be, because before the Written Statement was filed inspection was given by the plaintiffs of this correspondence and against the conscientious draftman of the written statement could not possibly have controverted (sic) the statement that these letters passed between the parties. Therefore, in our opinion, these two letters of the 7th September 1948 and 13th September 1948 are admissible in evidence, and we will formally admit them in evidence."

Then they proceeded to state :

"Now, we read this denial to mean not a denial of the exchange of letters and telegrams, not a denial of the correctness of the copies of the documents of which the Defendants have taken inspection, but a submission in law that no contract emerges from the exchange of these letters and telegrams."

65. Likewise, it is equally settled proposition that the averments made in the plaint, if not denied in the written statement would be deemed to be admitted as held by Hon'ble Supreme Court in ***M. Venkatramana Hebbar (Dead) by LRs. vs. M. Rajagopal Hebbar and others (2007) 6 SCC 401***, which reads thus:-

12. The contract between the parties, moreover was a contingent contract. It was to have its effect only on payment of the said sum of Rs. 15,000.00 by the plaintiff and other respondents by the defendant Nos. 1 to 3. It has been noticed hereinbefore by us that as of fact, it was found that no such payment had been made. Even there had been no denial of the assertions made by the appellant in their written statement in that behalf. The said averments would, therefore, be deemed to be admitted. Or. 8 R. 3 and Or. 8 R. 5 of the Civil Procedure Code read thus:-

"3. Denial to be specific.-It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.

5. Specific denial.- [(1)] Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against person under disability. Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

(2) Where the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability, but the Court may, in its discretion, require any such fact to be proved.

(3) In exercising its discretion under the proviso to sub- rule (1) or under sub-rule (2), the Court shall have due regard to the fact whether the defendant could have, or has, engaged a pleader.

(4) Whenever a judgment is pronounced under this rule, a decree shall be drawn up in accordance with such judgment and such decree shall bear the date on which the judgment was pronounced.]"

13. Thus, if a plea which was relevant for the purpose of maintaining a suit had not been specifically traversed, the Court was entitled to draw an inference that the same had been admitted. A fact admitted in terms of Sec. 58 of the Evidence Act need not be proved."

66. A denial of fact in the written statement has to be specific and what would be the effect of such fact not being denied was specifically dealt with by the Hon'ble Supreme Court in ***Muddasani Venkata Narsaiah (dead) through LRs. vs. Muddasani Sarojana (2016) 12 SCC 288***, wherein it was observed as under:-

"13. Coming to the question whether execution of sale deed in favour of plaintiff has been proved, the High Court has held that the sale deed has not been proved for want of examination of Buchamma. The High Court has ignored the pleadings of the parties and the evidence on the question of execution of sale deed which establishes that sale deed had been executed by Buchamma in favour of the plaintiff. In the written statement filed on behalf of the defendants, the sale deed was denied for want of knowledge. A perusal of same indicates that the authority of Buchamma to execute the sale deed in favour of the plaintiff was put into question. Defendant no. 3 Sarojana in her deposition in court did not deny the fact that sale deed was executed by Buchamma in favour of the plaintiff. She has stated that she was not aware whether Buchamma has executed any sale deed in favour of the plaintiff. She only asserted that she was the adopted daughter of Yashoda.

14. It is settled law that denial for want of knowledge is no denial at all. The execution of the sale deed was not specifically denied in the written statement. Once the execution of the sale deed was not disputed it was not necessary to examine Buchamma to prove it. The provisions contained in Order 8 Rule 5 require pleadings to be answered specifically in written statement. This Court in Jahuri Sah & Ors. v. Dwarika Prasad Jhunjhunwala, 1967 AIR(SC) 109 has laid down that if a defendant has no knowledge of a fact pleaded by the plaintiff is not tantamount to a denial of existence of fact, not even an implied denial. Same decision has been followed by Madhya Pradesh High Court in Dhanbai D/o Late Shri Cowash v. State of M.P. & Ors, 1978 MPLJ 717. The High Court of Madhya Pradesh in Samrathmal & Anr. v. Union of India, Ministry of Railway & Ors, 1959 AIR(MP) 305 relying on P.L.N.K.L. Chettyar Firm v. Ko Lu Doke, 1934 AIR(Rang) 278 and Lakhmi Chand v. Ram Lal, 1931 AIR(All) 423, had also opined that if the defendant did not know of a fact, denial of the knowledge of a particular fact is not a denial of the fact and has not even the effect of putting the fact in issue."

67. Evasive denial in a given case may amounts to admission of the allegations made in the plaint as held by Hon'ble Supreme Court in ***Jaspal Kaur Cheema and another vs. Industrial Trade Links and others (2017) 8 SCC 592,*** which reads thus:-

10. Section 116 deals with estoppel of a tenant founded upon contract between the tenant and his landlord. It enumerates the principle of estoppel which is merely an extension of principle that no person is allowed to approbate and reprobate at the same time. The tenant who has been let into possession cannot deny his landlord's title. In Mt. Bilas Kunwar v. Desraj Ranjit Singh & Ors., 1915 AIR(PC) 96, it was held that a tenant who has been let into possession cannot deny his landlord's

title, however, defective it may be, so long as he has not openly restored possession by surrender to his landlord.

11. The principle of estoppel arising from contract of tenancy is based upon the principle of law and justice that a tenant who could not have got possession but for a contract of tenancy admitting the right of the landlord, should not be allowed to put his landlord in some inequitable situation taking undue advantage of the position that he got and any probable defect in the title of his landlord. This Court in Bansraj Laltaprasad Mishra v. Stanley Parker Jones, 2006 3 SCC 91 has enumerated the policy underlying Section 116 as follows:

> *"13. The underlying policy of Section 116 is that where a person has been brought into possession as a tenant by the landlord and if that tenant is permitted to question the title of the landlord at the time of the settlement then that will give rise to extreme confusion in the matter of relationship of the landlord and tenant and so the equitable principle of estoppel has been incorporated by the legislature in the said section.*
>
> *14. The principle of estoppel arising from the contract of tenancy is based upon a healthy and salutary principle of law and justice that a tenant who could not have got possession but for his contract of tenancy admitting the right of the landlord should not be allowed to launch his landlord in some inequitable situation taking undue advantage of the possession that he got and any probable defect in the title of his landlord. It is on account of such a contract of tenancy and as a result of the tenant's entry into possession on the admission of the landlord's title that the principle of estoppel is attracted.*
>
> *15. Section 116 enumerates the principle of estoppel which is merely an extension of the principle that no person is allowed to approbate and reprobate at the same time."*

68. Now adverting to the evidence, it would be noticed that the plaintiffs had examined PW 2- Shri Dharam Singh, Junior Assistant, Office of Sub Registrar, Nahan, and since his statement is most material to the case, the same is reproduced below in its entirety alongwith cross examination:-

> *" I am working as Junior Assistant in the office of Sub Registrar, Nahan since March, 2006. I brought the summoned record. Ext. PW2/A sale deed executed by Atma Ram in favour of Niranjan Singh Ahluwalia is recorded in Bahi No. 1 at page 30 of the register maintained by the Registrar Office. (Original seen and returned.) Ext.PW2/B sale deed executed by Niranjan Singh Ahluwalia in favour of Col. Hira Singh Baam is recorded in Bahi No. 1 at page 30/34. (original seen and returned.) Ext. PW2/C sale deed dated 09.01.1960 executed by Col. Hira Singh Baam in favour of Prem Chand is recorded in Bahi No. 1 at page 28 (Original seen and returned). Ext.PW2/D sale deed dated 30.9.1961 is recorded at page 35 of Bhai No. 1 executed by Prem Chand son of Shri Sandhu Ram in favour of Rameshwar dass. (Original seen and returned.)*
>
> *xxxxx By Shri Bhupinder Gupta, Sr. Advocate, with Shri Suneet Goel, Advocate, for defendants No. 1 and 2.*
>
> *I cannot say who has transcribed the sale deeds Ext.PW2/A. Ext.PW2/B, Ext.PW2/C and Ext.PW2/D in the registers/Bahi No. 1 brought by me in the Court today. It is correct that Ext.PW2/A as transcribed in Bahi No. 1 shows that land has been sold by Atma Ram to Himachal Rasayan Shala through Niranjan Dass.*

xxxx By Shri G.D. Verma, Sr. Advocate, with Mr. B.C. Verma, Advocate for defendant No. 3.

It is correct that whenever a sale deed is registered with the office of Sub Registrar then registration of memorandum is sent to the concerned Assistant Collector IInd Grade so that entries are incorporated in the revenue record. It is correct that registration of memorandum(s) for sale deeds Ext.PW2/A, Ext.PW2/B and Ext.PW2/C and Ext. PW2/D has not been sent to the concerned revenue authority(ies)."

69. It would be evidently clear from the aforesaid statement that the appellants/defendants did not even raise a little finger when the sale deed Ext. PW2/A, Ext. PW2/B, Ext.PW2/C and Ext.PW2/D were being exhibited. Not only this, it was the defendants No. 1 and 2 who through their counsel have themselves suggested very positively that Ext.PW2/A as transcribed in Bahi No. 1 shows that the land had been sold by Shri Atma Ram to M/s Himachal Rasayan Shala through Shri Niranjan Dass.

70. Once this is the position, obviously then the appellants cannot claim and are rather estopped from assailing the sale deed or questioning the sale deeds Ext. PW2/A to Ext.PW2/D, or its mode and method of proof.

71. No doubt, that the plaintiffs in order to improve its case have sought to put certain questions to PW10 Satender Thakur, Senior Assistant of the Office of Tehsildar, Nahan qua the sale deeds but then this is too late in the day, as such objections were required to be taken at the earliest given opportunities.

72. Order XIII Rule 4 of the Code of Civil Procedure provides that every document admitted in evidence in the suit being endorsed by or on behalf of the Court, which endorsement signed or initialled by the judge amounts to admission of the document in evidence. An objection to the admissibility of the document has to be raised before such endorsement is made and the Court is obliged to form an opinion on the question of admissibility and express the same on which opinion would depend the document being endorsed as admitted or not admitted in the evidence. In the latter case, the document may be returned by the Court to the person from whose custody it was produced.

73. The appellants having failed to question the admissibility of the document at the time when the same was produced by PW2 are precluded from doing so.

74. Somewhat similar issue came up before the Hon'ble Supreme Court in ***R.V.E. Venkatachala Gounder vs. Arulmigu Viswesaraswami & V.P. Temple and another (2003) 8 SCC 752***, wherein it was observed as under:-

16. One document A30 is the photocopy of a certified copy of the decision given by Charity Commissioner. This document was tendered in evidence and marked as an exhibit without any objection by the defendants when this was done. The plaintiff has in his statement deposed and made it clear that the certified copy, though available, was placed on the record of another legal proceedings and, therefore, in the present proceedings he was tendering the photocopy. There is no challenge to this part of the statement of the plaintiff. If only the tendering of the photocopy would have been objected to by the defendant, the plaintiff would have been and there sought for the leave of the Court either for tendering in evidence a certified copy freshly obtained or else would have summoned the record of the other legal proceedings with the certified copy available on record for the perusal of the Court. It is not disputed that the order of Charity Commissioner is a public document admissible in evidence without formal proof and certified copy of the document is admissible in evidence for the purpose of proving the existence and contents of the original. An order of Charity Commissioner is not per se the evidence of title

inasmuch as the Charity Commissioner is not under the law competent to adjudicate upon questions of title relating to immovable property which determination lies within the domain of a Civil Court. However, still the order has relevance as evidence to show that the property forming subject-matter of the order of the Charity Commissioner was claimed by the temple to be its property but the temple failed in proving its claim. If only the claimant temple would have succeeded, the item of the property would have been directed by the Charity Commissioner to be entered into records as property of the charity, i.e. the temple, which finding and the entry so made, unless dislodged, would have achieved a finality. On the contrary, the appellant herein, who claimed the property to be his and not belonging to the charity, succeeded in the claim asserted by him.

17. The other document is the rent note executed by defendant No. 2 in favour of plaintiff. Here also photocopy of the rent note was produced. The defendant No. 2 when in witness-box was confronted with this document and he admitted to have executed this document in favour of the plaintiff and also admitted the existence of his signature on the document. It is nobody' case that the original rent note was not admissible in evidence. However, secondary evidence was allowed to be adduced without any objection and even in the absence of a foundation for admitting secondary evidence having been laid by the plaintiff.

18. The abovesaid facts have been stated by us in somewhat such details as would have been otherwise unnecessary, only for the purpose of demonstrating that the objection raised by the defendant-appellant before the High Court related not to the admissibility of the documentary evidence but to the mode and method of proof thereof.

19. Order 13, R. 4 of the C.P.C. provides for every document admitted in evidence in the suit being endorsed by or on behalf of the Court, which endorsement signed or initiated by the Judge amounts to admission of the document in evidence. An objection to the admissibility of the document should be raised before such endorsement is made and the Court is obliged to form its opinion on the question of admissibility and express the same on which opinion would depend the document being endorsed as admitted or not admitted in evidence. In the latter case, the document may be returned by the Court to the person from whose custody it was produced.

20. The learned counsel for the defendant-respondent has relied on the Roman Catholic Mission v. State of Madras and another, AIR 1966 SC 1457 in support of his submission that a document not admissible in evidence, though brought on record, has to be excluded from consideration. We do not have any dispute with the proposition of law so laid down in the abovesaid case. However, the present one is a case which calls for the correct position of law being made precise. Ordinarily an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes :- (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as 'an exhibit,' an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken before the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage

subsequent to the marking of the document as an exhibit. The later proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons : firstly, it enables the Court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the Court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the Court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the later case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in superior Court.

23. Since documents A30 and A34 were admitted in evidence without any objection, the High Court erred in holding that these documents were inadmissible being photo copies, the originals of which were not produced.

24. So is the observation of the High Court that the photocopy of the rent note was not readable. The photocopy was admitted in evidence, as already stated. It was read by the trial Court as also by the first appellate Court. None of the said two Courts appear to have felt any difficulty in reading the document and understanding and appreciating its contents. May be, that the copy had fainted by the time the matter came up for hearing before the High Court. The High Court if it felt any difficulty in comfortable reading of the document then should have said so at the time of hearing and afforded the parties an opportunity of either producing the original or a readable copy of the document. Nothing such was done. The High Court has not even doubted the factum of the contents of the document having been read by the two Courts below, drawn deductions therefrom and based their finding of fact on this document as well. All that the High Court has said is that the document was inadmissible in evidence being a photocopy and with that view we have already expressed our disagreement. Nothing, therefore, turns on the observation of the High Court that the document was not readable when the matter came up for hearing before it.

75. At this stage, Shri G.C. Gupta, learned Senior Counsel for the appellants would vehemently argue that the certified copies of the documents at best are secondary evidence and without proving the circumstances entitling the respondents to give secondary evidence, the same were not admissible in evidence. Even this contention of the appellants is without merit.

76. As noticed above, no objection was raised by the appellants while the certified copies were being produced in evidence by PW2, rather the suggestion given by their counsel in the cross-examination fully fortifies and supports the case of the respondents qua the execution of the sale deed Ext.PW2/A to Ext. PW2/D.

77. That apart, it is more than settled that the objection as to mode of proof falls within the procedural law and such objection, if not raised, would be deemed to be waived, as was observed by the Hon'ble Supreme Court in ***Dayamathi Bai (Smt.) vs K.M. Shaffi (2004) 7 SCC 107,*** which reads thus:-

13. We do not find merit in this civil appeal. In the present case the objection was not that the certified copy of Ex. P1 is in itself inadmissible but that the mode of proof was irregular and insufficient. Objection as to the mode of proof falls within procedural law. Therefore, such objections could be waived. They have to be taken before the document is marked as an exhibit and admitted to the record (See Order XIII, R. 3 of Code of Civil Procedure). This aspect has been brought out succinctly in the judgment of this Court in R.V.E. Venkata-chala Gounder v. Arulmigu Viswesaraswami and V. P. Temple and another, reported in ((2003) 8 SCC 752) to which one of us, Bhan, J., was a party vide para 20:

> *"20. The learned counsel for the defendant-respondent has relied on Roman Catholic Mission v. State of Madras (AIR 1966 SC 1457) in support of his submission that a document not admissible in evidence, though brought on record, has to be excluded from consideration. We do not have any dispute with the proposition of law so laid down in the abovesaid case. However, the present one is a case which calls for the correct position of law being made precise. Ordinarily, an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as "an exhibit," an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons : firstly, it enables the Court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the Court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the Court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in a superior Court."*

14. To the same effect is the judgment of the Privy Council in the case of Gopal Das and another v. Sri Thakurji and others, reported in (AIR 1943 PC 83), in which it has been held that when the objection to the mode of proof is not taken, the party cannot lie by until the case comes before a Court of appeal and then complain for the first time of the mode of proof. That when the objection to be taken is not that the document is in itself inadmissible but that the mode of proof was irregular, it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. Similarly, in Sarkar on Evidence, 15th Edition, page 1084, it has been stated that where copies of the documents are admitted without objection in the trial Court, no objection to their admissibility can be taken afterwards in the Court of appeal. When a party gives in evidence a certified copy, without proving the circumstances entitling him to give secondary evidence, objection must be taken at the time of admission and such objection will not be allowed at a later stage.

15. In the present case, when the plaintiff submitted a certified copy of the sale deed (Ex. P1) in evidence and when the sale deed was taken on record and marked as an exhibit, the appellant did not raise any objection. Even execution of Ex. P2 was not challenged. In the circumstances, it was not open to the appellant to object to the mode of proof before the lower appellate Court. If the objection had been taken at the trial stage, the plaintiff could have met it by calling for the original sale deed which was on record in collateral proceedings. But as there was no objection from the appellant, the sale deed dated 14-11-1944 was marked as Ex. P1 and it was admitted to the record without objection.

78. This question otherwise is not open to challenge for the appellants in view of the decision rendered by this Court in ***CMPMO No. 136 of 2010,*** titled as ***Madan Swaroop & another vs. Nand Lal and others***, decided on 13.03.2012, wherein appellants therein had assailed the order passed by the learned trial Court allowing the application of the respondents for leading secondary evidence under Section 65 of the Evidence Act and this Court observed as under:-

"2. It is undisputed before me that the suit, out of which the present proceedings have arisen, was originally instituted in this Court and on increase of the pecuniary jurisdiction of this Court, the case was sent for trial before the learned District Judge, Sirmour. The bone of contention between the parties is that an application has been moved under Section 65 of the Indian Evidence Act seeking permission for leading secondary evidence with respect to the two sale deeds Ext.PW2/A and Ext.PW2/B, which are certified copies of the sale deeds executed by Atma Ram in favour of Shri Naranjan Singh, and second by Naranjan Singh in favour of Col. Hira Singh Balm which form the basis/foundation of the case of the parties before the learned trial Court.

3. It is also undisputed before me that these sale deeds are from the official records of Sub Registrar duly maintained in his office. It is not disputed that Dharam Singh was summoned as PW2 by the Court on 23.1.2008 and these two sale deeds were exhibited and proved without their being any objection. If that be so, there was no necessity for moving the application under Section 65 of the Evidence Act for the reason that the petitioner herein had not objected to the mode of proof in the manner by placing them on the record as exhibits and not insisting on the original. I do not wish to add anything more. The application has been filed by the plaintiffs by way of abundant caution, which prayer has been allowed. The objection taken by the defendant is that the pleadings in the application itself are bereft of the foundation on facts which is required to invoke the jurisdiction of the Court."

79. It is vehemently contended by learned Senior Counsel for the appellants that no jamabandi or revenue record is accompanying the sale deeds, therefore, these cannot be looked

into. It is also contended that respondents have not even bothered to place on record any revenue record prior to the year 1974, especially when their own case is that it was Shri Atma Ram, who was the owner of the property and had sold the same to the Himachal Rasayan Shala vide registered sale deed dated 28.05.1949. Undoubtedly, the plaintiffs have to stand on their own legs and cannot take advantage of the weakness of the defendants but the said principle is not applicable to the facts of the present case.

80. As regards the revenue records, it is more than settled that an entry therein does not confer title on a person whose name appears in the record of right. Equally settled is the proposition that the entry in the revenue record or jamabandi has only fiscal purpose i.e. payment of land revenue and no ownership is conferred on the basis of such entry so far as the title to the property is concerned and it can only be decided by the competent Civil Court (**Ref.: *Jattu Ram vs. Hakam Singh and other AIR 1994 SCC 1653*** and in ***Suraj Bhan and other vs. Financial Commissioner and other (2007) 6 SCC 186)***.

81. As a last ditch effort, the learned counsel for the appellants would argue that the learned trial Court could not have taken into consideration the testimonies of PW 11 and PW 12, who had been examined in rebuttal and had failed to depose in affirmative, more particularly, when there was no issue in rebuttal. Even this contention of the appellants is equally without any merit because admittedly Issue No. 10 as framed requires rebuttal and noticeably statements of PW11 and PW12 are only confined to rebuttal evidence i.e. with regard to possession.

82. In view of aforesaid discussion, I find no merit in this appeal and the same is accordingly dismissed, leaving the parties to bear their own costs. Pending application(s), if any, also stands disposed of.

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