THE
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HIMACHAL SERIES, 2019

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INDIAN LAW REPORTS

HIMACHAL SERIES

(March and April, 2019)

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Code of Civil Procedure, 1908 – Order 1 Rule 10 (2) – Impleadment of co-defendants- Whether suit barred on date of application?- Determination- Stage- Trial Court ordering joining of new defendants without issuing notices to them after holding that question of suit being barred against proposed defendants can be decided subsequently- Petition against- Held, when sole defendant had raised objection of suit being barred by limitation against proposed defendants, Trial Court ought to have decided this point before ordering their impleadment. (Para 22) Title: Ashwani Kumar and another vs. Sanjay Kumar and others, Page- 165.

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Code of Civil Procedure, 1908 - Order II Rule 2 – Splitting of claims – Leave of court – Requirement – Plaintiffs filing suit for injunction for restraining defendants from interfering in their land – Also filing application seeking leave to file separate suit for damages caused to their property by such interference – Trial court dismissing application on ground that both reliefs being distinct, leave of court was not required – Petition against - Plaint revealing plaintiffs' having specifically pleaded of defendants interfering in their land and causing damage to it – Cause of action to claim both reliefs accrued to plaintiffs on same cause of action – Causes of action not distinct - Subsequent suit for damages can only be filed with leave of court - Petition allowed – Order of trial court set aside – Leave granted. (Paras 11 to 13) Title: Satish Kumar and others vs. Mehta Raguvindera Singh and others (CMPMO No.: 362 of 2018), Page- 473.

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alternative path to defendant's property - Held, balance of convenience in favour of defendant – District Judge right in allowing appeal and dismissing plaintiff's application for temporary injunction – Petition dismissed. (Paras 12 to 17) Title: Thakur Dass vs. Sunita Rajput, Page- 174.

Code of Civil Procedure, 1908 – Order XLI Rule 27 **-** Additional evidence – Taking of – Opportunity to rebut to other party – Absence of – Effect - Party adducing copies of judgment and decree as well as revenue record prepared in consonance with said decree in evidence at appellate stage – Opportunity not given to opposite party to rebut additional evidence-Appellate court deciding appeal considering these documents also – Held, judgment and decree not shown to have been reversed by Hon'ble Supreme Court – Previous dispute between same parties and pertaining to suit land – Additional evidence cannot be denuded of its efficacy even if opposite party was not given opportunity to lead evidence in rebuttal. (Para 10) Title: Dinesh Kumar Langa & another vs. Maharaj Mall (since deceased) through his legal heirs, Page- 107.

Code of Criminal Procedure, 1973 – Section 127 - Maintenance – Interpretation of – Held, word *'maintenance' should* not be narrowly interpreted - Maintenance to child does not mean providing raiment and food only - It should include expenses of education and his overall development - Order of Sessions Judge directing petitioner to pay arrears of maintenance at enhanced rate within one month during pendency of revision petition upheld - Petition dismissed. (Paras 6 to 8) Title: Harish Chand vs. Sarita Devi & another, Page- 389.

Code of Civil Procedure, 1908 - Section 151 CPC & Order VII Rule 14 (3) – Additional evidence - Production of documents - Plaintiff filing application for placing documents on record by way of additional evidence on ground that these could not be traced earlier – Documents pertained to old transaction and lying in its record room - And could not be produced before Court despite due diligence - Defendant resisting application on ground of documents being beyond pleadings and new case being spelt out by it - Facts showing that documents were already in possession of plaintiff – Plaintiff filed applications for producing documents twice earlier and those were allowed - No plea regarding present documents raised in those applications - Held, Plaintiff failed to exercise due diligence or withheld documents deliberately - Evidence beyond pleadings can't be allowed – Application dismissed. (Paras 18 to 22) Title: M/s Dev Resins Pvt. Ltd. vs. M/s Sudhir & Company & others, Page- 403.

Code of Criminal Procedure, 1973 – Sections 156 (3) & 482 **–** Complaint seeking registration of FIR – Dismissal in default – Sustainability – Trial court dismissing complaint for non-prosecution by complainant or his counsel on date fixed – Petition against – On facts, complainant found admitted in hospital for eye surgery some days prior to date fixed in case - Complainant absent for first time in trial court – Held, trial court hastily dismissed complaint for non-prosecution for one solitary date - It should have adjourned case for another date and had complainant or his counsel not appeared before it on next date also, then appropriate order should have been passed – Petition allowed - Order set aside – Complaint ordered to be restored. (Paras 5 to 7) Title: Uttam Chand vs. Desh Raj and others, Page- 350.

Code of Criminal Procedure, 1973- Section- 164- Dying declaration- Recording of- Whether it is mandatorily to be recorded by Magistrate?- Held, there is no fixed format or

mode for recording dying declaration- It can be recorded in any manner or in any form- It is not necessarily to be recorded by Magistrate. (Paras 20-27 & 35) Title: State of Himachal Pradesh vs. Rajeev Singh @ Ranju and others, Page- 26.

Code of Criminal procedure, 1973- Section 256 –Dismissal of complaint in default – Acquittal - Trial court dismissing complaint for non-appearance of complainant or his counsel on date fixed and acquitting accused- Appeal against – Held, complainant showing sufficient cause for not appearing before trial court on date fixed as his counsel having noted down wrong date in his diary – Petitioner infact was serious in pursuing complaint demonstrated in filing appeal by him against acquittal resulting from its dismissal – In every case, complaint is not to be dismissed in default and accused acquitted for non-appearance of complainant and his counsel – It is mandate of law to adjourn case to some other date by recording reasons – Appeal allowed - Acquittal set aside – Complaint ordered to be restored. (Paras 5 to 9) Title: Hi Tech Satluj Pvt. Ltd vs. North Star Cable Q Data.com Pvt. Ltd., Page- 346.

Code of Criminal Procedure, 1973 (Code) - Section 311- Additional evidence- Wrong provision of law- Mentioning of- Consequences- Trial Court permitting complainant to produce additional documents in support of complaint- Application found having quoted Order VII Rule 14, Code of Civil Procedure, 1908, on it instead of Section 311 of Code-- Petition against- Held, mere mentioning of wrong provision of law is inconsequential- Trial Court considered this aspect of matter and dealt it in its order- Application taken to be one under Section 311 of Code- It is substance and not form that is to be looked into- Documents found relevant for just decision of case- No infirmity in order of Trial Court- Petition dismissed. (Paras 5 to 8) Title: Mohinder Singh Dudharta vs. Bal Krishan Rawat, Page- 66.

Code of Criminal Procedure, 1973 – Section 313 – Examination of accused - Evidentiary value - Held, answers given by accused can be taken into consideration for drawing inference as to his guilt. (Para 34) Title: Amar Bahadur vs. State of Himachal Pradesh, Page- 294.

Code of Criminal Procedure, 1973 (Code) - Sections 397 & 482 – Whether inherent powers can be invoked when second revision is not maintainable ? – Held, when second revision is expressly barred under Code, inherent powers cannot be invoked to defeat statutory limitations- Petition dismissed. (Para 7) Title: Prithi Singh vs. Jagdish Chand & others, Page- 394.

Code of Criminal Procedure, 1973 - Section 438 - Pre-arrest bail - Grant of – Principle of parity – Applicability - Accused seeking anticipatory bail in case registered for gang rape – On facts, co-accused already enlarged on bail - No likelihood of accused fleeing away from justice or his tampering with prosecution evidence – Accused having joined investigation as such ordered to be enlarged on bail on principle of parity - Petition allowed with conditions. (Paras 6 & 7) Title: Parminder Singh vs. The State of Himachal Pradesh, Page- 391.

Code of Criminal Procedure, 1973- Section 438 - Pre-arrest bail - Grant of – Principle of parity – Applicability - Accused seeking anticipatory bail in case registered for cheating, forgery etc – On facts, principal accused already enlarged on bail - No likelihood of accused fleeing away from justice or his tampering with prosecution evidence – Accused having joined investigation as such ordered to be enlarged on bail on principle of parity - Petition

allowed with conditions. (Paras 4 to 7) Title: Tek Chand vs. The State of Himachal Pradesh, Page- 401.

Code of Criminal Procedure, 1973- Section 439- Regular Bail- Grant of- Petitioner accused of murdering her husband in conspiracy with co-accused 'S'- Seeking bail by averring of her having committed no overt act in alleged episode- She being young lady should be enlarged on bail- State resisting petition on ground of accused being involved in heinous offences- And her petition was dismissed earlier also on ground that she may influence witnesses- Held, trial pending before Court of Session and is at evidence stage- Only official witnesses are to be examined and she will not be in position to influence them- Allegations of murder are subject matter of trial- Under-trial detention should not be used as conviction before trial- Petitioner being young woman can be treated differently from co-accused- Petition allowed with conditions. (Paras 6 to 8) Title: Sushma Rani vs. State of Himachal Pradesh, Page- 44.

Code of Criminal Procedure, 1973 – Section 482 - Inherent powers – Exercise of – Quashing of FIR - Whether maintainable in heinous offences? – Held, though in exercise of its inherent powers, High court may quash FIR but this jurisdiction not available in heinous offences – Robbery being heinous offence, FIR cannot be ordered to be quashed notwithstanding amicable settlement of dispute between parties – Petition dismissed - ***Parbatbhai Aahir alias Parbatbhai Bhimsinhbhai Kumar and others Vs. State of Gujarat and another, (2017) 9 Supreme Court Cases 641*** *relied upon.* (Paras 3 & 4) Title: Dilpreet Singh alias Laddi and another vs. State of HP, Page- 362.

Code of Criminal Procedure, 1973 – Section 482 – Inherent power – Exercise of - Cancellation report – Acceptance thereof – Trial court accepting cancellation report and setting aside FIR – Sessions court upholding order in revision – Revision against – On facts, dispute between parties purely civil in nature – Demolition of boundary wall, if any, will have civil consequences – Remedy for petitioner lies in filing suit for damages or any other appropriate relief- petition dismissed. (Paras 6 to 10) Title: Prithi Singh vs. Jagdish Chand & others, Page- 394.

Constitution of India, 1950 - Article 14 & 16 - **Life Insurance Group Superannuation Cash Cumulative (Defined Beneficiaries) Scheme** - Denial of pensionary benefits - Writ jurisdiction – HIMUDA (trustee) entering into contract with LIC regarding payment of pensionary benefits to its employees - LIC working out modalities and trustee making contribution – Parties creating corpus out of which payments of benefits to be disbursed – On accounts of revision of pay, LIC declining pensionary benefits for want of necessary corpus - Petition against - Held, it is legitimate to assume that Scheme was signed by LIC after working out all financial implications - It cannot claim that on account of manifold increase in salary and deficit corpus, Scheme has become unviable - Deficiency in corpus, if any, is attributable to lapses of LIC and it cannot take any advantage of its own lapses - Petition allowed - LIC directed to pay pension with upto date DA to retirees. (Paras 29, 30, 39 to 41) Title: Rajesh Kumar Thakur and others vs. State of H.P. and others, Page- 421.

Constitution of India, 1950- Articles 14, 16 & 226- Regularization of Services- Writ jurisdiction- Availability- Petitioners seeking directions to employer to regularize them from date of their engagement- Also praying for quashing of regularization policy of Board- Regularization policy however requiring workmen to have continuous three years service as on cutoff date and their possessing requisite qualification as laid down in Regulations-

Petitioners not found having completed three years continuous engagement- Allegations of malafide disengagement or fictional breaks not pleaded in petition- Other regularized workmen not shown to have been engaged in work similar to work for which petitioners were engaged- Held, no material to indicate intentional or deliberate administering of fictional breaks in service of petitioners vis-a-vis other workmen- Otherwise also disputed questions of fact cannot be delved into by Writ Court- Regularization policy providing more liberal benefits for regularization of daily rated workmen, cannot be termed as un-reasonable or arbitrary- Petitions dismissed with liberty to petitioners to raise industrial dispute and seek reference to Labour Court. (Paras 3 to 6) Title: Anil Kumar & others vs. Bhakra Beas Management Board & others, Page- 98.

Constitution of India, 1950 – Article 21 - **Code of Criminal Procedure, 1973 -** Section 439 –Personal liberty - Regular bail – Grant of - Held, personal liberty as guaranteed under Article 21 of Constitution of India is to be respected but within confines of law- Offence under Section 302 of IPC being serious one, petitioner not entitled for bail- Petition dismissed.(Paras 7 & 9) Title: Rahul Malik vs. State of Himachal Pradesh, Page- 352.

Constitution of India, 1950 – Article 226 – **Advocates Act, 1961 -** Section 8(A) – **Bar Council of India Rules, 1975** - Rule 10 - Election of office bearers of Bar Council of Himachal Pradesh – Dispute of – Writ jurisdiction – Maintainability – Bar Council of India (BCI) constituting committee to supervise elections to State Bar Councils pursuant to directions of Hon'ble Supreme Court - Office bearers of Bar Council of Himachal Pradesh unanimously elected by its constituent members - Complaint to BCI by some advocates regarding improper conduct of elections – BCI directing parties to maintain *status quo ante,* resulting in nullifying such elections - Petition against – Complainant (R8) contending that since matter regarding elections to Bar Councils pending before Supreme Court, Writ not maintainable - Held, Hon'ble Supreme Court not adjudicating matter regarding elections to State Bar Councils – No restraint or order against entertaining petitions by High Courts pertaining to election disputes of State Bar Councils - Petition cannot said to be not maintainable. (Paras 5,24, 26 to 28) Title: Ramakant Sharma & Ors. vs. Bar Council of India & Ors., Page- 444.

Constitution of India, 1950 – Article 226 – Election of officer bearers of State Bar Council – Dispute of – Writ jurisdiction – Estoppel - State Bar Council unanimously electing its office bearers – Complainant (R8) and others filing complaint to BCI (R1) and alleging improper conduct of elections - BCI directing parties to maintain *status quo ante* - Petition against by elected members – Held, complainant found having attended and participated in meeting which unanimously elected office bearers – He even seconded one of office bearers - Newly elected office bearers conducted business for about one month – Complainant never raised dispute regarding election before Tribunal within stipulated period – Complainant estopped from challenging election - Petition allowed - Election of office bearers upheld.(Paras 28 to 30,38 to 42 & 45) Title: Ramakant Sharma & Ors. vs. Bar Council of India & Ors., Page-444.

Constitution of India 1950 – Article 226 – Writ- Amendment of pleadings – Delay and laches- Effect- Held, delay and laches in seeking amendment of writ petition ipso facto not a ground to denial amendment, if otherwise, necessary- Petitioner challenging order dated 30.4.2010 granting seniority to private respondent over and above him- Seeking amendment to incorporate challenge to another order dated 26.5.1999- Order dated 26.5.1999 finds mention in subsequent order dated 30.4.2010 which petitioner is already challenging in writ- Petitioner not changing nature of dispute- Amendment necessary for just decision of

writ- For fault of Advocate party should not suffer- Application allowed. (Paras 2, 7, 10 & 13) Title: Suresh Kumar vs. Union of India and others, Page- 16.

Constitution of India, 1950 – Article 226 – Writ jurisdiction – Electrocution- Compensation – Grant of - Held, on proof of fact that petitioner had suffered injuries in accident on account of negligence of State or its functionaries, Writ Court can grant compensation to him – But, if disputed questions of fact come on record, same cannot be adjudicated by it. (Para 7) Title: Rakesh Kumar vs. The Himachal Pradesh State Electricity Board and another, Page-199.

Constitution of India, 1950 – Article 226 – Electrocution – Compensation – Writ jurisdiction – Availability – Petitioner suffered severe electric burns and consequent permanent disability of 55%- Filing writ and claiming compensation for injuries caused to him on account of negligence of Electricity Board – Respondents though admitting accident but denying their negligence- And alleging accident having taken place on account of locale of spot i.e. dangerous hilly slope – Held, extent of negligence of officials of Board and quantum of compensation can be properly examined in suit on leading cogent and convincing evidence by petitioner – Interim compensation granted in sum of Rs.5 lakh in favour of Petitioner – Petition disposed of. (Paras 10 to 14) Title: Rakesh Kumar vs. The Himachal Pradesh State Electricity Board and another, Page- 199.

‘E’

Employees’ Compensation Act, 1923 (Act) - Section 4–A - Motor accident – Payment of compensation – Default by employer – Penalty - Imposition of - Held, when mandate of Section 4-A (1) & (2) of Act is not complied with by employer, Commissioner must invoke these provisions and impose penalty on him for such non-compliance. (Para 6) Title: Prakash Chand vs. Babu Ram and others, Page- 141.

Employees’ Compensation Act, 1923 (Act) - Section 4 (c)(ii) - Schedule I -Motor accident- Claim application- Permanent disability - Loss of earning capacity – Determination of by qualified medical practitioner – Necessity of – Held, provision of law requiring assessment of loss of earning capacity of workman only by qualified medical practitioner resulting from his permanent disability because of injury not specified in Schedule-I of Act is applicable only when injury has not resulted into his permanent total functional disability from performing his avocation, he was doing before accident – And he is still empowered to perform his avocation though there is some diminution or reduction in his earnings due to said disability. (Para 5) Title: Prakash Chand vs. Babu Ram and others, Page- 141.

Employees’ Compensation Act, 1923 (Act) - Section 4 (c)(ii) - Schedule I- Motor accident – Claim application- Claimant driver by profession – Suffering permanent total disability of right limb – Disability assessed 30% with respect to entire body – Commissioner granting compensation on basis of percentage of assessed disability only - Appeal against – Held, disability certificate showing permanent total loss of functioning of right limb – Claimant being driver cannot drive vehicle at all on account of disability - Medical officer not necessarily to depose that claimant unable to perform callings of his avocation as driver - Commissioner wrong in assessing compensation – Compensation re-assessed by taking it as case of total functional disability. (Para 5) Title: Prakash Chand vs. Babu Ram and others, Page-141.

‘F’

Family settlement – Proof – Plaintiff claiming exclusive ownership over suit land under family settlement- In previous suit he claimed suit land as joint between him and other co-sharers- Held, plaintiff cannot raise plea of exclusive ownership under family settlement. (Para 12) Title: Baggu Ram (since deceased) through his legal heirs and others vs. Ganga Ram and others, Page- 101.

‘H’

Himachal Pradesh Cooperative Societies Act, 1968 (Act) - Section 2(11) – ‘Officer’ - Meaning of – Held, expression ‘Officer’ as defined in Section 2(11) of Act is inclusive one – It includes any officer of Society empowered under Rules and bye-laws to give directions in regard to its business etc - Assistant Manager of Society specifically authorized vide resolution of Administrative Board to engage counsel and defend suit, is an officer of Society. (Paras 20 to 22) Title: M/s Indo Farm Tractors and Motors Ltd. vs. The Rajpura Cooperative Agriculture Service Society and others, Page-408.

Himachal Pradesh Co-operative Societies Act, 1968 (Act) - Section 76 – Statutory notice - Whether mandatory?- Held, issuance of statutory notice contemplated by Section 76 of Act before filing of suit against Society is mandatory- However, requirement is procedural in nature - Defendant must take objection regarding non maintainability of suit for want of notice at the earliest opportunity- When no objection is taken by defendant, it can be deemed to have waived notice - Order of trial court dismissing defendant’s application for rejection of plaint for want of notice filed at evidence stage proper and valid- Petition dismissed.(Paras 10 to 14) Title: M/s Jai Luxmi Labour and Construction Co-operative Society Ltd. vs. Dev Singh Negi, Page-465.

Hindu Succession Act, 1956 (Act) - Section 14 - **Code of Civil Procedure, 1908** - Section 47- Limited estate – Effect – Decree-holder (DH) obtaining decree of possession against ‘A’, Hindu widow holding life estate in suit land – Decree passed before commencement of Act – ‘A’ dying in 2007 - DH filing execution petition - Executing court dismissing objections of legal representatives (LRs) of ‘A’ - Petition against – Held, no material on record suggesting ‘A’ having acquired full fledged ownership of suit land under Act – LRs not having become owner by way of adverse possession – Executing court justified in dismissing objections – Petition dismissed. (Para 11) Title: Madan Singh vs. Hira Lal and others, Page- 273.

‘I’

Indian Evidence Act, 1872 - Section 3 - Circumstantial evidence - Appreciation of evidence - Held, prosecution should prove each and every circumstance relied upon by prosecution – Evidence as a whole should make out complete chain in manner leading to only conclusion that accused committed offence – However, evidence to be analyzed on parameters of veracity, credibility and genuineness. (Paras 59 & 60) Title: Amar Bahadur vs. State of Himachal Pradesh, Page- 294.

Indian Evidence Act, 1872 - Section 3 – Appreciation of evidence - Held, when two reasonable views emerge out from evidence on record, then view favouring accused should be taken – On facts, evidence regarding transport of Khair wood more than permitted under transport permit, conflicting – Official witnesses admitting that Khair wood was being transported under valid permit - Acquittal recorded by trial court not to be interfered with - Appeal dismissed.(Paras 13 to 17) Title: State of H.P. vs. Bishamber Singh, Page- 397.

Indian Evidence Act, 1872 – Section 3– False plea – Evidentiary value – Held, non explanation or false plea can be taken only as an additional circumstance to corroborate links proved by prosecution against accused– It cannot be taken as proof for links missing in prosecution story. (Paras 22 to 24) Title: Sanjay Kumar vs. State of Himachal Pradesh, Page- 246.

Indian Evidence Act, 1872 – Sections 3, 45 A and 65 B – Electronic record -Authenticity – Held, when electronic record duly produced in evidence, its genuineness can be proved by opinion of examiner of electronic evidence. (Para 16) Title: Rattan Chand vs. State of Himachal Pradesh, Page- 206.

Indian Evidence Act, 1872 – Sections 3 & 65 B – Electronic evidence – Admissibility – Requirements – Held, certificate of authorized officer must contain particulars of device involved in production of record, particulars identifying electronic record containing statement and it must be signed by him - It must accompany electronic record like computer printout, compact disc, video compact disc, pen drive etc., pertaining to statement sought to be given in evidence – Record without requisite certificate not admissible – Call detail records between deceased and accused without requisite certificate of Nodal Officer of service provider not admissible in evidence. (Para 13) Title: Rattan Chand vs. State of Himachal Pradesh, Page- 206.

Indian Evidence Act, 1872 – Section 3 & 65 B – Electronic evidence – Mandatory requirements – Purpose of – Held, purpose of safeguards provided under law is to ensure source and authenticity – These are hallmarks pertaining to electronic record sought to be used as evidence – Electronic record being more susceptible to tampering, alteration and transposition – Without such safeguards whole trial based on electronic records can lead to travesty of justice (Para 13) Title: Rattan Chand vs. State of Himachal Pradesh, Page- 206.

Indian Evidence Act, 1872 - Sections 3 and 154 - Appreciation of evidence – Hostile witness- Evidentiary value – Held, prosecution can rely upon that part of evidence of hostile witness which supports its case - Mere fact of witnesses turning hostile is inconsequential if other independent evidence connects accused with commission of crime. (Paras 27-29) Title: Rajinder Kumar vs. State of Himachal Pradesh, Page- 320.

Indian Evidence Act, 1872 - Section 8 – Motive - Absence of evidence – Effect - Held, where evidence is direct and corroborative of guilt of accused, absence of evidence as to motive to commit crime, is inconsequential. (Para 49) Title: Amar Bahadur vs. State of Himachal Pradesh, Page-294.

Indian Evidence Act, 1872 – Section 32- Dying declaration- Evidentiary value- Held, dying declaration, if trustworthy and inspires confidence, can be basis for conviction. (Paras 20-27 & 35) Title: State of Himachal Pradesh vs. Rajeev Singh @ Ranju and others, Page- 26.

Indian Evidence Act, 1872 - Section 35 - Entries in public record – Date of birth – Relevancy – Held, entries of date of birth recorded in Birth and Death Register as well in school admission register being primary evidence, are relevant and admissible as proof of date of birth.(Para 17) Title: Rajinder Kumar vs. State of Himachal Pradesh, Page-320.

Indian Evidence Act, 1872 - Section 35 - Entries in public record - Date of birth - Mode of proof – Held, entries of date of birth recorded in school admission register must be proved by examining person at whose instance these entries were made - Authenticity of such entries depends upon deposition of person at whose instance these were recorded.(Paras 19 to 21) Title: Ravinder Sharma @ Ravi vs. State of Himachal Pradesh, Page- 331.

Indian Evidence Act, 1872 - Section 35 - Entries in public record - Date of birth – School admission register – Probative value –Date of birth entries in high school register recorded on basis of school leaving certificate issued by primary school in absence of production of admission form of primary school showing at whose declaration such entries were made, not relevant. (Para 19) Title: Ravinder Sharma @ Ravi vs. State of Himachal Pradesh, Page- 331.

Indian Evidence Act, 1872 - Section 35 - Entries in public record - Date of birth – Parivar register – Relevancy- Date of birth not specifically mentioned in parivar register – Column meant for recording birth entries found scratched – Held, document cannot be accepted as proof of age of victim. (Para 20) Title: Ravinder Sharma @ Ravi vs. State of Himachal Pradesh, Page- 331.

Indian Evidence Act, 1872 - Section 73**-** Comparison of signatures, thumb impression etc by expert - Request of – Permissibility – Plaintiff filing application for comparison of thumb impression of deceased on “Will”- Defendant contesting application on ground of its having been filed at belated stage with intent to linger on case - Trial Court dismissing application - Petition against- Held, plaintiff in possession of document sought to be examined for more than ten years – Application for comparison of thumb impression with admitted or proved thumb impression not filed earlier – Plaintiff already granted sufficient opportunity to lead evidence – Suit at stage of final arguments and many adjournments sought for arguments also - His conduct demonstrates that application was filed with intent to delay matter- Petition dismissed –Order upheld (Paras 7 to 10) Title: Chittru vs. Pal and another, Page-358.

Indian Penal Code, 1860 – Sections 201 and 302 read with 34 – Murder and destruction of evidence etc.– Proof – Trial Court convicting ‘S’ and his wife ‘R’ of murdering ‘N’ with whom ‘R’ having extra marital relations, but acquitting co-accused ‘A’ – ‘S’ & ‘R’ also convicted of offence of destruction of evidence of commission of offence – Appeal against – Defence arguing lack of evidence on record and depicting convictions as unwarranted- On facts, (i) ‘R’ eloped with deceased ‘N’ and stayed with him for months together (ii) ‘R’ asking ‘N’ to leave her otherwise it would not be good for him (iii) on day of incident, presence of ‘S’ ‘R’ and ‘N’ in house of accused established (iv) dead body of ‘N’ found in house of ‘R’ & ‘S’ (v) no explanation as how dead body of ‘N’ came there (vi) keys of room given by ‘R’ to police from where dead body of ‘N’ recovered (vii) ‘S’ identifying slab of house from where deceased was thrown down (viii) ‘S’ also identifying place near rivulet where articles including SIM of deceased were burnt (ix) ‘S’ had motive to commit murder of ‘N’- Held, evidence does not indicate participation of ‘R’ in murder – Her involvement in destruction of evidence of commission of offence proved – Appeal of ‘R’ partly allowed – She is acquitted of offence of

murder but conviction for offence of destruction of evidence maintained – Sentence altered – Conviction of 'S' for murder and destruction of evidence maintained. (Paras 20 to 30) Title: Sanjay Kumar vs. State of Himachal Pradesh, Page- 246.

Indian Penal Code, 1860 - Section 302 - Double Murder – Proof – Accused convicted by trial court for murdering owner of orchard and his mother with whom he was working – Appeal against – Accused contending wrong appreciation of evidence by trial court and submitting that evidence being full of contradictions, conviction is not warranted – On facts, (i) 'N' wife of deceased 'KC', on reaching place of occurrence found accused with axe in his hand and deceased lying on ground (ii) accused admitting his presence at place of occurrence at relevant time (iii) accused fleeing away alongwith his family after incident (iv) accused confessing guilt before 'SD' who alongwith 'K' apprehended accused and his family in forest (v) accused had time and opportunity to commit offence (vi)DNA report proving presence of blood of deceased on axe- Held, evidence on record clearly proves guilt of accused- Appeal dismissed- Conviction and sentence upheld (Paras 14 to 47) Title: Amar Bahadur vs. State of Himachal Pradesh, Page-294.

Indian Penal Code, 1860- Sections 302, 323 and 325 read with 34 - Grievous hurt, murder in furtherance of common intention etc. - Proof - Trial Court convicting all accused of murdering 'BD' and causing injuries to other victims in furtherance of common intention of each other - Appeal against - Accused arguing wrong appreciation of evidence on part of Trial Court in convicting them for murder- Facts revealing (i) dispute arose between parties suddenly because of demolition of their house by complainant party and on account of debris some seepage was being caused to property of accused (ii) all accused appeared at spot together and indulged in altercation with complainant party (iii) during altercation, accused 'M' snatched spade from labourer engaged by complainant party and hit on head of 'BD' with it – Death of 'BD' homicidal in nature- Injury sufficient to cause death in ordinary course of things - Held, evidence does not indicate that assault on 'BD' with spade by 'M' was in furtherance of common intention of other accused also- Other co-accused did not participate in assault on BD or other injured- 'M' having knowledge that strike on head with spade would cause death of 'BD'- Conviction of 'M' for murder of 'BD' upheld- Other accused acquitted of murdering 'BD' and injuries to others in furtherance of common intention of 'M'- Appeals partly allowed- Convictions of co-accused set aside. (Paras 21 to 23) Title: Nimmo Devi vs. State of Himachal Pradesh, Page-237.

Indian Penal Code, 1860 - Sections 302, 376, 404 and 414 – Rape cum murder, theft and receipt of jewellary – Proof – Prosecution filing charge sheet on allegations that accused 'RC' strangled victim with her dupatta when she demanded money from him for coitus he had with her – And thereafter he removed jewellary from her dead body and sold to accused 'VP' – Trial Court convicting 'RC' for murder and removing ornaments from dead body and accused 'VP' for receiving stolen property from him by relying upon amongst other things, call detail records between 'RC' and deceased of date of incident – Appeal against – On facts, (i) CDR's not accompanying requisite certificate of Nodal Officer (ii) no evidence showing 'RC' having acquaintance with deceased or they were having live-in relation (iii) incriminatory SIM number through which 'RC' allegedly used to talk to her not in his name but issued in favour of 'S' (iv) no evidence that said SIM number extracted from cell phone recovered from 'RC' at time of his arrest (v) mobile phone number of deceased found issued in name of her son (vii) recorded audio version between 'RC' and deceased not taken into possession (vii) foundation of prosecution case that 'RC' had sexual intercourse with deceased before he murdered her, not established even as per Trial Court and prosecution not challenging acquittal of 'RC' for rape (viii) statement of 'DC' a witness of having seen accused going

towards jungle during day time found doubtful (xi) ornaments of deceased not got identified as belonging to her from her relatives - Held, no acceptable evidence on record to hold accused guilty of offences – Appeals allowed – Conviction set aside – Accused acquitted. (Paras 18 to 30) Title: Rattan Chand vs. State of Himachal Pradesh, Page- 206.

Indian Penal Code, 1860- Sections 306 & 498-A read with 34- Cruelty and abetment to commit suicide – Proof of - Trial Court acquitting husband, parents-in-law as well as sister-in-law for harassing and abetting victim to commit suicide- Appeal against- Evidence revealing husband and wife having heated arguments and during course of it, wife threatening to commit suicide- Husband responding to her to go ahead with it- Wife putting kerosene and setting herself ablaze- Husband tried to douse fire and also took wife to hospital- Parents-in-law residing separately from couple since long- Previous conduct of parents-in-law towards victim not indicative of their abetment- Victim found having history of mental ailment- Held, evidence does not indicate intention on part of husband and other relatives to abet victim to commit suicide- Acquittal upheld. (Paras 32, 33, 37-40, 41 & 42) Title: State of Himachal Pradesh vs. Rajeev Singh @ Ranju and others, Page- 26.

Indian Penal Code, 1860 - Sections 342 & 376 (2) (n) **Protection of Children from Sexual Offences Act, 2012-** Section 6 – Wrongful confinement, rape and aggravated penetrative sexual assault – Proof – Accused convicted by Special Judge for repeatedly raping victim, a minor - Appeal against – On facts, (i) victim not proved to be below eighteen years of age on date of offence (ii) she was taken in car to different places and raped by accused 'R' (iii) seminal stains on under garment of victim matched with accused (iv) hair collected from car also matched with hair of victim (v) medical evidence proving assault on victim (vi) visitor register of hotel proving visit of 'R' with female at relevant time (vii) victim taken by accused from place nearby her school by dragging and intimidation – Held, evidence proving guilt of accused – Conviction altered to offence under Section 376 (2) (n) instead of 376 D of Code in view of acquittal of co-accused – Sentence modified. (Paras 34 to 40) Title: Ravinder Sharma @ Ravi vs. State of Himachal Pradesh, Page- 331.

Indian Penal Code, 1860 – Sections 363, 366 and 376 – **Protection of Children from Sexual Offences Act, 2012**– Section 4– Kidnapping, penetrative sexual assault etc.– Proof – Police filing charge sheet against 'R' for kidnapping and raping victim, a minor- And against 'P' also for raping her– Trial Court convicting 'R' for kidnapping and rape but acquitting 'P' for said charge – Appeals by 'R' against conviction and by State against acquittal of 'P'– Prosecution alleging 'R' having kidnapped victim after executing threats to blackmail her and then raped her in house of 'P'– And 'P' also raped her there– On facts, mobile phone recovered from 'R' not having camera, blue tooth and memory card – Taking and transferring nude photographs of victim through it not possible– Victim using cell phone gifted to her by 'R'– She concealed of his having gifted it to her, from her family- She used to talk to 'R' daily – She knew 'R' since before she left school– She not proved to be below 18 years of age on date of incident– Her medical age found between 17-19 years– Held, Prosecutrix was major at time of alleged incident– 'BR' father of accused 'P' did not see victim visiting their house at relevant time – Raping victim there first by 'R' and then by 'P' becomes doubtful– Victim wholly unreliable – Case of prosecutrix extremely doubtful– 'R' cannot be convicted of said offences on its basis– Appeal of 'R' allowed – Conviction set aside –'R' acquitted of charges– Appeal of State against acquittal of 'P' also dismissed. (Paras 26 to 32) Title: Ram Lal vs. State of Himachal Pradesh, Page- 222.

Indian Penal Code, 1860 – Section 376(2) **- Protection of Children from Sexual Offences Act, 2012 -** Section 6 – Aggravated penetrative sexual assault – Proof – Special Judge convicting accused of committing aggravated penetrative sexual assault on victim and sentencing him to imprisonment for life - Appeal against - Accused arguing that victim and her mother did not support prosecution case during trial – And at any rate sexual relationship was with consent of victim - Facts revealing that (i) victim and her mother, informant of case though turned hostile but DNA profiling of foetus connecting accused and victim as biological father and mother respectively (ii) entries of date of birth recorded in Birth and Death Register at instance of 'KN', Ward Member of Panchayat and in school admission register at instance of grandfather of victim 'BR' duly proved (iii) birth entries proving victim below 18 years of age at relevant time - Held, notwithstanding victim and her mother not supporting prosecution case during trial, there is enough evidence connecting accused with offence - Conviction upheld - On facts, sentence modified. (Paras 27 to 29) Title: Rajinder Kumar vs. State of Himachal Pradesh, Page- 320.

Indian Penal Code, 1860 - Sections 376 (2) (f), 506 - **Protection of Children from Sexual Offences Act, 2012-** Section 4 – Rape and penetrative sexual assault- Accused alleged to have raped his minor daughter- Trial Court convicting accused- Appeal against- Accused assailing judgment of conviction as being based on wrong appreciation of evidence- On facts, (i) husband (accused) and wife residing separately since long, each suspecting fidelity of other (ii) minor daughter staying with father in house, where accused's parents and grandmother also residing (iii) incident happened in March, 2016 (iv) complaint under Section 156(3) for registration of FIR for said offences filed before Special Judge on 16.11.2016 (v) explanation given by wife of accused for delayed FIR in her deposition does not find any mention in complaint filed under Section 156 (3) of Cr.P.C. (vi) story of accused having confessed his guilt before complainant (wife) and sought her pardon palpably false and fabricated by her to implicate him (vii) witness 'S' claiming to have been told of incident(s) by victim, does not find mention in victim's statement recorded under Section 164 Cr.P.C. (viii) complainant (mother) not disclosing date, time and place when 'S' told her about misdeeds of accused qua victim (ix) in her complaint to Women Cell against accused (husband) filed on 17.10.2016, complainant not mentioning incident of March, 2016, which happened with victim- Held, complainant evidently liar- Case appears to have been engineered by wife against accused- Conviction set aside- Accused acquitted. (Paras 17 to 26) Title: Rakesh Kumar @ Raka vs. State of Himachal Pradesh, Page- 1.

Indian Penal Code, 1860 – Sections 415 and 420 – Cheating – Necessary ingredients – Explained – Held, person can be said to have committed cheating if he dishonestly induces person deceived to deliver any property to any person or make alter or destroy whole or any part of valuable security etc. - Doing regular law course (Evening Schedule) from an institute during service without taking study leave does not amount to cheating of third party (complainant) or Education Department, where accused was serving or Bar Council of Himachal Pradesh with whom he got enrolled himself - Doing course without taking permission from Department at most matter of departmental inquiry – No action taken by Education Department or Bar Council of Himachal Pradesh against accused – Order of discharge of accused for cheating etc. of trial court as upheld by Additional Sessions Judge, valid and proper - Petition dismissed. (Paras 8 to 13) Title: State of Himachal Pradesh vs. Dina Nath Sharma, Page- 187.

Indian Registration Act, 1908- Section 17- Held, document conveying title in immovable property valuing more than Rs.100/- mandatorily requires to be registered. (Para 15) Title: Brahm Dass (since deceased through LRs) vs. Kaur Chand and Ors., Page- 55.

Indian Registration Act, 1908- Section 17 – Registration of document, when mandatory ? – Held, document conveying interest in immoveable property valuing more than rupees one hundred mandatorily requires to be registered – Document, if not registered, is inadmissible and cannot be read in evidence – First Appellate Court justified in ignoring unregistered exchange deed. (Para 12) Title: Dinesh Kumar Langa & another vs. Maharaj Mall (since deceased) through his legal heirs, Page- 107.

Indian Succession Act, 1925 – Section 63 - Will – Due execution – Proof – Plaintiffs claiming succession to estate of 'JR' through Will – Suit dismissed by trial court – Their appeal also dismissed by District Judge – RSA- Plaintiffs arguing that since they having duly proved Will by examining scribe and attesting witnesses, suit ought to have been decreed – Facts revealing (i)testator dying after four days of execution of alleged Will (ii) one of plaintiffs and one of marginal witnesses present at time of attestation of mutation and no reference regarding said Will made by them at that time (iii) story pleaded in plaint to bring suit within limitation palpably wrong (iv) non disclosure about Will at time of attestation of mutation suggesting non existence of Will at that particular time (v) tampering and interpolations in register of document writer regarding Will (vi) one of plaintiffs 'OP' present at time when Will was scribed (viii) statements of marginal witnesses contrary and contradictory to each other- Held, execution of Will shrouded with suspicious circumstances - Findings of lower courts borne out from record – RSA dismissed – Decrees upheld. (Paras 17 to 30) Title: Om Prakash and another vs. Vidya Sagar and others, Page- 155.

Industrial Disputes Act, 1947 – Section 10 (1) – Industrial dispute – Fading away of – Held, State Government may at any time refer industrial dispute for adjudication if such dispute exists or apprehended – No limitation prescribed under Act for making reference– On facts, writ petitioner had kept industrial dispute alive by issuing notices to Department and then by raising demand – Dispute had not faded away with passage of time- Labour Commissioner directed to send reference to Labour Court – LPA allowed. (Paras 7 & 8) Title: Deen Dayal Yogi vs. State of H.P. & Others, Page- 23.

Industrial Disputes Act, 1947- Section 25-F – Retrenchment -Notice -Requirement- Employer orally terminating services of workmen without notice- On reference, Labour Court directing their reinstatement and continuity in service but without back wages- Hon'ble Single Bench dismissing writs of employer and upholding award of Labour Court- LPA - Employer contending that workmen were engaged casually and no notice was required to be given to them before dispensing their services-Employer not producing any agreement between it and workmen concerned-Workmen had completed period of 240 days in a calendar year with employer-Workmen could not have been retrenched without serving statutory notice on them- LPA dismissed-Judgment of Hon'ble Single Bench upheld. (Paras 8 and 9) Title: HPTDC vs. Narinder Kumar, Page-148.

Interpretation of Commercial Contract – Principles - Held, insurance contract is *specie* of commercial transactions and must be construed like any other contract on its own terms and by itself *albeit* subject to additional requirements of *uberrime fides*, i.e., good faith on part of insured - In other respects there is no difference between contract of insurance and other contracts - Terms of insurance contract have to be strictly construed without venturing into extra-liberalism that might result in re-writing of contract. (Para 25) Title: Rajesh Kumar Thakur and others vs. State of H.P. and others, Page-421.

'J'

Joint land- Rights inter-se co-sharers- Held, ownership of joint land is vested in all co-sharers- They hold such land under unity of title and community of possession- Co-sharer in exclusive possession cannot appropriate land exclusively to the exclusion of other co-sharers unless their ouster is pleaded and proved- On facts, possession of defendants found to be for and on behalf of all co-sharers including plaintiffs- Plaintiff entitled for permanent injunction for restraining defendants from raising construction till it is partitioned in accordance with law- RSA allowed- Decrees of lower courts set aside- Suit decreed. (Para 8) Title: Ramesh Kumari and others vs. Chander Kumar and others, Page- 145.

Juvenile Justice (Care and Protection of Children) Act, 2000 (Old Act) – Section 52 (2) **- Juvenile Justice (Care and Protection of Children) Act, 2015 (New Act)** – Section 101 – Appeal against acquittal – Maintainability- Juvenile Justice Board (JJB) disposing inquiry by holding accusation not proved against child in conflict with law – Complainant filing appeal before Court of Session which dismissing it on ground of its maintainability – Petition against – Held, matter decided by JJB under old Act – Appeal also preferred by petitioner under old Act – Appeal to be decided under provisions of old Act – Under said Act, no appeal against acquittal recorded by JJB shall lie – No infirmity in judgment of Sessions Judge holding appeal not maintainable – Petition dismissed. (Paras 2 & 3) Title: Som Raj vs.Vinod Kumar, Page-205.

'L'

Land Acquisition Act, 1894 (Act) – Sections 4 & 48 - Possession prior to notification- Effect- State possessing acquired land much before issuance of notification under Section 4 of Act- On facts, landowners granted damages by way of additional interest @ 15% per annum on value of land since taking of possession till issuance of notification. (Para 20) Title: Ramesh and others vs. The Land Acquisition Collector and Others, Page-11.

Land Acquisition Act, 1894 – Sections 18 & 23- Acquisition of land for public purpose- Reference- Trees – Compensation- Landowners claiming compensation qua trees standing over acquired land- List of trees prepared in 1986- Land acquired in 2006- No evidence that trees mentioned in list prepared in 1986 were standing over land in 2006 also- Discrepancy in list prepared in 1986- Cuttings and interpolations in list- Held, landowners failing to prove existence of trees over acquired land- Landowners not entitled for any compensation qua trees. (Para 13) Title: Ramesh and others vs. The Land Acquisition Collector and Others, Page- 11.

Land Acquisition Act, 1894 – Sections 18 & 23- Acquisition of land for public purpose- Reference- Market value- Assessment- Post-notification sale transactions- Evidentiary value- Held, in absence of exemplar sale transactions one year prior to notification, subsequent exemplar sale transactions can be taken into consideration with suitable deductions- On facts, 10% deduction given on post-notification sale transactions. (Para 18) Title: Ramesh and others vs. The Land Acquisition Collector and Others, Page-11.

Life Insurance Corporation Act, 1956 - Section 37 - **Income Tax Rules, 1962** - Rule 89 - Purchase of annuity - Purpose – Held, Rule 89 requiring trustees to purchase annuity from

Life Insurance Corporation of India (LIC) to exclusion of anyone else must be judged in context that contract of life insurance entered with it, is backed by Government guarantee – Payment of annuity is, thus, secured.(Para 23) Title: Rajesh Kumar Thakur and others vs. State of H.P. and others, Page- 421.

Limitation Act, 1963 – Section 3 – Appeal- Maintainability- Held, time barred appeal can be entertained only if there is an application for condonation of delay caused in filing it- No application seeking condonation of delay filed either along with appeal or at any time during its pendency- Order of dismissal of appeal on ground of its being time barred, not illegal- Petition dismissed. (Para 2) Title: Kamlesh Kishore vs. Vishal and Others, Page- 170.

Limitation Act, 1963 - Section 5 – Condonation of delay – Sufficient cause – Proof – Appellate court dismissing application for condonation of delay and refusing to entertain appeal against *ex-parte* decree of trial court – Petition against – On facts, petitioner proceeded against *ex-parte* in suit on report of process server effecting substituted service by affixation – Report not mentioning who identified defendant's house and in whose presence process was pasted there by him – Summons sent through post also returned with report that defendant's house was locked and intimation slip was dropped - Held, material on record probablizes plea of defendant that she was not residing at relevant time on given address rather attending her ailing daughter at Delhi – Petition allowed – Delay condoned- Appellate court directed to register appeal. (Paras 10-11) Title: Kamaljeet Kaur vs. Satya Devi and others, Page- 115.

Limitation Act, 1963 (Act)- Section 22- Tort- Defamation by libel, whether gives continuous cause of action?- Held, defamation by libel is complete on day of publication of defamatory matter- It is not continuous civil wrong- Limitation to claim damages will start from date of its publication- Period in filing suit cannot be extended by invoking Section 22 of Act. (Para 21) Title: Indresh Dhiman vs. Hindustan Times and others, Page- 48.

'M'

Motor Vehicles Act, 1988 –Motor accident – Claim application – Future medical expenses – Entitlement - Held, compensation towards future medical expenses can be awarded only on proof that claimant requires medical treatment in future also. (Para 6) Title: National Insurance Company Ltd. vs. Niranjan Singh and others, Page-470.

Motor Vehicles Act, 1988 – Motor accident – Claim application – Permanent disability – Compensation – Permanent disability not resulting in functional disability of victim– Claimant continues to draw salary – No evidence that she is unable to perform household or agricultural work because of such disability – Held, no compensation can be awarded to her under this head. (Para 5) Title: Rukko Devi vs. M/s Frontier Bus Service & others, Page-95.

Motor Vehicles Act, 1988 – Motor accident- Claim application - Permanent disability – Pain and suffering and loss of amenities – Compensation - Assessment – Claimant suffering permanent disability with respect to whole body – She is suffering perennial pain and suffering – Held, claimant entitled for compensation under head 'pain & suffering' as also for 'loss of amenities' – Appeal of claimant allowed- Compensation enhanced. (Para 6) Title: Rukko Devi vs. M/s Frontier Bus Service & others, Page- 95.

Motor Vehicles Act, 1988 – Sections 149 & 166 - Motor accident- Claim application – Defences – Route permit – Additional evidence- Claims Tribunal allowing claim application and fastening liability on insurer - Appeal and cross objection – Insurer submitting offending vehicle not having route permit to ply vehicle in Himachal Pradesh at relevant time– There was violation of terms and conditions of insurance policy - Owner filing application for adducing additional evidence showing valid route permit with respect to vehicle at relevant time- Held, additional evidence can be received by Appellate Court also– Additional evidence of cross objector relevant – Application allowed – Insurer had valid route permit at relevant time to ply vehicle – Plea of insurer is devoid of merit. (Para 4) Title: National Insurance Company Ltd. vs. Niranjan Singh and others, Page- 470.

Motor Vehicles Act, 1988 (Act) - Section-163-A – Motor accident – Claim application - No fault liability - Tribunal allowing application of legal representatives of deceased and imposing liability on insurer – Appeal against – Insurance company contending that deceased was negligent in driving offending vehicle resulting in breach of terms and conditions of policy - Being so, it has no liability – Held, question of negligence on part of driver in proceedings instituted under Section-163-A of Act doesn’t arise - Insurance company failing to prove breach of terms and conditions of policy - Appeal dismissed - Award upheld. (Paras 9-11) Title: National Insurance Company Limited vs. Usha Devi and others, Page- 92.

Motor Vehicles Act, 1988 (Act) - Section-163-A – Motor accident – Claim application - No fault liability - Tribunal allowing application of legal representatives of deceased and imposing liability on insurer – Appeal against – Insurance company contending that deceased was negligent in driving offending vehicle resulting in breach of terms and conditions of policy - Being so, it has no liability – Held, question of negligence on part of driver in proceedings instituted under Section-163-A of Act doesn’t arise - Insurance company failing to prove breach of terms and conditions of policy - Appeal dismissed - Award upheld. (Para 4) Title: National Insurance Company Limited vs. Indu Devi and others, Page- 135.

Motor Vehicles Act, 1988 – Section 166 – Motor accident – Claim application- Permanent total disability – Compensation under head ‘pain & suffering’ – Held, compensation under this head also encompasses monetary indemnification qua claim for future pain and suffering resulting from his disability. (Para 5) Title: National Insurance Company Ltd. vs. Niranjan Singh and others, Page-470.

‘N’

Narcotic Drugs and Psychotropic Substances Act, 1985- Section 15 – Recovery of poppy husk – Proof – Trial Court convicting accused of possessing poppy husk – Appeal against – Accused assailing conviction on ground of mis-appreciation of evidence by Special Judge – Held, on receiving secret information police had recorded statement of reasons of belief and sent to authorized officer – Search of bag carried by accused conducted in presence of panch witnesses – Stuff recovered from accused duly sent to FSL and got analyzed – Expert report confirming examined material as poppy husk – Witnesses admitting their signatures on recovery cum seizure memo – Evidence on record proves conscious possession of poppy husk by accused – Accused rightly convicted by Trial Court – Appeal dismissed – Conviction upheld. (Paras 9 to 12) Title: Geeta Devi vs. State of H.P., Page-112.

Narcotic Drugs and Psychotropic Substances Act, 1985- Sections 20, 21 and 37- **Code of Criminal Procedure, 1973** – Section 439 – Regular bail- Grant of- Accused seeking regular bail on ground of co-accused having been granted bail by Court- And what was recovered from him not *Ganja* but only seeds of cannabis plant- Held, accused allegedly found possessing commercial quantity of *Ganja*- FSL report confirming recovered stuff as ganja- Expert report prima facie carries presumption of correctness -Other accused not involved in similar offences- Accused cannot seek parity in given circumstances-Accused not entitled for bail-Petition dismissed. (Para 6) Title: Vishambhar Isiah Striesand vs. State of H.P., Page- 152.

Negotiable Instruments Act, 1988 - Section 138 – Dishonour of cheque – Complaint - Trial court convicting accused for dishonour of cheque - Sessions Judge upholding conviction - Revision – Accused contending wrong appreciation of evidence – Taking plea of cheque having been given to third person and complainant misusing it - Held, signature of accused on cheque not disputed - Defence that cheque issued to some other person, was actually misused by complainant is bald assertion and not substantiated by any other evidence - No complaint lodged by accused in this context – Accused also agreeing before High Court for paying cheque amount with composition fee but failed in complying undertaking - Petition devoid of merits - Revision dismissed - Conviction and sentence upheld. (Paras 10 & 11) Title: Mohan Verma @ Shillu vs. B.M. Thakur, Page- 288.

Negotiable Instruments Act, 1881 – Section 138 – Dishonour of cheque – Complaint – Proof – Trial Court convicting accused for dishonour of cheque – Appellate Court affirming conviction in appeal – Revision – Accused taking plea of debt, if any, being time barred and amount in question not taken as loan by him – Evidence revealing loan account in name of accused – Signature on cheque not denied by him – Issuance of cheque will amount to new agreement inter-se parties to pay debt- Debt not time barred - No infirmity in judgments of Lower Courts – Accused rightly convicted for dishonour of cheque- Revision dismissed. (Paras 3 & 6 to 8) Title: Paras Ram vs. H.P. State Co-operative, Bank Ltd., Page- 171.

‘P’

Protection of Women from Domestic Violence Act 2005 - Sections 12 and 23 –Interim maintenance – Nonpayment of – Consequences – Parties compromising dispute before High Court – Liberty granted to parties to revive proceedings if compromise is not honoured by them –Husband not taking wife to matrimonial home nor paying maintenance to her and child – Trial court reviving proceedings on wife’s application and sending husband to civil imprisonment for not paying maintenance – Petition against – Trial court found having granted many opportunities to husband to pay maintenance even after revival of proceedings - No explanation given for non-payment of amount – Application filed by him for directing wife to join his company nothing but an attempt to prolong case – No fault can be found with order of trial court sending husband to civil imprisonment for non-payment of maintenance – Petition dismissed – Order upheld (Paras 9 to 11) Title: Rahul Sharma vs. Rajni Devi and another, Page- 356.

‘S’

Specific Relief Act, 1963 – Sections 5 & 38- Permanent prohibitory injunction and in alternative for possession of land after fixation of boundaries – Grant of – Plaintiff praying for fixation of boundaries of estates of parties and seeking injunction and possession by demolition of structures of defendants– Defendants denying plaintiff's possession and claiming ownership of land is subject to rights of proprietors of village – Trial Court dismissing suit – District Judge upholding decree – RSA – Land though allotted in favour of 'MC' but subject to Bartandari rights of right holders- Sale of land by 'MC' in favour of plaintiff would also be subject to such rights of proprietors- Substantial part of suit land in possession of HP PWD by way of road – HP PWD not made party to suit– Plaintiff not entitled for possession or for permanent prohibitory injunction – RSA dismissed – Decrees of lower courts upheld. (Paras 13 to 17) Title: Prem Chand vs. Oma Chand and others, Page- 190.

Specific Relief Act, 1963, - Sections 5 & 39 –Possession and mandatory injunction – Grant of – Plaintiff seeking possession of land by demolition of boundary wall raised by defendant over it – Defendant claiming ownership of said land by adverse possession – Boundary wall found having been raised by defendant within one year prior to institution of suit – Held, defendant did not become its owner by adverse possession – Decree of First Appellate Court decreeing suit upheld – RSA dismissed. (Paras 11 & 15) Title: Dinesh Kumar Langa & another vs. Maharaj Mall (since deceased) through his legal heirs, Page- 107.

Specific Relief Act, 1963 - Section 10 - **Limitation Act, 1963** – Article 54 - Specific performance of agreement to sell – Limitation – Computation - Held, limitation in filing suit for specific performance of agreement to sell is three years from date mentioned in agreement for its execution unless time is extended by parties mutually - On facts, plaintiff failing to prove that time for execution was ever extended on defendant's request - Notice claimed to have been sent by defendant requesting plaintiff for extension of time for execution of sale deed not proved to have been issued by him – Receipts regarding payment of amount to defendant relied upon by plaintiff not relatable to sale consideration – Parties never extended time for execution of sale deed - Suit barred by limitation – Decrees of lower courts upheld- RSA dismissed. (Paras 9-12) Title: Girdhari Lal vs. Naru Ram (since deceased through LRs), Page- 69.

Specific Relief Act, 1963- Sections 34 & 38**- Transfer of Property Act, 1882-** Section 118- Exchange – Mode of effecting- Unregistered document- Effect- Plaintiff filing suit for declaration and injunction with respect to suit land and alleging that it was never given to defendants under exchange- Defendants claiming its ownership by way of exchange with plaintiff- Trial Court decreeing suit- First Appellate Court allowing defendants' appeal, setting aside decree and dismissing suit- RSA - Held, facts revealing parties having entered into written agreement regarding exchange of lands between them- No oral exchange ever took place between them- Suit land not mentioned in written agreement as subject matter of exchange- Mutation of exchange, however, attested on basis of report of oral exchange- Defendant also admitting of no oral exchange having ever taken place between them- Agreement purportedly conveyed interest in property valuing more than Rs.100/- - And ought to have been registered- For want of its registration, agreement cannot be read in evidence- Suit land not exchanged by plaintiff with defendants- RSA allowed- Decree of First Appellate Court set aside and of Trial Court restored. (Paras 11 & 17) Title: Brahm Dass (since deceased through LRs) vs. Kaur Chand and Ors., Page- 55.

Specific Relief Act, 1963- Sections 34 & 38- Declaration and injunction- Grant of- Plaintiff claiming himself as owner of suit land and depicting revenue entries showing public path

over it as wrong- Also assailing orders of Revenue Officers passed in 1983 ordering correction of revenue record and thereby showing existence of public passage over it as without jurisdiction since such orders having been passed during pendency of civil litigation (First litigation)- Trial Court decreeing suit- First Appellate Court allowing appeal and dismissing suit by holding existence of path over suit land and defendants having right of passage through it- RSA- Held, defendants were not parties to previous litigation (First litigation)- Nor right of passage through suit land was subject matter of dispute in it (First litigation)- Doctrine of lis pendens will not apply- In another litigation (Second litigation) Civil Court relying upon these very orders of Revenue Officers for recording findings of existence of path over suit land and its user by the defendants- Second litigation between plaintiff's predecessor in interest and defendants- Predecessor in interest of plaintiff not disputing these orders of Revenue Officers in second litigation- Decree passed in second litigation attained finality- Plaintiff estopped from challenging these orders of Revenue Officers in third round of litigation- Findings of First Appellate Court regarding existence of path and its user by defendants clearly borne out from record- Decree does not suffer from any infirmity- Decree of First Appellate Court upheld- RSA dismissed. (Paras 9 to 12) Title: Maharaj Mall (since deceased) through his legal heirs vs. Vinod Kumar and others, Page-123.

Specific Relief Act, 1963- Section 38- Suit for permanent prohibitory injunction - Plaintiff seeking permanent prohibitory injunction against defendants by claiming exclusive possession over abadi land - Trial court declining injunction - Appeal dismissed by District Judge – RSA - Land recorded in possession of Bashindgan (proprietors) of area - On strength of revenue entries exclusive possession of plaintiff over suit land cannot be inferred simply because he is proprietor of area - Physical possession of plaintiff to exclusion of other Bashindgan must be established – Oral evidence not proving his exclusive possession - Plaintiff not entitled for injunction *qua* abadi land - RSA dismissed- (Paras 11 &12) Title: Kuldeep Chand vs. Raghubir Singh and others, Page-285.

'T'

Tort – Defamation by libel- Period of limitation– Commencement- Held, defamation by libel is complete on day when defamatory matter is published- Period of limitation for filing suit for damages will commence from date of publication of defamatory matter. (Paras 17 to 22) Title: Indresh Dhiman vs. Hindustan Times and others, Page- 48.

Transfer of Property Act, 1882 – Section 58 - Usufructory mortgage – Land already in possession of mortgagee as tenant – Redemption by landlord – Effect - Whether on redemption, tenancy rights would revive? – Held, redemption of usufructory mortgage by landowner will result in extinguishment of pre-existing tenancy only if from terms of mortgage, it can be inferred that parties had intended for surrender of tenancy rights by tenant- Intention of parties relevant – Facts, must disclose that tenant had expressly or impliedly surrendered his tenancy rights in said land when mortgage was executed– On facts, mutation attesting mortgage transaction though not showing plaintiff's predecessor had expressly surrendered tenancy rights in such land in favour of landowner – But no evidence that mortgagee after mortgage, continued to pay rent to land owner or any other payment to be adjusted against interest payable on principal mortgage amount– Implied surrender of tenancy rights in favour of landowner can be inferred – Tenancy was not kept

in abeyance during pendency of mortgage- Redemption of mortgage will not revive tenancy. (Paras 9 & 10) Title: Nandu Ram & another vs. Bansi & another, Page-128.

Transfer of Property Act, 1882 – Section 123 - Gift deed – Validity – Mental capacity of donor – Plaintiff challenging gift deed executed in favour of defendants 1 & 2 by 'N' on ground of donor not having mental capacity to execute it – Plaintiff or his witness not speaking anything about lack of mental capacity of 'N' to validily execute gift deed – Document being registered one raises presumptions of truth – Held, gift deed not proved to be invalid and void – RSA dismissed – Decrees of Lower Courts upheld. (Para 11) Title: Baggu Ram (since deceased) through his legal heirs and others vs. Ganga Ram and others, Page- 101.

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Vivek Singh vs. State of Himachal Pradesh, Cr. Appeal No. 31 of 2017, decided on 22.9.2017

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

Rakesh Kumar @ Raka ……Appellant.
Versus
State of Himachal Pradesh ……Respondent.

Cr. Appeal No. 245 of 2018.
Reserved on: November 19, 2018.
Decided on: 11.01.2019.

Indian Penal Code, 1860 - Sections 376 (2) (f), 506 - **Protection of Children from Sexual Offences Act, 2012-** Section 4 – Rape and penetrative sexual assault- Accused alleged to have raped his minor daughter- Trial Court convicting accused- Appeal against- Accused assailing judgment of conviction as being based on wrong appreciation of evidence- On facts, (i) husband (accused) and wife residing separately since long, each suspecting fidelity of other (ii) minor daughter staying with father in house, where accused's parents and grandmother also residing (iii) incident happened in March, 2016 (iv) complaint under Section 156(3) for registration of FIR for said offences filed before Special Judge on 16.11.2016 (v) explanation given by wife of accused for delayed FIR in her deposition does not find any mention in complaint filed under Section 156 (3) of Cr.P.C. (vi) story of accused having confessed his guilt before complainant (wife) and sought her pardon palpably false and fabricated by her to implicate him (vii) witness 'S' claiming to have been told of incident(s) by victim, does not find mention in victim's statement recorded under Section 164 Cr.P.C. (viii) complainant (mother) not disclosing date, time and place when 'S' told her about misdeeds of accused qua victim (ix) in her complaint to Women Cell against accused (husband) filed on 17.10.2016, complainant not mentioning incident of March, 2016, which happened with victim- Held, complainant evidently liar- Case appears to have been engineered by wife against accused- Conviction set aside- Accused acquitted. (Paras 17 to 26)

Cases referred:
Gorkha Ram vs. State of H.P., Cr. Appeal No. 545 of 2017, decided on 5.12.2018
Vivek Singh vs. State of Himachal Pradesh, Cr. Appeal No. 31 of 2017, decided on 22.9.2017

For the appellant Mr. Ram Murti Bisht, Advocate.
For the respondent Mr. Vikas Rathore, Addl. AG with Mr. J.S.Guleria, Dy. AG & Mr. Kunal Thakur, Dy. AG.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J.

Appellant Rakesh Kumar alias Raka, a resident of Vill. Kandla, PO Surangani, Tehsil Salooni, Distt. Chamba, (hereinafter referred to as the accused) is a convict. He has been convicted and sentenced by learned Special Judge Chamba, Session Division at Chamba, for the commission of offence punishable under Sections 376 (2)(f) and 506 IPC and Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as "POCSO Act" in short). He has been sentenced to undergo rigorous imprisonment for a period of 12 years and to pay a fine of Rs. 25,000/- for the

commission of the offence punishable under Section 376 (2) (f) whereas 2 years and to pay Rs. 5,000/- as fine for the commission of the offence punishable under Section 506 IPC. He has also been sentenced to undergo rigorous imprisonment for a period of 2 years and to pay a fine of Rs. 25,000/- for the commission of offence punishable under Section 4 of the POCSO Act.

2. Aggrieved by the findings of conviction and the order whereby he has been sentenced, the appellant-convict has assailed the impugned judgment on the grounds inter alia that material contradictions, discrepancies and infirmities in the prosecution evidence have been ignored without assigning any reason. The weightage has been given to the evidence highly unreliable, inconsistent and contradictory. The factum of the incident reported to the police after a period over 8 months has been ignored in a cursory manner. No plausible and reasonable explanation is forthcoming to substantiate such inordinate delay as occurred in lodging the FIR. The prosecution story on the face of it leads to the only conclusion that the same has been cooked up by his wife PW-10 Reeta Devi who as per the overwhelming evidence on record is inimical to him. This aspect of the matter, however, has not been taken into consideration by learned trial Judge and has rather erred in laws while placing reliance on her testimony. The statement of PW-8 Shashikala, sister-in-law (Bhabhi) of PW-10 Reeta Devi and maternal Aunt of the alleged victim hence interested witness has also been erroneously relied upon. Their statements otherwise also reveal that at the most the evidence having come on record thereby is merely hearsay, hence not admissible in the eyes of law. The proof of the commission of the alleged sexual assault/rape by the accused upon the child victim is completely missing. Even the victim has also not stated anything in this regard and as PW-10 Reeta Devi, her mother had not consented for medical examination of the victim, therefore, there is no tangible material available on record to show that she was assaulted sexually. As a matter of fact, no case is stated to be made out against the accused who allegedly is innocent and has been falsely implicated in this case. The present is stated to be a case where the learned trial Court has failed to appreciate that the witnesses relied upon by the prosecution were not credible and rather interested to implicate the appellant-convict falsely in a criminal case. The prosecution allegedly failed to bring home the guilt to the appellant-convict beyond reasonable doubt. He, therefore, deserves acquittal in this case.

3. Now, if coming to the facts of the case, the accused and PW-10 Reeta Devi are husband and wife in relation. The child victim is born to them out of the wedlock. Besides her, a son has also been born to PW-10 Reeta Devi from the loins of the accused. The relations between them are not cordial because both are suspecting the chastity of each other. It is on account of the strained relations between them, PW-10 Reeta Devi mostly used to reside at the place of her parents. It has come in her own statement that she had been residing with her parents for the last 4-5 years prior to the incident and subsequently also i.e. during the investigation of the case and she was residing there even on the day when appeared in the witness-box. The evidence has also come on record qua a complaint the wife of the accused PW-10 Reeta Devi made against him on 17.10.2016 to Anti-Human Trafficking Unit, Chamba. The allegations in the complaint were gone into by the said Unit and on finding that the dispute, if any, falls under the provisions of the Domestic Violence Act, 2005, the complaint along with the findings of the Unit were forwarded to Child Development Project Officer, Salooni Block, Distt. Chamba for necessary action vide letter dated 25.10.2016 Ext. DW-1/A. The statements of the accused and PW-10 Reeta Devi as well as other persons recorded by the Inquiry Officer to enquire into the allegations in the complaint levelled against the accused are Ext. DW-1/B, DW-1/C, DW-1/D, DW-1/E and DW-1/F. This complaint, admittedly was lodged by PW-10 Reeta Devi before she filed application Ext. PW-10/A on 16.11.2016 under Section 156(3) Cr.P.C. for registration of a

case under the POCSO Act against the accused in the Court of learned Special Judge, Chamba. In the complaint, however, the incident finds no mention, which as per the prosecution story pertains to the month of March, 2016.

4. It is in this backdrop, the prosecution case as disclosed from the FIR Ext. PW-11/A registered in Police Station Kihar District Chamba on 20.11.2016 consequent upon the order passed by learned Special Judge on the application Ext. PW-10/A has to be discussed hereinafter.

5. The accused and PW-10 Reeta Devi, admittedly are husband and wife. The accused is a resident of village Kandla, Tehsil and District Chamba. He along with his family, including PW-10 Reeta Devi and children was residing in a joint family comprising his parents, brother and his family in the same house. As noticed supra, his wife mostly remained away from his house at Village Kandla and resided in her parents' house at village Kundi.

6. The allegations against the accused as disclosed from the complaint under Section 156(3) Cr.P.C. Ext. PW-10/A and the statement of minor PW-7 are that she used to sleep with her great grandmother. It is in March, 2016, her mother PW-10 Reeta Devi was away to the house of her parents. She had been sleeping with her great grandmother during the night. Her father, the accused came there and told her that since the great grandmother is suffering from disease and that she may also have the infection of such disease, therefore, he insisted her to sleep in his room with him. She agreed to that and went with the accused to his bed-room. After watching programmes on T.V. for some time, the accused started showing her game on his cell phone. In this process, he opened some site in which boy and girl were in naked position. She objected to it and snubbed the accused as to what he was showing to her. She had thrown the cell phone and went to sleep. It is in the mid-night when she woke up all of a sudden noticed that her trouser was removed half by the accused and he touching his mouth and tongue with her vagina. On seeing all this, she cried. The accused, however, gagged her mouth and also told that a father and daughter loves each other in this very manner. He also threatened her with dire consequences in case she disclosed anything about the incident either to her mother (PW-10) and grand mother or to anyone else. Now, when she apprized her mother about the incident, he started threatening to kill her and also too now to face the consequences.

7. According to her, she could not apprize her mother about this incident for many months. There is only distinction in the statement Ext. PW-7/A under Section 164 Cr.P.C. of the child victim and the application Ext. PW-10/A that when she woke up all of a sudden in the mid-night, she noticed the accused licking her vagina with his tongue whereas as per Ext. PW-7/A he was touching his mouth and tongue with her vagina. It is with these allegations, the FIR Ext. PW-11/A came to be registered in PS Kihar, District Chamba against the accused. The investigation has been conducted by PW-9 Insp. Ajay Kumar. The child victim though was taken to hospital and her MLC is Ext. PW-3/B, however, no opinion that she was sexually abused could come on record because PW-10 Reeta Devi had not consented for the internal medical examination of the child victim. The application Ext. PW-1/A was made to Principal, Sr. Secondary School Chamba (Ext. PX) for issuance of the date of birth certificate. The same was issued and taken into possession vide recovery memo Ext. PW-1/B. The application Ext. PW-2/A was made to the Medical Officer, CHC Kihar, District Chamba for medical examination of the accused. The MLC is Ext. PW-2/B. The application Ext. PW-5/A was made to Secretary, Gram Panchayat Biana, District Chamba who has supplied the date of birth certificate of the child victim Ext. PJ, which was taken into possession vide memo Ext. PW-5/B.

8. On completion of the investigation, report under Section 173 Cr.P.C. was filed. Learned Special Judge, on finding a prima-facie case made out against the accused had framed the charge against him for the commission of offence punishable under Section 376 and 506 IPC and Section 4 of the POCSO Act. The accused, however, pleaded not guilty and claimed trial.

9. The prosecution in order to prove its case has examined 11 witnesses in all. The material prosecution witnesses are the child victim (PW-7), her maternal Aunt PW-8 Shashikala and her mother PW-10 Reeta Devi. The remaining prosecution witnesses are formal as PW-1 Partap Chand, Drawing Teacher, Govt. Sr. Secondary School Salooni has proved the certificate Ext. PX. PW-2 Dr. Uttam Singh has medically examined the accused vide MLC Ext. PW-2/B whereas PW-3 Dr. Rupika has examined the victim vide MLC Ext. PW-3/B. PW-4 HC Surinder Kumar had videographed and photographed the spot whereas PW-5 Const. Sanjay Kumar is witness to seizure memo Ext. PW-5/B. PW-6 Hoshiar Singh is the Secretary, Gram Panchayat Biana, who issued the date of birth certificate Ext. P-5, the extract of family register Ext. P-6 and copy of birth report Ext. P-7. PW-9 Insp. Ajay Kumar and PW-11 Insp. Jagdish Chand are the Investigating Officers who have partly investigated the case.

10. The statement of the accused was also recorded under Section 313 Cr.P.C. He has admitted the prosecution case while answering question Nos. 2 to 8 that PW-10 Reeta Devi is his wife and victim his daughter. He has also admitted the date of birth of the victim as 15.11.2003. He has also admitted that his wife is working as tailoring instructor in Gram Panchayat Biyana and residing with her parents. He has also admitted that he is not having cordial relations with his wife and in the month of March, 2016 his wife had gone to her parents house along with her son as her father was ill. He also admitted that the victim stayed with her grandparents at home. The rest of the incriminating circumstances appearing against him in the prosecution evidence have been denied either being wrong or for want of knowledge. In his defence, he has examined DW-1 LHC Sunita who has proved enquiry report Ext. DW-1/A and also the statements of Maina Devi, Rakesh Kumar the accused in this case, one Deepa, Hans Raj and Reeta Devi (PW10) vide Ext. DW-1/B to Ext. DW-1/F.

11. Learned Special Judge, Chamba on completion of the record and on hearing the parties on both sides and on arriving at a conclusion that the prosecution has been able to prove its case against the accused beyond all reasonable doubt has convicted and sentenced him for the commission of offence punishable under Sections 376 (2)(f) and 506 IPC and Section 4 of the POCSO Act, as pointed out at the outset.

12. We have heard Mr. R.M. Bisht, Advocate, learned counsel representing the appellant-convict and Mr. Vikas Rathore, learned Addl. Advocate General for the respondent-State.

13. Mr. R.M. Bisht, Advocate, has strenuously contended that the complainant PW-10 Reeta Devi, the wife of accused in order to wreck vengeance against the accused and also to satisfy her ego has not spared even her minor daughter. She, in order to implicate her husband, the accused, falsely in this case made her minor daughter a scapegoat, forgetting that her character and reputation would be at stake by doing so. The minority of the victim and her weak sense to understand the consequences of the allegations has been exploited by PW-10 Reeta Devi in order to take revenge against her husband with whom her relations are strained. The enmity between the two, according to Mr. Bisht, is writ large on the face of the record. It is also pointed out that had the alleged occurrence been taken place, in the manner as claimed, the complainant would have reported the matter to the

police and not taken support of the order of the Court by filing the complaint under Section 156(3) Cr.P.C. for registration of the FIR against the accused. It is also pointed out that the minor victim residing with her parents in joint family comprising her grandparents, great grandmother, Uncle and Aunty, the accused could not have assaulted her sexually. The complainant in a clever move has levelled the allegations in such a manner so as to bring the case within the ambit of Section 376(2) (f) IPC and also under Section 4 of the POCSO Act skipping thereby the allegations of penetrative sexual assault against the child victim and to the contrary succeeded in her illegal designs to implicate the accused in the commission of a heinous offence and also to put him behind bars with the help of the evidence which even to her own knowledge was false and fabricated. The threatening to put the accused behind bar she had given as per the evidence available on record also stood falsified. Mr. R.M. Bisht, as such, has urged that the present is a false and concocted case, engineered by PW-10 Reeta Devi, the complainant in connivance with the police against the accused who is stated to be innocent.

14. On the other hand, learned Addl. Advocate General, while taking us to the evidence s has come on record by way of testimony of the child victim, her mother PW-10 Reeta Devi and maternal Aunt PW-8 Shashikala, has urged that the findings of conviction recorded against the accused calls for no interference. Also that, the sentence including the sentence of fine imposed upon him commensurate with the gravity and seriousness of the offence he committed. The impugned judgment, which according to Mr. Vikas Rathore, is well reasoned calls for no interference by this Court in the present appeal.

15. In a case of this nature, it is the age aspect of the victim which assumes considerable significance. However, the present is a case where the accused has not disputed the date of birth of the child victim (PW-7), which as per the date of birth certificate Ext.P-J is 15.11.2003, issued by the Secretary, Gram Panchayat, Biyana, Development Block Salloni, District Chamba, H.P. The abstract of birth register is Ext. P-7, which reveals that information qua her birth to the Gram Panchayat was given by Hans Raj, her grand-father. It is thereafter, the entries were made in the birth register qua her date of birth as 15.11.2003 on 31.12.2003. Both the documents have been proved from the statements of PW-6 Hoshiar Singh, Secretary, Gram Panchayat, Biyana. He has not been cross-examined. Similar is her date of birth which finds mention in Ext. P-X, the school leaving certificate proved by PW-1 Pratap Chand, Drawing Teacher. Since, there is no cross-examination conducted in this regard on behalf of the accused, therefore, the present is a case where the accused has also admitted the date of birth of the child victim as 15.11.2003. Therefore, on the day of alleged occurrence i.e. March, 2016, she was below 13 years of age.

16. On analyzing the rival submissions and also the evidence available on record, it is seen that PW-10 Reeta Devi, the mother of the child victim has set the machinery into motion, to prosecute the accused, her own husband. The complaint under Section 156(3) Ext. PW-10/A she filed in the Court of learned Special Judge, Chamba is based upon the information given to her by the child victim, hence hearsay. It is significant to note that the so called incident pertains to the month of March, 2016. The complaint Ext. PW-10/A has, however, been filed in the Court on 16.11.2016 i.e. after a period over 8 months. Although, PW-10 Reeta Devi while in the witness-box has given an impression that when the child victim apprized her about the incident, she scolded the accused who according to her confessed his guilt and sought pardon at the pretext that it might have happened under the influence of liquor. Therefore, action, according to her was dropped against him at that stage in view of he allegedly had undertaken not to repeat any such act in future. However, when he again kissed the child victim after 2-3 months in an obscene

manner, she was not left with any alternative except for launching criminal proceedings against him. Nothing of the sort has, however, come in the complaint Ext. PW-10/A on the basis whereof the FIR Ext. PW-11/A came to be registered. Even if such version of PW-10 Reeta Devi is believed to be true, she must have come to know about the incident of March, 2016 somewhere in July/August because the complaint Ext. PW-10/A was lodged by her in the month of November, 2016 after the alleged incident of obscene kissing of the victim by the accused after 2-3 months of his seeking pardon with respect to the alleged incident of March, 2016. But when nothing of the sort had come in the complaint Ext. PW-10/A, the story that the accused sought pardon with respect to the incident of March, 2016 and undertaken not to involve in such obscene act in future cannot be believed to be true by any stretch of imagination and rather appears to be engineered and fabricated to implicate him in this case falsely. Interestingly enough, while in the witness-box as PW-10 Reeta Devi, the mother of the child victim, has stated that it is her (Bhabhi) Shashi Kala (PW-8) who told her that her husband is not a good person and that his daughter the child victim wants to tell something to her (PW-10). It is on this, she enquired from the child victim when she disclosed to her the manner in which the alleged incident of March, 2016 had taken place. It is, therefore, Shashi Kala (PW-8), who for the first time had disclosed to PW-10 Reeta Devi about something happened with the child victim. Nothing of the sort, however, finds mention in this regard also in the complaint Ext. PW-10/A. It is also not known as to when PW-8 Shashi Kala had asked PW-10 to make enquiry from the child victim qua her husband the accused was not a good person. As per the version of PW-8 Shashi Kala, the child victim came to her house at Village Kundi in the month of June, 2016 and told that her father, the accused was impressing and kissing her since long. Also that, he had been touching her private parts. According to PW-8 the incident of March, 2016 was also disclosed by the child victim to her. Nothing to this effect, however, has come either in the complaint Ext. PW-10/A or the statement of the child victim Ext. PW-7/A recorded under Section 164 Cr.P.C.

17. Since the complaint Ext. PW-10/A has been filed on 16.11.2016 whereas the statement of the child victim Ext. PW-7/A is recorded on 21.11.2016, therefore, had there been any meeting of the child victim with PW-8 Shashi Kala and any such disclosure made by the former to the latter, it would also have been mentioned in Ext. PW-10/A and Ext. PW-7/A. The prosecution story to this effect, therefore, has again been engineered and fabricated. The alleged disclosure made by the child victim that she was threatened by her father not to disclose the incident to anyone and if she did so, he would kill her, is again germane of the mind of the complainant PW-10 Reeta Devi in connivance with PW-8 Shashi Kala and the police. PW-8 Shashi Kala has not stated as to on what date, time and place she apprized PW-10 Reeta Devi that her husband was not a good person and that she should enquire from her daughter the minor victim who wanted to disclose something to her. Similarly, PW-10 Reeta Devi has also not disclosed the date, time and place of the disclosure so made to her by PW-8 Shashi Kala. Not only this, but in the complaint Ext. PW-10/A, nothing to this effect has been mentioned which being an important circumstance in normal course should have been mentioned therein had it so happened. Anyhow, in view of the discussion hereinabove it appears to us that neither the child victim disclosed anything to PW-8 Shashi Kala nor the latter disclosed anything to PW-10 Reeta Devi and the story to this effect has been engineered and fabricated just to implicate the accused in this case falsely. Interestingly enough, in view of the alleged threatening given by the accused to her would have not chosen to take risk of making such disclosure to her maternal Aunt and rather to her mother PW-10 Reeta Devi as it would have been safe to her to disclose the incident if having taken place to her as compared to her maternal Aunt. As a matter of fact, nothing of the sort had happened and the duo i.e. PW-10 Reeta Devi and PW-8 Shashi Kala in connivance with each other implicated the accused in this case falsely because as per the

admitted case of the parties, the relations between the accused and his wife PW-10 Reeta Devi were not cordial. As a matter of fact, PW-10 Reeta Devi abandoned the company of the accused and was residing in the house of her parents since long. There is contradiction in the complaint Ext. PW-10/A and the statement of the child victim recorded under Section 164 Cr.P.C. qua the manner in which the incident of March, 2016 having taken place. It is worth mentioning that the child victim when all of a sudden woke up in mid-night, found the accused licking her private parts (vagina) whereas as per her version in Ext. PW-7/A, he had been touching his mouth and tongue therewith. There is lot of difference in licking and mere touching. Therefore, such contradiction that too qua material aspect of the prosecution case also goes deep to the root of the prosecution case and render the same highly improbable.

18. As a matter of fact, it is evident from the record that PW-10 Reeta Devi had been suspecting illicit relations of accused with another lady. It has come on record during the course of enquiry conducted by Women Cell, Chamba on the complaint that the allegations of mal treatment and torturing made by PW-10 Reeta Devi against her husband, the accused on 17.10.2016 (though no complaint is on record) was due to his illicit relations with another lady who was mother of four children. A reference in this behalf can also be made to the letter Ex.DW1/A. The enquiry Officer during the course of enquiry conducted had recorded the statement(s) of PW-10 Ext. DW-10/F, her mother Ext. DW-1/B and that of the accused Ext. DW-1/C as well as the so called lady with whom the accused had illicit relations Ext. PW-1/D. The statement of Sh. Hans Raj, the father of the accused was also recorded. The complainant PW-10 Reeta Devi has admitted the complaint having been made by her against her husband. She had also admitted that in the complaint, the allegations qua the incident of March, 2016 having taken place with her daughter were not mentioned. She, however, failed to give any reasonable and plausible explanation as to why the same omitted to be mentioned in the complaint while in the witness-box. In her cross-examination, it is admitted that she had made the complaint dated 17.10.2016 to Women Cell, Chamba. On the complaint so made by her, the accused and other persons of his family were called by the Women Cell. She has also admitted her statement and also that of the accused and other persons recorded during the course of enquiry conducted by the Women Cell. Since the allegations are that the accused had extra-marital affairs with another lady and that he had not been maintaining her, therefore, the matter was referred to Child Development Project Officer, Chamba being the case under the Domestic Violence Act. Though, during the course of enquiry conducted in that complaint, she had narrated the alleged incident of March, 2016 having taken place with her daughter, however, the Women Cell did not conduct any enquiry in this regard. It cannot be believed by any stretch of imagination that the police had not conducted any enquiry irrespective of alleged incident was disclosed by PW-10 Reeta Devi during the course of enquiry conducted in the complaint she had filed. PW-10 Reeta Devi, therefore, is a liar. Though, as per her version, she had disclosed to the police that the accused when scolded as to why he did wrong act with the child victim, he sought pardon and undertook not to do any such unlawful act in future, however, nothing to this effect had come in her statement recorded under Section 161 Cr.P.C. She was confronted therewith while in the witness-box. On the other hand, it has been admitted by her that she did not disclose the incident either with the Ward Member or respectable persons of Village Kandla. She had admitted that earlier also, she stayed in the house of her parents for 4-5 years. It has also been admitted that after compromise, she had returned to the matrimonial home at one point of time.

19. The child victim has also admitted while in the witness-box that the relations of her father and mother were not cordial. Except for three witnesses i.e. the child victim (PW-7), her mother PW-10 Reeta Devi and maternal Aunt PW-8 Shashi Kala who being

closely related otherwise also are interested witness. The prosecution has not made any effort to seek assistance from some independent source so as to satisfy this court that the occurrence had actually taken place in the manner as claimed by the child victim and her mother. In view of the inimical relations between the accused and his wife, the complainant and the threatening she had given to implicate him in a false case as he stated in his statement Ext. DW-1/F recorded during the course of enquiry conducted by the Women Cell, Chamba, it is handy work of PW-10 Reeta Devi and her Bhabhi PW-8 Shashi Kala to implicate the accused in this case falsely. The child victim has been made the scapegoat by PW10 to fulfill her illegal design because she was living under her care and custody in the house of her parents at Village Kundi. The child even being approximately 13 years of age was not in a position to have understood the consequences of the allegations she levelled against her father, the accused. It would not be improper to observe here that had anything of the sort been taken place during that night in March, 2016, or prior and after to that and the accused having exposed his daughter the child victim by opening her trouser, licking/touching her private part (vagina) from his mouth or tongue would have attempted to commit penetrative sexual assault also and not satisfied only by licking or touching her vagina. As a matter of fact, no such incident has taken place and it is for this reason, the complainant PW-10 Reeta Devi being apprehensive of the findings to the contrary may have come on record during the internal medical examination of the child victim and it is for this reason she did not opt for the same.

20. Otherwise also, even if the child victim was living with her father and other members of the family in the absence of her mother, the complainant who was away to the house of her parents, the accused in the presence of his parents, grandparents and Uncle/Aunt who also used to sleep in the rooms adjoining to his bed room could have not indulged in any such unlawful activity in their presence in the house. Since, the prosecution story that she was threatened with dire consequences in case she disclosed this incident to anyone is palpably false and as the incident had never taken place, the story to this effect has also been engineered and fabricated.

21. In view of the discussion hereinabove, we find the present a case where the mother in order to take revenge with her husband, has not even spared her own daughter without caring for the adverse consequences thereof in the career of her daughter. It is being said that why a mother or a daughter would level false allegations that too against her husband/father and thereby tarnish the reputation and character not only of the victim but also the family, however, it is not the rule and sometime under exceptional circumstances mother or daughter also level such allegations against the husband/father. It is due to variety of reasons, such as the background, temperament and soscio economic condition and the strata of the society to which the mother or daughter belongs. In the case in hand, when PW-10 Reeta Devi considers the accused as her biggest enemy, therefore, in order to satisfy her ego and also to take revenge, the possibility of his false implication at her end cannot be ruled out. It is an exceptional case where to our mind the mother i.e. PW-10 Reeta Devi had chosen her own daughter the child victim to get her ego satisfied by implicating the accused in this case falsely. This Court in a judgment rendered recently in ***Gorkha Ram vs. State of H.P., Cr. Appeal No. 545 of 2017,*** on 5.12.2018, a case involving more or less identical facts, has already expressed its concern about the implication of the near relations such as father with the allegation of molestation of minor daughters and observed as follows:

> "22. The close scrutiny of the evidence in the manner as aforesaid, amply demonstrate that the prosecution has falsely implicated the accused in this case and thereby not only tarnished the reputation of the accused,

who happens to be the father of the victim, but also put a question mark on the pious relations between father and a daughter. On the other hand, the prosecution story in the opinion of this Court has been engineered and fabricated to implicate the accused in this case falsely.

23. In a case having more or less identical facts, the Apex Court in ***Sham Singh vs. The State of Haryana, Cr. Appeal No. 544 of 2018,*** decided on 21.8.2018, has held that the accused cannot subject the prosecutrix to sexual intercourse in his own house that too in the presence of his wife, children, mother and sister. Therefore, the Apex Court while setting aside the findings of conviction recorded against the accused has acquitted him of the charge under Section 376 (2) (g), 342 and 506 IPC, while arriving at a conclusion that the case was engineered and fabricated on account of enmity of the parents of the prosecutrix with that of the family of the accused, none else but her cousin. In that case also, the two families used to quarrel and like the case in hand even Panchayat was also called. In the case in hand also, the possibility of the accused having been booked falsely cannot be ruled out.

24. In a **Division Bench judgment** authored by one of us (Justice Dharam Chand Chaudhary, J.) on 22.9.2017 in **Cr. Appeal No. 31 of 2017**, titled **Vivek Singh vs. State of Himachal Pradesh** again having more or less similar allegations against the father that he has assaulted sexually his own daughter aged 2 years, has held as under:

> "35. Before parting, we would be failing in our duty if not point out that overall conduct of the Investigating Agency which has implicated the accused in a false case on the basis of highly interested evidence i.e. the only statement of complainant who was not only inimical to the accused but also to other members of his family. Her mother PW-2 Chino Devi, though helped her daughter, the complainant in getting the accused booked falsely, however, unsuccessfully. Anyhow, we leave it open to high ups in police department to take steps as warranted to sensitize the officers/I.Os so that any such instance does not reoccur.
>
> 36. Learned trial Judge has also failed to appreciate the evidence in its right perspective and swayed only by the severity of the allegations and the alleged incident of rape with a minor below to years of age by none else but allegedly her father. Since the allegations levelled against the accused were highly sensitive having repercussions in the society as a whole, an onerous duty was cast upon learned trial Judge to have examined the given facts and circumstances of the case and also evidence available on record with all circumspection and more care and caution. Due to such an approach in the matter, pious relations between a father and daughter got tarnished. We hope and trust that in a case of this nature, the Investigators, Prosecutors and Adjudicators shall discharge their respective duties in the light of the principles we settled in this judgment and also in accordance with law. With the above observations, the appeal is finally disposed of."

22. This Court in ***State of Himachal Pradesh vs. Gorkha alias Vijay Kumar,*** has also held as follows:

> "16. In our considered view, trauma and threats are to be gathered from the facts of the case and prosecution has not been able to demonstrate as to what was the trauma that the proseuctrix was suffering in her house, which prevented her from disclosing all these facts to her mother because it is not the case of the prosecution that the prosecutrix was not putting up her with her parents either in the either in the month of July, 2013 or October, 2013. The case of the accused teasing the prosecutrix is also falsified from the fact that the alleged incident of teasing is not so recorded in Ex. PW1/A and Ex. PW1/C. This demonstrates that the prosecutrix has made improvements in her statement. Cross-examination of the prosecutrix further demonstrates that there are lot of contradictions in her statement recorded under Section 164 Cr.P.C. and her statement recorded as PW-1. Besides this, there are major contradictions in the statements of the mother and father of the prosecutrix also. PW-2 mother of the prosecutrix has stated that K.K. and Kukki Pradhan had not come to their house on the evening of 15.06.2013, whereas PW-3 father of the prosecutrix has deposed that they had come to their house on the evening of 15.06.2013. PW-2 has admitted the suggestion that police officials from Bathri Police Post had come to their house on 15.06.2013, whereas PW-3 has stated that no police had come to their house on 15.06.2013. However, PW-3 in the same breath thereafter stated that one accused Gorakh was let off after sometime after certain inquiries were made and police was called. These are also major contradictions in the testimonies of material prosecution witnesses which contradictions have not been satisfactorily explained by the State."

23. If it is not shocking, it is painful to point out that learned Special Judge, though has referred to this judgment in para 57 of the impugned judgment, however, brushed aside simply with the observation that the accused cannot derive any advantage thereof without recording any reason. Such an approach on the part of learned Special Judge, is not only casual but tantamount to ignore the law laid down by this Court without assigning any reason.

24. The evidence as has come on record by way of testimony of the remaining witnesses i.e. PW-2 Dr. Uttam Singh would have relevant, had the victim been subjected to penetrative sexual assault by the accused. It is not the prosecution case that he had satisfied his sexual lust by undressing his own daughter. He rather has allegedly touched her vagina and tongue which had nothing to do with the commission of sexual intercourse with her, of course, an offence within the meaning of **Section 375(d) IPC and punishable under Section 376 IPC**. The medical examination of the accused in the case in hand as such is a futile exercise. Similarly, PW-3 Dr. Rupika would have been a material witness had the child victim undergone the internal medical examination. However, in the case in hand, her mother the complainant had not given her consent for the same and as such her testimony is also not relevant in this case. PW-4 HC Surinder Kumar and PW-5 Constable Sanjay Kumar are police officials who remained associated in one way or the other during the course of the investigation of the case. They would have also been relevant and their evidence used as link evidence had the prosecution been otherwise able to prove its case against the accused beyond all reasonable doubt. Similarly, the investigating officers PW-9 Inspector Ajay Kumar and PW-11 Inspector Jagdish Chand are again not so relevant in the case in hand as they have deposed qua the manner in which they conducted the

investigation in this case. On the other hand, the defence of the accused that he has been implicated falsely in this case due to enmity finds support from the documentary evidence i.e. Ext. DW-1/B to Ext.DW-1/F proved by DW-1 LHC Sunita, he examined in his defence.

25. For all the reasons hereinabove, we find the present a case where the prosecution has miserably failed to prove the case against the accused beyond all reasonable doubt. Learned trial Judge has convicted and sentenced him for the commission of offence punishable under Sections 376(2) (f) and 506 IPC and Section 4 of the POCSO Act on surmises and conjectures by not appreciating the evidence in its right perspective. Undue weightage has been given to the testimony of the prosecution witnesses who being closely related and inimical to the accused were interested to implicate him in a false case. The impugned judgment, as such, is not legally and factually sustainable and the same deserves to be quashed and set aside and the accused acquitted of the charge.

26. In view of the above, this appeal succeeds and the same is accordingly allowed. Consequently, the accused is acquitted of the charge framed against him under Sections 376(2) (f) and 506 IPC and Section 4 of the POCSO Act. Since upon the impugned judgment, he presently is serving out the sentence, therefore, if not required in any other case, be set free forthwith. Release warrant be prepared accordingly. The appeal is finally disposed of.

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

RFAs No. 173 to 177 of 2014
Decided on: 27.02.2019

1. RFA No. 173 of 2014

Ramesh and others …Appellants
Versus
The Land Acquisition Collector and others …Respondents

2. RFA No. 174 of 2014

Smt.Shyama Devi and others …Appellants
Versus
The Land Acquisition Collector and others …Respondents

3. RFA No. 175 of 2014

Kesar Singh and others …Appellants
Versus
The Land Acquisition Collector and others …Respondents

4. RFA No. 176 of 2014

Surender Singh and others …Appellants
Versus

The Land Acquisition Collector ...Respondents
and others

5. RFA No. 177 of 2014

Rajender and others ...Appellants
Versus
The Land Acquisition Collector ...Respondents
and others

Land Acquisition Act, 1894 – Sections 18 & 23- Acquisition of land for public purpose- Reference- Trees – Compensation- Landowners claiming compensation qua trees standing over acquired land- List of trees prepared in 1986- Land acquired in 2006- No evidence that trees mentioned in list prepared in 1986 were standing over land in 2006 also- Discrepancy in list prepared in 1986- Cuttings and interpolations in list- Held, landowners failing to prove existence of trees over acquired land- Landowners not entitled for any compensation qua trees. (Para 13)

Land Acquisition Act, 1894 – Sections 18 & 23- Acquisition of land for public purpose- Reference- Market value- Assessment- Post-notification sale transactions- Evidentiary value- Held, in absence of exemplar sale transactions one year prior to notification, subsequent exemplar sale transactions can be taken into consideration with suitable deductions- On facts, 10% deduction given on post-notification sale transactions. (Para 18)

Land Acquisition Act, 1894 (Act) – Sections 4 & 48 - Possession prior to notification- Effect- State possessing acquired land much before issuance of notification under Section 4 of Act- On facts, landowners granted damages by way of additional interest @ 15% per annum on value of land since taking of possession till issuance of notification. (Para 20)

Cases referred:

Balwan Singh and Others vs. Land Acquisition Collector and Another, (2016) 13 SCC 412
Chandrashekar (dead) by LRs and Others vs. Land Acquisition Officer and Another, (2012) 1 SCC 390 (Para 37)
R.L. Jain vs. DDA, (2004) 4 SCC 79
Tahera Khotoon and Others vs. Revenue Divisional Officer/Land Acquisition Officer and Others, (2014) 13 SCC 613

For the appellants: Mr. Rupinder Singh, Advocate.
For the respondents: Mr. Shiv Pal Manhans, Additional Advocate General, with R.P.Singh and Mr. Raju Ram Rahi, Deputy Advocate Generals.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge. *(oral)*

These appeals, arise out of the common award dated 2nd December, 2013 passed by learned Additional District Judge, Sirmaur, District at Nahan, H.P., in LAC Petition No.17-N/4 of 2008 titled as Ramesh & others Versus Land Acquisition Collector & others, LAC Petition No.18-N/4 of 2008 titled as Smt. Shyama Devi & others Versus Land Acquisition Collector & others, LAC Petition No.19-N/4 of 2008 titled as Kesar Singh & others Versus Land Acquisition Collector & others, LAC Petition No.20-N/4 of 2008 titled

as Lajender Singh & others Versus Land Acquisition Collector & others and LAC Petition No.21-N/4 of 2008 titled as Rajender & others Versus Land Acquisition Collector & others, are being decided by this common judgment, as common questions of Law and facts, based on common evidence, are involved therein.

2. The respondent/State has acquired the land situated in village Dadhog, Tehsil Nahan, District Sirmaur, H.P., by invoking the provisions of Land Acquisition Act (hereinafter referred to as the 'Act'), after issuing notification dated 23rd February, 2006, under Section 4 of the Act, for the public purpose i.e. Jamta-Rajban Road. After completing the process under the Act, award No.8 of 2008 dated 20th June, 2008 was announced under Section 11 of the Act, wherein the Land Acquisition Collector had awarded compensation after determining the value of acquired land on the basis of its classification by determining the rate of various kinds of land ranging from ₹ 3,894/- per bigha to ₹1,28, 502/- per bigha, on the basis of one year average value of land situated in adjoining village Dhagida, for the reason that no sale transaction had taken place in village Dadhog, one year prior to the date of publication of notification under Section 4 (1) of the Act.

3. Feeling aggrieved and dis-satisfied with the compensation awarded by the Land Acquisition Collector, land owners/appellants had preferred Reference Petitions under Section 18 of the Act, which have been decided vide impugned award dated 2nd December, 2013 passed by the Reference Court, whereby the Reference Court has awarded compensation at uniform rate of ₹1,29,000/- per bigha, irrespective of category of classification of the acquired land along with statutory benefits admissible thereon, as per provisions of the Act. Award passed by the Reference Court has been assailed by land owners in present appeals.

4. Before the Reference Court, land owners have examined five witnesses i.e. PW-1 Yashveer Singh (Patwari), PW-2 Heera Singh (Patwari), PW-3 Amar Singh (Vendee in sale deed Ext.PW3/A), PW-4 Ramesh Kumar (land owner) and PW-5 Kamlesh Kumar (Range Officer of the Forest Department), whereas the respondent/State has examined only one witness Jagat Singh (J.E.) as RW-1.

5. The land owners have relied upon the sale deed Ext.PW3/A dated 23rd June, 2006, pertaining to village Dadhog itself, wherein the land measuring 3 biswa has been sold for ₹60,000/- and also sale deed Ext.PX dated 28th October, 2006, pertaining to village Jamta, Tehsil Nahan, District Sirmaur, H.P., wherein 10 biswa of land has been sold for ₹1,50,000/-.

6. Learned counsel for the land owners has also prayed for additional compensation in terms of judgments passed in ***R.L. Jain Versus DDA (2004) 4 SCC 79, Tahera Khotoon and Others Versus Revenue Divisional Officer/Land Acquisition Officer and Others (2014) 13, SCC 613, Balwan Singh and Others Versus Land Acquisition Collector and Another (2016) 13 SCC 412***, for utilizing the land in question, for construction of road since April, 1986.

7. Relying upon the judgment passed in ***Chandrashekar (dead) by LRs and Others Versus Land Acquisition Officer and Another (2012) 1 SCC 390 (Para 37)***, learned counsel for land owners has submitted that when no sale deed prior to date of notification is available, the sale deeds of the period subsequent to the issuance of notification can be taken into consideration after making suitable deduction.

8. The land owners have also relied upon the list of trees Ext.PW2/A and valuation thereof Ext.PW5/A, wherein value of trees standing on their acquired land were

carried out by the forest officials including PW5, but no compensation has been awarded either by the Land Acquisition Collector or by the Reference Court by the impugned award.

9. Learned Additional Advocate General submits that Land Acquisition Collector has rightly relied upon the average value of village Dhagida, for determination of value of the land and accordingly, on the basis of said average value, compensation determined by the Reference Court at the rate of 1,29,000/- per bigha, for all kinds of land does not warrant interference, as the sale deeds being relied upon by the land owners/appellants are the transactions subsequent to issuance of notification under Section 4 of the Act. Further there is no cogent and reliable evidence on record so as to corroborate the claim of land owners with respect to existence of trees on the acquired land, particularly keeping in view the admission of PW-5 in cross-examination, wherein he has categorically stated that evaluation by him was carried on 25th February, 2012 and he was not able to produce any document establishing the existence of trees on the acquired land. He has also submitted that there is no evidence on record regarding taking of possession of the land for construction of road in April, 1986.

10. PW-2 Heera Singh, in his examination-in-chief has stated that in the file of award No.8 of 2008, list of trees is appended, wherein it is recorded that details of trees shall be prepared during the proceedings under Sections 6 & 7 of the Act. He has further stated that in original file, at the time of proceedings under Sections 6 & 7 of the Act, list of trees was not prepared. However, in the old lapsed file, list of trees is there, copy whereof Ext.PW2/A is true and correct according to the original. He has further submitted that compensation for trees has not been paid to the land owners. In his cross-examination, he has admitted that Ext.PW2/A had not been prepared in his presence and he had no knowledge about some of trees and he had not visited the spot.

11. PW-5 Kamlesh Kumar, has produced the valuation of trees Ext.PW5/A. But in his cross-examination, he has failed to substantiate the existence of trees on the spot at time of acquisition of land by stating that he was not in position to produce any document with respect to that and further he did not know as to whether at the time of acquisition, trees were standing on the land or not.

12. Learned counsel for the land owners/appellants has submitted that the date appended below the signatures of Patwari and Kanungo, who had prepared the list of trees Ext.PW2/A, it is evident that the said list was prepared on 29th January, 1982 and names of owners and corresponding khasra numbers, mentioned in this list, are the same which have been acquired by the respondents/State for construction of the road and valuation thereof is in Ext.PW5/A.

13. As discussed above, PW2 had not visited the spot at the time of preparation of the list and this list of trees is not there in the proceedings of the award No.8 of 2008 and according to PW2, the same is lying in the old lapsed file. As pointed out by learned counsel for the land owners, list Ext.PW2/A was prepared in the year 1982, whereas the acquisition proceedings, by which compensation has been awarded, were initiated in the year 2006 and completed in the year 2008. There is nothing on record to substantiate the existence of trees on the spot at the time of initiation of acquisition proceedings in the year 2006. The evaluation Ext.PW5/A, as per PW5, was carried out on 25th February, 2012. In the list Ext.PW2/A, there are five khasra numbers, whereas in the evaluation report Ext.PW5/A, there are only four khasra numbers. In list Ext.PW2/A, against khasra No.210/111, earlier 37 trees were shown which were after cutting were shown as 7 trees of three classes, whereas in Ext.PW5/A, against this khasra number, seven number of trees of two classes only i.e. third and fourth class, have been reflected. Khasra No.211/111 is missing in

Ext.PW5/A. In list Ext.PW2/A, against khasra No.205/179, firstly 26 trees were shown, which were, after cutting, shown as two in number. Against khasra No.115 in Ext.PW2/A, 12 trees of three classes have been reflected, whereas in Ext.PW5/A, 12 trees of two classes only have been reflected. Similarly, against khasra No.208/181, 5 trees of three classes have been shown in Ext.PW2/A, whereas in Ext.PW5/A, 5 trees of two classes only have been evaluated. The valuation has been done in the year 2012. There are discrepancies in number of trees and classes of trees mentioned in Ext.PW2/A and Ext.PW5/A. Moreover, in the list Ext.PW2/A, which was prepared in 1982, there is nothing on record to substantiate that the same trees were also standing on the said land in the year 2006. Learned counsel for the land owners has submitted that those lists were prepared in the year 1982, but at the time of construction of the road, those trees were felled and removed from the spot. Interestingly, PW5 has stated that he has evaluated the trees standing on the spot in the year 2012. According to land owners, the land was constructed in the year 1986 and acquired in the year 2006. When the trees were felled in the year 1986, then it is beyond imagination to believe that evaluation of those trees on the spot was conducted by PW5 along with other officials in the year 2012. Therefore, the evidence with respect to the claim for these trees standing on the acquired land is not substantiated by cogent and reliable evidence. Therefore, in my opinion the claim of the land owners for damages on account of trees standing on the acquired land is not tenable and thus rejected.

14. It is admitted fact that there is no exemplar transaction available, pertaining to one year period prior to issuance of notification under Section 4 of the Act, in the present case. Land Acquisition Collector has relied upon one year average value of adjoining village Dhagida for determining the compensation, which has been further relied upon by the Reference Court for determining the uniform rate. There is not even an iota of evidence on record indicating similarity of nature and potentiality of land situated in village Dadhog and village Dhagida. On the contrary, RW-1 Jagat Singh (J.E.), in his cross-examination has admitted the suggestion that village Dhagida is situated in a gorge, at a distance of 4 kilometer from Jamta-Rajban Road. Though, he has also stated that the said village is situated in the same circle, however the fact remains that as per his admission, village Dhagida is not situated in the alignment of Jamta-Rajban Road, for which land of village Dadhog has been acquired. For evidence on record land of village Dhagida is not comparable with land in village Dadhog.

15. The sale deeds Ext.PW3/A and Ext.PX, relied upon by the land owners, are of dates 23rd June, 2006 and 28th October, 2006, respectively. In these sale deeds, value of land becomes to be ₹4,00,000/- and ₹3,00,000/- per bigha. In sale deed Ext.PW3/A, only 3 biawa of land is involved, whereas in sale deed Ext.PX, 10 biswa of land is involved. In sale deed Ext.PW3/A, for smaller chunk of land, value of land is higher i.e. ₹4,00,000/- per bigha, whereas in sale deed Ext.PX, for bigger chunk of land, value of land is ₹3,00,000/- per bigha.

16. Sale deed Ext.PW3/A pertains to village Dadhog, whereas sale deed Ext.PX is of village Jamta. In these facts, even if it is considered that sale deed Ext.PW3/A might have been executed for proving higher value of land as land transferred in this transaction is very small i.e. 3 biswa and it is post-notification under Section 4 of the Act, then also another sale deed of another considerable big chunk of different village Jamta is available.

17. PW-4 Ramesh Kumar, in his examination-in-chief has categorically stated that the acquired land is equivalent in production and utility to the land of village Jamta and Jetak. The said fact has not been disputed either in cross-examination by the respondents/State or by leading any evidence contrary to that.

18. Considering the pronouncement of the Apex Court in *Chandrashekar's case (supra),* in absence of unavailability of the exemplar transactions within one year prior to publication of notification under Section 4 of the Act, exemplar transactions available for period subsequent to Section 4 of the Act, can be taken into consideration, but subject to suitable deduction therein. In the aforesaid case, the Apex Court has approved 10% deduction for sale deeds pertaining to one year period after the notification under Section 4 of the Act. The sale deed Ext.PX, in present case, is within one year from the date of notification, wherein land has been transferred for value of ₹3,00,000/- per bigha.

19. The land owners have also prayed for damages from the date of taking of possession of the land since April, 1986, for construction of road.

20. PW-4 Ramesh Kumar, in his examination-in-chief, vide affidavit Ext.PW4/A, has categorically stated that for construction of the road, respondents/State had taken possession of the land in April, 1986. In first line of cross-examination, he has again reiterated the same fact. The said fact has not been disputed by the respondents/State, rather it has been suggested to this witness that in the year 1986, Pine View Resort and Green View Resort were not existing on the spot, which implies that taking of possession in the year 1986 has not been disputed, rather it has been admitted by the State. It appears from the trend of cross-examination that acquisition process was initiated in 1986 also, as there is a suggestion to this witness, which has been admitted by this witness that in the year 1986, value of land for acquisition was determined on the basis of valuation report of the Patwari. Therefore, it stands established on record that the acquired land was taken into possession by the respondents/State for construction of road in April, 1986, whereas the acquisition process has been completed on 20th June, 2008 in pursuance to the notification dated 23rd February, 2006 issued under Section 4 of the Act. Therefore, in terms of the judgments passed by the Apex Court in *R.L. Jain, Tahera Khotoon and Balwan Singh's cases* (supra), land owners are entitled for damages as addition interest at the rate of 15% per annum on the value of land from the date of possession till notification issued by respondent/State under Section 4 of the Act i.e. from 1.4.1986 to 23.2.2006.

21. Keeping in view the entire facts and circumstances, it would be appropriate to make deduction of 10% in the value of land, arrived at on the basis of sale deed Ext.PX, to determine the value of compensation payable to the land owners after deduction of 10% therein, value of land is determined at the rate of ₹2,70,000/- per bigha. Accordingly, the land owners/appellants are held entitled for compensation at the rate of ₹2,70,000/- per bigha along with all statutory benefits available to them in accordance with law and in addition thereto, the land owners shall also be entitled for damages of additional interest at the rate of 15% per annum on value of land for the period between the date of dispossession and date of notification under Section 4 (1) of the Act, i.e. from 1st April, 1986 to 26th February,2006 in terms of pronouncement of the Apex Court referred supra.

22. 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 on or before 31st July, 2019.

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

Suresh Kumar …Petitioner

Versus

Union of India and others ...Respondents

CMP No. 2210 of 2016 in
CWP No.5253 of 2010
Order reserved on 10th August, 2018
Date of Decision 05th March, 2019

Constitution of India 1950 – Article 226 – Writ- Amendment of pleadings – Delay and laches- Effect- Held, delay and laches in seeking amendment of writ petition ipso facto not a ground to denial amendment, if otherwise, necessary- Petitioner challenging order dated 30.4.2010 granting seniority to private respondent over and above him- Seeking amendment to incorporate challenge to another order dated 26.5.1999- Order dated 26.5.1999 finds mention in subsequent order dated 30.4.2010 which petitioner is already challenging in writ- Petitioner not changing nature of dispute- Amendment necessary for just decision of writ- For fault of Advocate party should not suffer- Application allowed. (Paras 2, 7, 10 & 13)

Case referred:
Chakreshwari Construction Private Ltd. vs. Manohar Lal, (2017)5 SCC 212

For the Petitioner: Mr. Neel Kamal Sharma, Advocate.
For the Respondents: Mr. Balram Sharma, Central Government Standing Counsel, for respondents No. 1 to 5 and Mr.Prashant Sharma Advocate vice Mr. Rajiv Jiwan, Advocate for respondent No.6.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

This application has been filed by petitioner seeking certain amendments in the writ petition with the addition of prayer, whereby challenge to order dated 26.5.1999 (Annexure P-12A) passed by respondent No. 3 is proposed to be incorporated in the writ petition on the ground that the said order was passed behind the back of petitioner without notice and without affording opportunity of being heard to him and despite having larger length of service of petitioner, vide aforesaid order, respondent No. 6 has been declared senior to him and this order has been brought on record by respondent No. 6 with his reply as Annexure R-14. Though order dated 30.4.2010 (Annexure P16) impugned in the writ petition contains a reference of order dated 26.5.1999, however specific challenge has not been laid against the said order, therefore on account of issue raised during hearing of petition, specific challenge to order dated 26.5.1999 has necessitated.

2 The amendment sought by the petitioner has been vehemently opposed by respondent No.6 by filing a detailed reply mainly on the ground that at this belated stage, petitioner is estopped from challenging the order dated 26.5.1999 as it was not only placed on record by respondent as Annexure R-14, but the same has been specifically mentioned in order dated 30.4.2010 (Annexure P16), assailed by the petitioner in the writ petition. It is further submitted that plea of petitioner, that this order was passed without notice to the petitioner and without hearing him, is not sustainable at this stage as the reference of this order was made in order dated 30.4.2010 and also in reply filed to the petition in March, 2011 and thereafter pleadings were completed and case was listed for hearing so many

times, but the petitioner has not bothered to assail the said order, despite having knowledge about the same. It is further submitted that amendments sought are device to avail new grounds to challenge against an order which is altogether different from order assailed in the main petition.

3 The Apex Court, in its pronouncement in case ***Chakreshwari Construction Private Ltd. vs. Manohar Lal*** reported in ***(2017)5 SCC 212*** has summarized principles for considering amendment of pleadings which are:-

> ***"13. The principle applicable for deciding the application made for amendment in the pleadings remains no more*** *res integra* ***and is laid down in several cases. In Revajeetu Builders and Developers vs. Narayanaswamy and Sons (2009)10 SCC 84, this Court, after examining the entire previous case law on the subject, culled out the following principle in para 63 of the judgment which reads as under: (SCC p.102)***
>
> ***"63. On critically analyzing 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 malafide;***
>
> ***(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.***
>
> ***There 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."***

4 The basic grievance of the petitioner is that he has joined as TGT on 3.6.1994, whereas respondent No. 6 has joined as Shastri and was promoted to the post of TGT on 23.10.1997 and despite that, respondent No. 6 has been assigned the seniority from 2.6.1994 on which date the post of TGT had fallen vacant, which has resulted placement of respondent No. 6, who is junior to the petitioner, above the petitioner and the said action of respondent authority was assailed by the petitioner by filing CWP No. 172 of 2003 and the said petition was disposed of vide order 16.5.2007 with a direction to the respondent to decide the appeal of petitioner filed against the impugned action of the respondent authority, within a period of six weeks from the date of passing of order and thereafter, vide resolution No. 13 dated 29.8.2008 (Annexure P14) petitioner was directed to be placed senior to respondent No. 6 and in pursuant thereto, seniority list Annexure P15 was issued.

5 Meanwhile, Northern Command vide letter dated 26.5.1999, in an appeal preferred by respondent No.6, has placed him senior most amongst the recruits appointed on the basis of letter dated 25.4.1994, despite the fact that petitioner was appointed on 3.6.1994 and respondent No. 6 was promoted on 23.10.1997.

6 In the light of aforesaid decision of Northern Command, President Cantonment Board had reconsidered the representation of petitioner dated 25.2.2002 decided vide resolution No. 13 dated 29.8.2008 in the light of judgment dated 16.5.2007 passed in CWP No. 172 of 2003 and by referring the decision of Northern Command as a decision passed by the Higher Competent Authority, had rejected the same vide impugned order dated 30.4.2010 (Annexure P-16) and had re-fixed the seniority as Manohar Lal above the petitioner vide impugned seniority list dated 30.4.2010 (Annexure P-17), which resulted into filing of present petition in August, 2010.

7 Petitioner has approached the counsel and filed the present petition on the basis of advise and drafting by the counsel, wherein order dated 30.4.2010 (Annexure P16) rejecting the representation of petitioner has been assailed wherein seniority of respondent No. 6 has been re-fixed above the petitioner. Impugned rejection dated 30.4.2010 is based upon order dated 26.5.1999 and has been referred therein. Therefore, the challenge laid to rejection dated 30.4.2010 (Annexure P-16) impliedly means that petitioner is aggrieved by the said order which contains the reference of order dated 26.5.1999 and thus for determining the validity of rejection of representation dated 30.4.2010, the legality of order dated 26.5.1999 is necessarily to be looked into. Therefore, from the omission and commission on the part of petitioner, it cannot be said that he has acquiescence to order dated 26.5.1999.

8 Vide order dated 30.4.2010, respondent No. 6 has been declared senior to the petitioner and resolution of order dated 26.5.1999 is also the same as it directs to assign the seniority to respondent No. 6 above all including the petitioner. Therefore, specific challenge proposed to be laid to order dated 26.5.1999 cannot be termed as an amendment changing the nature of writ petition and making out a new ground altogether assailing a different order.

9 So far as the issue of delay and latches, seeking the amendment or laying challenge to order dated 26.5.1999, is concerned, it cannot be attributed to the petitioner as he had approached the counsel immediately after rejection of his representation and filed petition assailing the placement of respondent No. 6 above him in August, 2010. What are those orders which are required to be assailed for redressal of grievances of the petitioner, has been decided by the counsel and accordingly, writ petition was filed against order dated 30.4.2010. As order 30.4.2010 contains a reference of order dated 26.5.1999, there is possibility of considering it by the Advocate that order dated 26.5.1999 had merged in order dated 30.4.2010 and no specific challenge was required to be laid to order dated 26.5.1999. This possibility is also substantiated from the reason assigned by the counsel in application for filing it at this stage wherein it is stated that during hearing, the issue of challenging the order dated 26.5.1999 had cropped up and therefore, it necessitates to file the application for amendment for specifically challenging the order dated 26.5.1999.

10 The petitioner has to suffer for delay and latches on his part but not for advise or action of Advocate imparted/taken on the basis of his expertise after applying his mind. In the present case, petitioner cannot be held liable for delay and latches. As noticed supra, he had approached the counsel within four weeks of disturbing his seniority. I find no deliberate, intentional or willful reason for not assailing the order dated 26.5.1999 at the first instance and mistake by Advocate appears to be bonafide one in the facts and

circumstances of the case. It is not a case where petitioner has failed to act with due diligence and care. Therefore, petitioner should not be made to suffer for any lapse on the part of Advocate, wherein he has no role to play.

11 Even otherwise, the basic dispute in the main petition is with respect to placement of respondent No. 6 above the petitioner in the seniority list for which at the time of adjudicating the legality and validity of order dated 30.4.2010, validity of order dated 26.5.1999 has also to be assessed and it would require returning of findings with respect to the said order also. Therefore, it cannot be said that the new case is being made out or respondents were not aware about the dispute.

12 It is true that there is reference of order dated 26.5.1999 in order dated 30.4.2010 and copy of this order was placed on record as Annexure R-14 by respondent No. 6. But in this application, it is not the stand of petitioner that he came to know about the order at the time of filing of reply by respondent or filing of present application. But the stand of petitioner in para 3 of application is that this order was brought on record by respondent No. 6 (Annexure R-14) and in para 4 also, it is not claimed that passing of order was not in the knowledge of petitioner, but it has been averred that appeal filed by respondent No. 6 was decided vide order dated 26.5.1999 without giving him the notice and without hearing him. Therefore, it would be wrong to suggest that petitioner has tried to claim that he was not having the knowledge of passing of order at the time of filing of petition.

13 In the aforesaid facts and circumstances, I find that application for amendment is bonafide and amendment sought is imperative for proper and effective adjudication of dispute and it is neither causing prejudice to respondents nor constitutionally or fundamentally changing the nature and character of the case. In my opinion, for the ends of justice and to arrive at the just and fair conclusion, the amendment sought deserves to be allowed.

14 Accordingly, the petitioner is permitted to carry out the proposed amendments in the writ petition. The petitioner has filed the amended petition along with this application. The same is directed to be taken on record and placed at the appropriate place. Application stands allowed in aforesaid terms.

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

Virender Speya ……Appellant
Versus
Man Chand Katoch ……Respondent.

CMP (M) No.23 of 2019 & OSA No. 5 of 2018.
Decided on: 26th February, 2019

Code of Civil Procedure, 1908 – Order XXII Rules 3 & 4- Substitution of legal representatives of deceased party- Failure- Effect- Plaintiff dying when suit was pending before Hon'ble Single Bench- Decree passed by it unaware of his death- Held, judgment passed against dead party is nullity- Question of bringing on record legal representatives of deceased party and abatement of suit, if any, is to be decided by that Court where lis was

pending at time of death- Judgment of Hon'ble Single Judge set aside- Matter remanded for substitution of legal representatives of deceased plaintiff and deciding question of abatement. (Paras 2 & 3)

Code of Civil Procedure, 1908 – Order XXII Rules 3 & 4- Abatement of suit- Held, abatement of suit is automatic- No specific order of Court ordering abatement is required. (Paras 2 & 3)

Cases referred:

Gurnam Singh (dead) by legal representatives and others vs. Gurbachan Kaur (dead) by legal representatives, (2017) 13 SCC 414

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

Jaswant Singh vs. State of Himachal Pradesh and others, 2015(2) Shim.L.C. 674

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

For the appellant : Mr. Romesh Verma, Advocate.
For the respondent : Mr. N.D. Sharma, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

The appeal has been preferred against the judgment and decree dated 13.7.2018 by Virender Speya, the defendant whereby the suit filed by Man Chand, the plaintiff (since dead) has been decreed against him.

2. The appeal, after its admission is at the stage of final hearing, however, now it transpired that Man Chand, the plaintiff has already expired during the pendency of the suit before learned Single Judge. Consequently, the appellant-defendant has filed an application registered as CMP(M) No. 23 of 2019 with a prayer to delete his name from the array of parties, perhaps in view of the caveat filed by his legal representatives and they are duly represented. No such relief, however, can be granted because the plaintiff Man Chand was no more in the land of living on the day when the arguments in the suit were heard and the judgment pronounced.

3. As a matter of fact, the factum of death of plaintiff Man Chand went unnoticed and learned Single Judge has decided the suit without substitution of his legal representatives and deciding the question of abatement of the suit. On the death of a party to the suit or appeal and for want of consequential steps, suit/appeal abates because abatement is automatic. In view of the law laid down by this Court, as and when the question of abatement of the suit or appeal arises, the same can only be gone into and decided by the Court where the suit or appeal was pending at the time of death of a party. It has been held so by this Court in ***Jaswant Singh*** versus ***State of Himachal Pradesh and others, 2015(2) Shim.L.C. 674*** while placing reliance on the ratio of the judgments rendered by this Court in ***Jagan Nath and others*** versus ***Ishwari Devi, 1988(2) Shim.L.C. 273*** and ***Karam Chand and others*** versus ***Bakshi Ram and others, 2002(1) Shim.L.C. 9***.

4. Not only this, but the apex Court in a recent judgment in ***(2017) 13 SCC 414, Gurnam Singh*** (dead) by legal representatives and others versus ***Gurbachan Kaur*** (dead) by legal representatives, has reiterated the legal principles already settled further by holding that a decision in favour and/or against a dead person renders such decision

nullity. The Apex Court has went one step further by holding that the decree passed without taking note of the death of a party to the lis or deciding the question of abatement and substitution of legal representatives can be challenged at any time including at its execution stage. This judgment reads as follows:

> 15)The question, therefore, is whether the impugned judgment/order is a nullity because it was passed by the High Court in favour of and also against the dead persons. In our considered opinion, it is a nullity. The reasons are not far to seek.
>
> 16) It is not in dispute that the appellant and the two respondents expired during the pendency of the second appeal. It is also not in dispute that no steps were taken by any of the legal representatives representing the dead persons and on whom the right to sue had devolved to file an application under Order 22 Rules 3 and 4 of the Code of Civil Procedure,1908 (for short, 'the Code') for bringing their names on record in place of the dead persons to enable them to continue the lis.
>
> 17) The law on the point is well settled. On the death of a party to the appeal, if no application is made by the party concerned to the appeal or by the legal representatives of the deceased on whom the right to sue has devolved for substitution of their names in place of the deceased party within 90 days from the date of death of the party, such appeal abates automatically on expiry of 90 days from the date of death of the party. In other words, on 91st day, there is no appeal pending before the Court. It is "dismissed as abated".
>
> 18) Order 22 Rule 3(2) which applies in the case of the death of plaintiff/appellant and Order 22 Rule 4(3) which applies in the case of defendant/respondent provides the consequences for not filing the application for substitution of legal representatives by the parties concerned within the time prescribed. These provisions read as under:-
>
> **Order 22 Rule 3(2)**
>
> "Where within the time limited by law no application is made under sub-rule (1) the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff."
>
> **Order 22 Rule 4(3)**
>
> "Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant."
>
> xxx xxx xxx
>
> xxx xxx xxx
>
> 21) It is a fundamental principle of law laid down by this court in Kiran Singh case, that a decree passed by the court, if it is a nullity, its validity can be questioned in any proceeding including in execution proceedings or even in collateral proceedings whenever such decree is sought to be enforced by the decree-holder. The reason is that the defect of this nature affects the very authority of the Court in passing such decree and goes to the root of the case. The principle, in our considered opinion, squarely applied to this case because it is a settled principle of law that the decree passed by a court for or against a dead person is a 'nullity'."

5. In view of the legal as well as factual position discussed supra, this Court is left with no option except to hold that the judgment and decree passed by learned Single Judge, without substitution of legal representatives of a dead person and deciding the question of abatement is nullity, hence not legally sustainable.

6. Consequently, the judgment and decree passed by learned Single Judge being nullity is quashed and set aside and the suit is remanded to learned Single Judge to decide the question of abatement of the proceedings and the substitution of the legal representatives of Man Chand, the deceased plaintiff and thereafter disposal in accordance with law. The parties through learned Counsel representing them are directed to appear before learned Single Judge. The suit be listed before learned Single Judge as per Roster of Boards on 1st April, 2019.

7. The appeal as well as CMP(M) No. 23 of 2019 stand disposed of accordingly.

CMP No. 202 of 2019.

In view of the judgment of the day passed in the main matter, this application has turned infructuous and the same is accordingly disposed of.

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

Deen Dayal Yogi …….Appellant.
Versus
State of H.P. & Others …….Respondents.

LPA No.488 of 2012.
Decided on :10th January, 2019.

Industrial Disputes Act, 1947 – Section 10 (1) – Industrial dispute – Fading away of – Held, State Government may at any time refer industrial dispute for adjudication if such dispute exists or apprehended – No limitation prescribed under Act for making reference– On facts, writ petitioner had kept industrial dispute alive by issuing notices to Department and then by raising demand – Dispute had not faded away with passage of time- Labour Commissioner directed to send reference to Labour Court – LPA allowed. (Paras 7 & 8)

Cases referred:
Jasmer Singh vs. State of Haryana and another, (2015) 4 SCC, 458
Raghubir Singh vs. General Manager Harababa Roadways, Hissar, (2014) 10 SCC 301

For the appellant Mr. O.P. Sharma, Advocate.
For the respondents Mr. Vikas Rathore &Mr. Narinder Guleria, Addl.A.Gs. with Mr. J.S. Guleria, Dy. A.G. for respondents No.1 and 3.
Mr. Naveen K. Bhardwaj, Advocate for respondent No.2.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

Deen Dayal Yogi, the writ petitioner in CWP No. 2958 of 2012, is aggrieved by the judgment dated 8.10.2012, whereby learned Single Judge has dismissed the writ petition. He, therefore, has preferred the present appeal under Clause 10 of the Letters Patent of High Court of Judicature at Lahore, applicable to the High Court of Himachal Pradesh, with a prayer to quash and set aside the same.

2. The facts, which are not disputed, reveal that writ petitioner was engaged as clerk on daily wage basis in the defunct Agro Industrial Packaging India, an undertaking of respondent No.1-State on 22.7.1996. He allegedly continued till the year 1999 as such with 240 days in each calendar year. The respondent terminated his services orally without assigning any reason in gross violation of Section 25 (f)(g) and (h) of the Industrial Disputes Act. Against his illegal termination, he made the representations dated 16.7.2001, 24.6.2003 and 5.7.2004, Annexures P-3 to P-5 to the response. The postal receipts have also been annexed thereto. The respondents when failed to take any action on the representations he made, served them with the demand notice Annexure P-6, at such a stage when came to know that one Uma Kanwar, his junior and a similarly situated person was re-engaged and subsequently her services were also regularized. The Labour Officer tried conciliation, however, when the same failed, forwarded the matter to the Labour Commissioner, Himachal Pradesh for making a reference of the dispute to the Labour Court-cum-Industrial Tribunal. The Labour Commissioner-respondent No.3 herein has, however, rejected the demand notice being belated, allegedly made after lapse of about 11 to 13 years and there being nothing to suggest that during this period the dispute was kept alive by the writ petitioner. The impugned order is Annexure P-7.

3. In reply to the writ petition, the stand of respondents, however, was that the employment of the petitioner with respondent was contractual for a limited period i.e. 89 days. The provisions contained under Section 25(f) of the Act as such were not required to be complied with. The circulation of seniority list as on 31.8.1998 in which the name of the writ petitioner and other daily waged clerks 29 in numbers were reflected. There being reduction in the workload and respondent No.2 having taken a decision to retain only 15 clerks on 6.11.1998. After rationalization of staff, the services of the petitioner could not be renewed further. There being no violation of the provision under the Industrial Dispute Act, the contentions to the contrary have been denied being wrong. It is also denied that the respondent never received any representation allegedly made by the writ petitioner. The submissions to this effect are stated to be after thought made with a view to bring the case within limitation. It is denied that Uma Kanwar, a junior on daily wage basis was re-engaged and her services were regularized. In this regard, it is submitted that she was regular in her job. The filing of demand notice though has been admitted, however, the same was sought to be rejected being time barred.

4. In rejoinder, the writ petitioner has denied the contention to the contrary in the reply to the writ petition being wrong and reiterated his entire case as set out in the writ petition. Learned Single Judge, has, however, dismissed the writ petition while taking a view of the matter that the dispute has faded away with the passage of time and was no more in existence.

5. The legality and validity of the impugned judgment has been questioned on the grounds inter alia that the same is contrary to the facts and circumstances of the case and also the material available on record. In view of the petitioner having made representation and also raised demands on coming to know that his junior Uma Kanwar was reengaged and appointed on regular basis, there was no occasion to learned Single

Judge to have recorded the findings that the claim has faded away with the passage of time and that the same is no more in existence. It is pointed out that when the conciliation failed, the conciliation officer has referred the dispute to respondent No.3 for appropriate action. Had there been no dispute in existence at that time and the same rather allegedly faded away with the passage of time, the conciliation officer should have not referred the matter to respondent No.3. This aspect has not been taken into consideration by learned Single Judge. The factum of he having come to know in the year 2010 that his junior Uma Kanwar was reengaged and it is thereafter he has served the respondent with the demand notice has also been erroneously ignored by learned Single Judge. Such approach, according to the writ petitioner, has resulted into serious miscarriage of justice to him. The impugned judgment as such has been sought to be quashed and set aside.

6. On hearing learned counsel appearing on behalf of the writ petitioner and learned Additional Advocate General as well as going through the record, we are not in agreement with the findings recorded by learned Single Judge while dismissing the writ petition vide judgment dated 8.10.2012, under challenge in the present appeal for the reason that the writ petitioner by placing on record the xeroxed copies of the representations Annexures P-3 to P-5, sent through currier services along with postal receipts has succeeded to establish prima facie that such representations were made by him against his termination from service allegedly illegally. Respondent No.2, however, failed to respond thereto. True it is that after 5.7.2004, the day when he made the representation Annexure P-5, the writ petitioner did not raise the dispute till 24.9.2010, when he served the respondent with demand notice Annexure P-6. He, however, has succeeded to explain satisfactorily this aspect of the matter while submitting that he issued the demand notice when he came to know about the re-engagement of Uma Kanwar, a similarly situated person and terminated in similar manner, in which his services were dispensed with, reengaged and later on appointed on regular basis. Though the response of the respondents to this part of the petitioner's case is that Uma Kanwar was a regularly appointed employee, hence not similarly situated, however, without there being any supporting material on record to substantiate the same. The denial of the respondent that they did not receive the representations made by the writ petitioner is again a disputed fact because he in respect of such claim has produced the receipts issued by the courier concerned through whom the representations he made to respondent No.2 were sent. These facts raised by the writ petitioner as such were required to be adjudicated upon and it could have only been done by referring the matter to Labour Court-cum-Industrial Tribunal concerned by the Labour Commissioner, respondent No.3 herein for the purpose. The present as such is a case where the writ petitioner has kept alive the dispute and never allowed he same to be faded away. Therefore, the reasons to the contrary recorded by respondent No.3 while dismissing the demand notice vide order Annexure P-7 are contrary to the legal as well as factual position. At the same time, learned Single Judge was also not justified in dismissing the writ petition while taking a view of the matter that with the passage of time, the dispute has faded away. As a matter of fact, the law relied upon by learned Single Judge is distinguishable in the given facts and circumstances of the case.

7. On the other hand, Hon'ble Apex Court in ***Jasmer Singh*** versus ***State of Haryana and another, (2015) 4 SCC, 458,*** while holding that no period of limitation is prescribed under the Act and also that Limitation Act has no application in a case of this nature has concluded that the reference made by the Labour Court cannot be quashed on the ground of delay.

8. Similar is the ratio of the judgment of the Hon'ble apex Court in ***Raghubir Singh*** versus ***General Manager Harababa Roadways, Hissar, (2014) 10 SCC 301.*** It

has been held in this judgment that as per Section 10(1) of the Industrial Disputes Act, the appropriate Government "at any time" may refer the industrial dispute for adjudication, if it is of the opinion that such industrial dispute exists or is apprehended. In the case in hand, as noticed supra, the dispute raised by the writ petitioner not only exists, but in the given facts and circumstances being not faded away and rather the writ petitioner kept the same alive, should have been referred by respondent No.3 for adjudication to the Labour Court-cum-Industrial Tribunal concerned.

9. For all the reasons hereinabove, we quash and set aside the impugned judgment and direct respondent No.3 to make reference of the dispute to the Labour Court-cum-Industrial Tribunal concerned at the earliest, however, not beyond 31.3.2019. The appeal is accordingly allowed and stands disposed of.

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

State of Himachal Pradesh ….Appellant
Versus
Rajeev Singh @ Ranju and others ….Respondents

Cr. Appeal No. 281 of 2012
Date of Decision 10th January, 2019

Code of Criminal Procedure, 1973- Section- 164- Dying declaration- Recording of- Whether it is mandatorily to be recorded by Magistrate?- Held, there is no fixed format or mode for recording dying declaration- It can be recorded in any manner or in any form- It is not necessarily to be recorded by Magistrate. (Paras 20-27 & 35)
Indian Evidence Act, 1872 – Section 32- Dying declaration- Evidentiary value- Held, dying declaration, if trustworthy and inspires confidence, can be basis for conviction. (Paras 20-27 & 35)
Indian Penal Code, 1860- Sections 306 & 498-A read with 34- Cruelty and abetment to commit suicide – Proof of - Trial Court acquitting husband, parents-in-law as well as sister-in-law for harassing and abetting victim to commit suicide- Appeal against- Evidence revealing husband and wife having heated arguments and during course of it, wife threatening to commit suicide- Husband responding to her to go ahead with it- Wife putting kerosene and setting herself ablaze- Husband tried to douse fire and also took wife to hospital- Parents-in-law residing separately from couple since long- Previous conduct of parents-in-law towards victim not indicative of their abetment- Victim found having history of mental ailment- Held, evidence does not indicate intention on part of husband and other relatives to abet victim to commit suicide- Acquittal upheld. (Paras 32, 33, 37-40, 41 & 42)

Cases referred:
Deepak Verma vs. State of Himachal Pradesh, (2011)10 SCC 129
Gulzari Lal vs. State of Haryana, (2016)4 SCC 583
Muralidhar alias Gidda and another vs. State of Karnataka, (2014)5 SCC 730
Rakesh and another vs. State of Haryana, (2013)4 SCC 69
Ramakant Mishra alias Lalu and others vs. State of Uttar Pradesh, (2015)8 SCC 299
Satish Chandra and another vs. State of Madhya Pradesh, (2014)6 SCC 723

Surinder Kumar vs. State of Punjab, (2012)12 SCC 120
Umakant and another vs. State of Chhattisgarh, (2014)7 SCC 405
Vijay Pal vs. State (Government of NCT of Delhi), (2015) 4 SCC 749

For the Appellant: Shri M.A. Khan and Mr.Virender Verma, Additional Advocate Generals.
For the Respondents: Shri Tara Singh Chauhan, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

State has preferred present appeal against acquittal of respondents by learned Additional Sessions Judge (I) Kangra at Dharamshala vide judgment dated 30.11.2011 passed in sessions trial No. 8-N of 2010, title State vs. Rajeev Singh and others, in case FIR No. 245 of 2009, dated 19.7.2009 registered at Police Station Nurpur, District Kangra, under Sections 498-A and 306 read with Section 34 of Indian Penal Code.

2. In instant case, Ranju Bala deceased wife of accused No.1 had succumbed to her injuries on 20.7.2009 after suffering 80-90% burn injuries in an attempt to commit suicide by putting herself on fire after pouring kerosene oil upon her on 19.7.2009. Marriage of accused No.1 and Ranju Bala (deceased) had taken place in the year 2003. Accused No. 2 Kushal Dev and accused No. 3 Jamuna Devi are parents-in-laws of Ranju Bala (deceased) whereas accused No. 4 Seema Devi is her sister-in-law (Nanad).

3. Case of the prosecution is that on 19.7.2009 a telephonic information was received from Medical Officer, Civil Hospital, Nurpur in police station Nurpur calling police for further action informing that a female was brought to hospital for treatment in burning case. After reducing the said information into writing, by recording GD entry No. 13 (A) at 10.05 AM, PW16 ASI Mukesh Kumar along with PW7 HC Govind Pal and C.Budhi Singh (not examined) rushed to hospital. On finding critical condition of patient, PW16 telephonically informed PW12 SHO Kamaljit about it with request to reach hospital along with Tehsildar. On his application Ext.PW1/B, at 10.40 AM, PW1 Dr. Suman Saksena vide her opinion Ext.PW1/C, opined that patient was fit to make statement. PW12 SHO along with PW4 Ms. Kavita Thakur Tehsildar came to hospital and Tehsildar verified from doctor (PW1) about fitness of patient to make statement and on getting answer in affirmative, persons gathered in the room were turned out by SHO and in presence of PW1 doctor, PW4 Tehsildar and PW12 SHO Kamaljit, PW16 ASI Mukesh Kumar recorded statement of Ranju Bala deceased, who had put thumb impression on said statement Ext.PW4/A as she was not able to sign. The said statement was certified by PW4 Tehsildar in writing. Thereafter, ruka was prepared by making endorsement Ext.PW16/A on statement of Ranju Bala deceased and sent to Police Station through C. Budhi Singh for registration of FIR whereupon FIR Ext.PW11/A was registered by PW11 ASI Ramesh Kumar,followed by endorsement Ext.PW11/B on ruka and handing over the case file to Budhi Singh for delivering it to Investigating Officer.

4. After examination, PW1 referred Ranju Bala deceased to Zonal Hospital, Dharamshala for further treatment and expert opinion by surgeon. She issued MLC Ext.PW1/A deferring her opinion to be given after observation till three weeks and expert opinion by surgeon. As per this MLC, Ranju Bala was brought to hospital by attendants and in column of name of relative or friend, name and relation of accused is mentioned as ‘husband Rajiv’. Time of arrival in hospital was recorded as 10 AM. In history given by Ranju Bala, (deceased), PW1 has recorded that she poured kerosene oil on herself and put herself

on fire at about 9 AM in morning and that after her marriage in 2003, her in-laws and husband used to harass her and she had one daughter and one son and age of younger child is four years. It is also noted on MLC that patient was conscious, but in pain and agony, oriented to person and time and responding well to the questions asked and that odour of kerosene oil, singing of hair, tags of pantees and writ was also attached to the body. Superficial burn injuries approximately 80-85% were noticed on her body. It has also come on record that Ranju Bala was shifted to Raavi Multi Speciallity Hospital Pathankot on 19.7.2009. As per certificate Ext.PW2/A issued by PW2 Dr. Suhael Zahur, she was admitted in the said hospital at 12.15 PM with 95% burns and had expired on 20.7.2009 at 6.20 AM.

5. Postmortem of deceased was conducted at 1 PM on 20.7.2009 by PW3 Dr. Shiv Darshan Singh, Medical Officer, Civil Hospital, Nurpur. According to post mortem report, total percentage of burns was around 85-90% and there were burn marks over mouth and cause of death was hypovolemic shock and death. Probable duration between injury and death was between 12-24 hours and probable time between death and postmortem was 6-12 hours.

6. PW3 Dr.Shiv Darshan Singh had also examined accused Rajiv on 19.7.2009 at 2.30 PM and issued MLC Ext.PW3/C noticing following injuries on his body:-

1. Blebs over right forearm and hand two were over right hand and two were over forearm.
2. Superficial burns over all four finger tips and base of themb on left hand. According to him, injuries sustained by accused Rajiv were possible while extinguishing the fire.

7 Prosecution has examined 16 witnesses to establish its case, whereafter after recording of evidence under Section 313 Cr.P.C., respondents/accused have not chosen to lead any evidence in their defence.

8. PW1 Dr. Suman Saxena, has treated the victim at the first stage, and PW2 Susheel Jahoor has treated her in Ravi Multi Specialty Hospital at Pathankot where the victim had expired on the same day at 6.20 PM. PW3 Dr. Shiv Darshan Singh, Medical Officer, has conducted the postmortem of deceased. PW3 has also examined accused Rajeev Singh on 19.7.2009 at about 2-30 PM and had found injuries on his body, which according to his opinion, were possible while extinguishing the fire.

9. The factum of burning of victim and followed by her death on the next day in Ravi Multi Specialty Hospital and postmortem of her body by PW3 in Civil Hospital, Nurpur and medical examination of accused Rajeev Singh by PW3 are not in dispute. Therefore, their statements in this regard are not necessary to be discussed.

10. PW6 Rajinder Sahoga has taken the photographs of burnt articles lying in the house of accused persons after the incident and he had also taken photographs of dead body of Ranju Bala, which have been placed on record as Ext.P1 to Ext.P12 along with negatives Ext.P13 to Ext.P24. He has also witnessed the memo Ext.PW6/A along with PW7 HC Govind Pal with regard to seizure of empty bottle, matchstick and burnt clothes etc. PW7 Govind Pal has corroborated the seizure of matchstick Ext.P5, burnt piece of cloth Ext.P6 and one bottle Ext.P27 vide memo Ext.PW6/A. PW9 Khaidi Ram MHC at the relevant point of time, had sent the parcels through PW10 HC Yashpal to Regional FSL Dharamshala vide Road Certificate Ext.PW9/A and after handing over the same in RFSL Dharamshala PW10 HC Yash Pal handed over the receipt thereof Ext.PW10/A to PW9 HC Khaidi Ram. PW11 ASI Ramesh Kumar, after receiving ruka Ext.PW4/A from PW16 ASI Mukesh Kumar, had

registered FIR Ext.PW11/A and after making endorsement Ext.PW11/B on ruka had sent the file back to PW16 SI Mukesh Kumar.

11 PW13 Gangesh, six years old son of deceased, is only eye witness to the incident. Whereas, PW5 Balwant Singh (father of deceased) and PW14 Jeevan Jyoti (sister of deceased) have deposed about maltreatment by in-laws to the deceased. PW16 ASI Mukesh Kumar has recorded the dying declaration Ext.PW4/A under the supervision of PW4 Kavita Thakur Tehsildar and PW12 Inspector Kamlajit and PW14 Jeevan Jyoti were also present at that time in the hospital. PW12, PW13, PW15 and PW16 only would be relevant for adjudication of prosecution case as other official witnesses are only link witnesses associated during the investigation for completion thereof. Besides them, for arriving at the final conclusion, depositions of PW4 Kavita Thakur, PW5 Balwant Singh and PW14 Jeevan Jyoti is also required to be considered.

12 One more witness PW15 Dr. Rajpal, examined by prosecution to prove the treatment of deceased with respect to her mental ailment in the year 2004, is also a relevant for final adjudication.

13 Other evidence on record, with respect to maltreatment by her husband, is deposition of PW5 Balwant Singh and PW14 Jeevan Jyoti and to corroborate the said evidence of cruelty and harassment on the part of in-laws, PW15 Rajpal has been examined.

14 PW5 has alleged the maltreatment to victim because of insufficient dowry with further allegation that her father-in-law used to ask her to leave his house constructed by him and he has further stated that he used to pay Rs. 10,000-20,000/- to his daughter and her husband for five years and despite that accused persons did not stop maltreating her and two years prior to incident victim was beaten up by her sister-in-law and mother-in-law and shunted out from the house whereupon victim had taken shelter in the house of her elder sister PW14 Jeevan Jyoti, married in the same village, and on receiving the telephonic call regarding the incident, he and his wife along with 3-4 persons had come to house of his elder daughter and, after seeing the condition of his younger daughter, had taken her to the hospital of PW15 Dr.Rajpal at Pathankot and after recovery, victim had returned to parental house and wherefrom she was sent along with her husband, however, on account of her continuous harassment by accused, his daughter had taken extreme step for ending her life by pouring kerosene oil on her in July, 2009. There is improvement in his statement as he has admitted that he did not disclose the police about incident of beating his daughter by her sister-in-law and forcing the victim to leave the house. He has also admitted that his daughter and her husband along with children used to reside in second storey and were having their separate kitchen and whenever he used to visit his daughter, he did not meet her parents-in-laws and sister-in-law.

15 PW14 Jeevan Jyoti has also given general statement with respect to harassment and ill-treatment by in-laws of victim with one specific incident alleged to have taken place two years ago from the date of her committing suicide. But she has added one more fact that accused Rajeev was also accompanying her sister when she was left at her home, whereafter she was taken for treatment to PW15 Dr. Rajpal. She has also added that sister-in-law of the victim used to demand money from her sister and her father-in-law used to ask to leave the house belonging to him. According to her, PW13 Gangesh had informed her at about 8-15 AM, on the day of incident, about happening by stating that his mother was weeping and saying that her father-in-law, mother-in-law and sister-in-law were about her and she would end her life and thereafter, sister-in-law of victim had come on line and had informed her about burning of her sister.

16 The fact of payment of Rs.10,000-20,000/- has come on record for the first time in the statement of PW5 Balwant Singh and allegations of maltreatment alleged in statements of PW5 Balwant Singh and PW14 Jeevan Jyoti are general in nature except with respect to one incident alleged to have happened two years ago from the incident and according to these witnesses victim was ousted from the house by her sister-in-law and mother-in-law but according to PW5, victim had taken shelter in the house of her elder sister, whereas according to PW14, accused Rajeev, husband of victim, was accompanying her sister when she came to her house after the incident. It has also come in evidence of both these witnesses that after that incident, victim was taken to hospital at Pathankot for treatment through PW15 Dr. Rajpal, who is none-else but MD Psychiatry in Raj Pal Neuro Psychiatric Hospital, Laimini Road, Pathankot.

17 The marriage of victim had taken place in the year 2003. PW15 in his examination-in-chief has stated that, as per alleged history given to him by the victim, victim was brought to his hospital in the year 2003 with acute stress disorder, since one day earlier to 16th of March on account of family conflict with her sister-in-law and as per his examination, patient was mute, not responding to his questions and was not in a position to tell the exact cause as what had happened. However, she had responded to treatment and was calm and composed. According to him, patient was having a stiffness of the body and was diagnosed finally as a case of historical neurosis sub type conversion reaction. He has endorsed subscribing OPD prescription slip and treatment Ext.PW8/B. He has further deposed that the lady was in above stated situation due to family conflict and domestic violence. In cross examination, he has admitted that it is not mentioned in Ext.PW8/B that since when the patient was suffering from mental illness, but he has stated that it was told to him that she was suffering such ailment one day prior to coming to OPD and according to him, such ailment can develop within any span of time. In the prescription slip, he has mentioned the ailment of victim as catatonic plus. He has stated that it is one of symptom of schizophrenia and persons suffering from such diseases has abnormalities of two extreme types, excitably over activity on the one hand and bizarre posturing with abnormal muscle tone, vaxy flexibility on the other and it is serious psychiatric illness and schizophrenia behaviour refers splitting of mind which means total disorientation of thinking, mute, perception, judgment, contact with the reality insight and abstract and concrete thinking and people suffering from hysteria become upset, excited and unable to control their feelings. He has admitted that as per Modi, catatonia is one of variety of schizophrenia and patient in the state of wild excitement is destructive, violent and abusive and may impulsively assault anyone without the slightest provocation and may make homicidal or suicidal attempts and in such cases, auditory hallucinations frequently occur leading to violent behaviour and sometimes, such patient also destroys himself. However, he has explained that such symptoms are found in cases of major mental disorder schizophrenia subtype catatonics, but in Ext.PW8/B these symptoms are not there and that word catatonics can also be used in case of typhoid, biochemical disturbances etc. Further he has admitted that medicines prescribed in Ext.PW8/B are for release of stress and minor psychiatric problem. According to him, catatonics mentioned in Ext.PW8/B was mild.

18. In Ext.PW4/A, according to victim, after becoming fed up with the behaviour of her in-laws, she had told her husband that she would die, whereupon her husband had asked her to die and out of anger, she poured kerosene oil on her and put herself on fire. PW13 Gangesh has also stated that there was quarrel between his father and mother, which resulted into the commission of suicide by his mother, but he has also admitted that his father had gone to bring meals from his aunt (Tai), living in the first floor (ground floor of the house), which was not liked by his mother. It has also come in statement of PW3 Dr. Shiv Darshan Singh that injuries found on body of accused Rajeev are possible during

extinguishing the fire and PW13 Gangesh has corroborated the said attempt by his father in his statement. Other accused persons/respondents are not living with family of deceased since long. Existence of separate accommodation and kitchen of the family of victim has also been admitted by her father PW15 Balwant Singh. Deposition of PW15 also indicates that victim was suffering some psychiatric disorder. According to PW5 and 14, the said disorder had developed two years ago of incident on account of ill-treatment of in-laws. The incident had taken place in the year 2009, therefore, the alleged disorder, according to PW5 and PW14, had developed in 2006 or 2007, whereas it has come in the deposition of PW15, as also evident from evidence of PW8, that victim was under treatment since 2003-2004. Marriage of victim and accused Rajeev was solemnized in the year 2003. Exact date has not been brought on record. Even otherwise, the date of treatment given by PW15 in Ext.PW8/B does not corroborate the alleged mental duress and stress on account of ouster of victim from the house of in-laws, alleged to have taken place, two years prior to incident. As treatment record is of 2004, whereas time of alleged incident, as per statement of PW5 and PW14, becomes 2006-07.

19. Dying declaration Ext.PW4/A is heavily relied upon by prosecution whereas accused are disputing its veracity on the grounds that it was not recorded by Magistrate himself, PW1 has not certified it by making signature thereupon, there is over writing/addition by Investigating Officer on said statement, there is discrepancy in statement giving reference of cane of kerosene, whereas from spot bottle of kerosene was recovered and also that it was tutored by PW4 Tehsildar, as with 80-90% burn injuries neither Ranju Bala was able to make statement nor to put her thumb impression on said statement and therefore they disputed volunteerness, truthfullness and trustworthiness of this statement.

20. The Apex Court in ***Umakant and another vs. State of Chhattisgarh (2014)7 SCC 405*** held that

> ***"20. The philosophy of law which signifies the importance of a dying declaration is based on the mexim nemo moriturus praesumitur mentire, which means, "no one at the time of death is presumed to lie and he will not meet his Maker with a lie in his mouth". Though a dying declaration is not recorded in the court in the presence of the accused nor is it put to strict proof of cross examination by accused, still it is admitted in evidence against the general rule that hearsay evidence is not admissible in evidence.The dying declaration does not even require any corroboration as long as it inspires confidence in the mind of the court and that it is free from any form of tutoring. At the same time, dying declaration has to be judged and appreciated in the light of surrounding circumstances. The whole point in giving lot of credence and importance to the piece of dying declaration, deviating from the rule of evidence is that such declaration is made by the victim when he/she is on the verge of death.***
>
> ***21. In spite of all the importance attached and the sanctity given to the piece of dying declaration, the courts have to be very careful while analying the truthfulness, genuineness of the dying declaration and should come to a proper conclusion that the dying declaration is not a produce of prompting or tutoring.***
>
> ***22. The legal position about the admissibility of a dying declaration is settled by this Court in several judgments. This Court in Atbir vs. Govt. (NCT of Delhi) (2010)9 SCC 1, taking into consideration***

the earlier judgments of this Court in Paniben vs. State of Gujarat (1992)2 SCC 474 has given certain guidelines while considering a dying declaration: (Atbir case, SCC pp. 8-9, para 22)

"(i) Dying declaration can be the sole basis of conviction if it inspires the full confidence of the Court.

(ii) The Court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.

(iii) Where the Court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.

(iv) It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.

(v) Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence.

(vi) A dying declaration which suffers from infirmity, such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.

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

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

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

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

(at pp 413-414)

21. In ***Vijay Pal vs. State (Government of NCT of Delhi) (2015) 4 SCC 749*** the Hon'ble Supreme Court has held:-

"18. In Laxman v. State of Maharashtra (2002)6 SCC 710, the Constitution Bench has held thus:

"3. The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-

examination are dispensed with. Since the accused has no power of cross-examination, the courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite."

19. The aforesaid judgment makes it absolutely clear that the dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice, provided the communication is positive and definite. There cannot be any cavil over the proposition that a dying declaration cannot be mechanically relied upon. In fact, it is the duty of the Court to examine a dying declaration with studied scrutiny to find out whether the same is voluntary, truthful and made in a conscious state of mind and further it is without any influence.

20. At this juncture, we may quote a passage from Babulal v. State of M.P(2003) 12 SCC 490 wherein the value of dying declaration in evidence has been stated:-

"7. ... A person who is facing imminent death, with even a shadow of continuing in this world practically non-existent, every motive of falsehood is obliterated. The mind gets altered by most powerful ethical reasons to speak only the truth. Great solemnity and sanctity is attached to the words of a dying person because a person on the verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person. The maxim is "a man will not meet his Maker with a lie in his mouth" (nemo moriturus praesumitur mentiri). Mathew Arnold said, "truth sits on the lips of a dying man". The general principle on which the species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced and mind induced by the most powerful consideration to speak the truth; situation so solemn that law considers the same as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice."

21. Dealing with the oral dying declaration, a two-Judge Bench in Prakash V. State of M.P.(1992)4 SCC 225 has stated thus: (SCC p.234, para 11)

"11. ... In the ordinary course, the members of the family including the father were expected to ask the victim the names of the assailants at the first opportunity and if the victim was in a position to communicate, it is reasonably expected that he would give the names of the assailants if he had recognised the assailants. In the instant case there is no occasion to hold that the deceased was not in a position to identify the assailants because it is nobody's case that the deceased did not know the accused [pic]persons. It is therefore quite likely that on being asked the deceased would name the assailants. In the facts and circumstances of the case the High Court has accepted the dying declaration and we do not think that such a finding is perverse and requires to be interfered with."

22. Thus, the law is quite clear that if the dying declaration is absolutely credible and nothing is brought on record that the deceased was in such a condition, he or she could not have made a dying declaration to a witness, there is no justification to discard the same. In the instant case, PW-1 had immediately rushed to the house of the deceased and she had told him that her husband had poured kerosene on her."

22. In ***Gulzari Lal vs. State of Haryana (2016)4 SCC 583*** the Supreme Court has held:-

"14.The learned counsel further placed reliance on the Constitution Bench judgment of this Court in the case of Tarachand Damu Sutar v. The State of Maharashtra, wherein it was held as under:

"21... A dying declaration is not to be believed merely because no possible reason can be given for accusing the accused falsely. It can only be believed if there are no grounds for doubting it at all.

15. Further reliance has been placed on the judgement of this Court in Waikhom Yaima Singh v. State of Manipur AIR 1962 SC 130, wherein it was held as under:

"20. There can be no dispute that the dying declaration can be the sole basis for conviction however, such a dying declaration has to be proved to be wholly reliable, voluntary and truthful and further that the matter thereof must be in fit medical condition to make it.

16. The learned counsel further placed reliance on the decision of this Court in the case of Nanhar & Ors. v. State of Haryana[3], wherein the Division Bench of this Court opined as under : (S p. 432,para 33)

"33... The dying declaration should be such, which should immensely strike to be genuine and stating true story of its maker. It should be free from all doubts and on going through it, an impression has to be registered immediately in mind that it is genuine, true and not tainted with doubts..."

17. Further, the reliance was placed in the case of P. Mani v. State of Tamil Nadu (2006)3 SCC 161, wherein the Division Bench of this Court held that: (SCC p.166, para 14)

"14. Indisputably conviction can be recorded on the basis of the dying declaration alone but therefore the same must be wholly reliable. In a case where suspicion can be raised as regards the correctness of the

dying declaration, the court before convicting an accused on the basis thereof would look for some corroborative evidence. Suspicion, it is trite, is no substitute for proof. If evidence brought on record suggests that such dying declaration does not reveal the entire truth, it may be considered only as piece of evidence in which event conviction may not be rested only on the basis thereof. The question as to whether a dying declaration is of impeccable character would depend upon several factors; physical and mental condition of the deceased is one of them...

21. We find no infirmities with the statements made by the deceased and recorded by the Head Constable Manphool Singh (PW-7). A valid dying declaration may be made without obtaining a certificate of fitness of the declarant by a medical officer. The law regarding the same is well-settled by this Court in the decision of Laxman v. State of Maharashtra (2002)6 SCC 710, wherein this Court observed thus:

"***3. There is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise***."

23. Mere presence of relatives at the time of recording dying declaration cannot be made basis to discard the said statement unless it is proved that dying declaration is tutored. Hon'ble Apex Court in ***Rakesh and another vs. State of Haryana (2013)4 SCC 69*** held

"13........Though, in the evidence, it has come on record that few of the relatives were standing in the ward, in view of the assertion of the Magistrate (PW10) who recorded her statement, mere presence of some of the close relatives would not affect the contents of the declaration.

20. The claim that there was wrong description of names in the dying declaration and some of the relatives were present at the time of recording of the dying declaration are not material contradictions which would affect the prosecution case."

In ***Satish Chandra and another vs. State of Madhya Pradesh (2014)6 SCC 723*** it is held by Hon'ble Supreme Court that

"32......Primarily, two objections are raised questioning the veracity of this dying declaration. It is stated that Sunita was tutored before she made the statement as it was made in the presence of the family members of the deceased and Appellant 2 was made to sit outside when the statement was being recorded. Secondly, it is not recorded in

> ***the form of questions and answers. On the facts of this case both these contentions are to be rejected.***
>
> ***33. It is clear that the Executive Magistrate took due precautions and even obtained the certificate about the state of health of Sunita before recording her statement. He has entered the witness box as PW2 and deposed to this effect. There is nothing on record which would indicate that Sunita may have been tutored by her mausa. Nothing could be pointed out to show that after reaching the hospital, she had occasion to meet her mausa and he got an opportunity to tutor her......"***

24. Minor discrepancies in dying declaration do not render it doubtful. In ***Deepak Verma vs. State of Himachal Pradesh (2011)10 SCC 129*** the Hon'ble Apex Court held:-

> ***"36. The last contention advanced at the hands of the learned counsel for the appellant was that the dying declaration of Kamini Verma which became the basis of registering the first information report itself was forged and fabricated. The learned counsel for the appellants vehemently contended that the very foundation of the prosectuion story itself being shrouded in suspicious circumstances, must lead to the inevitable conclusion that appellant-accused have been falsely implicated in the crime in question.....***
>
> ***37. The learned counsel for the appellants also invited the Court's attention of Exts. PW11/C, PW23/A and PW26/A so as to point out a number of discrepancies. It was submitted that there are a number of cuttings/overwritings of the time at which the endorsements on the dying declaration of Kamini Verma were recorded.....***
>
> ***38. Additionally, it was the contention of the learned counsel for the appellants, that the language of the dying declaration itself shows, that the same was not a voluntary statement made by Kamini Verma, but actually the handiwork of ASI Jog Raj, PW26 who had recorded the aforesaid statement. In this regard learned counsel for the appellants pointed out that various words and observations were used in the dying declaration were used in the dying declaration, which are in use of police personnel (and/or advocates), but not in the use of common persons.......***
>
> ***39. We have considered the last submission advanced at the hands of the learned counsel for the appellants. There can be no doubt that there are certain discrepancies in the time recorded in the dying declaration. Additionallly, there can also be no doubt that certain words which are not in common use have found place in the dying declaration made by Kamini Verma. Despite the aforesaid, we find no merit in the submissions advanced at the hands of the learned counsel for the appellant......***
>
> ***40. ....The question of doubting the dying declaration made by Kamini Verma could have arisen if there had been other cogent evidence to establish any material discrepancy therein."***

25. In ***Muralidhar alias Gidda and another vs. State of Karnataka (2014)5 SCC 730*** the Hon'ble Supreme Court held:-

"15......The recording of Pradeep's statement by a constable (PW30) as dictated by PW36 (PSI) in this situation riased many questions. The trial Court found this absurd......

18. The sanctity is attached to a dying declaration because it comes from the mouth of a dying person. If the dying declaration is recorded not directly from the actual words of the maker but as dictated by somebody else, in our opinion, this by itself creates a lot of suspicion about credibility of such statement and the prosecution has to clear the same to the satisfaction of the court......."

26 In ***Surinder Kumar vs. State of Punjab (2012)12 SCC 120*** the Hon'ble Apex Court has also held that

"14. We are not at all impressed by any of these submissions. There are a large number of decisions that have been cited before us by learned counsel for the State where persons with 90% burns have given a dying declaration and that has been accepted. For example, in Amit Kumar v. State of Punjab, (2010) 12 SCC 285 the victim had 90% burns and yet her statement was accepted. This Court noted, inter alia, that the victim did not unfairly implicate anybody who had not participated in the crime. This Court relied on ten principles governing a dying declaration as mentioned in Paniben v. State of Gujarat, (1992) 2 SCC 474 to conclude that there was no reason to disbelieve the dying declaration given by the victim in that case.

15. Similarly, in Govindappa v. State of Karnataka, (2010) 6 SCC 533 the victim had 100% burn injuries and yet she was found to be in a fit state of mind to give her statement and affix her left thumb impression on the statement. The dying declaration was accepted by this Court on the evidence of the doctor that the victim was in a position to talk.

16. In Sukanti Moharana v. State of Orissa, (2009) 9 SCC 163, the victim had 90 to 95 per cent burn injuries covering 90 to 95 per cent body surface and yet her dying declaration was accepted after considering the principles laid down in Paniben.

17. In Kamalavva v. State of Karnataka, (2009) 13 SCC 614, reference was again made to Paniben. It was noted that the doctor who was present at the time of recording the dying declaration had attached a certificate to the effect that it was recorded in his presence. This Court rejected the technical objection regarding the non-availability of a certificate and endorsement from the doctor regarding the mental fitness of the deceased. It was held that the view taken by this Court in numerous decisions is that this is a mere rule of prudence and not the ultimate test as to whether or not the dying declaration was truthful or voluntary.

18. In Satish Ambanna Bansode v. State of Maharashtra, (2009) 11 SCC 217, the victim had 95% superficial to deep burns and after referring to Paniben, her dying declaration was accepted by this Court.

19. Insofar as the case before us is concerned, we may only note that there is no format prescribed for recording a dying declaration. Indeed, no such format can be prescribed. Therefore, it is not

obligatory that a dying declaration should be recorded in a question-answer form. There may be occasions when it is possible to do so and others when it may not be possible to do so either because of the prevailing situation or because of the pain and agony that the victim might be suffering at that point of time.

20. It is also not obligatory that either an Executive Magistrate or a Judicial Magistrate should be present for recording a dying declaration. It is enough that there is evidence available to show that the dying declaration is voluntary and truthful. There could be occasions when persons from the family of the accused are present and in such a situation, the victim may be under some pressure while making a dying declaration. In such a case, the Court has to carefully weigh the evidence and may need to take into consideration the surrounding facts to arrive at the correct factual position."

(at pp. 125-126)

27 In ***Ramakant Mishra alias Lalu and others vs. State of Uttar Pradesh (2015)8 SCC 299*** the Hon'ble Supreme Court held:-

"7. The defence has rested very heavily nay, almost entirely, on the alleged Dying Declaration attributed to the deceased. The admissibility of a Dying Declaration as a piece of evidence in a Trial is governed by Section 32(1) of the Evidence Act, 1872. Section 32, as a whole, enunciates the exceptions to the rule of non-admissibility of hearsay evidences, eventuated out of necessity to give relevance to the statements made by a person whose attendance cannot be procured for reasons stipulated in the section. Postulating the essential ingredients to define what exactly would constitute a hearsay is an arduous task, and since we are only concerned with one of its exceptions, we should forbear entering into the entire arena. The risks while admitting a Dying Declaration and the statements falling within the domain of Section 32(1) run higher in contrast to other sundry evidences, and this entails a huge bearing on their admissibility and credibility. Such statements are neither made on oath nor the maker of the statement would be available for cross-examination nor are they made under the influence of the supremacy and the solemnity of the court-room. This is the reason why this Court has consistently underlined the necessity to examine this specie of evidence with great circumspection and care. However, once a Dying Declaration is held to be authentic, inspiring full confidence beyond the pale of doubt, voluntary, consistent and credible, barren of tutoring, significant sanctity is endowed to it; such is the sanctitude that it can even be the exclusive and the solitary basis for conviction without seeking any corroboration. At this juncture, it is worthwhile noting that the sanctity attached to a Dying Declaration springs up from the rationale that a person genuinely under the sense of imminent death would speak only the truth.

8. In addition to the Dying Declaration, which is only one of the species of the genus of Section 32(1), there could be other statements, written or verbal, which also would be encompassed within the sweep of this section, and at this point the Indian law drifts from the English law. This is further evident from the usage of phraseology in the

section, embracing not only statements made about "cause of death" but also about "any of the circumstances of the transaction which resulted in the death", whether or not the person making the statement was under "expectation of death". These statements could be in the form of a suicide note, a letter, a sign or a signal, or a product of any reliable means of communication; their genuineness and credibility shall, of course, be reckoned by the Court entertaining the concerned matter. A Dying Declaration enjoys a higher level of credence vis--vis any other statement abovementioned, which is on account of the former being made in the "contemplation of death". "Contemplation of death" is the primal factor to segregate Dying Declarations from other statements. But no hard-and-fast rule can be laid down to confine the contemplation within the circumference of few hours or a few days in which death of the maker of the statement must happen so as to elevate that statement to the level of a Dying Declaration. Moreover, the state of mind of the maker would also be material in discerning completely as to whether the maker was mentally fit to make the statement and whether the maker actually could have contemplated death.

9. Definition of this legal concept found in Black's Law Dictionary (5th Edition) justifies reproduction:

"Dying Declarations - Statements made by a person who is lying at the point of death, and is conscious of his approaching death, in reference to the manner in which he received the injuries of which he is dying, or other immediate cause of his death, and in reference to the person who inflicted such injuries or the connection with such injuries of a person who is charged or suspected of having committed them; which statements are admissible in evidence in a trial for homicide (and occasionally, at least in some jurisdictions, in other cases) where the killing of the declarant is the crime charged to the defendant. Shepard v. United States,78 L.Ed. 196.

Generally, the admissibility of such declarations is limited to use in prosecutions for homicide; but is admissible on behalf of accused as well as for prosecution. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death is not excluded by the hearsay rule (the Federal Rules of Evidence, Rule 804(b)(2): "Statement under the Belief of imminent Death")

10. When a person makes a statement while being aware of the prospect that his death is imminent and proximate, such a statement assumes a probative value which is almost unassailable, unlike other statements which he may have made earlier, when death was not lurking around, indicating the cause of his death. That is to say that a person might be quite willing to implicate an innocent person but would not do so when death is knocking at his door. That is why a Dying Declaration, to conform to this unique specie, should have been made when death was in the contemplation of the person making the statement/declaration. In the case before us, the statement, if made by the deceased, would qualify to be treated as a Dying Declaration

because she was admitted in the hospital, having sustained 90-95 per cent burn injuries, and because of this grave burn injuries, she would be expecting to shortly breathe her last.

11. The central question, however, remains as to whether the alleged Dying Declaration attracts authenticity. Since the prosecution has succeeded in showing/proving by preponderance of probability that a dowry death has occurred, the burden of proving innocence has shifted to the accused. It appears to us to be unexceptionable that whenever a person is brought to a hospital in an injured state which indicates foul-play, the hospital authorities are enjoined to treat it as a medico-legal case and inform the police. If the doctor, who has attended the injured, is of the opinion that death is likely to ensue, it is essential for him to immediately report the case to the police; any delay in doing so will almost never be brooked. The police in turn should be alive to the need to record a declaration/statement of the injured person, by pursuing a procedure which would make the recording of it beyond the pale of doubt. This is why an investigating officer (I.O.) is expected to alert the jurisdictional Magistrate of the occurrence, who in turn should immediately examine the injured. When this procedure is adopted, conditional on the certification of a doctor that the injured is in a fit state to make a statement, a Dying Declaration assumes incontrovertible evidentiary value. We cannot conceive of a more important duty cast on the Magistrate, since the life & death of a human being is of paramount importance. We think that only if it is impossible for the Magistrate to personally perform this duty, should he depute another senior official. Non-adherence to this procedure would needlessly and avoidably cast a shadow on the recording of a Dying Declaration. The prosecution, therefore, would be expected to prove that every step was diligently complied with. The prosecution would have to produce the doctor or the medical authority to establish that on the examination of the injured/deceased, the police had been immediately informed. The I.O. who was so informed would then have to testify that he alerted the Magistrate, on whose non- availability, some responsible person was deputed for the purpose of recording the Dying Declaration. We are not in any manner of doubt that where medical opinion is to the effect that a person is facing death as a consequence of unnatural events, the responsibility of the Magistrate to record the statement far outweighs any other responsibility. There may be instances where there was no time to follow this procedure, but that does not seem to be what has transpired in the case in hand. In cases where some other person is stated to be recipient of a Dying Declaration, doubts may reasonably arise."

28. It is evident from the aforesaid exposition of law related to dying declaration that though, in certain judgments, Hon'ble Surpeme Court has prescribed procedure to record dying declaration so as to make it reliable and adherence to the said procedure has been strictly warranted, however, in given facts and circumstances, it has also been clarified in numerous judgments that there cannot be a fixed mode/format and procedure for recording dying declaration for relying upon it and dying declaration can be oral or in writing and in case dying declaration found to be volunteer, reliable and trustworthy the same,

recorded in any manner or in any form, by any person, can be relied upon to convict accused.

29 As per prosecution case, PW12 Inspector Kamaljit SHO P.S. Nurpur received the telephonic message from Medical Officer Civil Hospital, Nurpur about the arrival of a lady in the hospital for treatment in burning case whereupon he sent PW16 SI Mukesh Kumar to the said hospital and on receiving the message on mobile phone from PW16 SI Mukesh Kumar, requesting him to come along with Magistrate in the hospital, he reached the hospital at 10.15 AM and by that time, PW4 Kavita Thakur, Tehsildar (Executive Magistrate) also reached in the hospital and in her presence statement of victim was recorded by PW16 Mukesh Kumar and said statement Ext.PW4/A was attested by PW4 Kavita Thakur. It is also the case of prosecution that at that time Medical Officer PW1 Dr. Suman Saxena was also present there.

30. It has come in evidence of PW4, PW12 and PW16 that PW4 Tehsildar was putting questions to the victim and statement was being recorded by PW16 Mukesh Kumar on the dictation of PW4 Tehsildar. As per PW1 Dr. Suman Saxena, the victim was answering in Hindi as well as in local language. PW12 has also stated that deceased was giving answers in Hindi, Punjabi and Pahari and these witnesses are silent about presence PW14 Jeevan Jyoti, sister of deceased, at that time, whereas, according to PW14 Jeevan Jyoti, when she reached in hospital, PW4 Tehsildar was questioning the victim and she was giving answers to the same indicates her presence at the time of recording of evidence. In her statement Ext.DX, PW14 Jeevan Jyoti, recorded under Section 161 Cr.P.C., has stated that statement of her sister Ranju Bala was recorded in her presence. It has also come in her evidence that after receiving telephonic call at about 8/8.15 AM she had proceeded to the hospital along with her husband on scooty and had reached in the hospital within 20-25 minutes, which means that she was present in the hospital at least by 9 O'clock. It has also come in her evidence that when she reached in the hospital, statement of victim was being recorded in the presence of Tehsildar by police, whereas according to PW4 Kavita Thakur, she was called by police at 11.10 AM and thereafter she went to the hospital and it is also the case of prosecution as established on the basis of GD entry Ext.PW12/A proved in the statement of PW12 Kamaljit that police had received the telephonic information from the Medical Officer Civil Hospital Nurpur at 10.05 AM and thereafter PW16 SI Mukesh Kumar had rushed to the hospital. Dying declaration Ext.PW4/A has been stated to have been recorded at 11.30 AM. Therefore, it indicates that PW14 Jeevan Jyoti had reached in hospital prior to the arrival of police as well as Tehsildar, whereas deposition of PW14 Jeevan Jyoti is contrary to that. There are discrepancies and contradictions in statements of witnesses in this regard with respect to the timing of recording Ext.PW4/A and persons in whose presence the said statement was recorded and for which their versions in this regard cannot co-exist as instead of supplementing, depositions of witnesses are demolishing the version of each other.

31 Even if statement Ext.PW4/A is to be considered to have been recorded correctly and in accordance with law and there is no illegality or irregularity in recording the statement of deceased by PW16 SI Mukesh Kumar in presence of PW4 Kavita Thakur, Tehsildar, then also for the evidence on record, as discussed hereinafter, it cannot be relied upon to convict the accused.

32 In the present case, respondents have been charged under Sections 498-A and 306 read with Section 34 IPC. Section 306 IPC provides punishment for abetment of suicide. To attract the ingredients of abetment, intention of accused to aid or instigate or to abet the deceased to commit the suicide is necessary. Section 107 of IPC defines the abetment of a thing. Sections 107, 306 and 498-A IPC read as under:-

"107 <u>Abetment of a thing</u>-A person abets the doing of a thing, who-

First – Instigates any person to do that thing; or

Secondly-Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place I pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly-Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1-A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Section 306 IPC reads as under:-

"306. <u>Abetment of suicide</u>-If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine."

<u>Section 498-A IPC</u>

498A. Husband or relative of husband of a woman subjecting her to cruelty-

Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation-For the purpose of this secgtion, "cruelty" means-

(a) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet an unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand."

33 The statement Ext.PW4/A does not prove on record that accused persons had either instigated the deceased to commit suicide or had engaged with each other in conspiracy for that purpose or intentionally aided the deceased by any act or illegal omission for committing the suicide.

34 In statement Ext.PW4/A, it is recorded that on 19.7.2009 at about 9 AM husband of victim had started abusing her who was a drunkard whereupon victim had told that his family (her in-laws) had harassed her too much and therefore, she would end her life and in response thereto, her husband had asked her to die and thereafter, victim, out of anger and being tired of in-laws, had put off kerosene oil from a canny upon her and lit the fire and despite her continuous cries and burning to large extent, her husband did not come to save her and thereafter he brought her to hospital and it is further stated that her father-in-law, mother-in-law and sister-in-law and husband also used to abuse and harass her too much.

35 Only eye witness to the incident PW13 Gangesh Kumar, six years old son of couple. After observing him, the trial Court has considered him a competent witness. He in his examination-in-chief has stated that on the day of incident, his mother and father were quarreling with each other in the room in his presence whereas, his sister was playing outside. His father was abusing his mother and mother had started weeping and thereafter his mother went to bathroom and poured kerosene oil out of bottle and set herself on fire, which started from her feet. On crying of his mother, his aunt/Bua Seema came there and Gudia (daughter of Tai) also came and by that time fire had spread upon whole body. He has also stated that his father used to drink in night and, abuse and assault his mother and as and when his aunt Seema came, she also used to abuse his mother. As per his statement, his father came and tried to put off the fire with chappal and thereafter asked him to make a telephonic call to his mausi (PW14 Jeevan Jyoti) and his father dialed to his mausi and he (PW13 Gangesh) talked with her and told that his mother had set herself on fire and thereafter his mother was taken to hospital. In the last he has stated that besides his father, his grandmother, grandfather and bua also used to quarrel with his mother.

36. From the entire evidence on record, it emerges that parents-in-laws along with their another son and unmarried daughter were residing in ground floor, whereas accused Rajeev (husband of deceased), with his family, was residing separately in the first floor and both units were having separate kitchens and separate entry to their residence and on the day of incident, husband and wife (Rajeev and Ranju Bala) were quarreling with each other and in the meanwhile, accused Rajeev went to the ground floor to bring food from family of his brother, which aggravated the anger of Ranju Bala leading to suicidal act of Ranju Bala, whereafter accused Rajeev had tried to extinguish the fire and had taken her to hospital. In statement Ext.PW4/A, Ranju Bala has disclosed that she had attempted to die on account of response of her husband to her threat to die. It has also established on record, by prosecution, itself from document Ext.PW8A and also statement of PW15 Dr. Rajpal Singh that deceased was suffering from psychiatric problem since 2003-2004 and PW15 has noticed symptoms of catatonia in the deceased. Though, he has stated that catatonia was mild in the patient, however, he has admitted that catatonia is a variety of schizophrenia causing wild excitement leading to homicidal or suicidal tendency and patient may cause harm to others or himself.

37 Even if the reason for attempting suicide, as disclosed in Ext.PW4/A, is admitted to be true, it does not meet the requirement of ingredients of abetment as defined under Section 107 IPC as during the hot exchange, to ask to die, in response to the threat to die, cannot be treated as an instigation to commit suicide or a conspiracy for doing the said act or intentionally aiding for commission of suicide by accused Rajeev Kumar. So far as the other accused are concerned, they were living separately for all intends and purposes since long and therefore, their previous conduct, if any, causing harassment to the deceased cannot be treated as an abetment to commit suicide on the date of incident. For absence of ingredients for abetment of suicide, the accused persons cannot be punished for commission of offence under Section 306 IPC.

38 For conviction under Section 498-A IPC there must be cruelty towards the wife by husband or her relatives as explained in the said Section for which a willful conduct of a nature which is likely to drive a woman to commit suicide or cause grave injury or danger to life, limb or health (whether mental or physical) of the woman is necessary or harassment with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security is necessary.

39 In the present case, so far as demand is concerned, it was never alleged in statement Ext.PW4/A or otherwise at first instance, however a stray reference of payment of

money to deceased and her husband by father of deceased has come in evidence of her father PW5 Balwant Singh, but the said fact was deposed by him in Court for the first time and was not disclosed to police during investigation or any other point of time. PW14 Jeevan Jyoti, sister of deceased, is also silent on this count. Therefore, harassment on account of demand is ruled out.

40. So far as cruelty is concerned, ingredients required to prove it under Section 498-A IPC are also missing. From the statement of PW13 Gangesh and the injuries received by accused Rajeev during extinguishing the fire of deceased, which stands established through medical evidence, it cannot be inferred that accused Rajeev was having any intention to cause death of deceased or drive her to commit suicide. On the basis of evidence, what can be said at all is that there is possibility of strained relations of deceased with other family members of her husband, which had resulted separation of her family from the rest of the family members and accused Rajeev Kumar might be a drunkard and quarrelsome in nature but these facts are not sufficient to hold that accused have committed the offences as charged, more particularly when evidence of PW5 Dr.Rajpal indicates that deceased might have the suicidal tendency and it creates doubt about the cause of suicide as alleged by prosecution.

41. It is settled law that when there is doubt, the benefit of same is to be extended to the accused.

42. In view of above discussion, we are of the considered opinion that prosecution has not been able to prove its case beyond reasonable doubt and therefore, respondents are entitled for benefit of doubt.

43. Respondents have advantage of acquittal by the trial Court fortifying the presumption of innocence in their favour. Prosecution has failed to point out any incriminatory evidence on record against the respondents, not considered by the trial Court. The trial Court has considered the entire evidence on record completely and correctly. There is no illegality, irregularity or perversity in judgement. Acquittal of respondents has neither resulted into travesty of justice nor has caused miscarriage of justice. Therefore, w e find no ground for inferference in the impugned judgment. Appeal is dismissed accordingly. Bail/surety bonds furnished by respondents and their sureties are discharged. Record be sent back to the concerned Court.

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

Sushma Rani …Petitioner
Versus
State of Himachal Pradesh …Respondent

CrMP(M) No. 1338 of 2018
Decided on: 08.03.2019.

Code of Criminal Procedure, 1973- Section 439- Regular Bail- Grant of- Petitioner accused of murdering her husband in conspiracy with co-accused 'S'- Seeking bail by averring of her having committed no overt act in alleged episode- She being young lady should be enlarged on bail- State resisting petition on ground of accused being involved in heinous offences- And her petition was dismissed earlier also on ground that she may influence witnesses-

Held, trial pending before Court of Session and is at evidence stage- Only official witnesses are to be examined and she will not be in position to influence them- Allegations of murder are subject matter of trial- Under-trial detention should not be used as conviction before trial- Petitioner being young woman can be treated differently from co-accused- Petition allowed with conditions. (Paras 6 to 8)

Case referred:
Nirmala Devi vs. State of H.P., latest HLJ 2016 (HP) 382
Rita Devi vs. State of H.P., Cr.MP(M) No.1870 of 2015

For the petitioner: Ms. Shashi Kiran Negi, Advocate.
For the respondent: Mr. Shiv Pal Manhans, Additional Advocate General, with Mr. R.P. Singh and Mr. Raju Ram Rahi, Deputy Advocate Generals.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge. (oral)

Petitioner has preferred present petition under Section 439 of the Code of Criminal Procedure (hereinafter referred to as 'CrPC'), for grant of regular bail in case FIR No. 54 of 2016, dated 4th July, 2016, registered under Sections 302, 120-B and Section 34 of the Indian Penal Code (hereinafter referred to as 'IPC'), registered at Police Station Kala Amb, District Sirmour, H.P.

2. The respondent/State has filed status reports and produced the record for perusal. Prosecution case in brief is that deceased Sohan Singh (husband of present petitioner) had not returned back from his shop on 3rd July, 2016 and his dead body was noticed by complainant Gafur Mohammad, lying along with motor cycle below the culvert, on 4th July, 2016 at 8.00 a.m., near Gulria bridge, when he had looked below the culvert after noticing the blood, pieces of glass, battery and mobile phone on the road. Whereafter, he informed one Satish Kumar, who in turn informed the villagers and on arrival of the police on the spot, his statement under Section 154 Cr.P.C. was recorded and after registration of F.I.R., investigation was carried out. During post-mortem, it revealed that deceased died as a result of shock due to anti mortem injury to brain tissue with a moderately heavy wooden leading to blunt trauma homicidal in nature. On verifying the details of mobile phones of relatives and friends of deceased, it revealed that during the night of incident at 12.31 a.m., petitioner had conversation from her mobile phone bearing No.8894449439, with a Puran, having mobile number of Haryana area, bearing No.8930892125. On further enquiry of CDR and IMEI of mobile phones, it was found that mobile phone used for Sim No.8930892125, was also being used for any Sim No.9812582353, location of which was found on the spot of incident during the night of commission of offence and it was also revealed that Sim No.9812582353 was in the name of father of petitioner Sushma Rani, who had given it to his son Rinku, who had given it to petitioner Sushma Rani, who lastly had given it to co-accused Rajesh Kumar son of his step maternal aunt and at the time of incident, he was found using the said sim. On tracing, on 20th July, 2016, Rajesh Kumar was found in a village in district Yamunanagar and on enquiry he had disclosed that he and Sushma were having affairs, but due to marriage of petitioner Sushma in April, 2016 with deceased Sohan Singh, they were finding it difficult to meet each other. Therefore, they had conspired to eliminate deceased Sohan Singh and as per plan, on 3rd July, 2016, co-accused Rajesh had come to Barma Papri, the place of

deceased Sohan Singh and had concealed a piece of iron pipe behind the parapet and started waiting for Sohan Singh near his shop on the road, wherefrom deceased Sohan Singh had to cross to go home after closing his shop. On arrival of Sohan Singh at that place, co-accused Rajesh met him and they started moving on their motor cycle, having talks with each other. On reaching Gulria bridge culvert, Rajesh asked deceased Sohan Singh to stop on the pretext of urinating. At that time Sohan Singh was carrying a bundle of rubber pipe on his neck. Co-accused Rajesh took out the iron pipe and hit the head of Sohan Singh with it with force, whereupon Sohan Singh fell down on the road. Whereafter, co-accused had thrown the pipe into the Naala and dragged Sohan Singh and thrown his motor cycle below the culvert. Thereafter, co-accused Rajesh Kumar came down below the culvert and found that Sohan Singh had expired within two-three minutes and then he went back to Yamunagar on his motor cycle. As per prosecution case, during investigation, petitioner Sushma had corroborated the version of co-accused Rajesh Kumar.

3. It is also mentioned in the status report that on verification of antecedents of co-accused Rajesh Kumar, it has been found that there were five cases registered against him and in case No.297/06 under Sections 279, 337 of IPC, case No.331/06 under Sections 457, 511of IPC and case No.31/07 under Section 364A, 376, 302, 201 of IPC, he had been acquitted and in case No.293/06 under Section 457, 380 of IPC, trial is pending, whereas in case No.18/07 under Sections 376, 302, 201 of IPC, registered in Police Station Paonta Sahib, District Sirmaur, H.P., he was convicted and sentenced with life and was serving sentence in Modal Central Jail, Nahan, District Sirmaur at the time of incident. On enquiry from the Superintendent of Jail, it was revealed that he was released on parole sanctioned from 12th November, 2015 to 21st November, 2015 but had not returned to jail on expiry of the said period and was absentee on parole. During this period, co-accused and petitioner have conspired and committed the offence.

4. Learned counsel for the petitioner has submitted that even if, prosecutions case is admitted to be proved in all respect, there is no overt act on the part of the petitioner for commission of offence and further that petitioner is a woman of young age of 26 years and keeping in view the principles incorporated under Section 437 Cr.P.C., she is entitled to be treated differently and deserves to be enlarged on bail, particularly keeping in view the fact that she is behind the bar since 20th July, 2016 and now, majority of witnesses have been examined. Learned counsel has also relied upon the judgments passed by the coordinate Bench, in case ***Nirmala Devi Versus State of H.P. reported in latest HLJ 2016 (HP) 382*** and ***Cr.MP(M) No.1870 of 2015 titled as Rita Devi Versus State of H.P.***, wherein accused in case under Section 302 of IPC, were released on bail keeping in view their womanhood. It is further submitted that the petitioner had applied for bail before the trial Court, which was rejected by the Additional Sessions Judge, Sirmaur, District at Nahan, vide order dated 21st January, 2017, considering the stage of case/investigation at that time and now, in the changed circumstances, petitioner is entitled for bail.

5. Learned Additional Advocate General has opposed the bail for the reasons assigned in order passed by learned Additional Sessions Judge, Sirmaur, and also on the ground that the offence involved in present case is heinous crime and release of petitioner will have adverse impact on the society at large and thus, keeping in view the nature and gravity of the offence, he has prayed for dismissal of the petition.

6. There is no quarrel with the ratio of law discussed in *Nirmala Devi* and *Rita Devi's* cases (supra), but such principles are to be applied by considering the facts and circumstances of each and every case which normally are not identical in two different criminal cases. Learned Additional Sessions Judge has rightly observed that Section 437 Cr.P.C. does not directs that in each and every case of woman, accused in a case for

commission of offence punishable with death or imprisonment with life, is entitled for bail in any facts and circumstances of the case. No doubt, Section 437 Cr.P.C. deals with a situation when accused is produced before the Magistrate and under Section 439 Cr.P.C. devolves special powers on the High Court and or/Court of Session regarding the bail. But it is also settled position that provisions contained in Sections 437 and 438 Cr.P.C., can also be taken into consideration at the time of considering the bail under Section 439 Cr.P.C. The observations of learned Additional Sessions Judge, in his order dated 21st January, 2017, that it is discretion of the Court to decide the bail application of a woman after considering the facts and circumstances of the case. In fact, Section 437 Cr.P.C. refrains the Courts other than the High Court or Court of Session, from releasing a person accused of, or suspect of the commission of any non bailable offence, who, is arrested or detained without warrant, or appears, or is brought before such Court and there appears reasonable ground for believing that he is guilty of an offence punishable with death, or imprisonment, for life. However, an exception has been carved out enabling such Court to release such a person on bail, in case such person is under the age of 16 years, or is a woman, or is sick, or infirm, with further provision that no such person shall be released without giving an opportunity of hearing to the Public Prosecutor, which means that the persons under the age of 16 years, or woman, or sick, or infirm, are not to be released in all cases, but after considering the facts and circumstances brought in the notice of the Court by the Public Prosecutor. Therefore, solely on the ground that the petitioner is a woman, she is not entitled for bail.

7. It is informed that recording of evidence in the trial is at final stage and out of 39 witnesses, only 11 witnesses are to be examined and out of those, 8 witnesses have been summoned for 23rd and 24th May, 2019. Further, that all remaining witnesses are official witnesses, who have to prove the link evidence on record. On 21st January, 2017, bail application of the petitioner was rejected on the ground that she may influence the witnesses as most of the witnesses were from her maternal side and the mobile sim, proving her involvement in the case, was also given to her by her brother and therefore, keeping in view the stage of the investigation/case, it was found that there were no special circumstances to release the petitioner on bail at that time, as important witnesses, who were to lay foundation of the prosecution case, had not been examined at that time. Now, it is a matter of fact as informed that only official witnesses are to be examined and petitioner may not be in a position to influence such witnesses.

8. It is true that the marriage of petitioner and deceased Sohan Singh was solemnized in April, 2016 and he was murdered in July, 2016 and relation of husband and wife are based on faith upon each other and after parents, it is only the spouse with whom one feels utmost security and breach of such faith is definitely a heinous crime that too, to the extent of causing murder of spouse. But at the same time, it is also fact that this allegation is subject to scrutiny of prosecution evidence on record and under trial detention should not be used as conviction before the trial. Keeping in view entire facts and circumstances and evidence connecting the petitioner with commission of offence, which are yet to be established by the prosecution, coupled with the fact that she is a woman of young age, she can be treated differently from the co-accused Rajesh Kumar.

9. In view of above discussion, I feel at this stage that the petitioner is entitled for bail and accordingly she is released on bail in case FIR No. 54 of 2016, dated 4th July, 2016, registered under Sections 302, 120-B and Section 34 of the Indian Penal Code, registered at Police Station Kala Amb, District Sirmour, H.P., if not required in any other case, subject to her furnishing personal bond in the sum of ₹ 50,000/- with one surety in the like amount, to the satisfaction of the trial Court.

10. The bail shall be subject to further following conditions:-

(i) *That the petitioner shall make herself available to the police or any other investigating agency or Court in the present case as and when required;*

(ii) *That the petitioner shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to Court or to any police officer or tamper with the evidence. She shall not, in any manner, try to overawe or influence or intimidate the prosecution witnesses;*

(iii) *That she shall not obstruct the smooth progress of the trial;*

(iv) *That the petitioner shall not commit the offence similar to the offence to which he is accused or suspected;*

(v) *That the petitioner shall not misuse his liberty in any manner;*

(vi) *That the petitioner shall not jump over the bail and also shall not leave the territory of India without information and she shall inform about his mobile/contact number and shall keep on informing about change of address/ mobile/contact number, if any;*

11. It will be open to the prosecution to apply for imposing and/or to the trial Court to impose any other condition on the petitioner as deemed necessary in the facts and circumstances of the case and in the interest of justice.

12. In case the petitioner violates any condition imposed upon her, her bail shall be liable to be cancelled. In such eventuality, prosecution may approach the competent Court of law for cancellation of bail in accordance with law.

13. Learned trial Court is directed to ensure compliance of the directions issued by the High Court vide communication No. HHC/VIG/Misc.Instructions /93-IV.7139 dated 18th March, 2013, as applicable.

14. Observations made in this petition hereinbefore shall not affect the merits of the case in any manner and will strictly be confined for the disposal of this bail application.

15. Petition stands disposed of in aforesaid terms.

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

Indresh Dhiman. …Plaintiff/non-applicant.
Versus
Hindustan Times and others. …Defendants/applicants.

OMP Nos. 388 and 394 of 2017 in
Civil Suit No. 26 of 2017
Date of decision: 7.3.2019

Code of Civil Procedure, 1908 –Order VII Rule 11 –Rejection of plaint – Stage – Held, Trial Court can reject plaint at any stage of suit- For rejection of plaint, facts pleaded in plaint and plaint only are relevant and need to be taken into consideration- Plea taken by defendant in written statement would be wholly irrelevant. (Para 20)

Tort – Defamation by libel- Period of limitation– Commencement- Held, defamation by libel is complete on day when defamatory matter is published- Period of limitation for filing suit for damages will commence from date of publication of defamatory matter. (Paras 17 to 22)

Limitation Act, 1963 (Act)- Section 22- Tort- Defamation by libel, whether gives continuous cause of action?- Held, defamation by libel is complete on day of publication of defamatory matter- It is not continuous civil wrong- Limitation to claim damages will start from date of its publication- Period in filing suit cannot be extended by invoking Section 22 of Act. (Para 21)

Cases referred:

Balasaria Construction Pvt. Ltd. vs. Hanuman Seva Trust & others, Civil appeal No. 4539 of 2003, decided on 4.11.2005
Khawar Butt vs. Asif Nazir Mir & others, CS (OS) No. 290 of 2010, decided on 7.11.2013
N.N.S Rana vs. Union of India and others, RFA No. 757 of 2010, decided on 16.9.2011
Popat and Kotecha Property vs. State Bank of India Staff Association, (2005) 7 SCC 510
Prithvi Raj Jhingta and another vs. Gopal Singh and another, 2006(2) Shim.LC 441
Ramesh B. Desai and others vs. Bipin Vadilal Mehta & others, AIR 2006 SC 3672

For the Plaintiff/Non-applicant: Mr.Bhuvnesh Sharma, Advocate.
For the Defendants/Applicants: Mr.Pranay Pratap Singh, Advocate, for applicants No. 1 and 2.
Mr.B.R. Verma, Advocate, for defendant No. 4.
Mr.Vikrant Thakur and Mr.Sushant Vir Singh, Advocates, for defendant No. 5.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge (oral)

Main suit, in present case, has been filed for damages on account of acts of misfeasance, malfeasance and nonfeasance on account of false and malicious printing and publishing of defamatory material by the defendants against the plaintiff in their respective newspaper/news channel on various dates in the month of January, 2014.

2. Applications, being decided vide this common order, have been filed by defendants No.1 and 2 under Order 7 Rule 11 of the Code of Civil Procedure (herein after referred to as 'CPC' for short), before filing but reserving right to file written statement, on the ground that the suit is barred by provisions of Limitation Act, 1963 and thus plaint is liable to be rejected, for the reason that the publication, alleged to be defamatory, by which plaintiff is aggrieved, was published on 14.1.2014, whereas, present suit has been filed on 7.1.2017 after expiry of limitation period, as prescribed under Article 75 of Limitation Act.

3. In reply to these applications, there is denial simplicitor to the averments made in the applications with further assertion that suit is well within the period of limitation.

4. As per para 22 of the plaint, cause of action against defendants No. 1 to 3, defendants No. 4 and No. 5 and defendant No. 6 arose in favour of plaintiff respectively on 14.1.2014, 10.1.2014 and 9.1.2014, when news items were published/telecasted in respective newspaper/news channel related to these defendants and also on 22.2.2015 when Investigating Officer had filed report of cancellation of FIR No. 5 of 2014 lodged by

complainant Bindiya Rani, on the basis of which news item was published/telecasted and also on 9.11.2015 when concerned Judicial Magistrate accepted the cancellation of FIR and it is further averred that cause of action is still continuing in favour of plaintiff and against the defendants, as till date plaintiff has been facing consequences of false and malicious publication/telecasting of news against him.

5. It is contended on behalf of non-applicant/plaintiff that there is nonfeasance, malfeasance and misfeasance on the part of defendants for their act and conduct as clean chit given by the Court in favour of plaintiff has not been published, whereas they have willfully published the news item on the basis of intentional incorrect action or advise and the publication/telecasting was willful and intentional action, causing injury to the plaintiff. It is further contended that limitation is a mixed question of fact and law, which is to be decided along with other issues. Reliance has been placed on a judgment passed by Full Bench of this High Court in ***Prithvi Raj Jhingta and another Vs. Gopal Singh and another 2006(2) Shim.LC 441*** and pronouncement of the Apex Court in ***Ramesh B. Desai and others Vs. Bipin Vadilal Mehta & others AIR 2006 SC 3672.*** Further reliance has also been placed on unreported judgment of the Apex Court passed in ***Balasaria Construction Pvt. Ltd. Vs. Hanuman Seva Trust & others, Civil appeal No. 4539 of 2003, decided on 4.11.2005.***

6. Learned counsel for the applicants/defendants has submitted that Article 75 of the Limitation Act provides that a suit for compensation for libel, has to be filed within one year from the date of publication of libel and there is no other provision for extension of limitation period provided under Article 75 of the Limitation Act and keeping in view the language of Article 75 of Schedule of Limitation Act, there can be no continuous cause of action with respect to publication of defamatory material on one date and Section 22 of the Limitation Act, providing extension of period of limitation for continuing breach and torts, is not applicable in present case. Reliance has been placed upon the pronouncement of Delhi High Court in case ***N.N.S Rana Vs. Union of India and others, RFA No. 757 of 2010, decided on 16.9.2011 and Khawar Butt Vs. Asif Nazir Mir & others, CS (OS) No. 290 of 2010, decided on 7.11.2013.***

7. Plea of non-applicant/plaintiff that issue of limitation is to be decided along with other issues involved in the suit is based upon the judgment of Full Bench passed by this High Court in *Prithvi Raj Jhingta's* case, wherein provisions of Order 14 Rule 2 CPC providing to pronounce the judgment by the Court on all issues, has been explained. Rule 2 of Order 14 C.P.C. reads as under:-

> *"2. Court to pronounce judgment on all issues.—(1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.*
>
> *(2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to—*
>
> > *(a) the jurisdiction of the Court, or*
> >
> > *(b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue."*

8. In *Prithvi Raj Jhingta's* case, it has been held as under:-

"9. Based upon the aforesaid reasons therefore, and in the light of legislative background of Rule 2 of the legislative intent as well as mandate based upon such background, as well as on its plain reading, we have no doubt in our minds that except in situations perceived or warranted under sub-rule (2) where a Court in fact frames only issues of law in the first instance and postpones settlement of other issues, under sub-rule (1), clearly and explicitly in situations where the Court has framed all issues together, it is not open to the Court in such a situation to adopt the principle of severability and proceed to decide issues of law first, without taking up simultaneously other issues for decision. This course of action is not available to a Court because sub-rule (1) does not permit the Court to adopt any such principle of severability and to dispose of a suit only on preliminary issues, or what can be termed as issues of law. Sub-rule (1) clearly mandates that in a situation contemplated under it, where all the issues have been framed together and have also been taken up for adjudication during the course of the trial, these must be decided together and the judgment in the suit as a whole must be pronounced by the Court covering all the issues framed in the suit."

9. From the aforesaid findings returned by the Full Bench, it is unambiguously clear that in a situation where the Court frames only issue under sub-rule (2), related to the jurisdiction of the Court or a bar to the suit created by any law for the time being in force and postpone the settlement of other issues under sub-rule (1) of Order 14 Rule 2, the Court is empowered to deal and determine that suit in accordance with the issues so framed under sub-rule (2) instead of pronouncing the judgment on all issues.

10. From perusal of judgment in *Prithvi Raj Jhingta's* case, it is evident that the situation involved in that case is not similar to the present case. In that case the Full Bench, dealing with a situation where all the issues were framed together and were also taken up for adjudication during the course of the trial, has held that all issues framed and adjudicated must be decided together and the judgment in the suit as a whole must be pronounced by the Court covering all such issues. In present case that situation has not arrived yet. Some of defendants have preferred to file written statement, whereas applicants/defendants No. 1 and 2, before filing the written statement, have opted to file present applications under Order 7 Rule 11 CPC.

11. Order 7 Rule 11 CPC reads as under:-

*"11. **Rejection of plaint**.---The plaint shall be rejected in the following cases:--*

(a) where it does not disclose a cause of action;

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

(c) where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law;

(e) where it is not filed in duplicate;

(f) where the plaintiff fails to comply with the provisions of rule 9;"

12. The Apex Court in ***Popat and Kotecha Property Vs. State Bank of India Staff Association (2005) 7 SCC 510***, while dealing with the ambit and scope of order 7 Rule 11 CPC has held that the law ostensibly does not contemplate any stage when the objections can be raised and also does not say in express terms about the filing of a written statement and instead the word 'shall' is used clearly implying thereby that it casts a duty on the Court to perform its obligations in rejecting the plaint when the same is hit by any of the infirmities provided in the four clauses of Rule 11, even without intervention of the defendant. In the said judgment legal ambit of Order 7 Rule 11 CPC has been discussed as under:-

> *"13. Before dealing with the factual scenario, the spectrum of Order 7 Rule 11 in the legal ambit needs to be noted.*
>
> *14. In Saleem Bhai Vs. State of Maharashtra (2003) 1 SCC 123 it was held with reference to Order 7 Rule 11 of the Code that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plant. The trial court can exercise the power at any stage of the suit---before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) and (d) of Order 7 Rule 11 of the Code, the averments in the plaint are the germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage.*
>
> *15. In I.T.C. Ltd. Vs. Debts Recovery Appellate Tribunal (1998) 2 SCC 70 it was held that the basic question to be decided while dealing with an application filed under Order 7 Rule 11 of the Code is whether a real cause of action has been set out in the plaint or something purely illusory has been stated with a view to get out of Order 7 Rule 11 of the Code.*
>
> *16. The trial court must remember that if on a meaningful and not formal reading of the plaint it is manifestly vexatious and meritless in the sense of not disclosing a clear right to sue, it should exercise the power under Order 7 Rule 11 of the Code taking care to see that the ground mentioned therein is fulfilled. If clever drafting has created the illusion of a cause of action, it has to be nipped in the bud at the first hearing by examining the party searchingly under Order 10 of the Code. (See T. Arivandandam Vs. T.V. Satyapal (1977) 4 SCC 467.)*
>
> *17. It is trite law that not any particular plea has to be considered, and the whole plain has to be read. As was observed by this Court in Rioop Lal Sathi Vs. Nachhattar Singh Gill (1982) 3 SCC 487 only a part of the plain cannot be rejected and if no cause of action is disclosed, the plaint as a whole must be rejected.*
>
> *18. In Raptakos Brett & Co. Ltd. Vs. Ganesh Property (1998) 7 SCC 184 it was observed that the averments in the plaint as a whole have to be seen to find out whether clause (d) of Rule 11 of Order 7 was applicable.*
>
> *19. There cannot be any compartmentalization, dissection, segregation and inversions of the language of various paragraphs in the plaint. If such a course is adopted is would run counter to the cardinal cannon of interpretation according to which a pleading has to be read as a whole to ascertain its true import. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading*

has to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense. The intention of the party concerned is to be gathered primarily from the tenor and terms of his pleadings taken as a whole. At the same time it should be borne in mind that no pedantic approach should be adopted to defeat justice on hair-splitting technicalities.

20. Keeping in view the aforesaid principles the reliefs sought for in the suit as quoted supra have to be considered. The real object of Order 7 Rule 11 of the Code is to keep out of courts irresponsible law suits. Therefore, Order 10 of the Code is a tool in the hands of the courts by resorting to which and by searching examination of the party in case the court is prima facie of the view that the suit is an abuse of the process of the court in the sense that it is a bogus and irresponsible litigation, the jurisdiction under Order 7 Rule 11 of the Code can be exercised.

21…… … … ….

22…… …. … …

23. Rule 11 of Order 7 lays down an independent remedy made available to the defendant to challenge the maintainability of the suit itself, irrespective of his right to contest the same on merits. The law ostensibly does not contemplate at any stage when the objections can be raised, and also does not say in express terms about the filing of a written statement. Instead, the word "shall" is used clearly implying thereby that it casts a duty on the court to perform its obligations in rejecting the plaint when the same is hit by any of the infirmities provided in the four clauses of Rule 11, even without intervention of the defendant. In any event, rejection of the plaint under Rule 11 does not preclude the plaintiffs from presenting a fresh plaint in terms of Rule 13."

13. Plea of non-applicant/plaintiff that issue of limitation cannot be decided as an abstract principle of law, divorced from the facts, is based upon the judgment of Apex Court in *Ramesh B. Desai's* case. The said observation in that case has been clarified in para 16, wherein it has been held that in every case the starting point of limitation has to be ascertained which is entirely a question of fact. Referring its pronouncement in *Balasaria Construction Pvt. Ltd*. case, the Apex Court has quoted that suit in case, under consideration therein, could not be dismissed as barred by limitation without proper pleadings, framing of an issue of limitation and taking of evidence, as in that case, ex facie, on the reading of the plaint it cannot be held that the suit is barred by time. This pronouncement does not propound that even if, ex facie, on reading of plaint, it can be ascertained that the suit is barred by time, the Court is not empowered to exercise its jurisdiction under Order 7 Rule 11 C.P.C, rather it envisages that where from plain reading of the plaint, it can be said to be barred by limitation without addition or substitution anything thereto, the provisions of Order 7 Rule 11 C.P.C. shall be applicable in that case. The observation made in para 25 of *Popat and Kotecha Property's case* are of the similar nature. Judgment in *Balasaria Construction Pvt. Ltd.* case also propounds the same ratio of law.

14. Judgment of Delhi High court passed in *Khawar Butt's* case, relied by applicants/defendants with respect to 'single publication rule', is not applicable in present case, as it is no where the case of the plaintiff that continuous publication was made by defendants.

15. Where something additional is necessary to ascertain, the limitation period, definitely Order 7 Rule 11 CPC shall be not attracted, but in case where on the basis of pleadings in the plaint, but without reference of any material including the plea taken in written statement, the limitation period can be ascertained in unambiguous terms, order 7 Rule 11(d) CPC shall have to enforceability.

16. Article 75 of part VII of the schedule of the Limitation Act provides as under:-

Description of suit	*Period of limitation*	*Time from which period begins to run*
75. For compensation for libel.	*One year*	*When the libel is published.*

17. Section 22 of the Limitation Act, reads as under:-

> *"22. Continuing breaches and torts.---In the case of a continuing breach of contract or in the case of a continuing tort, a fresh period of limitation begins to run at every moment of the time during which the breach or the tort, as the case may be, continues."*

18. Section 22 of the Limitation Act deals with a situation where defendant(s) continues to commit the tort. In present case, there is no allegation that after publication/telecasting of news item in the month of January, 2014, defendants have continued in publishing/telecasting the news item against the plaintiff. Though it is averred in para 22 of the plaint that cause of action is continuing , but there is no averments in the plaint on the basis of which, it has been claimed that there is continuing tort on the part of defendants after first publication/telecasting by them in January, 2014. Therefore, Section 22 of the Limitation Act is not applicable. There is no other averment in the plaint entitling the plaintiff for extension of period of limitation provided under Article 75 of the Limitation Act.

19. Article 75 provides one year limitation from the date of publication of libel. Date of publication/telecasting has been specifically mentioned in the plaint as 9.1.2014, 10.1.2014 and 14.1.2014. Date of filing of plaint, as 7.1.2017, is also evident from the record and is undisputed. It is evident from the plain reading of the plaint without any external aid that last date of publication/telecasting of news item was 14.1.2014 and one year thereafter had elapsed on 14.1.2015. Therefore, suit/plaint has been filed after expiry of one year period provided under Article 75 of the Limitation Act. Filing of cancellation report in the concerned FIR on 22.2.2015 and acceptance thereof on 9.11.2015 by concerned Magistrate, is also of no help to the plaintiff, as these acts are not continuation of tort on the part of defendants and further on this ground there is no provision of extension of limitation period under Article 75 of the Limitation Act. Further even if, date of last cause of action is taken from the cancellation of FIR i.e. 9.11.2015, then also, plaint has been filed on a date beyond one year from 9.11.2015. I am also in agreement with the judgment passed by Delhi High Court in *N.N.S. Rana's* case.

20. Plea of the plaintiff is that defendants have committed nonfeasance for failure on their part to verify the facts before publication/telecasting of the news item and misfeasance for publication/telecasting of news item on the basis of incorrect action or advise and malfeasance for committing willful and intentional act of publication of news item, causing injury to the plaintiff. As discussed supra, even if, this plea is admitted to be

true in toto, it is definitely barred by the provisions of Limitation Act and thus it is hit by clause (d) of Order 7 Rule 11 C.P.C. and therefore, plaint is liable to be rejected.

21. In view of aforesaid discussion, since the suit to claim damages for libel, has not been filed within period of limitation of one year from the date when cause of action arose, i.e. date of publication/telecasting, the suit is barred by limitation. Accordingly the applications are allowed and plaint is rejected.

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

Brahm Dass (since deceased through LRs) ....Appellants/plaintiffs.
Versus
Kaur Chand and Ors. ....Respondents/defendants.

RSA No. 273 of 2008
Date of Decision: 1.3.2019.

Specific Relief Act, 1963- Sections 34 & 38**- Transfer of Property Act, 1882-** Section 118- Exchange – Mode of effecting- Unregistered document- Effect- Plaintiff filing suit for declaration and injunction with respect to suit land and alleging that it was never given to defendants under exchange- Defendants claiming its ownership by way of exchange with plaintiff- Trial Court decreeing suit- First Appellate Court allowing defendants' appeal, setting aside decree and dismissing suit- RSA - Held, facts revealing parties having entered into written agreement regarding exchange of lands between them- No oral exchange ever took place between them- Suit land not mentioned in written agreement as subject matter of exchange- Mutation of exchange, however, attested on basis of report of oral exchange- Defendant also admitting of no oral exchange having ever taken place between them- Agreement purportedly conveyed interest in property valuing more than Rs.100/- - And ought to have been registered- For want of its registration, agreement cannot be read in evidence- Suit land not exchanged by plaintiff with defendants- RSA allowed- Decree of First Appellate Court set aside and of Trial Court restored. (Paras 11 & 17)
Indian Registration Act, 1908- Section 17- Held, document conveying title in immovable property valuing more than Rs.100/- mandatorily requires to be registered. (Para 15)

Case referred:
Piar Chand and Ors vs. Sant Ram and Ors, 2017 (2) SLC 886

For the appellants: Mr. Bhuvnesh Sharma, Advocate.
For the respondents: Mr. R.K. Sharma, Senior Advocate with Mr. Arun Kumar, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant regular second appeal filed under Section 100 of the CPC, is directed against the judgment and decree dated 31.3.2008, passed by the learned Additional District Judge-II, Kangra, H.P., in CA No. 154-C/2003, reversing the judgment and decree dated

26.6.2003, passed by the learned Sub Judge, Ist Class-II, Dehra, H.P., in CS No. 30/99, whereby suit for declaration, injunction and consequential relief of perpetual prohibitory injunction having been filed by the plaintiff-appellant *(herein after referred to as "the plaintiff")*, came to be decreed.

2. For having bird's eye view, necessary facts as emerge from the record are that the plaintiff filed a suit for declaration and consequential relief of perpetual prohibitory injunction and in alternative for possession against the respondents-defendants (for short the defendants) in the Court of learned Sub Judge, Ist Class-II, Dehra, District Kangra, H.P., averring therein that he is in possession of the land compromised in khata No.52 min, Khatauni No. 97 and khasra Nos. 222, 148 and 169, Kita 3, area measuring 1-15-74 hects, and land comprised in khata No.5 Min, Khatauni No. 97, field No.219 area measuring 0-17-18 hects, total land measuring 0-17-18 Hects., situate in Mohal Dareen, Mauza Gagruhi, Tehsil Dehra, District Kangra, H.P. and is entitled to remain in its possession in future also. By way of aforesaid suit, plaintiff also sought declaration to the effect that order dated 22.12.1992 with regard to the exchange of the suit land alongwith other land is wrong and illegal and as such, not binding upon him. Plaintiff claimed before the court below that land comprised in khata No. 52 min, khatauni No. 97 Min, filed Nos. 169, 148, 200, 222 and 201 kita 5 area measuring 5-35-68 Hects., situate in Mohal Dareen Mauza Gagruhi, Tehsil Dehra District Kanra, H.P., is recorded in the ownership and possession of the defendants, but previously, this land was recorded in ownership and possession of the plaintiff as per jamabandi for the year 1986-87. Plaintiff pleaded before the court below that he is recorded in the possession qua the land comprised in khata No. 44 min, khatauni No. 92, field Nos. 211 and 254 to the extent of $1/4^{th}$ share as per Jamabandi for the year, 1986-87, whereas defendants are recorded as owners in possession over the land comprised in kahasra No. 775, 776 790, measuring 1-66-52 Hects., as per Jamabandi for the year 1986-87 to the extent of 25533 shares out of 31976 shares and they are recorded owner in possession of the land comprised in field No. 219. Plaintiff took a stand before the court below that about 10 to 11 years back, he and defendants entered into an oral agreement for the exchange of their land i.e. 20 kanals. The plaintiff offered the land comprised in field Nos. 200 and 201 to the defendants in exchange of defendants' land comprised in field No. 219 and also land measuring 0-74-08 hects., out of the field No 790. Possession was transferred at spot on the basis of aforesaid oral agreement, whereafter defendants built their house in field No. 210, whereas plaintiff remained in possession of field No. 219. As per the plaintiff, mutation was not effected properly on the basis of exchange and defendants in collusion with Patwari got field Nos. 148, 169 and 222, entered in mutation of exchange wrongly at the back of the plaintiff. He further averred in the plaint that field Nos. 148 and 169 are near to the road having commercial value, whereas land of the defendants is nowhere near the road at all. He averred in the plaint that factum with regard to the aforesaid mutation came to his knowledge when one Sh. Anant Ram of Mohal Dareen, Mauza Gagruhi got his land demarcated and the Kanoongo, disclosed that field Nos. 148 and 169 had been recorded in the ownership of the defendants despite the fact that plaintiff was in possession of the field Nos. 148 &169 on the spot. Plaintiff also took a plea before the court below that land compromised in field Nos. 148, 169 and 222 were never given nor intended to be given in exchange and as such, same has been wrongly entered in the ownership of the defendants by way of mutation No. 76 dated 28.12.1992.

3. Defendants by way of written statement refuted the aforesaid claim put forth by the plaintiff in his complaint on the ground of maintainability limitation, valuation and cause of action. On merits, defendants denied the averments contained in the complaint in toto and contended that mutation was rightly attested and sanctioned by the Tehsildar and as such, suit filed by the plaintiff be dismissed.

4. Subsequently, plaintiff by way of amendment, amended para No.3 of the plaint, wherein he pleaded that the defendants had entered into written agreement with the plaintiff on 8.9.1980 and no oral agreement was ever entered into by the parties as was earlier pleaded.

5. On the basis of aforesaid pleadings, learned trial court below framed following issues:-

> *"1. Whether the plaintiff is entitled for the relief of declaration, as prayed for? OPP*
>
> *2. Whether the plaintiff is entitled to the relief of possession, as prayed for? OPP*
>
> *3. Whether the plaintiff has no cause of action? OPD*
>
> *4. Whether the suit is not maintainable in the present form? OPD*
>
> *5. Whether the suit is not properly valued for the purpose of court fee and jurisdiction? OPD*
>
> *6. Relief."*

6. Subsequently, on the basis of evidence led on record by the respective parties, learned trial Court vide judgment dated 26.6.2003, decreed the suit of the plaintiff and declared him to be the owner in possession of the land comprised in khata No. 52 min khatauni 97, khasra No. 222, 148 and 169 kita 3, area measuring 0-15-74 hects., and land comprised in khata No. 52 Min, Khatauni No. 97 field No. 219, area measuring 0-02-10 Hects., situate in Mohal Dareen Mauza Gagruhi Tehsil Dehra District Kangra, H.P. Learned court also held mutation No. 76 dated 22.12.1992, to be wrong and illegal and not binding upon the plaintiff and accordingly, restrained the defendants permanently from causing any interference in the plaintiff's possession qua the aforesaid suit land.

7. Being aggrieved and dissatisfied with the aforesaid judgment and decree passed by the learned trial Court, respondents-defendants preferred an appeal under Section 96 of CPC in the Court of learned Additional District Judge–II, Kangra, Dharamshala, H.P., who vide judgment dated 31.3.2008 accepted the appeal having been filed by the defendants and set-aside the judgment and decree dated 26.6.2003, passed by the learned trial Court, as a consequence of which, suit having been filed by the plaintiff, came to be dismissed. In the aforesaid background, plaintiff has approached this Court in the instant proceedings, praying therein for restoration of the judgment dated 26.6.2003, passed by the learned trial Court after setting aside judgment of reversal recorded by the learned Additional District Judge (II), Kangra at Dharamshala, H.P.

8. This Court vide order dated 23.6.2008, admitted the instant appeal on the following substantial questions of law No. 1 and 2.

> ***"1.Whether the lower appellate Court has totally misread and misconstrued the documents Ext.PW-1/B?***
>
> ***2.Whether the learned lower Appellate Court could not have quashed the agreement Ext.PW-1/B, without there being any prayer in his behalf?"***

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

10. Having heard the learned counsel for the parties and perused evidence collected on record by the respective parties vis-à-vis impugned judgment dated 31.3.2008, passed by the learned Additional District Judge-II, Kangra at Dharamshala, this Court is

persuaded to agree with Mr. Bhuvnesh Sharma, learned counsel for the plaintiff that learned first appellate Court while reversing the judgment of learned trial court, whereby suit of the plaintiff was decreed, has mis-read and misconstrued the documents, especially, Ext.PW1/B, whereby parties to the lis had entered into a written agreement with regard to exchange of suit land with the land of the defendants, rather having carefully perused pleadings as well as evidence led on record by the respective parties, this court has no hesitation to conclude that learned first appellate Court, while returning the findings, as contained in impugned judgment, has failed to appreciate the material placed before it in its right perspective, as a consequence of which, erroneous findings have come to the fore. Though at the first instance, plaintiff in the plaint had set up a case that he and the defendants had entered into an oral agreement for exchange of their land, whereby he had offered his land comprised in field Nos. 202 and 201 to the defendants in exchange of defendants land comprised in field No. 219 and land measuring 0-74-08 hects., out of field No. 79, but subsequently, by way of amendment, he amended para-3 of the plaint and pleaded that defendants had entered into a written agreement with the plaintiff on 8.9.1980 and exchange was not effected on the basis of oral agreement, rather same was effected on the basis of written agreement.

11. Careful perusal of zimini order dated 21.6.2001, passed by the learned trial Court , clearly reveals that defendants chose not to file reply to the application filed by the plaintiff under Order 6 Rule 17, praying therein for amendment of para-3 of the plaint despite sufficient opportunity afforded to them, rather during the course of arguments, counsel representing the defendants gave no objection, which statement of him to that effect stands recorded and is part of the record. Otherwise also, defendant No.1 (DW1) in his cross-examination has categorically admitted the execution of the written agreement Ext.PW1/B. He also identified his signatures on the same. During his cross-examination, he admitted that on the basis of agreement (Ext.PW1/B), there was exchange of land inter-se parties. During his cross-examination, he volunteered to state that mutation on the basis of written agreement Ext.PW1/B was attested in the year, 1992. He further admitted that there was no other exchange of land with the plaintiff except the land which has been effected on the basis of Ext.PW1/B. Hence, in view of the above, it can be safely concluded that there is no dispute, if any, with regard to averments contained in para-3 of the plaint, which subsequently, came to be amended that parties to the lis had entered into an agreement, agreeing thereby to exchange the suit land with the land of the defendant. If the aforesaid admission having been made by the defendant (DW1) in his cross-examination, is read, juxtaposing mutation No.76 placed on record as Ext.P1, it certainly compels this Court to agree with Mr. Bhuvnesh Sharma, learned counsel representing the plaintiff that mutation which was admittedly attested on 27.12.1992 was wrongly entered because perusal of written agreement Ext.PW1/B itself suggests that suit land was never the subject matter of the agreement arrived *inter-se* parties and as such, mutation, if any, on the basis of aforesaid agreement is otherwise of no consequence. Learned trial Court taking into consideration written agreement Ext.PW1/B arrived at a conclusion that parties to the suit had exchanged the land in suit and by way of same, defendants had given land measuring 0-01 -62 hects., comprised in khasra No. 736, measuring 1-26-22 hects., out of khasra No. 752 i.e. total land 1-27-84 hects., to the plaintiff. Learned trial Court on the basis of aforesaid document (Ext.PW1/B) further arrived at a conclusion that plaintiff had given in exchange the land comprised in khasra Nos. 211, 254, 203, 204, 251 205, 209, 210 and 201, measuring 1-27-84 hects., to the defendants and the possession was also delivered on the spot, whereas as has been noticed herein above, careful perusal of Ext.P1 i.e. mutation No. 76 clearly reveals that same has not been attested on the basis of written compromise Ext.PW1/B, rather there is reference in the column of remarks that mutation was entered on the basis of oral exchange, but such remarks otherwise appear to be wrong, especially, in

view of the statement of defendant-DW1, wherein he in his cross-examination, categorically admitted that there was no other oral compromise or agreement with regard to the exchange save and except written agreement Ext.PW1/B and as such, learned trial Court rightly came to the conclusion that defendants have not been able to show, as to how, the mutation No. 76 came into existence, especially, when there was no oral exchange.

12. This Court was unable to lay its hand to evidence, if any, led on record by the defendants that save and except written agreement Ext.PW1/B, oral agreement agreeing therein for exchange of the suit land with the land of the defendant, ever came into existence *inter-se* parties and as such, learned trial court rightly held that mutation Ext.PW1 based upon written compromise Ext.PW1/B cannot be held to be legal.

13. Learned first appellate Court while reversing findings returned by the learned trial court arrived at a conclusion that since written agreement Ext.PW1/B was executed by the minor and others, that being void could not be given effect to and as such, held written compromise Ext.PW1/B to be illegal. Whether written agreement Ext.PW1/B was void/voidable, was not a question to be decided by the first appellate Court in the appeal filed before him, because admittedly no challenge, if any, to the same on the ground, as has been taken by the learned first appellate Court, came to be laid to the written compromise by the defendant or either of the parties, rather sole question needed to be determined by the courts below was whether mutation No. 76 Ext.P1 attested on 27.12.1992 was based on written compromise Ext.PW1/B or oral agreement as claimed by the defendants. Though, this Court in earlier part of the judgment has already held that no mutation, if any, could be effected on the basis of Ext.PW1/B because bare perusal of same, clearly reveals that plaintiff never intended to get the suit land as mentioned in written agreement exchanged with the land of the defendants. But since specific case of the defendants was that land came to be recorded in their name on the basis of oral exchange, they ought to have led on record some specific evidence to prove oral agreement, if any, *inter-se* parties, which is altogether missing.

14. In view of the detailed discussion made herein above, this Court in the instant proceedings, is not necessarily called upon to return a finding whether written compromise Ext.PB, executed inter-se plaintiff and defendant No.1, who was minor at that relevant time, can be termed to be void/voidable, especially when there is no specific challenge, if any, on the ground as has been applied by the learned first appellate Court while terming written agreement Ext.PW1/B to be void/voidable. Similarly, no issue with regard to the validity of written compromise Ext.PB ever came to be raised on behalf of the defendants and as such, learned first appellate Court ought not have gone into that question, especially when claim of the defendants is that mutation No. 76 attested on 27.12.1992 Ext.P1 was recorded on the basis of oral agreement.

15. Leaving everything aside, as per Section 17 of the Registrations Act, 1908, any document or instrument, which purports or intends to create right, title to an immovable property, would be registered and in case same is not registered, it would not affect any immovable property comprised therein or moreover it cannot be allowed as evidence of any transaction affecting such property, especially when valuation of the property in question is more than Rs. 100. In this regard, reliance is placed on judgment passed by this Court in case titled **Piar Chand and Ors v. Sant Ram and Ors, 2017 (2) SLC 886,** relevant paras whereof are being reproduced herein below:-

> **"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)

31. In the instant case, though this Court is of the view that learned first appellate Court exceeded its jurisdiction by creating new case for defendants while placing reliance upon Ex.P-1 and Ex.DX, more particularly, when no such plea of 'Azadinama' was ever raised/taken by the defendants in the pleadings as well as evidence adduced before the trial Court, but even then if findings returned by learned first appellate Court qua entitlement of defendants to ½ share in the suit property on the basis of aforesaid document is examined and tested in the light of aforesaid provisions of Registration Act, 1908, same cannot be held to be valid and in accordance with law. There is no relinquishment deed adduced on record by the defendants to prove their claim with regard to their having acquired ½ share in the suit land and as such learned first appellate Court erred in while placing reliance upon Ex.P-1, whereby, on the basis of oral Azadinama/relinquishment deed, ½ share in the suit land has been ordered to be mutated in the name of defendants.

32. In the instant case, in view of aforesaid discussion having been made hereinabove, this Court is of definite view that no reliance, if any, could be placed by first appellate Court on 'Azadinama' Ex.P-1 to conclude that plaintiff had relinquished his ½ share in favour of the defendants, more particularly, in the absence of registered relinquishment deed, if any, executed by the plaintiff. Since there was no registered relinquishment deed, mutation attested in favour of defendants, on the basis of Ex.P-1 is/was of no consequence and same could not be taken into consideration by the Court below while holding the defendant to be owners to the extent of ½ share in the suit land."

16. It is quite apparent from the aforesaid exposition of law that no immovable property having value of more than Rs. 100 can be transferred without there being any registered document and 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. Substantial questions of law are answered accordingly.

17. Consequently, in view of the detailed discussion made herein above as well as law relied upon, this Court has no hesitation to conclude that judgment of learned first appellate court cannot be allowed to sustain being totally contrary to the provisions of law as well as law laid down by this Court and as such, same is set-aside and judgment passed by the learned trial Court is restored. Hence, the appeal is allowed and disposed of accordingly.

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

Mohinder Singh Dudharta. …Petitioner.
Versus
Bal Krishan Rawat. …Respondent

Cr.MMO No. 267 of 2018
Date of decision: 27.2.2019

Code of Criminal Procedure, 1973 (Code) - Section 311- Additional evidence- Wrong provision of law- Mentioning of- Consequences- Trial Court permitting complainant to produce additional documents in support of complaint- Application found having quoted Order VII Rule 14, Code of Civil Procedure, 1908, on it instead of Section 311 of Code-- Petition against- Held, mere mentioning of wrong provision of law is inconsequential- Trial Court considered this aspect of matter and dealt it in its order- Application taken to be one under Section 311 of Code- It is substance and not form that is to be looked into- Documents found relevant for just decision of case- No infirmity in order of Trial Court- Petition dismissed. (Paras 5 to 8)

Cases referred:
Anil Chauhan vs. Education Society, Mandi, Latest HLJ 2014 (HP), 1080
Mina Lalita Baruwa vs. State of Orissa and others, (2013) 16 SC 173

For the Petitioner: Mr.K.B. Khajuria and Mr.Pushpinder Verma, Advocates.
For the Respondent: Mr.Neeraj Gupta and Ms.Rinki Kashmiri, Advocates.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge (oral)

This petition has been preferred against the impugned order dated 27.4.2018 passed by learned Judicial Magistrate 1st Class, Court No. 2, Rohru, H.P. in Complaint Case No. 69/3 of 2014 filed under Section 138 of the Negotiable Instruments Act, whereby trial Court, in an application filed on behalf of complainant/respondent to place additional documents on record, has permitted to produce the documents.

2. Impugned order has been assailed on the ground that application preferred by complainant/respondent was filed under Order 7 Rule 14 (3) of the Code of Civil Procedure read with Section 151 C.P.C, whereas complaint filed under the Negotiable Instruments Act is to be governed by the provisions of Criminal Procedure Code (Cr.P.C.) and thus the impugned order passed by the trial Court is without jurisdiction, as he was not competent to entertain the application for placing on record additional documents under the provisions of CPC in a Criminal Complaint. It is further submitted that it is not a case of mentioning wrong provision of law, but is a case of applying Civil Procedure Code in a Criminal Case.

3. Learned counsel for the respondent has supported the impugned order for the reasons assigned therein and has relied upon pronouncement of the Apex Court in ***Mina Lalita Baruwa Vs. State of Orissa and others (2013) 16 SC 173*** for explaining the powers of Court under Section 311 Cr.P.C. and has also referred a judgment of Co-ordinate

Bench of this Court in case titled ***Anil Chauhan Vs. Education Society, Mandi*** reported in ***Latest HLJ 2014 (HP), 1080***, wherein in almost identical case, order of trial Court allowing the application under Section 311 Cr.P.C. has been upheld.

4. So far as contention of petitioner that trial Court has applied Civil Procedure Code in a Criminal Complaint, is not tenable for the reasons that at the time of passing impugned order, trial court has specifically dealt with this issue and has observed in the impugned order that Court does not have power to allow an application under Order 7 Rule 4 C.P.C in a complaint case and the provisions of C.P.C. are not applicable therein. Thereafter, and rightly so, he has returned the findings that the application cannot be dismissed solely on the ground that wrong provisions of law has been mentioned.

5. It is not a case that Court was not empowered at all even under Cr.P.C. to allow the prayer. In the cause title of the application, placed on record, the application has been stated to have been filed under the provisions of C.P.C. but it is not a case that the trial Court was not empowered to allow to produce additional documents on record under Cr.P.C. The trial Court has rightly observed that Section 311 Cr.P.C. deals with the power of the Court to summon material witness or examine a person present in the Court at any stage of inquiry. The Apex Court in *Mina Lalita Baruwa's* case supra has held that ingredients of Section 311 Cr.P.C. empowers the trial Court to arrive at just decision to resort to an appropriate measure befitting the circumstances in the matter of examination of witnesses.

6. Co-ordinate Bench of this Court in *Anil Chauhan's* case supra has held as under:

> *"12. None of the parties has referred to the later judgment of the Hon'ble Supreme Court in Raja Ram Prasad Yadav versus State of Bihar and another (2013) 14 SCC 461 wherein the entire law on the subject has been discussed and, therefore, it is not necessary to fall back on the judgments of this Court or the earlier judgment of Hon'ble Supreme Court in the case of Natasha Singh (supra) heavily relied upon by the learned counsel for the respondent since this judgment also stands considered in Raja Ram's case (supra). The Hon'ble Supreme Court has clearly held that the powers under Section 311 of the Code to summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and reexamine any person already examined, can be exercised at any stage provided that the same is required for the just decision of the case.*
>
> *13. After discussing in detail the previous judgments of the Hon'ble Supreme Court on the subject, the following principles in Raja Ram's case (supra) were culled out:-*
>
> > *"17.1. Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case? 17.2. The exercise of the widest discretionary power under Section 311 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated. 17.3. If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and reexamine any such person. 17.4. 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 for such facts, which will lead to a just and correct decision of the case. 17.5. The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice. 17.6. The wide discretionary power should be exercised judiciously and not arbitrarily. 17.7. The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case. 17.8. The object of Section 311 CrPC simultaneously imposes a duty on the Court to determine the truth and to render a just decision. 17.9. The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered. 17.10. Exigency of the situation, fair play and good sense should be the safe guard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified. 17.11. The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results. 17.12. The additional evidence must not be received as a disguise or to change the nature of the case against any of the party. 17.13. The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party. 17.14. The power under Section 311 CrPC 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."

14. ……　　　　…　　　　……

15. The only ground taken by the petitioner is that the complainant under the garb of the order would now fill up the lacuna in his case and create and manipulate the documents. To my mind, this submission is totally ill-founded because the petitioner would always have a right to cross-examine the witnesses. Moreover, in terms of the principles as laid down by the Hon'ble Supreme Court in para 17.5 (supra) the exercise of 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."

7. Therefore, it is well within competence of the trial Court to cause or allow production of documents exercising the power under Section 311 Cr.P.C. to arrive at just decision. Hence, trial Court has not committed any mistake by considering the application, filed for placing additional documents under Section 311 Cr.P.C. despite having been filed mentioning the provisions of CPC.

8. In present case it is case of the complainant/respondent that an amount of Rs.2,00,000/- was taken by the petitioner earlier and to establish the said liability, cheque dated 30.10.2012 of PNB, Rohru was issued by him and when the same was presented in the bank, it was dishonoured for want of sufficient funds and thereafter a legal notice was issued to the accused/petitioner, who expressed his inability to make payment and had requested the complainant to accept a new cheque, which is subject matter of the complaint. In these circumstances, complainant had intended to produce earlier cheque dated 30.10.2012 along with dishonor memo of the same before the trial Court along with a writing alleged to be executed by the accused/petitioner admitting the receipt of Rs.2,00,000/- from the respondent/complainant. In reply to the application, issuance of notice by the complainant/respondent has been admitted, with further averments that the said notice was replied by the accused/petitioner, by stating therein that there was no liability of the accused/petitioner towards complainant/respondent. These are allegations and counter allegations by the complainant and the respondent. Trial has not completed yet, therefore, in order to arrive at a just conclusion, in the facts and circumstances explained herein above and also law established by the Apex Court and propounded by Co-ordinate Bench of this Court, I find that the trial Court has not committed any illegality, irregularity or perversity in passing the impugned order.

9. In view of above discussion, impugned order is upheld and the petition is dismissed. Parties are directed to appear before the trial Court on **18th March, 2019.**

****

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

Sh. Girdhari Lal …….Appellant.
Versus
Shri Naru Ram (since deceased through LRs) ……Respondents.

RSA No. 317 of 2008
Date of Decision: 27.2.2019.

Specific Relief Act, 1963 - Section 10 - **Limitation Act, 1963** – Article 54 - Specific performance of agreement to sell – Limitation – Computation - Held, limitation in filing suit for specific performance of agreement to sell is three years from date mentioned in agreement for its execution unless time is extended by parties mutually - On facts, plaintiff failing to prove that time for execution was ever extended on defendant's request - Notice claimed to have been sent by defendant requesting plaintiff for extension of time for execution of sale deed not proved to have been issued by him – Receipts regarding payment of amount to defendant relied upon by plaintiff not relatable to sale consideration – Parties

never extended time for execution of sale deed - Suit barred by limitation – Decrees of lower courts upheld- RSA dismissed. (Paras 9-12)

Case referred:

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

For the appellant: Mr. Ajay Kumar, Senior Advocate with Mr. Dheeraj K. Vashishat.

For the respondents: Mr. Rajnish K. Lal, Advocate, for respondents No. 1 (a), 1 (b) and 1 (d) to 1 (g).
Kanwar Bhupinder Singh, Advocate, for respondents No. 2 and 3.
Mr. Sanjeev Kuthiala, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant regular second appeal is directed against the judgment and decree dated 28.3.2008, passed by the learned Additional District Judge, Fast Track, Kullu, H.P., in CA No. 07/07, affirming the judgment and decree dated 29.11.2006, passed by the learned Civil Judge (Sr. Div.), Kullu, H.P., in CS No. 12 of 2002/RBT No. 52 of 2005, whereby suit for specific performance of contract as well as declaration having been filed by the plaintiff-appellant *(herein after referred to as "the plaintiff")*, came to be dismissed.

2. In nutshell, facts of the case, as emerge from the record are that plaintiff filed a suit for specific performance of the contract as well as for declaration, averring therein that respondent No.1, agreed to sell his half share in the suit land, description whereof is given in the plaint, vide agreement dated 23.3.1995, for total consideration of Rs. 4,75,000/- . As per plaintiff, sum of Rs. 40,000/- was paid to defendant No.1 on the same date i.e. 23.3.1995, whereas remaining amount was agreed to be paid at the time of registration of the sale deed, which as per agreed terms was to be executed on or before 23.3.1998. Plaintiff averred that in the month of August, 1996, defendant No.1 asked the plaintiff to pay more money as he was in need of the same and as such, plaintiff made further payment of Rs. 40,770/- against the receipt. As per plaintiff, he again on the request of defendant No.1, paid a sum of Rs. 80,000/- to the defendant on 25.12.1997, against proper receipt. Plaintiff apprised defendant No.1 that he is ready and willing to purchase the suit land by paying balance consideration amount and asked him to remain present in the office of Sub-Registrar on 23.3.1998, so that sale deed is executed in terms of agreement dated 23.3.1995 but despite assurance, defendant No.1 failed to turn up. On 8.2.1999, plaintiff served defendant No.1 with the registered notice through his counsel Mr. A.C. Thakur, Advocate, calling upon him to execute the sale deed. Plaintiff again requested the defendants through registered letter dated 30.7.1999 and 25.5.2000 for the execution of sale deed, but in vain. Plaintiff further averred in the plaint that on 3.3.1999, plaintiff on the request of son of defendant No.1 Mohan Lal, who had come to his house, paid sum of Rs. 2,500/-. On 22.5.1999, plaintiff again paid sum of Rs. 1043 for ration and Rs. 175 for the purchase of clothes, but thereafter son of defendant No.1 died, for whose last rites, plaintiff again paid a sum of Rs. 16,000/- to the defendant No.1 on 28.6.1999. Plaintiff further averred in the plaint that there was litigation with one Subhadra and defendant No.1 and as such, defendant No.1 expressed his inability to execute the sale deed in favour of the plaintiff and gave impression to him that Smt. Subhadra had filed an appeal and the

litigation is still pending and as such, he could not insist upon defendant No.1 to execute the sale deed. Plaintiff claimed before the court below that during the pendency of the case, he came to know that defendant No.1 had transferred the suit land by making the gift deed in favour of defendants No. 2 and 3 i.e. his grandsons vide gift deed No. 951 dated 29.6.2001 and mutation No. 6135 was also entered and attested on 25.7.2001. Plaintiff also set up a case before the court below that he came to know that defendant No.1 had also sold 4 biswas of land out of the suit land to one Shri Chhape Ram (defendant No.4) vide registered sale deed dated 12.7.2001, upon which mutation No. 6138 was entered and attested on 27.7.2004, whereafter he got his plaint amended and also challenged the gift deed made by defendant No.1 in favour of his grandsons as well as mutation attested on the basis of said transactions being null and void.

3. Defendant No.1 by way of written statement resisted the aforesaid claim on the ground of maintainability, limitation and cause of action. On merits, defendants denied factum with regard to execution of agreement dated 23.3.1995. Defendant also denied that in the year, 1996 to 1998, he had received Rs.2,40,777/- and Rs. 80,000/- from the plaintiff. Defendant No.1 also denied that plaintiff had been paying money to him and his son from time to time and he had issued receipts in that regard. Defendant No.1 also claimed that he rightly gifted the suit land in favour of the grandsons and thereafter, rightly sold the part of the suit land in favour of the defendant No.4. Defendants No. 2 and 3 by way of separate written statement denied the execution of agreement by defendant No.1 in favour of the plaintiff to sell the suit land. Defendants No. 2 and 3 also claimed that valid gift deed was executed in their favour by defendant No.1 and plaintiff had the knowledge with regard to such gift deeds made by defendant No.1 Defendants No.2 and 3 claimed that valid mutation No. 6135 came to be attested in their favour on the basis of valid gift deed executed in their favour by defendant No. 1. Defendant No.4 by way of separate written statement raised the preliminary objections with regard to maintainability, limitation and estoppel and denied that defendant No.1 had agreed to sell the suit land to the plaintiff. Defendant No.4 further stated that he had purchased 4 biswas of suit land, upon which valid and legal mutation No. 6138 was sanctioned and attested in his favour and as such, prayed that plaint having been filed by the plaintiff deserves to be dismissed.

4. On the basis of aforesaid pleadings, learned court below framed following issues:-

> *"1. Whether the plaintiff is entitled for the relief of specific performance of contract directing defendant to execute sale deed of the land comprised in Khasra No.5930/5604/1382/1 as alleged? OPP*
>
> *2. Whether the suit is not maintainable and plaintiff has no cause of action? OPD*
>
> *3. Whether the suit is not within time?OPD*
>
> *3A. Whether the gift deed dated 29.6.2001 is wrong and illegal as alleged? OPP*
>
> *3B. Whether the sale deed dated 12.7.2001 is wrong and illegal as alleged? OPP*
>
> *3C. Whether the plaintiff is entitled to a decree for possession of the suit land as claimed?OPP*
>
> *3D. Whether the plaintiff has a cause of action ?OPP*
>
> *3E. Whether the plaintiff is estopped from filing the suit by his act and conduct? OPD*

4. Relief."

5. Subsequently, on the basis of evidence led on record by the respective parties, learned trial Court, dismissed the aforesaid suit filed by the plaintiff vide judgment dated 29.11.2006. Plaintiff, being aggrieved and dissatisfied with the aforesaid judgment and decree passed by the learned trial Court filed an appeal under Section 96 of CPC in the court of learned Additional District Judge, Fast Track Kullu, which also came to be dismissed vide judgment dated 28.3.2008. 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.

6. This Court vide order dated 7.7.2008, admitted the instant appeal on the following substantial questions of law No. 1 and 2.

> ***"1.Whether the findings of the learned First Appellate Court with respect to limitation on the basis of agreement to sell above and by ignoring the receipts Ext. PW-1/A, Ext. PW-1/B and Ext. PW-1/C regarding balance payments is complete misreading of pleadings, evidence and law applicable to the facts of the case and such palpable erroneous and illegal and is not sustainable at all?***
>
> ***2.Whether the First Appellate Court being last Court of facts ought not to have decided the appeal on all issues and not on preliminary point of limitation? This has also vitiated the proceedings and resulted into passing of erroneous and illegal judgment? The finding of both the courts below on point of limitation is a result of complete misreading of oral and documentary evidence on record and mis-interpretation of law as applicable to the facts of the case?"***

7. I have heard the learned counsel for the parties as well as gone through the record of the case.

8. Having heard the learned counsel for the parties and perused evidence collected on record by the respective parties, this Court is not persuaded to agree with Mr. Ajay Kumar, learned Senior Counsel that impugned judgments and decrees passed by the courts below are not based upon proper appreciation of evidence, rather, this Court finds that both the courts below while dismissing the suit having been filed by the plaintiff, have dealt with evidence led on record by the respective parties in its right perspective and as such, it cannot be said that there is mis-reading of pleadings/evidence and law applicable to the facts of the case. Though in the case at hand, defendant No.1 by way of written statement categorically denied the factum with regard to the execution of agreement to sell dated 23.3.1995 (Ext.PW2/A), but learned trial Court after appreciating the evidence on record has categorically held that defendant No.1 had executed aforesaid agreement for sale of suit land, which finding never came to be assailed by defendant No.1 and as such, same has attained finality.

9. Close scrutiny of judgments passed by the courts below clearly reveals that suit having been filed by the plaintiff came to be dismissed on the ground of limitation. Since no specific challenge at any point of time came to be laid by the defendant with regard to finding returned by the court below on the point of execution of agreement to sell, this Court sees no reason to analyze the evidence available on record from that angle, rather this Court in the instant proceedings is only called upon to determine whether courts below have rightly held that suit having been filed by the plaintiff is barred by the limitation. Admittedly, as per own case set-up by the plaintiff, agreement to sell was executed on

23.3.1995, and as per agreement, sale deed was to be executed on or before 23.3.1998. In the case at hand, sale deed never came to be executed within the time frame stipulated in the agreement to sell and as such, suit, if any, for specific performance of contract ought to have been filed by the plaintiff within a period of three years from the date fixed for execution of sale deed i.e. 23.3.1998. But in the case at hand, civil suit came to be filed on 26.6.2002 i.e. beyond the prescribed period of limitation as provided under Article 54 of the Limitation Act. Suit, if any, for specific performance can be filed within a period of three years from the date fixed for execution of sale deed.

10. Shri Ajay Kumar, learned Senior counsel while making this Court to peruse evidence, be it ocular or documentary led on record, by the plaintiff made a serious attempt to persuade this Court, to agree with his contention that there is ample evidence available on record suggestive of the fact that time repeatedly came to be extended by the plaintiff on the request having been made by the defendant, who on various occasions even after expiry of date fixed in the agreement to sell, kept on receiving part payment towards the consideration. While referring to Ext.PW4/A, Mr. Ajay Kumar, learned senior counsel, contended that defendant No.1 sent a letter through his advocate, praying therein for extension of time to execute the sale deed, which fact itself suggests that plaintiff was always ready and willing to purchase the suit land by making payment of balance consideration amount from defendant No.1.

11. Close scrutiny of document Ext.PW4/A suggests that letter was addressed to the plaintiff by Advocate Amar Chand Thakur, on behalf of the defendant Naru Ram, but defendant Naru Ram has categorically taken the stand that he at no point of time, authorized the advocate, to serve letter/notice on the plaintiff Girdhari Lal. Though, plaintiff with a view to prove the letter in question examined the advocate Amar Chand as PW4, who while identifying his signatures on notice in question categorically deposed that he had issued letter on the instructions of defendant Naru Ram, but defendant also led rebuttal evidence to dispute the correctness of aforesaid document and ultimately, matter came to be referred to the handwriting expert Shri IS. Rao, who subsequently in his report stated that he was not in a position to give definite opinion regarding the signatures of Naru Ram on this document. Otherwise also, this Court after having carefully perused Ext.PW4/A finds that if aforesaid statement having been made by Mr. A.C. Thakur Advocate (PW4), is presumed to be correct, plaintiff was required to get the sale deed executed within a period of one week from the date of receipt of letter dated 8.2.1999 Ext.PW4/A. However, in the case at hand, admittedly, suit by plaintiff came to be filed on 26.6.2002, and as such, this Court is of the view that statement, if any, of Amar Chand, Advocate (PW4), may not be of any help to the plaintiff as far as determination of the date for limitation is concerned.

12. Having carefully perused receipts Ext. PW1/A, Ext.PW1/B and Ext.PW1/C, this Court is persuaded to agree with Mr. Rajnish K. Lal, learned counsel, representing defendant No. 1 that there is nothing to suggest that by way of aforesaid receipts, defendant ever asked to extend the time for the performance of contract, rather these receipts only show that some amount came to be received by defendant No. 1 from the plaintiff. He further contended that bare perusal of aforesaid receipts nowhere suggests that amount, if any, paid by the plaintiff to defendant No. 1 was towards the balance sale consideration.

13. Having carefully analyzed the evidence available on record, this Court is not inclined to accept the contention of learned Senior counsel that finding returned by the courts below on the point of limitation is erroneous, rather same appears to be totally in conformity with the provision contained under Article 54 of the Limitation Act.

14. Similarly, courts below have rightly ignored receipts Ext. PW1/A, Ext.PW1/B and Ext.PW1/C, while dismissing the contention of plaintiff that defendant No.1 by issuing aforesaid receipts, had prayed for extension of time for performance of contact. This Court is also not persuaded to agree with learned Senior counsel Mr. Ajay Kumar, that first appellate court being last court of fact has failed to decide all issues because complete reading of judgment passed by the learned first appellate court leaves no scope for this court to conclude that first appellate Court has failed to decide all the issues raised in appeal, rather at the cost of repetition, this Court wishes to observe that first appellate Court while agreeing with finding returned by the learned trial Court has given its own findings. Hence, 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.

15. At this stage, Mr. Rajnish K. Lall, learned counsel, 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."***

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 AJAY MOHAN GOEL, J.

Sh. Pradeep Sood and another .....Petitioners.

Versus

Smt. Suman Kumari .....Respondent.

CMPMO No.: 24 of 2018
Date of Decision: 12.03.2019

Code of Civil Procedure, 1908 - Order XXXIX Rules 1 & 2 - Suit for prohibitory and mandatory injunctions - Plaintiff filing application for interim injunction for restraining defendants during pendency of suit from blocking common path by erecting iron gate – Trial Court allowing application – Appellate Court confirming order of Lower Court- Petition against- On facts, plaintiff purchasing land from 'SP' (Co-sharer), brother of defendants – Defendants nowhere denying this fact in written statement - Defendants relying on compromise wherein 'SP' agreed not to sell his share to any person out of family- Revenue record showing disputed land as "Gair Mumkin Rasta" belying contention of defendants that disputed land is not common path- Another suit challenging sale deed pending before Trial Court – Held, Trial Court rightly passed order of status quo regarding common path- Petition dismissed. (Paras 17 to 19)

For the petitioners: Mr. Romesh Verma, Advocate.
For the respondent: Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*:

By way of this petition filed under Article 227 of the Constitution of India, the petitioners have challenged order dated 11.05.2017, passed by the Court of learned Senior Civil Judge, Theog, District Shimla in CMA No. 84-6 of 2015, Civil Suit No. 190/1 of 2015, vide which, an application filed by the respondent under Order 39 Rules 1 & 2 read with Section 151 of the Code of Civil Procedure stands allowed by the learned Trial Court whereby petitioners have been restrained from causing any kind of obstruction or blocking the path as is existing over the land comprised in Khasra No. 484, 485 and 496 till the final disposal of the suit, as also order dated 12.12.2017, passed by the Court of learned Additional District Judge (CBI), Shimla, Camp at Theog in Civil Misc. Appeal No. 6-T/14 of 2017, vide which the appeal filed by the petitioners against the order passed by the learned Trial Court has been dismissed.

2. Brief facts necessary for the adjudication of this petition are as under:

Respondent-plaintiff has filed a suit for perpetual and mandatory injunction against the petitioners/defendants, which is pending adjudication in the Court of learned Senior Civil Judge, Theog, District Shimla.

Case of the respondent-plaintiff, in brief, is that the suit land was owned by one Sat Prakash, upon which house was also constructed. There is one common path, which leads from Kotkhai Bazaar to the aforesaid land and house. Path exists since time immemorial and was being used by Sat Prakash and his predecessors and other inhabitants. The suit land was sold by Sat Prakash alongwith house thereupon on 12.12.2014 vide registered sale deed to the plaintiff and mutation to this effect also stood entered in favour of the plaintiff. Defendants, i.e., the present petitioners, who are brothers of Sat Prakash, have erected an iron gate with iron door over the aforesaid path on the boundary line of Khasra Nos. 485 and 486 and have locked the door of the gate, as a result of which, it has become difficult for the plaintiff and her family members to have excess to their house as also the land purchased. As per the plaintiff, in the demarcation which was carried out, it was found that defendants had blocked the path by erecting the gate just in the middle of Khasra Nos. 485 & 486. As despite her requests, defendants did not remove the obstruction, therefore, the suit was filed *inter alia*, with the prayer that the defendants be restrained permanently not to obstruct the path passing through Khasra Nos. 484, 485 and 486. Alongwith the suit, an application under Order 39 Rules 1 and 2, as already mentioned above, was also filed, which was opposed by the present petitioners. Learned Trial Court vide order dated 11.05.2017 allowed the application in the following terms:

> *"27. In view of aforesaid discussion, the applicant has been successful in proving that she has prima facie case in her favour and it will be the applicant who shall suffer irreparable loss if temporary injunction is not granted to her. The balance of convenience also favours the applicant.*
>
> *28. Resultantly, the respondents are hereby restrained from causing any kind of obstruction or block the path as existing over the land comprised Khasra No. 484, 485 and 496 till the final disposal of the case on merits. However, the aforesaid findings shall have no bearing or effect on the merits of the case. The record of application after its due completion be tagged with the main case file."*

This order passed by the learned Trial Court has been upheld in appeal by the learned Appellate Court.

3. Feeling aggrieved, the petitioners have filed this petition.

4. A perusal of the order passed by the learned Trial Court demonstrates that the factum of Sat Prakash having sold his share in favour of the plaintiff has not been denied by the petitioners/defendants. However, their defence was that the sale of his share by Sat Prakash in favour of respondent-plaintiff was illegal as Sat Prakash was bound by a compromise arrived between him and the petitioners/defendants, wherein he had agreed not to sell his share to any person out of the family. The sale deed in favour of plaintiff was null and void and inoperative against the right, title and interest of defendants.

5. Learned Trial Court held that copies of Jamabandi for the year 2006-2007 demonstrated that the nature of the suit land, i.e., land comprised in Khasra Nos. 485, 486 and 487 is *"Gair Mumkin Rasta"* and the contention of the petitioners/defendants that the suit land is not common path stood belied by the revenue record.

6. Learned Trial Court took into consideration the copy of demarcation report, as per which, Revenue Officer had found that the path was obstructed by way of construction of a gate. Learned Trial Court held that it was an admitted position that respondent/plaintiff was also one of the co-owner by virtue of sale deed dated 23.12.2014. It

took note of Suit No. 134-1 of 2015 filed by the present petitioner No. 1- Pradeep Sood, challenging the sale deed in issue, which was also pending before the learned Trial Court.

7. Learned Trial Court held that once it stood established on record that the plaintiff was co-owner of the land in issue, she had right to access the same through common path, i.e., the suit land in question. On these bases, learned Trial Court concluded that as the plaintiff has a *prima facie* case in her favour and balance of convenience was also in her favour, not granting interim relief, as prayed for by way of an application under Order 39 Rules 1 and 2 of the Code of Civil Procedure would cause irreparable loss to her.

8. These findings have been upheld in appeal by the learned Appellate Court, by holding that land comprised in Khasra Nos. 485,486 and 487 is shown as *Gair Mumkin Rasta,* which belies the case of the defendants that the suit land is not a common path. Learned Appellate Court also held that the plaintiff had made out a case for the grant of interim relief, which stood granted in her favour by the learned Trial Court.

9. Mr. Romesh Verma, learned counsel for the petitioners has vehemently argued that the orders passed by both the learned Courts below are not sustainable in the eyes of law, as learned Courts have erred in not appreciating that when a separate suit was already pending, in which, the validity of the sale deed stood questioned, no interim relief could have been granted in favour of the respondent. He has also argued that as in the Civil Suit filed by petitioner No. 1, a status quo order was passed on the same day by the learned Trial Court, therefore, no temporary injunction could have been granted in favour of the respondent in the Suit filed by her. He has further argued that learned Trial Court has erred in not appreciating that the suit of the defendants was not maintainable, as the same was bad for non-joinder of necessary parties.

10. On a query made by the Court to Mr. Verma, he fairly submitted that no application under Section 10 of the Code of Civil Procedure has been filed by the petitioners for the stay of the suit filed by the present respondent.

11. On the other hand, Mr. Neeraj Gupta, learned counsel for the respondent has defended the orders passed by both the learned Courts below by submitting that on the basis of the averments made in the application under Order 39 Rules 1 and 2 of the Code of Civil Procedure, as the respondent/plaintiff was able to make out a *prima facie* case in her favour, therefore, there is no perversity, illegality or jurisdictional error in the orders passed by the the learned Courts below, whereby interim protection has been granted in her favour. He has further argued that the respondent having entered into the footsteps of Sat Prakash could not be precluded from the usage of the path. According to him, as there is no merit in the present petition, therefore, the same deserves to be dismissed.

12. I have heard learned counsel for the parties and have also gone through the impugned orders as well as the record of the case.

13. In my considered view, there is no merit in this petition as neither the order passed by the learned Trial Court granting temporary injunction in favour of the respondent nor the order passed by the learned Appellate Court affirming the same suffers from any perversity, illegality or jurisdictional error. Both the learned Courts below, on the basis of material on record, have held and rightly so that as the respondent/plaintiff was able to make out a *prima facie* case in her favour, therefore, she was entitled for the grant of temporary injunction.

14. During the course of arguments, learned counsel for the petitioner could not demonstrate that the findings returned by both the learned Courts below on facts of the lis

were not borne out from the record of the case. His contention that the filing of a suit by the petitioners itself precluded learned Trial Court from passing any order in favour of the respondent, is without any basis. Whether or not the respondent was entitled for any temporary injunction, had to be decided by the learned Trial Court on the basis of averments made in the Suit instituted by the respondent and this is exactly what has been done by the learned Trial Court.

15. The contention of Mr. Verma that in view of a status quo order passed on the very same day by the learned Trial Court in the Suit filed by petitioner No. 1 in an application under Order 39 Rules 1 and 2 of the Code of Civil Procedure bearing CMA No. 53-6 of 2015 in Civil Suit No. 134/1 of 2015, the relief granted in favour of the respondent self contradicted the order passed in favour of the petitioners, is also without any merit. The only relief which has been granted by the learned Trial Court in favour of the respondent is that it has restrained the petitioners from causing any obstruction or blocking the path as it exists over the land comprised in Khasra Nos. 484, 485 and 496 till the disposal of the case.

16. I have gone through the certified copy of the order passed by the learned Trial Court in application filed under Order 39 Rules 1 & 2 of the Code of Civil Procedure by the present petitioner No. 1. The relevant part of the order is reproduced hereinbelow:

> *"24. Coming to the second relief of the applicant i.e. pertaining to the common path existing over the said property. This Court is also of the view that it will be in the fitness of the circumstance of the case if the parties are directed to maintain status quo qua the existence and nature of such path.*
>
> *25. Though, the applicant has not been able to brought on record any document showing exact measurement or specification of such common path however, it is clear from his pleadings that sch path exists over the suit land. The applicant can certainly brought on record further evidence to clearly establish the identity and specification of such path when the trial of the case will commence. At this stage, keeping in view the allegations of the applicant that respondents are causing interference in such path are required to be believed. The reason being if any obstruction is certainly being made by the respondents, then the applicant shall suffer irreparable loss which cannot be compensated in terms of money. The applicant can only use and enjoy his built up structure existing over the suit property, if he is permitted to use the common path existing over the suit land which as per the applicant leads to the entrance of his property/house. On the other hand, if such is not the case, still the respondents have nothing to loose as they will not suffer anything on account of the passing of such order. In view of this Court the user of the common path is required to be remained unobstructed for any of the party as well as for co-owner of the suit property over which the common path is also existing. Some of the photographs annexed with the plaint, to some extent depict such path.*
>
> *26. If as per the allegations of the applicant, there is obstruction in his user of common path then it will be the applicant who shall suffer inconvenience.*
>
> *27. In view of aforesaid discussion, the applicant has been successful in proving that he has prima facie case in his favour and will be the applicant who shall suffer irreparable loss if temporary injunction is not granted to him. The balance of convenience also favours of the applicant.*
>
> *28. As the result of aforesaid discussion the respondents are hereby restrained from alienating, creating charge or selling the suit land till the final*

disposal of the case on merits. It is further held that till the pendency of main suit both the parties shall maintain status quo qua existence and nature of such path as existing over the suit land. However, the aforesaid findings shall have no bearing or effect on the merits of the case. Record of application after its due completion be tagged with the main case file."

17. In my considered view, there is no conflict in the two orders, i.e., the order passed in the application under Order 39 Rules 1 and 2 CPC filed by the petitioner No. 1 and a similar application filed by the respondent in her case. In fact, a harmonious reading of both the orders clearly demonstrates that the intent of the learned Trial Court was that during the pendency of the suits, the parties are to maintain status quo qua the common path, meaning thereby that neither of the parties were to restrain or obstruct the moment of other party over the path in question. No order has been passed by the learned Trial Court allowing petitioner No. 1 to obstruct the moment of respondent over the suit land.

18. As far as the contention of learned counsel for the petitioners that the suit was bad for non-joinder of necessary parties and therefore also, no interim relief could have been granted to the respondent is concerned, in my considered view, the same is also without any merit. If the suit is bad for non-joinder of necessary parties, then there is a procedure prescribed under the Code of Civil Procedure, which has to be followed by the petitioners in this regard. However, simply because according to the present petitioners the suit is bad for non-joinder of necessary parties, this does not mean that the learned Trial Court was precluded from passing an order granting interim relief.

19. In view of the observations made hereinabove, as this Court does not find any perversity, illegality or jurisdictional error in the orders under challenge, this petition is dismissed. No order as to costs. Miscellaneous applications, if any, also stand disposed of.

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

Kishniya …Petitioner.
Versus
Tarsem Lal & another …Respondents.

CMPMO No.460 of 2017
Reserved on: 06.03.2019
Date of Decision: March 15th, 2019

Code of Civil Procedure, 1908- Order VII Rule 14(3) – Suit for specific performance of contract-Production of documents- Leave of Court- Grant of- Plaintiff filing application for placing on record agreement to sell and one receipt – Suit at stage of examination of plaintiff's witnesses- Defendant contested application on ground of alleged agreement and receipt as false and plaintiff failed to mention these documents in plaint – Trial Court allowing application- Petition against – Held, Court has inbuilt power to permit parties to produce evidence not known to them earlier or which could not be produced in spite of due diligence- Court can allow such documents to be placed on record which can facilitate it to adjudicate and determine real controversy between parties- Petition dismissed.- Order upheld. (Paras 21 to 24)

Cases referred:
Chakreshwari Construction Private Limited vs. Manohar Lal, (2017) 5 SCC 212
Salem Advocate Bar Association, T.N. vs. Union of India, (2003) 1 SCC 49

For the Petitioner: Mr. Vijay Kumar Arora, Advocate.
For the Respondents: Mr.Sanjeev Kuthiala, Advocate, for respondent No.1.
Mr.Sanjay Dalmia, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

Present petition has been filed against the impugned order dated 05.05.2017 passed by the the Senior Civil Judge, Nalagarh, District Solan, H.P., in Civil suit (Case No.33/1 of 2013, titled as *Tarsem Lal Vs. Kishniya & another)* filed by respondent No.1-plaintiff against the present petitioner-defendant for possession of suit land by way of Specific Performance of Contract and in alternative for Damages, whereby an application filed by respondent No.1-plaintiff under Order 7 Rule 14(3) CPC seeking permission to produce and place on record 'agreement to sell' dated 17.05.2005 alongwith one receipt dated 05.07.2005, has been allowed. Respondent No.2 is the proforma defendant in the main suit.

2. I have heard learned counsel for the parties and perused the record of the trial Court.

3. At the time of filing and decision of the application under Order 7 Rule 14(3) CPC, suit was at the stage of examination of plaintiff's witnesses.

4. Respondent No.1-plaintiff has preferred the suit on the basis of agreement to sell for total sale consideration of Rs.3,87,500/-, reduced into writing on 16.05.2006, between the parties. The said agreement has been typed under the caption "Agreement of Full and Final Payment". As per the plaint, petitioner-defendant has failed to perform his part of contract, whereby he had to execute the sale deed in favour of respondent No.1-plaintiff in pursuance to agreement to sell dated 16.05.2006. In alternative relief, damage to the tune of Rs.7,00,000/- has been claimed.

5. Petitioner-defendant has contested the claim of respondent No.1-plaintiff stating, in the written statement, that he had never agreed or entered into alleged agreement to sell qua the suit land with respondent No.1-plaintiff and had never received any amount of consideration from respondent No.1-plaintiff on 16.05.2006, as claimed in the alleged agreement, as a consideration of sale of suit land or any portion thereof and the alleged agreement dated 16.05.2006 is without consideration and is a sham paper transaction, not binding on him, in any manner. Further stated that respondent No.1-plaintiff, in connivance with the witnesses, has prepared false, fictitious and forged agreement with a designed malafide and illegal motive to grab the valuable suit land. It is further claimed that petitioner-defendant is an old aged, rural, rustic and illiterate person, who knows only to put his signatures. Further that, in fact, respondent No.1-plaintiff alongwith one Maan Singh had approached petitioner-defendant on 16.05.2005 to purchase the suit land in equal share and according to the bargain between the parties, total sale consideration was settled @ Rs.7,75,000/- and to this effect, an agreement to sell was reduced into writing on 17.05.2005 and on that date, earnest money of Rs.1,00,000/- was also paid and respondent No.1-plaintiff alongwith Maan Singh had agreed to pay balance sale consideration of

Rs.6,75,000/- on or before 16.05.2006, but they had failed to make the entire payment on or before 16.05.2006 and for rise in average value and failure to arrange the funds, respondent No.1-plaintiff and Maan Singh had refused to get the sale deed registered in their favour and had demanded return of amount paid by them, for which petitioner-defendant had agreed and returned it to them, and thereafter, on 16.05.2006, respondent No.1-plaintiff had asked him to execute the document for cancellation of previous agreement dated 17.05.2005 and as such, petitioner-defendant, came to Nalagarh for executing the document to cancel the previous agreement dated 17.05.2005, but respondent No.1-plaintiff in connivance with other witnesses with dishonest and fraudulent intention had prepared false, forged and fabricated document i.e. alleged agreement dated 16.05.2006, by taking undue advantage of illiteracy of petitioner-defendant, who signed this document at the instance of respondent No.1-plaintiff, under wrong impression by believing him.

6. The plea of the petitioner-defendant with respect to agreement dated 17.05.2005 has been raised in the preliminary objections incorporated in the written statement, which has been replied by respondent No.1-plaintiff, in the replication to the written statement clarifying therein that earlier he and Maan Singh had intended to purchase one bigha of land from the petitioner-defendant for a consideration of Rs.7,75,000/- and as such agreement dated 17.05.2005 was executed and earnest money of Rs.1,00,000/- was also paid to the petitioner-defendant. However, later on, another purchaser Maan Singh had shown his reluctance to purchase the land and therefore, respondent No.1-plaintiff alone had entered into an agreement to purchase half of the land i.e. 0-10 biswas for half consideration of the earlier settled amount of one bigha and thereafter after payment of sale consideration to the petitioner-defendant, agreement of full and final payment dated 16.05.2006 was executed for total sale consideration of Rs.3,87,500/- in presence of marginal witnesses. Plea of preparing forged and fabricated agreement on 16.05.2006, on the pretext of execution of cancellation agreement, has been denied by respondent No.1-plaintiff.

7. During the pendency of suit, respondent No.1-plaintiff has preferred an application under Order 7 Rule 14(3) CPC, for production and placing on record the agreement dated 17.05.2006 alongwith receipt dated 05.07.2005. In para-2 of the application, date of agreement has been wrongly typed out as 17.03.2005, which has caused the same mistake about the date in the impugned order also. However, in the cause title of the application as well as in the prayer, dates of agreement and receipt have been rightly mentioned.

8. In aforesaid application, it is averred on behalf of respondent No.1-plaintiff that despite exercising due diligence, these documents could not be mentioned in the list of documents, attached with the plaint and now necessity has arisen to place the same on record, as the petitioner-defendant has alleged that agreement dated 16.05.2006 is a forged and fabricated document, prepared without consideration. Whereas, it is an agreement of payment of full and final sale consideration on 16.05.2006 and the earlier agreement dated 17.05.2005, was also duly attested by the Notary Public and sale consideration paid therein was also taken into consideration at the time of executing agreement dated 16.05.2006. Further, production of these documents will not cause any prejudice to the petitioner-defendant, who is executant of these documents and the case is at its initial stage.

9. Petitioner-defendant has opposed the aforesaid application by stating that no agreement, as mentioned in the application, was executed between the parties on 17.03.2005 and further that there is no reference of above said document in agreement dated 16.05.2006, on the basis of which main suit has been filed. It is further averred that these documents were in the knowledge and possession of respondent No.1-plaintiff and he

could have referred all such documents in the plaint and produce the same before the Court or at least could have mentioned about these documents in the list of reliance. It is also denied that payment of sale consideration, so made in pursuance to the alleged document dated 17.05.2005, was taken into consideration at the time of execution of last agreement dated 16.05.2006.

10. Learned counsel for the petitioner-defendant has contended that there is no averment in the plaint with respect to agreement dated 17.05.2005 and receipt dated 05.07.2005, which is, now, being produced by filing the application referred to supra and there is no reference of such agreement dated 17.05.2005 in the agreement dated 16.05.2006 and the suit is based only on the agreement dated 16.05.2006. It is further submitted that the petitioner-defendant was prevented by none to mention these facts in the plaint and also to mention about first agreement in the subsequent agreement and despite that it is not so mentioned/referred either in plaint or in subsequent agreement, which creates doubt about the manner and circumstances of execution of agreement dated 17.05.2005 and receipt dated 05.07.2005, and as these documents were in the knowledge and possession of respondent No.1-plaintiff, he is not entitled to produce these documents at this stage for his act, conduct and deeds. According to him, for want of pleadings with respect to these documents, these documents cannot be permitted to be taken on record and therefore, trial Court has committed illegality and material irregularity in allowing the application by passing the impugned order.

11. Learned counsel for respondent No.1-plaintiff has supported the impugned order for the reasons stated therein and by referring the pleadings in written statement with respect to agreement dated 17.05.2005, it is claimed that these documents are necessary and relevant for complete and final adjudication of the dispute between the parties. Reliance has been placed on the decision rendered by the Apex Court in *Salem Advocate Bar Association, Tamil Nadu vs. Union of India,* AIR 2005 SC 3353 [(2005) 6 SCC 344] wherein it is observed that Order 7 Rule 14(3) CPC requires leave of the Court to be obtained for production of the documents at later stage after filing of the plaint and list of documents.

12. Reliance has also been placed on the decision rendered by the Apex Court in *Chakreshwari Construction Private Limited vs. Manohar Lal,* (2017) 5 SCC 212, wherein it has been held that law permits the parties to file additional evidence at any stage of the trial under Order 7 Rule 14(3) CPC, including at the first or/and second appellate stage under Order 41 Rule 27 CPC, with the leave of the Court provided a case is made out to seek such indulgence.

13. Claim of respondent No.1-plaintiff, in civil suit, is based upon agreement dated 16.05.2006, which is an agreement altogether different to the earlier agreement dated 17.05.2005 as earlier agreement was executed between (A) and (B plus C) with regard to one bigha of land. Whereas, agreement dated 16.05.2006 is an agreement executed between (A) and (B) only, wherein (C) is not a party and subject matter of the agreement is only 0-10 biswas of land, which might be a portion of property subject matter of earlier agreement, but not the entire land which is subject matter of earlier agreement. Therefore, in a claim, based upon a subsequent agreement dated 16.05.2006, independent of the earlier agreement dated 17.05.2005, there was no necessity of mentioning of details of earlier agreement as well as any receipt related thereto, might be issued with respect to part payment, if any. In the facts and circumstances detailed supra, it was also not necessary to mention about execution of agreement dated 17.05.2005 in subsequent and independent agreement dated 16.05.2006. Therefore, plea of petitioner-defendant that for want of mention in the plaint or in the agreement dated 16.05.2006, about agreement dated 17.05.2005 and receipt related thereto, these documents cannot be permitted to be placed on record, is not tenable.

14. Now question arises that when agreement dated 17.05.2005 or receipt related thereto was not necessary to be referred to in plaint or in subsequent agreement dated 16.05.2006, for what reason, the necessity has arisen to place these documents on record.

15. As noticed supra, it is preliminary objection of the petitioner-defendant, taken in written statement, wherein there is reference of earlier agreement dated 17.05.2005 entered into between him and respondent No.1-plaintiff alongwith one Maan Singh. Petitioner-defendant has given a reference of the said agreement in a particular manner, which has been replied and explained by respondent No.1-plaintiff in reply to preliminary objections in a different manner. Therefore, this document has also become relevant for consideration to adjudicate upon the issues raised in the suit completely and finally.

16. Respondent No.1-plaintiff has filed the application under provision of Order 7 Rule 14(3) CPC which reads as under:-

> "(3) A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit."

17. A bare reading of this provision indicates that any document which ought to be produced in the Court or to be entered in the list of reliance at the time of presentation of plaint, but not produced or entered accordingly, shall be received in evidence only with the leave of the Court. Agreement dated 17.05.2005 and receipt dated 05.07.2005 sought to be produced in the Court are not the documents which ought to be produced in the Court by the plaintiff or ought to be entered in the list of reliance at the time of presentation of a plaint because as discussed in detail supra, these documents had never been relied upon by respondent No.1-plaintiff and there was no occasion to file these documents with plaint or mention these documents in list of reliance. Therefore, question of grant of leave to produce the documents under this provision to the plaintiff will arise only when the document is of such a nature which ought to be produced or entered in the list of reliance at the time of presentation of plaint, which is not a situation in the present case. Therefore, provision of Order 7 Rule 14(3) CPC shall not be applicable in the present case.

18. By Amendment Act 104 of 1976, a provision enabling the party to produce the evidence not previously known or which could not be produced despite due diligence, was incorporated by inserting Rule 17-A to the Order 18. However, by Amendment Act, 1999, the said Rule 17-A stands omitted.

19. In *Salem Advocate Bar Association's* case (supra) referring its earlier decision in *Salem Advocate Bar Association, T.N. vs. Union of India,* (2003) 1 SCC 49, the Apex Court has held that on deletion of Order 18 Rule 17-A, which was provided for leading additional evidence, law existing before introduction of amendment would stand restored, and even before insertion of Order 18 Rule 17-A, Court had in built power to permit parties to produce evidence not known to them earlier or which could not be produced inspite of due diligence. It is further held that Order 18 Rule 17-A did not create any new right, but only clarified the position and therefore, deletion of Order 18 Rule 17-A does not disentitle production of evidence at later stage and on party satisfying the Court that after exercise of due diligence, that evidence was not within his knowledge or could not be produced at the time party was leading evidence, the Court may permit leading of such evidence at later stage on such terms as may appear to be just.

20. Where there is no specific provision, Section 151 CPC empowers the Court with inherent powers to do justice and it has been held in *Rajendra Prasad Gupta vs. Prakash Chandra Mishra,* (2011) 2 SCC 705 that this provision has to be interpreted to mean that every procedure is permitted to the Court for doing justice unless expressly prohibited. In the present case, there is no express power to file an application for leading additional evidence or to place the documents on record, which could not be produced earlier and were not ought to be produced with plaint or to be relied in list of reliance, like present case. The application, in present case, has been filed invoking the provisions of Order 7 Rule 14(3) CPC read with Section 151 CPC. However, even if, Order 7 Rule 14(3) CPC, is not found applicable in the facts and circumstances of the case, inherent powers under Section 151 CPC can be exercised undoubtedly in such a situation and where there is Court has power to pass an order otherwise than the provisions mentioned in the application, mentioning of wrong provisions cannot be a ground for rejecting the prayer.

21. The documents sought to be produced are not unknown to the petitioner-defendant, as he, in his written statement, had made categorical reference of the agreement dated 17.05.2005 and in response thereto, respondent No.1-plaintiff had made averments in replication for clarifying the same. By producing these documents and there is no change in basic nature of the claim set up by respondent No.1-plaintiff rather these documents would only be relevant to adjudicate the claim already made. It is also noticeable that these documents are in possession of respondent No.1-plaintiff and the petitioner-defendant had relied thereupon in preliminary objection taken in his written statement, but had not taken any step for production thereof in the Court during trial, including issuing notice to the plaintiff or seeking direction of the Court for its production by respondent No.1-plaintiff. Petitioner-defendant will have right to lead evidence to rebut the evidence led by respondent No.1-plaintiff and availability of these documents on record would facilitate the petitioner-defendant to prove his plea taken in written statement as production of these documents does not prove the plea of respondent No.1-plaintiff or petitioner-defendant. Rival claims of parties are to be assessed on the basis of pleadings, admissible and relevant oral as well as documentary evidence. Plea of parties to be evaluated on the basis of proved contents of documents. These documents shall facilitate the trial Court to adjudicate and determine the real controversy between the parties completely and finally.

22. In the present case, application has been filed only to produce and place on record certain documents, therefore, the trial Court has rightly accorded permission to place these documents on record, but subject to proving those documents, in accordance with law. Permission to produce and place the documents on record does not *ipso facto* make those documents admissible or proved on record. The production and placing of these documents on record shall be subject to all legal and just exceptions including admissibility, proof of documents and other averments related thereto. Therefore, any observation made in this application in this regard shall be confined to adjudication of present application and shall have no bearing on respective claims of parties which are yet to be assessed by the trial Court on conclusion of trial.

23. In view of the above discussion, I find no infirmity, illegality, irregularity or perversity in the impugned order dated 05.05.2017 passed by the the Senior Civil Judge, Nalagarh, District Solan, H.P., in civil suit (Case No.33/1 of 2013, titled as *Tarsem Lal Vs. Kishniya & another)* allowing the production and placing of documents on record.

24. Parties are directed to appear before the trial Court on 01.04.2019. Records be sent back immediately.

Petition is dismissed, being devoid of merits, in aforesaid terms, so also pending application(s), if any.

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

Sat Pal ...Petitioner
Versus
Baba Dharam Shah ...Respondent

CMPMO No. 445 of 2018
Judgment reserved on8th March, 2019
Date of Decision 15th March, 2019

Code of Civil Procedure, 1908- Order VI Rule 17- Amendment of pleadings- Principles- Trial Court permitting plaintiff to amend his plaint and thereby challenge mutation order passed by Assistant Collector in favour of defendant on basis of Will- Petition against- Defendant arguing said mutation having been attested in his favour pursuant to orders of High Court and as affirmed by Hon'ble Supreme Court- And Trial Court by allowing application for amendment, had questioned authority of High Court and Hon'ble Supreme Court- Held, order of High Court merely held defendant as an agriculturist of Himachal Pradesh entitled to acquire or succeed to agricultural property- It never directed Assistant Collector to attest mutation in a particular way or foreclosed right of any party to succeed to property in question- Trial Court justified in allowing application for amendment of plaint- Petition dismissed. (Paras 26, 34 & 36)

Cases referred:
Chakreshwari Construction Private Ltd. vs. Manohar Lal, (2017)5 SCC 212
State of Bihar vs. Modern Ten House and another, (2017)8 SCC 567

For the Petitioner: Mr. Ajay Kumar, Sr. Advocate with Mr.Abhishek Barowalia, Advocate,
For the Respondent: Mr. R.P. Singh, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

This petition has been filed against impugned common order dated 31.8.2018 (Annexure P-8) passed by learned Senior Civil Judge in civil suit No. 12 of 2014, titled Baba Dharam Dass vs. Sat Pal allowing CMA No. 1478 of 2018 filed under Order 6 Rule 17 CPC by the respondent/plaintiff and dismissing CMA No. 1479 of 2018 filed under Order 7 Rule 11 (A) CPC by the petitioner/defendant.

2. I have heard learned counsel for the parties and have gone through the documents placed on record. At the request of learned counsel for parties, record of CWP No. 3572 of 2014 titled Sat Pal Saini vs. State of H.P. has also been requisitioned, perused and taken into consideration.

3. At the very outset learned counsel for the petitioner submits that he has instructions not to press this petition against dismissal of application filed by the petitioner/defendant under Order 7 Rule 11(A) CPC, but to agitate only against allowing the application filed by respondent/plaintiff under Order 6 Rule 17 CPC.

4. The main dispute between the parties, in brief, is with respect to succession of property of late Baba Pritam Shah Chela Baba Game Shah, who has expired on 15.1.2012. Whereafter, respondent/plaintiff is claiming the right on the property of Dera Baba Pritam Game Moju Shah on the basis of unregistered Will, alleged to have been executed by Baba Pritam Shah on 15.8.2011, whereas petitioner/defendant is asserting his right on the said property of the basis of another unregistered Will, alleged to have been executed by Baba Pritam Shah on 4.5.2010.

5. Vide order dated 27.4.2012 (Annexure R-4), Assistant Collector 1st Grade, Una, after considering the rival contentions of parties and opinion of large number of gathering present on the spot at the time of consideration of succession of property in question, has declined to attest the mutation in favour of either party, but had attested the same as mutation No.993 in favour of Dera Baba Pritam,Game Moju Shah.

6. The aforesaid order dated 27.4.2012 Annexure R-4 was assailed by petitioner/defendant before Sub Divisional Collector, Una by filing an appeal No. 26 of 2012. Vide order dated 31.7.2013, Sub Divisional Collector had set aside the attestation of mutation No. 993 dated 27.4.2012 and had remanded the case for deciding afresh, by Assistant Collector 2nd Grade after hearing the parties, consequent whereupon the case was listed before Assistant Collector 2nd Grade, Una on 26.10.2013, on which date, an issue with respect to eligibility of petitioner/defendant, being not an agriculturist of Himachal Pradesh, to inherit the property of Bab Pritam Shah was raised whereupon petitioner/defendant had sought time to produce the documents and judgments in support of his claim. However, thereafter, he did not appear before the Assistant Collector on 22.2.2012, 29.3.2014 and 20.4.2014 and lastly on 20.4.2014 one more opportunity was granted to the petitioner/defendant to produce his agricultural certificate on 20.5.2014.

7. In the meanwhile, on 23.4.2014, petitioner/defendant had filed an application before the Tehsildar Una for issuance of agriculturist Himachali Certificate on the ground that his wife Smt. Ram Dulari was owner in possession of the land in village Kotla Kalan, Tehsil and District Una, basing his claim on clarification issued by the Government of H.P. vide letter No. B.F(5)-8/2001 dated 30.4.2002. However, the said application was rejected by Tehsildar on the ground that said clarification had already stood withdrawn by the Government of H.P. at that time and as per clarification in vogue, petitioner/defendant was not found to be eligible for agriculturist certificate. This order was assailed by petitioner/defendant in the High Court by filing CWP No. 3572 of 2014 titled Sat Pal Saini vs. State of H.P. and others.

8. For rejection of application submitted for issuance of agriculturist Himachali Certificate, petitioner/defendant did not appear before the Assistant Collector 2nd Grade on 20.5.2014 and on that date, the Assistant Collector 2nd Grade, after recording the facts that an application filed by the petitioner/defendant for issuance of agriculturist stood rejected by him as Tehsildar vide order dated 23.4.2014 and that petitioner/defendant has assailed the said rejection by filing writ petition in the High Court, had adjourned till passing of further orders by the High Court in the writ petition CWP No. 3572 of 2014.

9. Simultaneously, under direction of the High Court issued vide order dated 29.2.2014, petitioner/defendant had also assailed the rejection order dated 23.4.2014 by

filing statutory appeal before Sub Divisional Collector, Una which was dismissed vide order dated 31.1.2015 and after amending the petition, the said order was also assailed in CWP No. 3572 of 2014.

10. Before filing the writ petition, CWP No. 3572 of 2014 on 2.5.2014, respondent/plaintiff had filed civil suit on 21.1.2014.

11. Plaintiff has filed a civil suit on 21.1.2014 for declaring him owner in possession of the property in dispute after declaring the Will dated 4.5.2010 as null and void and Will dated 15.8.2011 as legal and valid, order passed wherein has been assailed in present petition. In the said civil suit earlier also, an application for amendment under Order 6 Rule 17 CPC was filed by the respondent/plaintiff on the basis of civil litigation, which had attained finality vide judgment dated 1.7.2009 passed by this High Court in RSA No. 369 of 2003. The said amendment was allowed by the trial Court on 21.3.2016.

12. Pendency of civil suit, preferred by respondent/plaintiff with respect to property in question on the basis of Will dated 15.8.2011 and fact of contesting the said suit by petitioner/defendant by asserting his claim on the same property on the basis of Will dated 4.5.2010 was not disclosed or raised by petitioner/defendant in CWP No. 3572 of 2014. In the said writ petition only, issue with respect to non-issuance of agriculturist certificate was raised and contested. Ultimately on the basis of clarifications issued by Government of H.P. and also on the basis of order dated 31.8.2016 passed by the District Collector in sequel to order dated 15.7.2016, passed by the High Court in aforesaid writ petition, whereby petitioner/defendant Sat Pal Saini was declared to be covered by definition of agriculturist being husband of an agriculturist's wife, the High Court vide order dated 23.9.2016 had quashed and set aside the order dated 23.4.2014 whereby application of petitioner/defendant for issuance of agriculturist Certificate was rejected with further direction to the respondent/State to attest the mutation within a period of eight weeks from passing of order by treating the petitioner/defendant to be an agriculturist. In addition, State was also directed to make suitable amendment to Section 118 of H.P. Tenancy and Land Reforms Act, 1972 and Rules therein.

13. The said order was assailed by the State in the Apex Court by filing SLP wherein the State had not assailed the portion of order whereby direction to attest the mutation by treating the petitioner as an agriculturist was given, but had assailed only the direction issued for making suitable amendment in Section 118 of H.P. Tenancy and Land Reforms Act and Rules.

14. The Apex Court vide judgment dated 8.2.2017 had set aside the said direction but direction to attest the mutation by treating the petitioner/defendant as an agriculturist remained intact.

15. After passing of direction by the High Court in CWP No. 3572 of 2014, mutation No. 993 has been attested by the revenue authorities on 30.9.2016 in favour of petitioner/defendant.

16. Thereafter, respondent/plaintiff has filed an application under Order 6 Rule 17 CPC on 5.2.2017 seeking certain amendments in plaint for addition of certain averments related to filing of CWP No. 3572 of 2014, direction passed therein and attestation of mutation No. 993 dated 30.9.2016 and for addition of prayer to assail the attestation of the said mutation in favour of petitioner/defendant, on the ground that these subsequent events i.e. passing of order by the High Court and attestation of mutation in pursuant thereto, have come in the notice of respondent/plaintiff only when the defendant/petitioner had tried to interfere in the suit property on the strength of attestation of mutation in his favour.

17. Learned counsel for the petitioner submits that respondent/defendant has no authority to question the judgment passed by the High Court and affirmed by the Supreme Court and mutation No. 993 attested in favour of the petitioner/defendant in pursuant thereto.

18. It is further contended that it is the second application for amendment and plaintiff was having the knowledge of pendency of filing of CWP No. 3572 of 2014 and had filed an application under Order 1 Rule 10 CPC therein for arraying him as party. Therefore, the respondent/plaintiff has not come with clean hands at the time of filing of second application for amendment by stating that it is a subsequent event and has come in the knowledge in February, 2017. He has submitted that pleadings in paras 10(a), 10(b) and 10(c) amount to questioning the authority of High Court to pass an order in a writ petition which stands affirmed by the Apex Court and allowing such amendment to be added in plaint is amounting to allow the Civil Judge to question the wisdom of the High Court.

19. Learned counsel for the respondent/plaintiff submits that first amendment was with respect to certain amendments based on the finality of litigation after passing of judgment by this High Court in RSA No. 369 of 2003 and at that time no order had been passed by the High Court in CWP No. 3572 of 2014 and further that passing of order by this High Court for attestation of mutation in the said writ petition and attestation of mutation in pursuance thereto was not in the knowledge of respondent/defendant till February, 2017 when petitioner/defendant had tried to interfere in the property as these orders were not passed in his presence. It is also submitted that writ petition was preferred after filing of suit by concealing the facts about pendency of suit filed questioning the validity of Will on the basis of which petitioner/defendant is claiming right on the property and ultimately he has succeeded in getting the mutation attested in his favour by concealing the material facts and thus respondent/plaintiff has every right to assail the said mutation.

20. From the submissions of learned counsel for the parties and on perusal of record of CWP No. 3572 of 2014, it emerges that CWP No. 3572 of 2104 was filed against the order dated 23.4.2014 passed by Tehsildar, Una rejecting an application filed by the petitioner/defendant from issuance of agriculturist certificate and later on, by amending the said CWP No. 3572 of 2014, order dated 31.1.2015 passed by the Sub Divisional Collector dismissing the appeal preferred by the petitioner/defendant was also assailed therein. However, the respondent/plaintiff was not party to the said application or appeal or writ petition.

21. Though in present petition, in ground (e), the petitioner/defendant has taken a specific plea that respondent/plaintiff had even filed an application under Order 1 Rule 10 CPC for being impleaded as a party to CWP No. 3572 of 2014 in this High Court, however, as per record of the said writ petition, no such application was ever filed by anybody much less by the respondent/plaintiff. There is nothing on record to substantiate the plea of petitioner/defendant that direction issued by this High Court vide order dated 23.9.2016 in CWP No. 3572 of 2014 and attestation of mutation No. 993 vide order dated 30.9.2016 in sequel to said direction was in the knowledge of respondent/plaintiff prior to filing of application for amendment.

22 In CWP No 3572 of 2014, there is reference of order dated 27.4.2012 passed by the Assistant Collector 2nd Grade rejecting the claim of petitioner set up by him on the basis of Will and also about order dated 31.7.2013 passed by the Sub Divisional Collector in appeal preferred by petitioner/defendant, but this petition was filed only against denial of issuance of agriculturist certificate by rejecting the application of petitioner/defendant by Tehsildar vide order dated 23.4.2014 and against the dismissal of appeal, preferred by the

petitioner/defendant, vide order dated 31.1.2015 passed by Sub Divisional Collector and issue of rival claims of various parties with respect to the property in dispute was not the subject matter of this CWP No. 3572 of 2014. It would be more clear from the prayer of petitioner in said writ petition, which reads as under:-

> ***"(i) That the impugned orders annexures P-9 dated 23.4.2014 and Annexure P-12 dated 31.1.2015, being unsustainable in the eyes of law, may kindly be quashed and set aside with directions to the respondents to immediately consider and pass orders in attesting the mutation as is entered in Jamabandi for the year 2007-08, annexure P-6 in favour of petitioner, taking the fact that petitioner is an agriculturist."***

23. This High Court in aforesaid writ petition No. 3572 of 2014 has adjudicated the issue as to whether petitioner is to be treated as agriculturist or not and on the basis of material before it, particularly in view of the order dated 31.8.2016 passed by the District Collector, Una wherein it is concluded that petitioner comes under the definition of agriculturist being a husband of agriculturist wife, this High Court had passed the following order:-

> ***"3. Accordingly, impugned annexure P-9 dated 23.4.2014 is quashed and set aside. Respondents are directed to attest the mutation within a period of eight weeks from today by treating the petitioner to be an agriculturist."***

24. In view of issue raised before the High Court in CWP No. 3572 of 2014, there was no occasion for the High Court to adjudicate the rival claims of persons claiming their title upon the suit property and the only issue raised before it, regarding issuance of agriculturist certificate, was adjudicated upon and finalized. The High Court has not directed the concerned authority to ignore the claims of other contesting parties asserting their claims on the suit property at the time of attestation of mutation No. 993 qua the suit property. The only direction was that at the time of attestation of mutation within a period of eight weeks, the petitioner/defendant was to be treated as an agriculturist and therefore, the claim of petitioner/defendant was not to be rejected on the ground that he was not an agriculturist but the rest objections/claims of petitioner/defendant, respondent/plaintiff and other interested persons were to be adjudicated upon by the concerned authority on its own merits in accordance with law.

25. The High Court has not directed the attestation of mutation in particular manner or in favour of particular person. Therefore, attestation of mutation in favour of petitioner/defendant cannot be said to have been attested on the directions issued by the High Court. The direction of the High Court was limited to the extent that petitioner/defendant was to be treated as an agriculturist. Therefore, it was incumbent upon the authority to ensure the presence of all interested persons and consider their rival claims after giving opportunity to each of them in accordance with law. Either of them, being aggrieved by attestation of mutation, was and is entitled to assail the same as permissible under law except re-opening of issue regarding the entitlement of petitioner to be treated as an agriculturist.

26. At the time of passing of order 27.4.2012, after considering the rival claims of interested persons, Assistant Collector 2nd Grade had not attested the mutation either in favour of the petitioner/defendant or respondent/plaintiff or anybody else, but in favour of Dera by leaving the fate of 'Wills' to be adjudicated by competent Court of law. The said

order was assailed before the Sub Divisional Collector, who, vide order dated 31.7.2013, had set aside the order passed by Assistant Collector 2nd Grade and remanded the case with direction to attest the mutation afresh after hearing/giving the proper opportunity to parties to prove their claims and to pass a reasonable order keeping in view the points discussed in appeal. In this order, the Sub Divisional Collector had discussed the rival claims of parties based on respective Wills, alleged to have been executed by deceased Baba Pritam Shah, in favour of respective party, but he had not returned the findings on merits on this issue, but had remanded the case back, as referred supra.

27. After aforesaid remand order, Assistant Collector 2nd Grade, while considering the claims of interested parties, had passed a detailed order dated 26.10.2013 and had adjourned the attestation on request of petitioner/defendant enabling him to produce the documents and to address arguments to prove him an agriculturist, for establishing his eligibility to inherit suit land. Pending consideration of aforesaid issue, an application of petitioner/defendant and appeal therein were dismissed by the concerned authority and ultimately this High Court vide order dated 23.9.2016 held him an agriculturist.

28. There is no finding of any Court with respect to genuineness of Will(s) produced by the parties. The Sub Divisional Collector in his order dated 31.7.2013 has reproduced the version of parties wherein there is reference of lodging/filing of criminal cases and examination of genuineness of Will by the Forensic Laboratory, but he had not adjudicated the rival claims in this regard and had directed the Assistant Collector 2nd Grade to adjudicate the said issue.

29. In CWP No. 3572 of 2014 also, there is order only to treat the petitioner/defendant as an agriculturist, but there is no direction or order with respect to legality, validity or genuineness of Will(s) in dispute. No doubt, in view of order passed in CWP No. 3572 of 2014 petitioner/defendant is to be considered an agriculturist but he has not been ordered to be entitled for suit land on the basis of Will. The said claim of petitioner is subject matter of present suit.

30. It was incumbent upon the concerned authority to decide and attest the mutation after considering the claims and issues raised by the interested parties on merits as there was no direction by the High Court to ignore such issues or claims in the order/judgment passed in CWP No. 3572 of 2014. Therefore, attestation of mutation No. 993 vide order dated 30.9.2016 does not amount to attestation of it under the order passed by this High Court. The only one issue that petitioner/defendant is an agriculturist has been decided by the High Court and it cannot be re-opened. However, for want of adjudication of other claims and issues raised by the interested parties, the said attestation of mutation No. 993 can always be challenged by the aggrieved party(ies).

31. The first amendment sought by the respondent/plaintiff in civil suit was finally adjudicated and permitted on 21.3.2016. The direction issued by the High Court vide order 23.9.2016 in CWP No. 3572 of 2014, attestation of mutation No. 993 vide order dated 30.9.2016 and interference by the petitioner/defendant in the suit property are subsequent to it. Therefore, there was no occasion for the respondent/plaintiff to pray for amendment to assail the mutation No. 993 at the time of filing of first application for amendment.

32. The Apex Court in ***Chakreshwari Construction Private Ltd. vs. Manohar Lal*** reported in ***(2017)5 SCC 212*** has summarized the some of important factors to be kept in mind at the time of dealing with application under Order 6 Rule 17 CPC, which reads as under:-

"13. The principle applicable for deciding the application made for amendment in the pleadings remains no more *res integra* ***and is laid down in several cases. In Revajeetu Builders and Developers vs. Narayanaswamy and Sons (2009)10 SCC 84, this Court, after examining the entire previous case law on the subject, culled out the following principle in para 63 of the judgment which reads as under: (SCC p.102)***

"63. On critically analyzing 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 malafide;

(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.

There 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."

33. The Apex Court in ***State of Bihar vs. Modern Ten House and another*** reported in ***(2017)8 SCC 567*** has allowed the amendment of written statement after completion of evidence and after considering the certain factors, some of which may be relevant in present case also, which reads as under:-

"8. We have perused the amendment application filed by the appellants. We find that firstly, the proposed amendment is on facts and the appellants in substance seek to elaborate the facts originally pleaded in the written statement; secondly and in other words, it is in the nature of amplification of the defence already taken, thirdly, it does not introduce any new defence compared to what has originally been pleaded in the written statement; fourthly, if allowed, it would neither result in changing the defence already taken nor will result in withdrawing any kind of admission, if made in the written statement' fifthly, there is no prejudice to the plaintiffs, if such amendment is allowed because notwithstanding the defence or/and the proposed amendment, the initial burden to prove the case continues to remain on the plaintiffs; and lastly, since the trial is not yet completed, it is in the interest of justice that the proposed amendment of the defendants should have been allowed by the Courts below rather than

to allow the defendants to raise such plea at the appellate stage, if occasion so arises.”

34. In the present case, respondent/petitioner is asserting his right upon the suit property since beginning and he has filed suit for declaration of ownership and possession with respect to the suit property after declaring the Will dated 15.8.2011 legal and valid and Will dated 4.5.2010 null and void. Now mutation has been attested on the basis of Will dated 4.5.2010, which, ‘Will’ has already been assailed by the respondent/plaintiff. Therefore, amendment sought for assailing the attestation of mutation is imperative for proper and effective adjudication of case. It is in the nature of amplification of claim already set up by plaintiff and it does not introduce any new case in comparison to the original pleadings of plaint and thus it would neither result in changing of stand of plaintiff already taken nor will result in withdrawing any kind of admission made in plaint and it is not changing the nature and character of case fundamentally or constitutionally. The circumstance in which the amendment has been sought is indicating that the same is bonafide and refusing the amendment, in fact, leads to multiplicity of litigation as in case the plaintiff succeeds in his suit, he will again have to assail the mutation, attested in favour of petitioner/defendant. This amendment will not cause any prejudice to the petitioner/defendant as defendant will have the opportunity to refute the claim of plaintiff by filing amended written statement and to lead evidence to substantiate his defence.

35. The trial has also not completed yet and both the parties will have the chance to substantiate their claims and rebut the claim of opposite party by leading the evidence.

36. For the aforesaid discussion, made here-in-above, by allowing the amendment sought by respondent/plaintiff, ends of justice would have been served. Therefore, I find no infirmity, irregularity, illegality or perversity in the impugned order passed by the trial Court. Therefore, the present petition is dismissed being devoid of any merit. No order as to costs.

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

National Insurance Company Limited ….Appellant.
Vs.
Smt. Usha Devi and others …..Respondents.

FAO No.: 107 of 2012
Date of Decision: 13.03.2019

Motor Vehicles Act, 1988 (Act) - Section-163-A – Motor accident – Claim application - No fault liability - Tribunal allowing application of legal representatives of deceased and imposing liability on insurer – Appeal against – Insurance company contending that deceased was negligent in driving offending vehicle resulting in breach of terms and conditions of policy - Being so, it has no liability – Held, question of negligence on part of driver in proceedings instituted under Section-163-A of Act doesn’t arise - Insurance company failing to prove breach of terms and conditions of policy - Appeal dismissed - Award upheld. (Paras 9-11)

Cases referred:
Shivaji and another vs. Divisional Manager, United India Insurance Co. Ltd. and others, Accidents Claims Journal 2018 (Volume IV) 2161
United India Insurance Co. Ltd. vs. Sunil Kumar and another, Accidents Claims Journal 2018 (Volume I) 1

For the appellant: Ms. Devyani Sharma, Advocate.
For the respondents: None.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*:

By way of this appeal, the appellant-Insurance Company has assailed the award dated 28.11.2011, passed by the learned Motor Accident Claims Tribunal-1, Solan in MAC Petition No. 9-S/2 of 2010, vide which, learned Tribunal while allowing the claim, has awarded an amount of Rs.4,57,000/- (including interim compensation, if any, granted) in favour of the claimants and against the respondents, as their joint and several liability with 7.5% interest per annum from the date of filing of petition till the realization of amount. Learned Tribunal has held that since the offending vehicle was proved to be insured, therefore, compensation was liable to be indemnified by the insurer.

2. Feeling aggrieved, the Insurance Company has filed this appeal.

3. Brief facts necessary for the adjudication of the appeal are as under:

Respondents No. 1 to 3 (hereinafter referred to as 'the petitioners') filed a claim petition under Section 163-A of the Motor Vehicles Act on the pleadings that the petitioners were wife, mother and daughter of deceased Rajesh, respectively, who lost his life in an accident which took place on 17.02.2010 near Haripurdhar, Police Station Sangrah. Their claim was for grant of compensation on structured formula basis against respondent Sudesh Kumar Thakur, owner of the offending vehicle Maruti 800 bearing registration No. HP-16-2951, as also the Insurance Company, i.e., the present appellant. According to the petitioners, the deceased was having income of Rs.40,000/- per annum, which he was earning by way of driving a Truck of his maternal uncle. Owner of the vehicle did not dispute the accident or death of the deceased in the accident involving the offending vehicle, however, according to him, the offending vehicle was duly insured. Insurance Company took the preliminary objection that the petition was not maintainable as the accident had occurred when the deceased was himself driving the Car and as the deceased was not holding a valid and effective driving licence at the time of accident, the petitioners were not entitled for any compensation from the Insurance Company.

4. The following issues were framed by the learned Tribunal on 10.11.2009:

"1. Whether the deceased Rajesh had died on account of the use of the motor vehicle?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 vehicle was being plied in violation of terms and conditions of the insurance policy and the respondent No. 2 is not liable to pay the compensation? OPR-3

4. Relief.

5. These issues were decided by the learned Tribunal as under:

Issue No.1:	Yes.
Issue No. 2:	Rs.4,57,000/- from respondents 1and 2 being joint and several liability to be indemnified by respondent No. 2.
Issue No. 3:	No.
Relief:	The petition is allowed as per operative portion of award.

6. Learned Tribunal held that the cause of accident is not required to be proved in proceedings under Section 163 of the Motor Vehicles Act and as the deceased had lost his life due to accident arising out of the use of the motor vehicle, therefore, the petitioners being dependent of the deceased were entitled for compensation, which was assessed at Rs.4,32,000/-. Learned Tribunal taking into consideration the statement of PW-2 Yash Pal Thakur, who stated that he used to pay Rs.3300/- per month to the deceased for working for him as a Driver and assessed the income of the deceased to be Rs.3,000/- per month by treating the same to be minimum wages and after deducting 1/3rd as his personal expenses, assessed the loss of income as Rs.2000 x 12, i.e., Rs.24,000/- per annum. Multiplier of 18 was applied by the learned Trial Court taking into consideration the fact that the age of the deceased was claimed to be 29 years by petitioner No. 1 and as per post mortem report, the age was shown as 27 years. Learned Tribunal also ordered funeral expenses of Rs.25,000/- to be paid to the petitioners. Learned Tribunal also held that the Insurance Company had failed to prove violation of the terms and conditions of the Insurance Policy and, therefore, in the absence thereof, the liability to compensate the petitioners was that of the Insurance Company on behalf of the owner of the vehicle which was duly insured.

7. Feeling aggrieved, the award stands assailed by the Insurance Company, *inter alia*, on the grounds: (a) that the impugned award is not sustainable as learned Tribunal has erred in not appreciating that there was breach of the terms and conditions of the Insurance Policy; (b) that as the deceased himself was negligent in driving the offending vehicle, therefore also, liability could not be fastened upon the Insurance Company; and (c) that even otherwise, the amount awarded by the learned Tribunal is on the higher side.

8. I have heard learned counsel for the appellant and have also gone through the impugned award, as also the record of the case.

9. During the course of arguments, appellant could not point out as to which particular Clause of the Insurance Policy stood breached by the owner of the vehicle. The unfortunate accident took place on 17.02.2010 and it is a matter of record that as on the date when the accident took place, the vehicle was duly insured. In this factual matrix, onus was completely upon the Insurance Company to prove by placing cogent evidence on record that there was a breach of the terms and conditions of the Insurance Policy, which the Insurance Company has failed to prove. There is not even an iota of evidence on record to suggest that there was any breach of the terms and conditions of the Insurance Policy.

10. The contention of learned counsel for the appellant that as the accident had purportedly occurred on account of the negligence on the part of the deceased, therefore, the Insurance Company was not liable to indeminify is also without any merit.

11. A three Judges Bench of the Hon'ble Supreme Court in ***United India Insurance Co. Ltd.***Vs. ***Sunil Kumar and another,*** Accidents Claims Journal 2018

(Volume I) 1, has now clearly and categorically held that grant of compensation under Section 163-A of the Motor Vehicles Act on the basis of structured formula is in the nature of a final award and adjudication thereunder is required to be made without any requirement of any proof of negligence of the driver/owner of the vehicle(s) involved in the accident. Hon'ble Supreme Court also held that though Section 163-A of the Act does not specifically exclude a possible defence of the insurer based on negligence of the claimant as contemplated by Section 140(4), to permit such defence to be introduced by the insurer and/or to understand the provisions of Section 263-A of the Act to be contemplating any such situation would go contrary to the very legislative object behind introduction of Section 163-A of the Act, namely final compensation within a limited time frame on the basis of the structured formula to overcome situations where the claims of compensation on the basis of fault liability was taking an unduly long time. Hon'ble Court has held that to understand Section 163-A of the Act to permit the insurer to raise the defence of negligence would be to bring a proceeding under Section 163-A of the Act at par with the proceeding under Section 166 of the Act, which would not only be self contradictory but also defeat the very legislative intention. Hon'ble Supreme Court has thus held that in a proceeding under Section 163-A of the Motor Vehicles Act, it is not open for the Insurance Company to raise any defence of negligence on the part of the victim.

12. This principle has thereafter been reiterated by the Hon'ble Supreme Court in ***Shivaji and another*** Vs. ***Divisional Manager, United India Insurance Co. Ltd. and others,*** Accidents Claims Journal 2018 (Volume IV) 2161 by again holding that in proceedings under Section 163-A of the Act, the Insurance Company cannot raise any defence of negligence on the part of the victim to counter the claim of the claimant.

13. Coming to the 3rd ground taken by the learned counsel that the amount awarded is excessive, in my considered view, the same is also without any merit. Learned Tribunal, taking into consideration the fact that the deceased was earning his livelihood as a Driver, took his monthly income to be Rs.3000/-, which by no stretch of imagination can be termed to be on the higher side. Thereafter, learned Tribunal has deducted 1/3rd amount from the same towards personal expenses of the deceased and on the balance of Rs.2000/-, the compensation paid to the petitioner has been assessed. As during the course of arguments, it could not be seriously disputed that the age of the deceased at the time of his death was 27 to 29 years, it cannot be said that the multiplier of 18 applied by the learned Tribunal is on the higher side. Therefore, it cannot be declared that the amount of compensation assessed by the Tribunal payable to the petitioners was on the higher side. The amount assessed by the learned Tribunal is reasonable and calls for no interference.

14. In view of the discussion held hereinabove, as there is no merit in the present appeal, the same is accordingly dismissed. No order as to costs. Miscellaneous applications, if any, also stand disposed of.

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

Rukko Devi .....Appellant.
Versus
M/s Frontier Bus Service & others ....Respondents/Cross-objectors.

FAO No. 121 of 2014 along with
Cross objections No. 52 of 2014.
Reserved on : 26th February, 2019.
Decided on : 15th March, 2019.

Motor Vehicles Act, 1988 – Motor accident – Claim application – Permanent disability – Compensation – Permanent disability not resulting in functional disability of victim– Claimant continues to draw salary – No evidence that she is unable to perform household or agricultural work because of such disability – Held, no compensation can be awarded to her under this head. (Para 5)

Motor Vehicles Act, 1988 – Motor accident- Claim application - Permanent disability – Pain and suffering and loss of amenities – Compensation - Assessment – Claimant suffering permanent disability with respect to whole body – She is suffering perennial pain and suffering – Held, claimant entitled for compensation under head 'pain & suffering' as also for 'loss of amenities' – Appeal of claimant allowed- Compensation enhanced. (Para 6)

For the Appellant: Mr. Surender Saklani, Advocate.
For Respondents No.1 & 2: Ms. Anjali Soni Verma, Advocate.
For Respondent No.3: Mr. B.M. Chauhan, Advocate.
For Respondents No.4 & 5/Cross-Objectors: Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal, stands directed, by the disabled claimant/appellant herein, against, the award pronounced, by the learned Motor Accident Claims Tribunal-II, Kangra at Dharamshala, H.P., upon, MACP No. 6-P/2006, on, 30.04.2013, wherethrough, compensation amount, borne in a sum of Rs.70,000/- stood assessed, vis-a-vis, the disabled claimant. The apposite indemnificatory liability thereof, stood fastened, upon respondent No.3, the latter being the insurer of the offending bus, (a) and, upon respondents No.4 and 5, being owner, and, driver of the offending tempo, hence, proportionately, in, 70:30 per centum, (b) given the learned Tribunal recording a finding, that, the disability entailed upon the claimant, being a sequel of contributory negligence, of, the driver of the offending vehicles concerned.

2. It has been fairly stated at the bar by the learned counsel appearing for the contesting litigants, that, respondents No.3, whereuponwhom, the apposite indemnificatory liability, in, the afore 70 per centum, vis-a-vis, the afore stated compensation amount, hence, stood fastened, (i) has not preferred any appeal before this court, wherethrough, it has concerted to make a challenge, upon, the afore fastening thereon, of, the apposite indemnificatory liability. However, respondents No.4, and, 5, whereuponwhom, in 30 per centum hence indemnificatory liability stood fastened, rather instituted cross-objection No.52 of 2014, hence, therethrough, they assail the afore fastening of the indemnificatory liability rather thereon. On the other hand, the claimant's appeal is directed, for, seeking enhancement of compensation amount, as, assessed qua her.

3. The claimant suffered, as, pronounced by disability certificate, borne in Ex.PW1/A, and, proven by PW-1, a, disability to the extent of 20%, disability whereof was a sequel of fracture of cervical spine C-2. PW-1 in his examination-in-chief, has, made a forthright, and, candid articulation qua hence the claimant being forbidden, rather to

perform any hard manual work. The learned learned tribunal under heads (i) attendant charges, (ii) pain and suffering, (iii) loss of amenities and future disability, (iv) expenses towards medical expenditure, and, also (v) towards expenses incurred towards transportation charges, hence respectively assessed compensation, in, a quantum as echoed in the impugned award.

4. The learned counsel appearing for the appellant, does not contest, the factum that the disabled claimant, even subsequent to the entailment of the afore per centum of disability upon her, hence continuing to render the prior thereto, hence, callings of her avocation, as, a Sahayak in Aganwari at Gharana, (i) and, that she continues to draw salary borne in a sum of Rs.3000/- per month. Consequently, it can be safely concluded, that, in sequel, to, the entailment of, a, disability in the afore per centum upon her, hence there is no loss of any future earnings, vis-a-vis, her, from the afore hitherto callings, of, the afore avocation. However, the learned counsel appearing, for, the claimant/appellant herein, has, contended with much vigour, before this Court, that the claimant, was prior to befallment, of, the afore disability upon her, rather performing household chores besides she was also assisting her husband in agricultural work, (ii) hence, upon hers being beset, with, the afore disability in the afore per centum, there being reduction, and, diminution in the earnings of her husband from agricultural work, and, also the household chores hitherto performed by the claimant rather being forbidden to be performed by her, hence, the apt pecuniary losses encumbered upon her, enjoining adequate indemnification in respect thereof.

5. However, the claimant in her deposition, has not made, any apposite articulation qua the purported household chores, purportedly performed by her, prior to the entailment of the afore disability upon her, rather being extantly performed, by engagement of a helper, (a) nor she has communicated in her deposition, that, the agricultural work of her husband, in respect whereof she lent assistance to him, (b) nowat, and, subsequent to befallment, of, the afore disability upon her, rather being performed by her husband, by the latter engaging paid labourers, and, hence there being a dire necessity, upon, this Court to indemnify her. In sequel, for, want of adduction of the afore evidence, renders the afore submissions, as made, being construable, to be surmisal, and, no credence rather thereon can hence can placed.

6. Nonetheless, with even if there is no loss of any permanent earnings to the petitioner, from, the callings of her hitherto avocation, as, a Sahayak in the Aganwari center concerned, (i) yet with PW-1 in his examination-in-chief making an echoing, that, the claimant would face difficulty in performing hard manual work, (ii) also, with the apposite per centum, of, the disability as pronounced in Ex.PW1/A, rather appertaining to the whole body, thereupon with the claimant being encumbered, with, perennial pain or suffering, (iii) hence, it was rather appropriate for the learned tribunal, vis-a-vis, loss of amenities, and, also vis-a-vis, concomitant perennial pain, and, suffering arising therefrom, hence, award an amount, vis-a-vis, the disabled claimant, rather in a sum higher than Rs.50,000/-. Consequently, apart from a sum of Rs.50,000/-, as, awarded vis-a-vis, the disabled claimant, under the afore head, this Court awards, a, further sum of Rs.1,00,000/-, and, the apposite indemnificatory liability thereof, is fastened, in the manner, as, ordered by the learned tribunal.

7. Even though cross objectors/respondents No. No.4 and 5 hence seek reversal, of, findings, appertaining to the relevant mishap, rather being a sequel of contributory negligence, arising from, commission of tort of negligence, by the drivers, of, the offending vehicles concerned, (a) yet the afore submission, hence, falters in the face of forthright, and, unflinching evidence existing on record, wherethrough, vivid displays, spur

qua the driver, of, bus bearing No. HP-36-1989, hence, plying the afore bus in the middle of the road, and, in a negligent manner, (b) and, the abrupt application of brakes thereon, by its driver, evidently begetting, the, unwanted sequel, of, the driver, of, tempo bearing No. HP-68-0586, hence, striking the rear of the bus, (c) whereupon, the disabling injuries stood entailed, upon the claimant, (d) thereupon, the afore manner of negligent driving of the offending vehicles concerned, reiteratedly, and, fortifyingly, empowers this Court to conclude, that, hence the drivers, of, vehicle bearing No. HP-36-1989, and, of, vehicle bearing No. HP-68-0586, both rendering themselves guilty, for, committing tort of negligence, (e) and, also the proportion in respect whereof the apposite indemnificatory liability, stands respectively fastened upon them, likewise suffers from no infirmity, given it being in complete tandem, with, the evident proportion, of, tort of negligence, as, provenly committed by the drivers, of, the offending vehicles concerned.

8. For the foregoing reasons, the appeal filed by the disabled claimant is allowed in the afore manner, whereas, the cross-objections instituted by the cross-objectors/respondents No.4 and 5, are dismissed, and, the impugned award, is, modified to the extent, that, the appellant/disabled claimant, is, entitled to a compensation borne in a sum of Rs.1,70,000/- along with interest at the rate of 7.5% per annum, from, the date of filing of the petition till its realization. The aforesaid amount shall be paid by respondents No.3 and 4 & 5 in the per centum, as ordered by the learned tribunal i.e. 70 and 30 per cent. All pending applications also stand disposed of. Records be sent back forthwith.

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

Anil Kumar & others ….Petitioners.

Versus

Bhakra Beas Management Board & others …..Respondents.

CWP No. 7459 of 2012 along
with CWP No. 7461 of 2012.
Reserved on : 6th March, 2019.
Decided on : 15th March, 2019.

Constitution of India, 1950- Articles 14, 16 & 226- Regularization of Services- Writ jurisdiction- Availability- Petitioners seeking directions to employer to regularize them from date of their engagement- Also praying for quashing of regularization policy of Board- Regularization policy however requiring workmen to have continuous three years service as on cutoff date and their possessing requisite qualification as laid down in Regulations- Petitioners not found having completed three years continuous engagement- Allegations of malafide disengagement or fictional breaks not pleaded in petition- Other regularized workmen not shown to have been engaged in work similar to work for which petitioners were engaged- Held, no material to indicate intentional or deliberate administering of fictional breaks in service of petitioners vis-a-vis other workmen- Otherwise also disputed questions of fact cannot be delved into by Writ Court- Regularization policy providing more liberal benefits for regularization of daily rated workmen, cannot be termed as un-reasonable or arbitrary- Petitions dismissed with liberty to petitioners to raise industrial dispute and seek reference to Labour Court. (Paras 3 to 6)

For the Petitioners: Mr. Naresh Kaul, Advocate (in all petitions).
For the Respondents: Mr. N.K. Sood, Senior Advocate with Mr. Aman Sood, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Since, common questions of facts, and, law are involved in both the aforestated petitions, hence, both are decided, under, a common judgment.

2. The writ petitioners claim, that, directions be issued to the respondents, for, regularizing their service, in the capacity, in which they are/were rendering work, under, their employers/respondents herein. The writ petitioners contend, that, the policy for regularization, respectively borne in Annexure P-2 of 2004, and, in Annexure P-6, be quashed, and, set aside, (a) as, the afore policies impose, an, embargo, upon, daily wagers to derive, the, benefit of regularization, and, also further pray, that, the respondents be directed, to, give them, the, benefit of regularization in service, from, the date of their initial engagement by the respondents herein. A further prayer is made that the afore benefit be given, to, them, from, the year 2004.

3. The respondents contested, the, granting of the, afore relief to the petitioners, and, also made a vehement contention in their reply, that, the benefit of regularization in service meted by them, vis-a-vis, the purported juniors to the writ petitioners, enumerated in Annexures P-3, and, in P-4, being not amenable for being quashed, and, set aside, (a) given the purported juniors to the writ petitioners, rather satiating all the guidelines encapsulated, in, the afore relevant policy(ies), whereas, the writ petitioners, hence, failing to satiate, the, relevant conditions borne, in, the guidelines/policy(ies), issued from time, to, time.

4. The petitioners' claim, for, relief qua quashing of Annexure P-2, warrants its being straightway rejected (a) as Annexure P-2 appertains to a policy framed, on 21.3.2001, hence, stood replaced, by, the subsequent extant in vogue policy, borne in Annexure P-5, issued on 11.5.2012. (b) Also, the, further reason qua the petitioners claim, for, benefit of regularization in service, from, 2004, being rather not bestowable upon them, is also rejected, conspicuously given rather the afore claim enjoining satiation being evidently meted, vis-a-vis, the imperative condition No.(i) borne therein, which stand extracted hereinafter:-

> "(i) To regularize the services of the daily rated workers who have completed 3 years continuous service (as defined under I.D. Act) as on 28.2.2001 against 'normal' & 'Special' class III & class IV vacant posts of corresponding/akin category as per their Chief Engineer wise seniority subject to their fulfilling the qualification as prescribed in the BBMB class III & class IV Employees' (Recruitment and Conditions of Service) Regulations, 1994. The instructions issued vide Board's letter dated 8.7.88 for making seniority of daily rated workers for their engagement, dis-engagement and re/engagement on daily wages basis shall remain intact. "

(c) whereunder, the workman is enjoined, to, evidently render three years' continuous service, as on 28.2.2001, and, when a reading of the mandays chart, placed on record, rather omits to disclose qua the afore condition, being satiated by the writ petitioner, (d) given theirs being disclosed in the affidavit, as, sworn by the authorized official, of the

respondents herein, rather standing employed, on, a seasonal basis, (e) and, thereupon, when the workmen, though, contested that they were barred to complete, the imperative condition, qua rendition, of, three years' continuous service, hence to be computed, in consonance with the definition, of, "continuous service", borne in the relevant provisions, of, the Industrial Disputes Act, (f) hence merely, on account of fictional or artificial breaks, being administered qua them, and, the afore breaks being not administered to other workmen, (g) and, when the afore administration, of, fictional, and, artificial breaks in service, to the workmen/writ petitioners, are not founded, upon, any material, demonstrative of it/theirs being actuated, by any pleaded malafides, nor when the afore purported malafides are also not proven, (h) and, also when it has not been proven that the workmen, purportedly junior(s), to, the writ petitioners, who, assumingly stand granted the benefit thereof, were engaged in a capacity akin, to, the capacity, wherein the services were enlisted, in, the apposite muster roll, hence, for rendition of work. (i) Furthermore, when the afore factum is a disputed question of fact, and, requires existence on record, of, cogent evidence, evidence whereof, is amiss hereat, rather when the afore dispute hence warrants, a, reference emanating from the appropriate government, vis-a-vis, the Industrial Tribunal concerned, (j) thereupon, it is not permissible, for the writ court, to, in the exercise of writ jurisdiction, delve into the aforestated disputed question of fact, (k) and, to hence conclude, that, there being any intentional, and, deliberate denial(s), to, the writ petitioners/workmen, purportedly sparked, by the employers/respondents herein, administering fictional breaks in service, vis-a-vis, the writ petitioners, (l) and, theirs omitting to administer the afore breaks in service, to, the other workmen rendering services under them, in, a category purportedly akin, whereon, the writ petitioners rather stand employed.

5. Be that as it may, the writ petitioners also cast a challenge to the vires of Annexure P-5. However, the policy borne in Anexure P-5, is, drawn in consonance with the verdict of the Hon'ble Apex Court, rendered on 10.4.2006 in Civil Appeal No.3595/3612 of 1999, and, hence the vires of Annexure P-6, is, unquestionable before this Court. Even otherwise, the policy, of, regularization, as, borne in Annexure P-5, dilutes the rigour of earlier policy borne in Annexure P-2, inasmuch, as the apposite period of "continuous service" as contemplated in Annexure P-2, is, ordained to be reckonable in the manner contemplated, in the relevant thereto provisions, embodied in the Industrial Disputes Act, (a) whereas, Annexure P-5, contemplates, that, the benefits thereof are bestowable, upon, daily rated workman concerned, upon, his/theirs rather evidently performing "continuous service" for 10 years or more on 31st December, 2006, and, are still working, without, any bar, on the number of days worked. Consequently, when a more liberal benefit of regularization, in, service, to the daily rated workmen, is, hence bestowable under Annexure P-5, vis-a-vis, the prior thereto Annexure P-2, (b) and, when the mandays' chart existing on record, omits to echo, qua the afore ordained therein condition precedent, being evidently satiated, by the writ petitioners/workmen concerned, (c) thereupon, the denying, of, benefit thereof to them, is both apt and tenable, and, the bestowing of benefit thereof, to those workmen, who satiated its criteria, even if purportedly junior(s) to the writ petitioner, cannot, constrain this Court to quash, the, benefit thereof granted to other workmen, purportedly junior to the writ petitioners.

6. For the foregoing reasons, there is no merit in the instant petition(s), and, hence both the petitions are dismissed accordingly. However, it is open to the writ petitioners to raise, an, industrial dispute by seeking a reference being made by the appropriate government, to the Labour Court concerned, qua the purported fictional or artificial breaks in service, administered to them, being ingrained with a vice of malafides, and, the same be condoned. All pending applications also stand disposed of.

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

Baggu Ram (since deceased) through his legal heirs and others.
....Appellants/Plaintiffs.

Versus

Ganga Ram and others .....Respondents/Defendants.

RSA No. 108 of 2006.
Reserved on : 1st March, 2019.
Decided on : 15th March, 2019.

Code of Civil Procedure, 1908 – Section 96 – First appeal – Disposal of – Principles – Held, First Appellate Court is required to critically examine entire material presented before it rather than to affirm findings of Trial Court in mechanical manner – But where appellant has specifically confined his arguments to only one plea, then all other contentions raised in memorandum of appeal would deemed to have been waived by him – Appellant estopped from contending that First Appellate Court was enjoined to delve into entire material placed before it unless party made motion before that Court itself that such argument was submitted under bonafide mistake, **Maharashtra Vs. Ramdas Shrinivisan Nayak and another 1982, 2 SCC 463 referred to and upon.** (Para 9)

Transfer of Property Act, 1882 – Section 123 - Gift deed – Validity – Mental capacity of donor – Plaintiff challenging gift deed executed in favour of defendants 1 & 2 by 'N' on ground of donor not having mental capacity to execute it – Plaintiff or his witness not speaking anything about lack of mental capacity of 'N' to validily execute gift deed – Document being registered one raises presumptions of truth – Held, gift deed not proved to be invalid and void – RSA dismissed – Decrees of Lower Courts upheld. (Para 11)

Family settlement – Proof – Plaintiff claiming exclusive ownership over suit land under family settlement- In previous suit he claimed suit land as joint between him and other co-sharers- Held, plaintiff can not raise plea of exclusive ownership under family settlement. (Para 12)

Cases referred:

Maharashtra vs. Ramdas Shrinivas Nayak and another, (1982)2 SCC 463

State of Rajasthan vs. Harphool Singh (dead) through his LRs, (2000) 5 SCC 652

For the Appellants: Mr. Ramakant Sharma, Senior Advocate with Ms. Soma Thakur, Advocate.

For Respondents No.1, 2 & 11: Mr. R.K. Gautam, Senior Advocate with Mr. Atul Sharma, Advocate.

For Respondents No.12 & 13: Mr. Arun Kumar, Advocate vice Mr. Ajay Kumar Dhiman, Advocate.

Other respondents already ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiffs' suit seeking therein a declaratory decree, vis-a-vis, the suit khasra numbers, besides a decree for permanent prohibitory injunction, and, in the alternative for possession, in, respect thereof, stood dismissed hence under concurrently recorded verdicts, by both the learned Courts below. The plaintiffs, being aggrieved therefrom, hence, instituted the instant appeal before this Court.

2. Briefly stated the facts of the case are that Nanku, defendant No.10, since deceased jointly owned and possessed land to the extent of 49 bighas, 2 biswas, hereinafter referred to as the suit land, with the plaintiffs and others out of the total land measuring 91 bighas 3 biswas. He had no issues. During his life time he gifted 35 biswas 1 biswa land to defendants No.1 and 2 through registered gift deed of 19.10.1991 out of his share. The plaintiff claimed to be the owner in possession of the suit land by way of family settlement effect on 15.5.1964 between him,defendant No.10, Mast Ram, defendant No.11 father of defendants No.1 and 2, Harbans defendant No.3 and Dina Nath, predecessor in title of defendants No.4 to 8. The plaintiff filed a suit for declaration and injunction and in the alternative for possession on the aforesaid grounds and also on the ground that on account of family settlement, defendant No.10 had no right to execute the gift deed as he was never owner of the land and apart from it he had not mental capacity at that time to execute it. In the alternative, the plaintiff alleged the suit land to be coparcenary property, therefore, respondent No.1 having no right to alienate the suit land by way of gift to defendants No.1 and 2. The gift deed was, therefore alleged to be void ab inito.

3. The defendants contested the suit and filed separate written statements. Defendants No.1, 2, 10 and 11, in their joint written statement denied that defendant No.10 had no mental capacity to execute the gift deed and alleged that he execute it in the sound state of mind. Defendants/respondents also alleged pendency of the partition proceedings before the A.C. 1st Grade, Nalagarh. The existence of any family settlement effected in 1964 was denied. It was also denied that defendant No.10 had no right in the property. The possession of the plaintiff and his having spent Rs.40,000/- on erection of boundary wall and planting of trees has also not been admitted. Similar written statement, has been filed by other defendants.

4. 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.

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 sole owner in possession of the suit land on the basis of family settlement dated 15.5.1964? OPP.
2. If issue No.1, is not proved in affirmative, whether the plaintiff has become owner of the suit land by way of adverse possession? OPP
3. Whether the Gift Deed dated 19.10.1991 is null and void, as alleged? OPP.
4. Whether the suit is ancestral coparcenary property, if so, its effect? OPP.
5. Whether the plaintiff is entitled for the relief of declaration? OPP.
6. Whether the plaintiff is entitled for the relief of permanent prohibitory injunction?OPP.

7. Whether the suit is not maintainable? OPD.
8. Whether the plaintiff is estopped to file the present suit by own act, conduct and acquiescence? OPD
9. 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(s)/appellant(s) herein, have instituted the instant Regular Second Appeal, before, this Court, wherein they assails the findings, recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, on 26.11.2006, this Court, admitted the appeal instituted by the plaintiff(s)/appellant(s) against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

1. Whether the learned lower appellate court being last court of fact is right in not discussing the entire oral and documentary evidence as required of it in view of the law laid down by the Hon'ble Apex Court and reported in 200(5) SCC page 653?
2. Whether the impugned judgment and decree is the result of non consideration of the statements of PW-1 to PW-3 and Ex.P-1 to P-3?
3. Whether the learned lower appellate court is right in taking judicial notice of gift deed which has not otherwise been proved on record in accordance with law?
4. Whether the learned courts below are right in not consideration the provisions of Article 65 of the Limitation Act?

Substantial questions of Law No.1 to 4:

8. The learned counsel appearing for the appellants has at the out set, hence, made a concentrated assault, upon, the impugned judgments, and, decrees, as concurrently recorded, by both the learned courts below, and, the afore assault, is, centered upon (a) the learned First Appellate Court in transgression of the mandate, of, the Hon'ble Apex Court, enshrined in a case, titled as ***State of Rajasthan vs. Harphool Singh (dead) through his LRs,*** reported in ***(2000) 5 SCC 652,*** (b) wherewithin a mandate is cast, upon, the learned First Appellate Court, to make a critical analysis, of, the entire material before it, rather hence proceeding, to, in a mechanical manner, rather affirm the findings recorded, upon, the relevant issues, by the learned trial Court, (c) and, in case the afore critical analysis of the entire material, existing before the learned First Appellate Court, is hence not manifest in the pronouncement made, upon, the apposite first appeal, (d) thereupon, the verdict recorded by the learned First Appellate Court, is, ingrained with, a, gross infirmity of non application of mind, and, it warrants reversal. He also proceed to submit, that, when the afore infirmities are evidently existing, in, the mandate recorded by the learned First Appellate Court, (e), thereupon, this Court in tandem therewith hence record a verdict rather reversing the verdict recorded by the learned First Appellate Court, and, to also make an order of remand of the lis, to the learned First Appellate Court, for, enabling it to record fresh findings, upon, Civil Appeal No. 2/NL/13 of 2005/02.

9. The afore submission addressed before this Court by the learned counsel appearing for the appellants, though, prima facie held some vigour, and, tenacity, and, this Court hence would lean towards accepting Civil Appeal No. 2/NL/13 of 2005/02, and, would also proceed to remand it,to the learned First Appellate Court, for enabling it to record fresh findings, on all, the grounds, ventilated in the memorandum of appeal instituted therebefore, and, against, the judgment, and, decree recorded by the learned trial Court, upon, Civil Suit No. 37/1 of 1994. However, for the reasons to be assigned hereafter, this Court is dis-inclined, to, make the afore endeavour, (a) given paragraph N.11 of the verdict recorded by the learned First Appellate Court upon Civil Appeal No. 2/NL/13 of 2005/02, making clear underscorings qua, upon, the afore civil appeal was listed for arguments, before the learned First Appellate Court, rather thereat the learned counsel for the appellant, making a submission qua his confining, his arguments qua lack of mental capacity, of, one Nanku to make the gift, vis-a-vis, the suit property. The afore submission, addressed before the learned First Appellate Court, by the learned counsel, for the appellants, does render, open a conclusion, qua the counsel, for, the appellants appearing before the learned First Appellate Court, rather waiving, and, abandoning all other ground(s), as, espoused in the memorandum of appeal, instituted before the learned Fist Appellate Court, (i) and, thereupon, the learned senior counsel appearing for the appellants before this Court, is, estopped to contend, on anvil of the afore citation, that rather the learned First Appellate Court, was enjoined to delve into the entire material placed before it, (ii) and, also was enjoined to record findings upon all the grounds, as taken in the memorandum of appeal, instituted before the learned first appellate Court. Furthermore, the afore submission, as finds mention in paragraph No.11, of the verdict recorded by the learned First Appellate Court, enjoins fastening, of, conclusivity thereto, and, is not amenable for being reneged or resiled, (iii) unless a motion was made, only before the learned First Appellate Court, that, the afore argument, upon which the learned First Appellate Court, was led to make, a, pronouncement upon Civil Appeal No. 2/NL/13 of 2005/02, rather being made hence under a bonafide mistake. However, the material existing on record, does not, make any display, that any motion was made before the learned First Appellate Court, by the learned counsel for the appellants, that the afore submission, upon, which the appeal was decided, was a sequel, of, sheer bonafide error or mistake. Consequently, rather firmest conclusivity is to be meted, to the afore recorded submission made by the counsel, for the appellants, before the learned First Appellate Court, and, concomitantly the learned counsel for the appellants, (a) is estopped, to contend that any want, on the part, of, the learned First Appellate Court, to, record findings, upon, all the grounds taken in the memorandum of appeal, instituted therebefore, rather rendering the verdict impugned before this Court, to, be concludable, to stand, ingrained with a gross infirmity,(b) nor he can hence contend that the extant Regular Second Appeal, be allowed, and, the matter be remitted to the learned First Appellate Court, to, record fresh findings, upon, all the relevant issues. In coming to the afore view, this Court, is, supported by a verdict of the Hon'ble Apex Court, recorded in case titled as State of ***Maharashtra vs. Ramdas Shrinivas Nayak and another***, reported in ***(1982)2 SCC 463***, the relevant paragraph No.4 whereof stands extracted hereinafter:-

> "4. When we drew the attention of the learned Attorney General to the concession made before the High Court, Shri A.K. Sen, who appeared for the State of Maharashtra before the High Court and led the arguments for the respondents there and who appeared for Shri Antulay before us intervened and protested that he never made any such concession and invited us to peruse the written submissions made by him in the High Court. We are afraid that we cannot launch into an inquiry as to what transpired in the High Court. It is simply not done. Public Policy bars us. Judicial decorum restrains us. Matters

of judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena. "Judgments cannot be treated as mere counters in the game of litigation". We are bound to accept the statement of the Judges recorded in their judgment, as to what transpired in court. We cannot allow the statement of the judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the judges, to call attention of the very judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error. That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course a party may resile and an Appellate Court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgment."

10. Be that as it may, even otherwise, substantial questions of law, other than the substantial question, of law No.1, also constitute, the, apposite substantial questions of law, upon, which the extant second appeal was admitted, (i) thereupon, when this Court, for reasons, to be assigned hereinafter, also proceeds to consider, the, efficacy thereof, (ii) thereupon, even if any iota of any infirmity, as may exist in the verdict pronounced by the learned First Appellate Court, rather would not imbue the judgment recorded by the learned First Appellate Court, with any vitiating vice.

11. The appellants had reared a contention, in the plaint, wherethrough, he made, a, challenge, vis-a-vis, the apposite gift deed, (i) and, the afore contention, is embodied, in the factum of defendant No.10, not, holding the apposite mental capacity, to execute, any, valid gift deed. An issue in respect thereof was struck, serialized at issue No.3, and, the discharging onus qua therewith was cast, upon, the plaintiff. Even though, the apposite registered gift deed hence exists at page 192, of, the record of the learned trial Court, (ii) however, neither the plaintiff nor his witnesses, in their respectively recorded deposition, made any unfoldings, qua the lack of mental capacity, of, defendant No.10, to, hence validly execute a gift deed, vis-a-vis, the suit property. Since, the pleaded ground rather appertain(s) hence singularly, qua the afore gift deed, standing imbued with a stench, of, voidness sparked by the lack, of, mental capacity of defendant No.10, and, (iii) when the afore espoused pleaded ground, for reasons aforestated, remained not proven, (iv) AND, with the plaintiff not recording any averment in the plaint qua any element of fictitiousness or fraud hence making a deep pervasive percolation, vis-a-vis, the validity of the gift deed, given the thumb marking thereof, by defendant No.10, being fictitious or thumb marks existing thereon, of, witnesses thereof being also fictitious, (v) hence, any want of evidence, on record, for proving the afore unpleaded ground, hence, did not, enjoin adduction of any evidence, by the defendants,obviously for proving the existence thereon, of, valid and genuine signatures of its executant, and, of the witnesses thereof. In aftermath, with the existence on record, of, the afore registered gift deed, and, with the requisite evidence, vis-a-vis, the apt imperative pleaded fact, remaining unadduced, thereupon, it was not insagacious for both the learned courts below hence to form a conclusion qua the validity,

of, execution of the apposite gift deed, vis-a-vis, the suit property. Even, otherwise, also any judicial note taken by the learned First Appellate Court, qua legality, of, registration of the apposite gift deed, is, permissible, especially when the statutory act of registration, enjoys a presumption of truth, and, when for rebutting the afore presumption, the plaintiff is enjoined to adduce apt rebuttal thereto evidence, and, when the apt rebutting thereto evidence, oral or documentary, remains uadduced, thereupon, the afore registered gift deed hence enjoys, on all fronts, rather a conclusive presumption of truth.

12. The learned counsel appearing for the appellant has also proceeded to rebut the efficacy of the entries, borne in the jamabandis appertaining to the suit land, on anvil, of a khangi settlement, rather occurring in the year 1964, (a) wherethrough, he purportedly hence acquired exclusive title qua the suit khasra numbers. However, the afore pleaded fact remained not efficaciously proven, rather with the existence of record of Ex.D-3, a plaint instituted by the plaintiff, (I) wherefrom, it is rather unraveled, that, the khasra numbers mentioned therein, holding analogity, vis-a-vis, the extant suit khasra numbers, (ii) and, with the impleadment therein of one Layak Ram, and, one Harbans, both of whom, are impleaded in the extant suit, as co-defendants No.2, and, 3, (iii) and, with his claiming a declaratory relief, on anvill, of afore stated khasra numbers, being joint amongst the co-sharers concerned, (iv) thereupon, the afore Ex.D-3, comprises an admission of the plaintiff, qua the correctness, and, truthfulness of the entries hence occurring, vis-a-vis, the suit land, in the jamabandis borne in Ex.P-1, and, in Ex. P-2, (v) thereupon, the plaintiff has abysmally failed to erode the truth thereof, (vi) rather a presumption of truth, as, attached thereto is enhanced, (vii) and, also acquires conclusivity, (viii) thereupon, also the plea of any private partition or any settlement amongst the contesting parties rather occurring, is, eroded of its efficacy.

13. The plaintiff(s) has raised a weak plea qua this acquiring title, vis-a-vis, the suit land by way of adverse possession. However, with a conclusive presumption of truth, being attached to Ex.P-1 and P-2, exhibits whereof, comprise jamabandis appertaining to the suit land, and, with the plaintiff being recorded, as co-owner, along with other co-owners concerned, qua the suit land, (i) and, when no plea of acquisition of title, by adverse possession being rearable against co-owners, (ii) unless there is a pleaded complete ouster, of all the recorded co-owners, and, also potent evidence qua therewith exists on record, hence, for wants thereof, rather the afore plea of acquisition of title by the plaintiff(s), vis-a-vis, the suit khasra numbers, being unespousable. Furthermore, with, a catena of verdicts, recorded by the Hon'ble Apex Court barring the plaintiff to raise in the affirmative, any, plea of his acquiring title by adverse possession, hence also estops the plaintiff, to contend that the plaintiff, has, acquired title by way of adverse possession.

14. 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 defendants/respondents, and, against the appellants/plaintiff(s).

15. In view of the above discussion, there is no merit in the instant appeal and it is dismissed accordingly. In sequel, the impugned judgments and decrees are maintained and affirmed. 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.

Dinesh Kumar Langa & another …Appellants/Defendants.
Versus
Maharaj Mall (since deceased) through his legal heirs …Respondents/Plaintiff.

RSA No. 541 of 2004.
Reserved on : 27th February, 2019.
Decided on : 15th March, 2019.

Specific Relief Act, 1963, - Sections 5 & 39 –Possession and mandatory injunction – Grant of – Plaintiff seeking possession of land by demolition of boundary wall raised by defendant over it – Defendant claiming ownership of said land by adverse possession – Boundary wall found having been raised by defendant within one year prior to institution of suit – Held, defendant did not become its owner by adverse possession – Decree of First Appellate Court decreeing suit upheld – RSA dismissed. (Paras 11 & 15)
Code of Civil Procedure, 1908 – Order XLI Rule 27 - Additional evidence – Taking of – Opportunity to rebut to other party – Absence of – Effect - Party adducing copies of judgment and decree as well as revenue record prepared in consonance with said decree in evidence at appellate stage – Opportunity not given to opposite party to rebut additional evidence-Appellate court deciding appeal considering these documents also – Held, judgment and decree not shown to have been reversed by Hon'ble Supreme Court – Previous dispute between same parties and pertaining to suit land – Additional evidence cannot be denuded of its efficacy even if opposite party was not given opportunity to lead evidence in rebuttal. (Para 10)
Indian Registration Act, 1908- Section 17 – Registration of document, when mandatory ? – Held, document conveying interest in immoveable property valuing more than rupees one hundred mandatorily requires to be registered – Document, if not registered, is inadmissible and cannot be read in evidence – First Appellate Court justified in ignoring unregistered exchange deed. (Para 12)

For the Appellants: Mr. Bhupender Gupta, Senior Advocate with Ms. Rinki Kashmiri, Advocate.
For the Respondents: Mr. Ajay Kumar, Senior Advocate with Mr. Dheeraj K. Vashishta, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiffs' suit for rendition of a decree for possession, vis-a-vis, the suit khasra number, and, also for rendition of a decree, vis-a-vis, demolition of, the, newly constructed boundary wall, upon, the suit land, stood dismissed by the learned trial, and, in an appeal carried therefrom by the plaintiff/respondent(s) herein before the learned First Appellate Court, the latter Court reversed the judgment, and, decree pronounced by the learned trial Court, and, rather rendered, the, espoused decree, against the defendants. The defendants/appellants herein being aggrieved therefrom, hence, instituted the extant appeal before this Court.

2. Briefly stated the facts of the case are that the plaintiff (now deceased) is owner in possession of the suit land comprising Khata No.32 min, Khatauni No.87 min, Khasra Nos. 2097/961 and 2099/961, measuring 0-00-32 hectares and Khasra Nos. 2101/962/1 and 2101/962/2 land measuring 0-00-63 hectares vide jamabandi for the year 1997-98 of Mohal, Mauza and Tehsil Baijnath, District Kangra, H.P. The defendants have no right, title or interest in the suit land. The defendants have illegally taken into possession th suit land on March, 2, 2000 by raising a boundary wall. Therefore, it has been prayed that the suit be decree for possession of the suit land by demolishing the boundary wall.

3. The defendants contested the suit and filed written statement, wherein, they have taken preliminary objections qua limitation, estoppel, locus sandi, cause of action, maintainability, etc. It has also been averred in the preliminary objections that the defendants have become owners of Khasra Nos. 2101/962/1, 2101/962/2 and 2099/961 by way of adverse possession. On merits, it has been submitted that plaintiff has exchanged the Khasra No.2097/961 with the land of the defendants entered in Khasra No.2098/961 on 22.4.1998, and, since then the defendants are owners in possession of this Khasra Number. The defendants are in possession of other Khasra numbers for the last more than 25 years and their possession is open hostile and well within the knowledge of the plaintiff which has ripened into ownership by the doctrine of adverse possession. The possession of the defendants over the suit land was never objected to by the plaintiff, hence, prayed for dismissal of the suit.

4. The plaintiff filed replication to the written statement of the defendants, 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 to the relief of possession as prayed for?OPP
2. Whether the defendants have constructed a wall on the suit land, if so its effect, as alleged?OPP
3. Whether suit is barred by period of limitation, as alleged?OPD.
4. Whether plaintiff is estopped form filing the present suit as alleged?OPD.
5. Whether defendants have become owners of the Kh. Nos. 2101/962/1 and 2101/962/2, 2099/961 by way of adverse possession, as alleged? OPD.
6. Whether plaintiff has no locus standi to file the present suit as alleged? OPD.
7. Whether suit is not maintainable in the present form as alleged? OPD.
8. Whether plaintiff has no cause of action to file the present suit, as alleged? OPD.
9. Whether plaintiff has no locus standi to file the present suit, as alleged? OPD.
10. Whether plaintiff has exchanged Khasra No.2097/961 with the defendants and if so its effect? OPD.

11. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiff/respondent(s) herein. In an appeal, preferred therefrom, by, the plaintiff/respondent(s) 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/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, on 26.7.2005, this Court, admitted the appeal instituted by the defendants/appellant(s) against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

1. Whether the appellant-defendant had the right to be afforded an opportunity to rebut the additional evidence which the respondent-plaintiff was allowed to lead by the first appellate Court and whether the denial of that right has prejudiced the appellant to such an extent that the judgment and decree of the first appellate court are liable to be reversed on this score alone?
2. Whether the writing of exchange, Ex.DW1/A has wrongly been held to be inadmissible by the first appellate court and in fact the said writing is admissible and relevant, as claimed by the appellant-defendant?
3. Whether the judgment and decree of the first appellate court are not sustainable and are liable to be set aside because the said court has passed the said judgment and decree without looking into the question of the suit being not within time particularly when the trial court had returned the finding that the suit was barred by time?

Substantial questions of Law No.1 to 3:

8. The learned trial Court in declining the espoused relief to the plaintiff, had, concluded qua the defendants rather proving theirs acquiring title by adverse possession, vis-a-vis, khasra numbers 2099/961, 2101/962/2, and, part of kahsra No.2101/962/1. Moreover, the learned trial Court, upon, meteing credence to Ex.DW1/A, exhibit whereof comprises a document, (i) wherethrough, the purported exchange, vis-a-vis the khasra numbers, as, disclosed therein hence occurred inter se the plaintiff, and, the defendants, (ii) thereupon, concluded, that, in consonance therewith, a path rather existing upon the apt khasra No.2098/961. Consequently, the learned trial Court also concluded, that, the plaintiff hence being estopped to institute, the apt suit for possession, qua, all the aforesaid suit khasra numbers. Preponderantly also the refusal of the espoused relief to the plaintiff, with, respect to khasra No. 2101/962/1, and, Khasra No. 2101/962/2, stood anvilled, (iii) upon no site plan, and, also the jamabandi appertaining, to the afore khasra numbers rather existing on record, (iii) besides obviously the afore reason held tacit underlinings, of, want of demarcation, hence, delineating therein, the encroachment made thereon by the defendants, rather, necessitating refusal, of, espoused relief..

9. However, the learned First Appellate Court, discountenanced all the afore reasoning, afforded by the learned trial Court. The plaintiff/respondent herein, during the pendency of the first appeal, before, the learned first appellate Court, instituted an application cast under the provisions of Order 41, Rule 27 of the CPC, (i) wherethrough, they sought permission to place on record, certified copy of judgment, and, decree respectively

bearing EX. CA, and, Ex.CB, and, also sought leave to tender, copy of missal hakiyat embodied in Ex.CC, (ii) and, the afore application was allowed, and, all the afore documents hence were permitted to be adduced into evidence, and, on anvil thereof, the, learned first appellate court, recorded a conclusion adversarial to the defendants.

10. The learned counsel appearing for the defendants/appellants, has contended, with much vigour (i) that want of, an, opportunity to the defendants to adduce rebuttal evidence qua therewith, rather per se diminished the probative vigour meted to the afore documents, by the learned first appellate Court, (ii) and, hence the learned counsel for the appellants further espoused, that, solitarily on the afore score, the, impugned judgment and decree warrants reversal, (iii) and, after quashing the impugned judgment, and, decree, the matter being remanded to the learned First Appellate Court, with, a direction to it, to, afford an opportunity to the appellants, to, adduce apt rebuttal evidence, and, to, thereafter pronounce upon the lis, hence, a fresh decision, in accordance with law. However, the afore espousal falters, (a) given the order made by the learned first appellate Court, on 27.10.2004, holding clear disclosure therein, qua arguments being heard thereat, on both Civil Appeal No. 111-B/XIII of 2002 , as well as, upon, an, application, cast under the provisions of Order 41, Rule 27 of the CPC, (b) and, both being thereafter listed, on 1.11.2004, for pronouncement of judgment/order. Since, it was thereat espousable by the appellants/plaintiffs, for, segregation, from the afore civil appeal, the application cast, under the provisions, of, order 41, rule 27 of the CPC, (c) and, also to make a vehement contest before the learned first appellate Court, that, the hearing upon the apposite civil appeal, be deferred until an adjudication is made, upon, the afore civil miscellaneous application, (d) yet the afore endeavour being evidently abandoned thereat by the learned counsel, for, the appellants/plaintiff, (e) consequently, the learned counsel for the appellants, is estopped to contend, that, for lack of an apt opportunity, to adduce evidence in rebuttal, qua, the afore documents, hence, they are wanting in legal efficacy. Furthermore, with the afore exhibits, acquiring, conclusivity, and, rather with the afore exhibits, (f) comprising the judgment, and, decree, as well as copy of missal hakiyat, prepared in consonance therewith, (g) and, when it has not been demonstrated, that, the judgment, and, decree respectively embodied in Ex.CA, and, in Ex. CB, being denuded, of, their efficacy, given the Hon'ble Apex Court rendering a verdict, hence, reversing them, (h) thereupon, the reliance as placed thereon, by the learned first appellate Court, in making dis-concurrent findings, vis-a-vis, the findings recorded by the learned trial Court, does not suffer, from, any palpable infirmity.

11. In addition, with the judgment, and, decree respectively, embodied in Ex.CA, and, in, Ex.CB, (i) rather appertaining to those khasra numbers, hence, holding analogity, vis-a-vis, the extant suit kahsra numbers, (ii) when there is also a further analogity inter se contesting parties, in, both litigations, (iii) thereupon, the afore judgment, and, decree, is, both relevant, (iv) and, also hence reliance stands aptly, and, tenably rather placed thereon by the learned first appellate court, for hence, adjudicating an almost alike dispute, engaging the legal combatants hereat. The learned first appellate court had proceed, to, on anvil of the afore judgment, and, decree, (v) conclude that excepting khasra number 2101/962/1, all, the other khasra numbers rather being in possession of the plaintiff, (vi) and, also made a further conclusion, that, the apt possession, was only delivered in pursuance to the conclusive, and, binding judgment, and, decree hence pronounced, and, embodied in Ex.PW2/A. Even though, the afore taking of possession by the plaintiff, of those khasra numbers, as, disclosed in Ex.PW2/A, hence occurred on September 23, 1994, (vii) and, where thereupon the defendants contends, that, prior thereto also they, with, a, requisite *animus possidendi,* and, with, a, hostile *animus possidendi,* held hence possession, of, the relevant suit khasra numbers, besides also for the statutorily enjoined period of time, (viii) thereupon, the findings, vis-a-vis, acquisition of title by the defendants, vis-a-vis, the

relevant suit khasa numbers rather enjoined tenacity rather being meted thereto. However, benefit, if any, on the afore score, also cannot be derived by the defendants/appellants, (ix) given, DW-2 rendering, a, deposition on oath, that, the boundary wall in respect whereof, a decree of demolition was sought, rather being constructed, only, two years back, and, when his statement stands hence recorded on 16th October 2001, (x) hence upon, counting two years earlier therefrom, rather spurs a conclusion qua the afore boundary wall, being raised subsequent to the decree pronounced in Ex.PW2/A, (xi) and, also with civil suit No. 58/2000 standing instituted on 6.5.2000, (xii) thereupon, the afore apt overt act, committed by the defendants, upon, the relevant suit khasra numbers, (xiii) does not, obviously beget satiation of the trite principle, that, the afore overt act, hence, purportedly committed, with, a purported *animus possidendi,* also begetting satiation of the further imperative legal principle, qua the statutorily enjoined length/duration, of, possession, standing hence also evidently accomplished by the defendants. Likewise, the, deposition of DW-4, underscores the factum qua the contested boundary wall, hence, standing raised 5-6 years back, and, with his deposition, standing recorded on 8th January, 2002, (xiv) thereupon, for, an, alike reason recorded by this Court, upon, appreciating, the, deposition of DW-2, hence, this Court makes a firm conclusion, qua the defendants, failing to prove, that they acquired title by adverse possession, vis-a-vis, the relevant suit kahsra numbers, by theirs holding hostile possession thereof, for the statutorily enjoined duration or length of time.

12. Be that as it may, the learned first appellate court, had, declined to assign any probative vigour, to Ex.DW1/A, (a) on anvil of, despite it,conveying title, vis-a-vis, immovable property, hence, holding a value of more than Rs.100/-, (b) and, with the afore exhibit hence warranting its being compulsorily registered, (c) and, with its remaining unregistered, hence, it being both inadmissible, and, unreadable in evidence. Even if, assumingly the afore document is admitted by the contesting parties, and, when, hence the afore reasoning, as, assigned by the learned first appellate court, for, declining to assign probative vigour thereto, (d) may also hence tentatively suffer some defect, (e) nonetheless, with the defendants propagating the plea of acquisition of title by adverse possession qua the contested boundary wall, (f) and, when for the afore reasons, theirs rather failing to prove the afore espousal, (g) thereupon, it has to be concluded that the defendants admitting qua theirs making an apt encroachment, by theirs raising construction of the contested boundary wall, upon, the land owned and possessed by the plaintiff, (h) and, also they are to be concluded, to also acquiesce qua, the, raising, of the boundary wall, rather existing, on khasra numbers, other than the ones falling within the domain of Ex.DW1/A. Furthermore, any lack of appending with the plaint, the demarcation report, and, the tatima prepared, in, consonance therewith, hence, delineating the specifications, of, the boundary wall, is wholly unnecessary, and, would not, also for, the afore reasons, gain any conclusion qua no executable binding decree, of, mandatory injunction, by way of demolition being renderable, qua it, and, vis-a-vis, the plaintiff.

13. Given the making of the afore conclusion, the affirmative findings appertaining to the plaintiff's suit being barred by limitation, rather both subsides, and, wanes, (i) necessarily also for further reason, that, with the defendants' witnesses, hence, making the afore unequivocal depositions qua assumption of possession, comprised in the raising of the contested boundary wall, upon, the relevant suit kahsra numbers, (ii) and, it hence, occurring three years prior, to, institution, of, the suit for possession, hence, the institution, of, the extant suit with in 3-4 years therefrom, rather render it, to fall within the domain, of, the apt statutorily prescribed period, of, limitation, hence, the affirmative findings recorded, upon, the issue of limitation, by the learned trial court, are, rather frail, and, warrant reversal.

14. The above discussion, unfolds, 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. Accordingly, the substantial questions, of law are answered in favour of the plaintiff(s)/respondents, and, against the appellants/defendants.

15. In view of the above discussion, there is no merit in the instant appeal and it is dismissed accordingly. In sequel, the impugned judgment and decree pronounced by the learned First Appellate Court, upon, Civil Appeal No. 111-B/XIII of 2002 on 1.11.2004 is maintained and affirmed. 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.

Geeta Devi .....Appellant.
Versus
State of H.P. .....Respondent.

Cr. Appeal No. 121 of 2007.
Reserved on: 1st March, 2019.
Date of Decision: 15th March, 2019.

Narcotic Drugs and Psychotropic Substances Act, 1985- Section 15 – Recovery of poppy husk – Proof – Trial Court convicting accused of possessing poppy husk – Appeal against – Accused assailing conviction on ground of mis-appreciation of evidence by Special Judge – Held, on receiving secret information police had recorded statement of reasons of belief and sent to authorized officer – Search of bag carried by accused conducted in presence of panch witnesses – Stuff recovered from accused duly sent to FSL and got analyzed – Expert report confirming examined material as poppy husk – Witnesses admitting their signatures on recovery cum seizure memo – Evidence on record proves conscious possession of poppy husk by accused – Accused rightly convicted by Trial Court – Appeal dismissed – Conviction upheld. (Paras 9 to 12)

For the Appellant: Mr. Ramakant Sharma, Sr. Advocate with Ms. Soma Thakur, Advocate.
For the Respondent: Mr. Hemant Vaid, Addl. A.G. with Mr. Yudhveer Singh, Deputy A. G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal, is, directed by the convict/ accused/appellant, against, the pronouncement made by the learned Special Judge (Additional Sessions Judge), Solan, H.P., upon, Sessions Trial No.1-NL/7 of 2006, whereunder, he convicted, besides imposed consequent sentence, upon, the convict/accused/appellant, for his committing an offence

punishable under Section 15 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as the "Act").

2. The facts relevant to decide the instant case are that on 7.5.2005 at about 5 PM ASI Dharam Singh along with other police officials was on patrolling duty where poppy straw was recovered from Dalip and Ishwar, who told them that they had purchased it from accused Gita Devi. ON this information reasons of belief were prepared and same were forwarded to Dy. S.P. Nalagarh through HHC Arjun Singh, who delivered the same to HC Jasbir Chand, the then Reader of Dy. S.P. Nalagarh. Thereafter, Anil Kumar and Ramu Sahni were associated in the raiding party and rukka Ex.PD was also prepared and sent to Police Station, Nalagarh through C. Sashi Pal, on the basis of which FIR EX.PE came to be recorded in P.S. Nalagarh. The raiding party proceeding towards the house of the accused and accused was found sitting outside her house in her cot, who on noticing the police party tried to run away with a bag in her hand at which the accused was over powered with the help of LC Manju and sear of the bag in possession of the accused was conducted which was found to be containing poppy husk which on weighment was found to be 3 kg, 250 grams. The two samples each weight 100 grams were taken separately from the contraband so recovered and the same were put in two different parcels of clothes whereas the remaining poppy husk was also put in the bag and thereafter in a parcel, and, all three parcels were sealed with seal impression "A" and were taken into possession vide separate memo, memo whereof signatured by the witnesses and the accused also put her thumb impression thereon. The sample seal was separately drawn and the site plan was prepared and NCRB form was filled in at the spot. The case property along with NCRB form and sample seal was produced before Inspector Samsher Singh, the then SHO P.S. Nalagarh, who has resealed the sample parcels and parcel containing the residue contraband with seal impression "T" regarding which resealing certificate was prepared and the same of seal was taken separately. Thereafter all the codel formalities were completed. As per the record of the FSL, the contents of the samples were found to be of poppy husk.

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

4. The accused/appellant herein stood charged, by the learned trial Court, for, hers committing an offence, punishable under Section 15 of the Act. In proof of the prosecution case, the prosecution examined 11 witnesses. On conclusion of recording, of, the prosecution evidence, the statement of the accused, under, Section 313 of the Code of Criminal Procedure, was, recorded by the learned trial Court, 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, returned findings of conviction upon the accused/appellant herein, for hers hence committing the aforesaid offence.

6. The appellant herein/accused, stands aggrieved, by the findings of conviction, recorded, by the learned trial Court. The learned senior counsel appearing, for, the appellant 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 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 being 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. The recovery of the relevant item of contraband was made under memo Ex.PB. The afore recovery, was made in pursuance, to, reasons to believe, recorded in PC. Subsequent thereto FIR borne in Ex.PE was recorded, and, the NCB form, borne in Ex.PL, records the factum, of, the relevant samples weighing 100 grams each, standing sealed with three seals each, carrying thereon English alphabet "A", (i) and, thereafter the SHO concerned, on, his receiving the afore samples, as well as, the case property, proceeded, to, at the police station concerned, emboss thereon three re-sealing impression(s) carrying thereon, the, English alphabet "T". The afore sample parcels were sent, for, analysis through road certificate No. 51/05 of 9.5.2005, to the CTL, Kandaghat, whereon, the latter recorded, a firm finding qua the exhibits received, by it, containing, hence, contents of poppy husk. The recitals borne in Ex.PB were proven by PW-1, PW-2, and, by PW-10. All the afore prosecution witness, wheretowhom the case property, was shown, during, the course of recording of their respective depositions, in Court, (ii) in their respective examination-in-chief, made vivid disclosures qua the thereat shown case property to them, comprising the one, as, stood recovered, from, the conscious and exclusive possession of the accused/convict. Even though, the learned defence counsel thereat, held, the opportunity to visualize, all the seal impression(s) embossed thereon, (iii) and, to also hence decipher therefrom, whether there existing compatibility or not, inter se therewith, vis-a-vis, the apt descriptions borne, in, Ex.PB, NCB form, borne in Ex.PL, the road certificate, and, in the report of CTL, borne, in, Ex.PN. However, an incisive reading of the depositions of all the afore witnesses, omits to unveil, qua the afore endeavours being made by the learned defence counsel. Want of making, of, the afore endeavours, by the learned defence counsel, especially at the afore appropriate stage, (iii) does constrain, this Court to conclude, that, the echoings made in Ex.PB, hence standing efficaciously proven, at, the time of production, of, the case property, in Court, hence, connecting it with Ex.PB, NCB form, borne in Ex.PL, road certificate, and, report of the CTL, borne in Ex.PN. In aftermath, the prosecution, is, to be concluded to firmly prove the charge against the accused.

10. Be that as it may, though PW-1, an independent witness, vis-a-vis, recovery memo, borne in Ex.PB, rather in his cross-examination, hence, deposed qua neither the accused, nor Ramu Sahni hence appending in his presence, their respective signature(s) or thumb impressions, upon, Ex.PB, yet the afore deposition, is unavailable, for any derivation of any leverage therefrom, given (a) with PW-1 admitting the existence of his signatures thereon, (b) and, thereupon, when he lends the completest proof, vis-a-vis, the veracity, of, all the recitals hence borne in Ex.PB, recitals whereof appertain to the preparation of Ex.PB at the place, and, time disclosed therein, (c) besides qua its preparation occurring, in, his presence, and, in the presence of PW-2, and, Ram Sahani, (c), whereupon, he is statutorily, through, the mandate, of, Sections 91 and 92 of the Indian Evidence Act, hence, estopped to depose in variance therewith.

11. Moreover, PW-9, in his examination-in-chief, has, feigned ignorance, vis-a-vis, the identity of Geeta Devi. However, upon, his being hence declared hostile, and, the learned PP being permitted to cross-examine him, rather thereat his admitting a suggestion, qua the police associating him, and, Anil Kumar, hence, in the conducting, of, the search of

Geeta Devi, (i) thereupon, the afore elicited admission carries therein rather a subtle articulation, by PW-9 qua his being familiar with the identity of Geeta Devi, (ii) and, rather also erodes the effect, if any, of his deposition qua his being unaware, of, the identity of Geeta Devi. Furthermore, he has admitted his signatures on Ex.PB, and, has disclosed, that, he appended his signatures thereon, only upon, the contents thereof being readover and explained to him. In sequel, the effect thereof, is, qua his oral deposition, comprised in his cross-examination, conducted by the learned defence counsel, rather unfolding qua the apt recovery being effectuated, from the scooter, in the house of convict Geeta Devi, is to be construable to be bereft, of, the espoused sanctity or probative vigour, (iii) it hence eroding the vigour, of Sections 91 and 92, of the Indian Evidence Act, provisions whereof bar, rather, receipt of any oral deposition, of the witness concerned, in variance, and, in digression, vis-a-vis, evidently hence through his admitted signatures, his hence proving, all the apposite recorded recitals borne therein. In view of the afore, the learned defence counsel cannot espouse, that, the reasons of believe, stand, fictitiously recorded, nor he can espouse, that, the convict, is, falsely implicated in the case. Even otherwise, with the investigating officer remaining unexamined by the learned defence counsel, vis-a-vis, the falsity, of, the reasons of believe, in sequel whereof Ex.PB was prepared, thereupon, it is to be concluded qua the prosecution firmly proving the charge against the accused.

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, hence, also does not suffer from any gross perversity or absurdity of mis-appreciation, and, non appreciation of germane thereto evidence, on record.

13. 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.

Kamaljeet Kaur .....Petitioner.
Versus
Satya Devi and others .....Respondents.

Civil Revision No. 175 of 2015.
Reserved on : 8th March, 2019.
Date of Decision: 15th March, 2019.

Code of Civil Procedure, 1908- Order V Rule 17 - Substituted service – Affixation of summons – Procedure – Held, report of process server effecting substituted service by affixation must show who identified house - It must also show in whose presence affixation was effected. (Paras 10-11)

Limitation Act, 1963 - Section 5 – Condonation of delay – Sufficient cause – Proof – Appellate court dismissing application for condonation of delay and refusing to entertain appeal against *ex-parte* decree of trial court – Petition against – On facts, petitioner proceeded against *ex-parte* in suit on report of process server effecting substituted service by affixation – Report not mentioning who identified defendant's house and in whose presence process was pasted there by him – Summons sent through post also returned with report

that defendant's house was locked and intimation slip was dropped - Held, material on record probablizes plea of defendant that she was not residing at relevant time on given address rather attending her ailing daughter at Delhi – Petition allowed – Delay condoned- Appellate court directed to register appeal. (Paras 10-11)

For the Petitioner: Mr. Sunil Chauhan, Advocate.
For Respondents No. 1(a) to 1(e): Mr. Harish Sharma, Advocate.
For Respondent No.2: Mr. Naresh K. Gupta, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant Civil Revision Petition, stands, directed against the disaffirmative orders pronounced by the learned District Judge, Shimla, H.P., upon, an application bearing CMP No. 309-S/6 of 2013, cast under the provisions of Section 5 of the Limitation Act, wherethrough, the petitioner herein, sought condonation of delay, in, instituting an appeal, against, the ex-prate judgment and decree, pronounced by the learned Civil Judge (Senior Division), Shimla, upon, Civil Suit No. 95/1 of 2010/08, titled as Bala Dutt vs. Kamal Jeet Kaur and another.

2. The learned trial Court on 10.03.2009, made a conclusion (a) that despite valid service being effectuated, through affixation, in the afore civil suit, upon, the petitioner herein/defendant No.1, and, yet hers omitting to record her appearance therebefore either in person or through any authorised counsel, hence, hers being enjoined, to, face an order, for hers being proceeded against ex-parte. She, thereafter pronounced ex-parte decree for mandatory injunction against defendant No.1/petitioner herein, was, strived to be assailed before the learned First Appellate Court, (b) yet only after expiry of the prescribed period of time for institution of an appeal therefrom, before the learned First Appellate Court, (c) obviously, the, belated concert of the aggrieved defendant/petitioner herein, enjoined, an, adjudication being made, upon, an application, cast under Section 5 of the Limitation Act, as, stood appended with the memorandum of appeal, instituted, before the learned First Appellate Court, against the afore rendered ex-parte judgment and decree. The petitioner herein/defendant No.1, was, enjoined to therein display good, and, sufficient cause, constraining her, to, belatedly institute, the apposite appeal before the learned First Appellate Court, wherebeforewhom, a challenge was cast, vis-a-vis, the ex-parte judgment and decree.

3. An averment is cast in the application, cast under the provisions of Section 5 of the Limitation Act, (a) that the summons were not served upon her in accordance with law, (b) and, obviously she intended to contend that the orders made, on 10.03.2009, by the learned trial Court, qua, valid service through affixation being caused, upon, her rather being legally infirm. Furthermore, she averred in the application, that, in the year 2009, she not residing at Shimla, and, rather was residing at Delhi, in connection with the treatment of her ailing daughter, (c) and, she thereafter pleaded that she acquired knowledge, vis-a-vis, the ex-parte judgment, and, decree, on 28.05.2013, (d) and, upon her within 30 days thereafter hence instituting, the apposite civil appeal against the ex-parte judgment, and, decree, hence renders her explanation, for, the apposite inordinate delay, being tangible, (e) and, she prayed that delay be condoned, and, thereafter, the, civil appeal reared against the ex-parte judgment and decree, be registered, in, the apposite register of civil appeals.

4. The petitioner herein, while stepping into the witness box, made, a testification bearing concurrence with the afore averments, cast, in the application at hand, (i) and, hence testified, that, the requisite delay being neither intentional, nor deliberate, rather it standing sufficiently explained, and, also necessitating its condonation. In her cross-examination, conducted by the learned counsel for th respondent(s), an affirmative suggestion was put to her, qua, the requisite intimation qua the rendition of the ex-parte decree, and, judgment, rather being conveyed to her by her neighbour, one Bala Nand Mehta, on 28.05.2013, whereto, an answer in the affirmative was rendered by her.

5 The respondent Bala Nand Sharma (now deceased) instituted reply to the application at hand, and, contended that the averments made in the application at hand, did not , convey any sufficient, and, good cause, and, rather the apposite inordinate delay, was both deliberate or intentional, and, also through, an, affidavit borne in Ex.RW1/A, tendered, during, the course of his examination-in-chief, he made disclosures therein, hence, bearing concurrence therewith. In his cross-examination, he has disclosed that in the months of March and April, 2009, in months and year whereof, the learned trial Court, for, want of appearance therebefore of the petitioner, in person or through her authorised counsel, despite valid service being caused upon her through affixation, hence directed hers being proceeded against ex-parte.

6. The learned District Judge, while declining the espoused relief to the petitioner, had, disbelieved all the afore averments, cast in the afore application, and, had emphasized, upon, the factum that, despite, the petitioner herein, in an earlier case, mentioning her address, as, resident of Erin Villa Cart Road, Shimla-3, (a) and, whereat, she was served, and, also thereafter hers rendering her statement before the Court concerned, (b) hence, concluded that with the afore address being similar, to the one mentioned, in the summons wherethrough service purportedly through affixation, was, effectuated upon her, (c) rather being her correct address, and, further concluded that, the, order made, on 10th March, 2009, rather being a valid order. It further disbelieved, an, averment qua the petitioner herein, especially for want of tangible, and, cogent evidence qua hers in the year, 2009, not, residing in Shimla, rather hers residing in Dely, in connection with the treatment of her ailing daughter. All the afore reasons, for the reasons to be assigned hereinafter, are weak and frail, and, merit interference.

7. Even though, in the earlier motion, the application/petitioner herein, had, mentioned her address bearing, hence, similarity with the address mentioned in the extant summons, (a) and, whereon she stood earlier personally served, in the ordinary mode, (b) yet in the extant case, the apposite summons issued, for hers being personally served thereunder, through ordinary mode, were not, palpably served personally upon her, rather the extant summons were served, upon, her through affixation. Consequently, it has to be determined, from the extant summons, whether the process server concerned, while causing service through affixation, upon her, by pasting the extant summons, on the face of the outer door of her premises, had proceeded, to, revere the mandate encapsulated in Order 5, Rule 17 CPC, provisions whereof, stand extracted hereinafter:-

> "**17 Procedure when defendant refuses to accept service, or cannot he found.-**Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgement, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made,

> the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed."

(c) Provisions whereof, through authorise the process server, to, initially ensure personal service being effectuated, upon, the addressee or his/her authorised agent, and, hence, on their refusal, to, the sign the acknowledgement, or (d) upon his making all due, and, reasonable diligence, his rather hence discovering, that, the addressee is absent from his/her resident, at the time contemporaneous, to, his concerting, to, effectuate personal service upon her/him through ordinary mode, (e) and, further upon there being no evident likelihood of his/her being foundwithin a reasonable time, at the relevant abode, (f) and, nor she/he hence athorising any agent to accept service of summons on his/her behalf, to hence, affix or paste the summons on the face, of the outer door of the premises, where, the addressee ordinarily resides. The afore authorization to affix the summons, on the face, of the outer door of the premises, ordinarily occupied by the addressee, is subject also to his begetting satiation, of all, the statutorily enjoined parameters, as, encapsulated in the provisions, borne in Order 5, Rule 17 of the CPC.

8. In aftermath, the relevant document, for determining, whether, hence evident satiation is begotten, vis-a-vis, all the afore enjoined parameters, is, comprised in the apposite summons. On the reverse of the apposite summons, an endorsement is made, by the process server concerned, qua his pasting them, on the face of the outer door of the relevant premises, and, only after his making the relevant abortive discoveries, for ensuring, hence the summons being effectuated personally, upon, her through ordinary mode, (a) and, also after, his, hence discovering hers, not, being present at the given address, given his rather discovering that the outer door, of, the premises are locked. The afore affixation of summons, on the face of the outer door of the premises of the petitioner herein, is, in pursuance to the orders pronounced, on 30.12.2018, by the learned Civil Judge concerned. However, in transgression of the mandate, of, the further provisions, borne in Order 5 Rule 17 of the CPC, wherein, he was, upon, his striving to cause service through affixation, of the apposite summons, by his pasting them on the outer door, of, the relevant premises, (b) also hence, enjoined to also mention the name, and, addresses of the persons, by whom the relevant house, was, identified, and, in whose presence the copy, of, summons was affixed or pasted on the outer door of the premises, whereat, the petitioner hence ordinarily resides. However, the afore report, made by the process server concerned, on the reverse of the apposite summons, per se omits, to make all the afore statutory disclosures, merely, on pretext of no witness being found at the relevant spot. The afore reason, for his transgressing the mandate, borne in the last lines of Order 5, Rule 17, CPC, is per se flimsy, and, pretextual. Rather, the process server concerned, was enjoined to make, a fresh resort, vis-a-vis, the afore mechanism, (i) and, only after his making, a report of his apposite failure, to the learned trial Court concerned, (ii) and, thereafter the latter proceeding, to make a direction, upon him, to make a fresh endeavour, to, personally serve the defendant No.1/petitioner herein through ordinary mode, (iii) and, only on failure thereof, he would stand empowered, after meteing the fullest deference to the mandate, of, the relevant provisions, to, hence, cause valid effectuation, of, service upon her, through, affixation. Consequently, for want, of, afore re-strivings, and, re-endeavours, the afore pretext for his hence omitting to beget compliance, with, the last portion, of Order 5, Rule 17 of the CPC, renders the causing of service through affixation, upon, defendant No.1/petitioner herein,

being construable to be grossly flawed, and, it also contravenes the peremptory mandate borne in Order 5, Rule 17, CPC, rendering hence a further conclusion, that, the espousal made by the petitioner herein that she was not served in accordance, with law, being both weighty, and, meritworthy.

9. The learned trial Court, under orders pronounced on 30.12.2008, also directed thereat, that apart from the process serving agency, hence, causing service of summons, upon the petitioner herein, through affixation, the apt service being strived to be effectuated, through, registered covers, (a) and, the endorsement made by the postman concerned, upon, the RAD reveals that he could not personally serve the addressee, (b) and, rather had dropped the notice into the door, and, hence, therefrom it is apparent that the addressee was not, at the relevant time, residing in the premises mentioned against her name, in the, memo of parties, of, Civil Suit bearing No. 95/1 of 2010/08. The further effect of the afore discussion, is, that it cannot be concluded firmly, (c) more so, when the process server did not step into the witness box, for, testifying that the summons, as, hence were affixed, on the face of the outer door of the premises purportedly ordinarily occupied by the defendant/petitioner herein, were personally known to him, to be occupied by her, (d) thereupon, the endorsement, made, on the reverse of the apposite summons, that he, had affixed them on the outer door, of, the premises of the defendant/petitioner herein, stands falsified, (e) conspicuously rather vis-a-vis, his affixing them, on the face of the outer door of the premises, whereat, the petitioner/defendant, rather was actually residing, (f) and, also a further inference is rearable, that, the summons may have been affixed on the outer door of the premises, other, than the one ordinarily occupied by the defendant/petitioner herein, (g) and, concomitantly also it is inferable, that, hence the defendant/petitioner herein, even upon, her visiting her premises, depicted, against her name in the memo of parties, in the civil suit, failed to notice the date mentioned therein, for hers thereat hence recording her personal appearance before the learned trial Court, (h) thereupon, her failure to appear before the learned trial Court, on 10.03.2009, cannot be construed to be a sequel of hers either deliberate or intentional, rather is construed to be hence, bonafide. (h) nor hence any presumption, of, truth is attached to the relevant official act, as it being rebutted by the afore inferences, sparked by the afore evident statutory infraction.

10. Be that as it may, the afore reasons, wherethrough this Court, is constrained to conclude, that, the defendant/petitioner herein, was not served, in accordance with law, nor she had knowledge of proceedings, drawn against, her, (i) thereupon, she is to be believed that she acquired knowledge qua the ex-parte judgment, and, decree only in the month of May, 2013, inasmuch as on 28.5.2013, (ii) especially when an affirmative suggestion in consonance therewith, is, meted to her by the counsel for the respondents, while holding her to cross-examination, whereto she meted an affirmative answer, (iii) thereupon, it is concluded, dehors, hers rendering a minimal prevaricated version qua, despite, hers applying earlier thereto, on 24.5.2013, for the copy of the judgement, rather hers only on 28.5.2013, hence acquiring the fullest actionable knowledge about rendition, of, an ex-parte judgment, and, decree. The afore minimal prevarication, is, also condonable, given hers applying, for, the copy of decree sheet on 29.5.2013, hence, a day latter to hers acquiring personal knowledge, from one Bala Nand Mehta, qua an ex-parte judgment and decree being passed against her, and, when she could rear, a, valid first appeal against the ex-parte judgment, and, decree only upon hers being supplied with a copy of the decree sheet, (iv) thereupon, merely, upon, the afore minimal prevarication, it would not be befitting to disbelieve her qua hers acquiring belated knowledge, about, the rendition of a ex-parte judgement, and, decree, in, civil suit No. 95/1 of 2010/08.

11. For the foregoing reasons, the instant petition is allowed, and, the order impugned before this Court, is, set aside. Consequently, CMP No.309-S/6 of 2013 is allowed, and, the delay as has occurred in instituting, the, appeal before the learned First Appellate Court, against the ex-parte judgment, and, decree, rendered by the learned trial Court, upon, Civil Suit No. 95/1 of 2010/08, is condoned. The learned District Judge, Shimla is directed to register the appeal in the apposite register, and, to decide it in accordance with law. The parties are directed to appear before the learned District Judge, Shimla on 29th March, 2019. All pending applications also stand disposed of. Records be sent back forthwith.

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

Kuldeep Chand & others ...Petitioners/appellants/defendants.
Versus
Rajesh Kumar & others ...Respondents/Plaintiffs.

Civil Revision No. 62 of 2018.
Reserved on : 11th March, 2019.
Date of Decision: 15th March, 2019.

Code of Civil Procedure, 1908 – Order XII Rules 1 & 6 – Order XXIII Rule 1(iv) – Withdrawal of counter claim at appellate stage- Permissibility – Trial Court dismissing defendants' counter claim seeking declaration qua tenancy rights and in alternative of their adverse possession over suit land – Appeal against – Defendants filing application at appellate stage for withdrawal of their counter claim and admitting plaintiffs claim– Application dismissed by First Appellate Court- Petition against- Held, plea of defendants if accepted would nullify adjudicated rights of parties – Permission for withdrawal or abandonment of any claim by defeated litigant at appellate stage would give unfair advantage to party motioning Appellate Court - All vested and substantive rights of successful party would be gravely or adversely affected – Petition dismissed – Order upheld. (Paras 4 to 6)

Cases referred:
Avenue Supermarts Private Limited vs. Nischint Bhalla and others, (2016) 15 SCC 411
K.S. Bhoopathy and others vs. Kokila and others, (2000) 5 SCC 458
R. Rathinavel Chettiar and another vs. V. Sivaraman and others, (1999) 4 SCC 89

For the Petitioners: Mr. Ajay Sharma, Advocate.
For Respondents No. 1, 2, 3(a) to 3(d) and 4 to 7: Mr. K.D. Sood, Senior Advocate with Mr. Rajnessh K. Lal, Advocate.
Respondent No.3 (e) exparte.

The following judgment of the Court was delivered:

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

The instant Civil Revision Petition, stands, directed against the disaffirmative orders pronounced by the learned First Appellate Court., upon, an application bearing CMA No. 676 of 2017, cast under the provisions of Order 12, Rules 1 and 6 read with Order 23, Rule 1 and Section 151 of the CPC, wherein, the defendants/appellants/applicant/counter claimants, projected an intention to withdraw the counterclaim, bearing No. 51of 2008, and, also made a further echoing qua theirs admitting the claim of the respondents/plaintiffs, reared by the latter, in, Civil Suit No. 5 of 2008.

2. The afore motion was made before the learned First Appellate Court, by, the defendants/appellants/ applicants, who, suffered a decree of eviction, vis-a-vis, the suit premises, (a) and, with, hence the learned trial Court hence recording disaffirmative findings, vis-a-vis, the defendants, hence, holding tenancy rights in the suit property, and, also it recorded dis-affirmative findings qua the defendants acquiring title, through adverse possession, vis-a-vis, the suit premises.

3. The learned counsel appearing for the aggrieved defendants/petitioners herein/counter-claimants/appellants, contends, (a) that a reading of the phraseology, occurring in Order 12, Rules 1 and 2 of the CPC, provisions whereof stand extracted hereinafter, cannot render open a conclusion, other than, qua its provisions being available for recoursings, by any party to the lis, even at the stage, the suit, has progressed upto the appellate stage, given an appeal being, a continuation of the suit. Provisions of Order 12, Rules 1 and 6 read as under:-

> “**1. Notice of admission of case**.-Any party to a suit may give notice, by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party.
>
> **6. Judgment on admissions**.- (1) Where admissions of fact have been made either in the pleading or otherwise, whether orally or in writing, the Court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, make such order or give such judgment as it may think fit, having regard to such admissions.
>
> (2) Whenever a judgment is pronounced under sub-rule (J) a decree shall be drawn up in accordance with the judgment and the decree shall bear the date on which the judgment was pronounced.”

He further contends that since, the, application echoed, a, projection, making, a simplicitor admission of the defendants/appellants/ applicants/counter-claimants, (a) thereupon, the mandate of Order 23, Rule 1 of the CPC, as, strived to be also invoked in the application at hand, especially, the mandate borne in sub-rule (iv) thereof, rather being in complete tandem, with, the invocation by the appellants/defendants/petitioners herein, also, of, provisions, of, Order 12, Rules 1 and 6 of the CPC, (b) and, there being no grave legal impediment in disallowing the application at hand, as, untenably done by the learned First Appellate Court.

4. The afore submission is impressive at its facade., however, it loses its sheen, (a) given any allowing, of, the application at had, rather resulting, in belittling the rigour, and, the clout of the verdict pronounced against the appellants/applicants/ defendants, by the learned trial Court. The verdict pronounced by the learned trial Court, holds, clear categorical adversarial findings, rather erosive of the claim and propagation, of, the defendants/counter-claimants/petitioners herein, vis-a-vis, theirs holding any tenancy rights, vis-a-vis, the suit property, (b) and, also dispels all the vigour of their contention qua their entitlement, vis-a-vis, the suit property. The afore firm pronouncement rendered by the

learned trial Court, as, strived to be subsumed by the afore concert, made by the aggrieved defendants/appellants/petitioners herein, especially at the appellate stage, (c) would upon, being countenanced, rather render nugatory, and, would also nullify, the, adjudicated rights acquired thereunder, by, the respondents/plaintiffs. Furthermore, given the Hon'ble Apex Court in a judgment pronounced in a case titled as ***R. Rathinavel Chettiar and another vs. V. Sivaraman and others,*** reported in ***(1999) 4 SCC 89,*** hence making a clear pronouncement, that, any permission for withdrawal or abandonment of any claim, by the aggrieved defeated litigant, would sequel an unfair advantage, to the party motioning the appellate court, and, also would tantamount to, all vested or substantive rights acquired through the apt verdict by the successful litigant, being hence gravely or adversely prejudiced. The afore view is also reiterated in a judgment of the Hon'ble Apex Court, rendered, in a case titled as ***K.S. Bhoopathy and others vs. Kokila and others,*** reported in ***(2000) 5 SCC 458,*** and, also in a judgment rendered in a case titled as ***Avenue Supermarts Private Limited vs. Nischint Bhalla and others,*** reported in ***(2016) 15 SCC 411,*** the relevant paragraph No.22 of the latter decision is extracted hereinafter:-

> "22. Applying the principles given in the aforementioned decisions to the facts of the present case, we find that in the order dated 10.02.2009, the learned single Judge while allowing the Notice of Motion No. 21 of 2006 had held that the highest offer made by the respondent therein (appellant before us) stood accepted by all the parties to the suit and thereafter passed certain directions to deposit the bid amount, execution of the conveyance deed etc. Thus a vested right has been created in favour of the respondent therein, that is, the present appellant and that cannot be set at naught simply by permitting the Defendant Nos. 4A, 4B and 5 to withdraw the Notice of Motion filed by them. It was for the Division Bench to decide the appeal on merits instead of permitting the withdrawal of the Notice of Motion and observing that the order of the learned single Judge passed on that Motion dated 10.02.2009 does not survive for consideration."

5 In supplement to the afore, the lack of rights, if any, of the aggrieved defendants/appellants/petitioners herein, in the suit property, when stand, firmly pronounced by the verdict recorded by the learned trial Court, (a) therefrom, when otherwise also may be on, a, contest in the appeal pending before the learned first appellate Court, the defendants/appellants/counter-claimants/petitioners herein, would hold no legal leverage, for, upsetting the findings recorded by the learned trial Court, (b) and, when the evidence prima faice existing on record, relied upon by the appellants/defendants, is, enjoined to display, dehors, the endeavour extantly made by the defendants/appellants, that, hence, they would yet succeed in appeal, (c) whereas, prima facie at this stage when the evidence on record may ultimately result, in the dismissal of the first appeal. Consequently, it appears that the extant endeavour, is, merely a ploy on the part of the defendants/appellants, to in its garb, theirs concerting to acquire tenancy, vis-a-vis, suit property, and, therethrough, hence present the plaintiffs/respondents, with, a, fait accompli , for the latter accepting them as tenants, even when, findings adversarial, vis-a-vis, the afore factum probandum, stand recorded against them, by the learned trial Court.

6. For the foregoing reasons, there is no merit in the instant petition, and, it is dismissed. In sequel, the impugned order is affirmed and maintained. The parties are directed to appear before the learned First Appellate Court, on 29th March, 2019. The learned First Appellate Court is directed to decide the appeal in accordance with law. Any observations made hereianbove shall not be construed as any expression on the merits of the case, and, the learned First Appellate Court shall decide the matter by remaining

uninfluenced by the observations made hereinabove. All pending applications also stand disposed of. Records be sent back forthwith.

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

Shri Maharaj Mall (since deceased) through his legal heirs. .....Appellants/Plaintiff.
Versus
Sh. Vinod Kumar and others ....Respondents/Defendants.

RSA No. 132 of 2007.
Reserved on : 27th February, 2019.
Decided on : 15th March, 2019.

Specific Relief Act, 1963- Sections 34 & 38- Declaration and injunction- Grant of- Plaintiff claiming himself as owner of suit land and depicting revenue entries showing public path over it as wrong- Also assailing orders of Revenue Officers passed in 1983 ordering correction of revenue record and thereby showing existence of public passage over it as without jurisdiction since such orders having been passed during pendency of civil litigation (First litigation)- Trial Court decreeing suit- First Appellate Court allowing appeal and dismissing suit by holding existence of path over suit land and defendants having right of passage through it- RSA- Held, defendants were not parties to previous litigation (First litigation)- Nor right of passage through suit land was subject matter of dispute in it (First litigation)- Doctrine of lis pendens will not apply- In another litigation (Second litigation) Civil Court relying upon these very orders of Revenue Officers for recording findings of existence of path over suit land and its user by the defendants- Second litigation between plaintiff's predecessor in interest and defendants- Predecessor in interest of plaintiff not disputing these orders of Revenue Officers in second litigation- Decree passed in second litigation attained finality- Plaintiff estopped from challenging these orders of Revenue Officers in third round of litigation- Findings of First Appellate Court regarding existence of path and its user by defendants clearly borne out from record- Decree does not suffer from any infirmity- Decree of First Appellate Court upheld- RSA dismissed. (Paras 9 to 12)

For the Appellants: Mr. Ajay Kumar, Senior Advocate with Mr. Dheeraj K. Vashishta, Advocate.
For the Respondents: Mr. Bhupender Gupta, Senior Advocate with Ms. Rinki Kashmiri, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiffs' suit for rendition of decree for declaration to the effect that the plaintiff is owner in possession of the land, as, entered in Khata No.32, min, Khatoni No.90, Khasra No.963, measuring 0-02-08 hectares and land in khasra No.962, measuring 0-07-31 hectares as per jamabandi for the year 1997-98 situated at Mohal, mauza and Tehsil Baijnath, (i) and that the entry in the revenue record showing "Rasta Share Aam" of three meters witidth in Khasra No.963, (ii) and, entry in red line in the Aks Sazra wherein 27 meters passage, in length has been shown to be passing, through, khasra No.962, are,

entirely illegal and contrary to the factual position as existing on the spot, (iii) and, further that the order of 26.2.1983, and, of 2.6.1983 passed by the Settlement Officer in Case Nos. 14/83/SO, and, 14/83/SO, and, order of 31.3.1983, passed by the Divisional Commissioner are entirely illegal, and, without jurisdiction, and, having been passed, during, the pendency of the civil proceedings instituted by the plaintiff appertaining to the suit land, (iv) and other land and as such these orders are not at all binding on the plaintiff,(v) and that the subsequent mutation attested and sanctioned by the revenue officers on the basis of above illegal orders, are, illegal and liable to be set aside, (vi) as also, for rendition of decree for permanent prohibitory injunction qua the suit khasra numbers, (vii) stood decreed by the learned trial court, (viii) and, the learned trial Court also passed a declaratory decree to the effect that the plaintiff is owner in possession of the suit land, and, that the orders passed by the settlement officers of 26.2.1983, and, of 2.6.1983, (ix) and, order passed by the Divisional Commissioner dated 31.3.1983, and, mutations attested on the basis of these orders, wherethrough, entries in the revenue record were made, by showing Rasta Share-aam in Khasra No.963, and, entry in red line in Aks Shajra shown to be passing, through, Khasra No.962, (x) are illegal and null, and, void, (xi) and, the plaintiffs' suit, stood, also for, rendition, of ,a decree for permanent prohibitory injunction hence decreed, and, the defendants were permanently restrained from interfering in the suit land, by way of digging. In an appeal carried therefrom, by the defendants before the learned First Appellate Court, the, latter rather Court allowed the appeal, and, set aside, the, judgment and decree recorded by the learned trial Court, (xi) with the rider that the findings, recorded by the learned trial court, that, there exists a path in the suit land, and, the defendants have right to use the same hence not warranting any interference. The plaintiff/appellants herein are aggrieved therefrom, hence, has instituted the instant appeal before this Court.

2. Briefly stated the facts of the case are that the suit land is owned and possessed by the plaintiff (now deceased) and the entry in the column of possession recorded as “shar-e-aam” in Khasra No.963 and red line entry reflected to the extent of 27 meters in length in Aks Sajra and Latha over Khasra No.962 have been managed and manipulated by the defendants in connivance with the Settlement Authorities behind the back of the plaintiff which are illegal and void. The plaintiff had filed Civil Suit on 26.09.1970 against Jagdish Raj and others which was dismissed by the learned Sub Judge 1st Class on 22.12.1975 against which judgment and decree, the plaintiff preferred an appeal, which came to be dismissed by the District Judge on 30.09.1978. The plaintiff carried a Regular Second Appeal No.7 of 1979 to the High Court and the High Court accepted the appeal, set aside the judgment and decree passed by both the learned Courts below and decreed his suit for possession, and on the basis of said judgment and decree the plaintiff was put in possession of the suit land other land on 23.09.1994, as a result of which the plaintiff became the owner and came in possession of the entire land comprised in Khasra Nos. 962 and 963 (2101/962/2), including the structure standing thereon and the defendants have nor right, title or interest in the suit land, as they are quite stranger to it. But, during the pendency of the civil proceedings, the defendants in connivance with the revenue authorities got entries of “shar-e-aam” and red line entry to the extent of 27 meters reflected in Aks Sajra and “latha” over khasra No.962, more particularly in Khasra No.2101/962/2 recorded and manipulated orders dated 26.2.1983, 2.6.1983 passed by the Settlement Officer and order dated 31.3.1983 passed by the Divisional Commissioner, which were passed behind the back of the plaintiff and without jurisdiction. The plaintiff requested the defendants to get the alleged entries corrected and not to make interference in the suit land but without any result and to the contrary they intended to construct a passage over the suit land, as a result of which the plaintiff was compelled to file the extant suit.

3. The defendants contested the suit and filed separate written statements. Defendants No.1, 3 to 6 in their joint written statement have taken preliminary objections qua estoppel, cause of action, maintainability, limitation, res-judicata and jurisdiction. On merits, the defendants termed the averments made in the plaint as wrong and incorrect and pleaded that the suit land is not in possession of the plaintiff, but ther exits a passage over the same since long, which is being used by the defendants and public at large since time immemorial as pleaded in para No.8 of the written statement, but the plaintiff while filing the suit, has suppressed the said material fact. The plaintiff was well aware of the correction proceedings remained pending before the Revenue Officers and, as such, the orders passed by the learned Settlement Officer and Divisional Commissioner are valid and legal. Even, the predecessor-in-interest of the plaintiff had filed a civil suit in the year 1985 seeking declaration and injunction in respect of the suit land, but the same was dismissed against which the predecessor-in-interest of the plaintiff preferred an appeal which was also dismissed and as such, the suit is barred by principle of res-judicata. It was further pleaded that the decree passed by the High Court has not effect on the rights of the defendants regarding use of passage in the suit land, because the passage is existing on the spot for the last more than 30 years and since time immemorial, which is being used by the defendant and public at large and, as such, the defendants never threatened to demolish any building of the plaintiff and nor made any interference except using of path existing in the suit land and to the contrary the plaintiff is tryig to block the same and, on the absis of such averments, the said defendants claimed dismissal of the suit.

4. Defendant No.2 in his written statement denied the correctness of the averments made in the plaint for want of knowledge and pleaded that there exists no passage in the revenue record and the passage was being used with the permission and consent of Jagdish Raj and others and it is submitted that he has no objection in case the suit filed by the plaintiff is decreed.

5. 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.

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

1. Whether the plaintiff is entitled to the relief of declaration, as prayed for?OPP.
2. Whether the orders dated 26.2.83 and 2.6.83 passed by Settlement Officer in case NO. 14/83/S.O and 14/83/S.O., are illegal and liable to be set aside, as alleged?OPP
3. Whether the order dated 31.3.1983 passed by the Divisional Commissioner is illegal and liable to be set aside, as alleged? OPP.
4. Whether the mutations sanctioned on the basis of orders passed by S.O. and Divisional Commissioner are liable to be set aside, as alleged?OPP.
5. Whether the plaintiff is entitled to the relief of permanent prohibitory injunction, as prayed for?OPP.
6. Whether the plaintiff is estopped from filing the present suit, as alleged?OPD.
7. Whether the plaintiff has no cause of action to file the present suit, as alleged?OPD

8. Whether the suit is not maintainable in the present form, as alleged?OPD.
9. Whether the suit is barred by period of limitation, as alleged?OPD.
10. Whether the suit is barred by principles of res-judicata, as alleged? OPD.
11. Whether the suit is barred under Order 2, Rule 2 of CPC, as alleged? OPD.
12. Whether this court has no jurisdiction to try this suit, as alleged? OPD
13. Whether there exits a public passage in the suit land, if so, its effect?OPD.
14. Whether the plaintiff is entitled to the relief of mandatory injunction, as prayed for?OPP.
15. Relief.

7. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiff/appellant(s) herein. In an appeal, preferred therefrom, by, the defendants No.1, 3 to 6/respondents herein, before the learned First Appellate Court, the latter Court allowed, the, appeal, and, reverse the findings recorded by the learned trial Court, except, the findings qua, the, passage existing on the suit land.

8. Now the plaintiff(s)/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, on 26.03.2008, this Court, admitted the appeal instituted by the plaintiff(s)/appellant(s) against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

1. Whether the entries of alleged corrections made in the revenue records by the Revenue Officers behind the back of the appellants with respect to Khasra No.962 and 963 during the pendney of Regular Second Appeal No. 7/79 in the High Court of Himachal Pradesh could affect or impinge the rights of the appellant in the suit property and whether the defendants could take any benefit of such entries so as to defeat the rights of the appellants in the suit property?
2. Whether the rights of the appellants with respect to the suit property comprising Khasra No.962 and 963 were protected by Section 52 of the Transfer of Property Act, 1882 under the doctrine of Lis pendens?

Substantial questions of Law No.1 and 2:

9. The defendants had espoused qua theirs acquiring an easementary right, for, trudging upon the suit khasra numbers. The afore plea stood vindicated, by the learned First Appellate Court, by its, placing reliance upon Ex.PW5/A, wherein clear articulations rather occur, qua a passage, existing on Khasra No.963. The afore disclosures hence occurring in Ex.PW5/A, do not suffer, from any fallibility, vis-a-vis, their probative sanctity, espeically for want of any potent thereto rebuttal evidence, hence, being adduced by the plaintiff. The learned First Appellate Court, also did not place, any reliance upon, a, judgement embodied, in Ex.P-7, judgment whereof though appertains to the suit land, (i) on anvil, of, the, defendants hence uncontestedly rather standing not arrayed as party(ies)

therein nor the controversy therein appertaining to the path, borne in Khasra No.963, hence standing adjudicated thereunder. The afore reason, obviously is neither fallacious nor suffers from any infirmity. The learned counsel appearing for the appellant/plaintiff, would succeed, in his endeavour qua the verdict, hence, nullfying the orders borne in Ex. P8, D-4, D-5, D-6, as, rendered by the learned trial Court, requiring no interference, by the learned First Appellate Court, (a) upon, his alluding to evidence hence making disclosures qua the reflections in Ex.PW5/A, wanting in legality given theirs being not preceded rather by any validly made orders. However, when the afore apposite submission, is rested merely, upon the fact that the afore orders, rather stood pronounced by the authorities concerned, despite, pendency, of, regular second appeal bearing No. 7 of 1979 before this Court, (b) and, also when he hence submits, that, all the afore orders, hence, acquiring the requisite vitiatory effect, also on anvil, of theirs obviously inviting the wrath, of, the mandate, as, enshrined in Section 52 of the Transfer of Property Act. However, the afore submission also falters, (c) given the learned counsel for the appellants, failing to establish, that in RSA No 7 of 1979, the defendants standing arrayed, in, the apposite array of the legal combatants, (d) rather when uncontestedly, the defendants/respondent hereat remained unarrayed in the afore second appeal, in, the apposite array of legal combatants, thereupon, reiteratedly the force, if any, of the afore contention rather loses all its vigour.

10. Be that as it may, even if, the learned counsel for the appellants/plaintiffs, dehors, the afore infirmity gripping his submission, in, his effort, to, nullify the afore orders, he could yet succeed by placing on record, the, relevant evidence, (a) hence, making vivid displays qua the occurrence, of, the entries in the jamabandi appertaining to the suit land, and, with clear echoings therein, qua the suit khasra numbers being reflected as "Shar-e-aam Rasta", rather coming under a cloud, (b) vitiation whereof being spurred, by the orders made by the authorities concerned, for incorporating the afore entries, in the jamabandi appertaining to the suit land, rather being void, and, nonest, given all, the, prior thereto entries, not, making the afore reflections. However, the relevant orders came to be pronounced, hence, respectively in the years 1983, and, in 1985, and, stood embodied respectively, in Ex. D-4, D-5, and, in D-6, and, with all the afore orders standing, relied upon, by the learned Sub Judge 1st Class, Palampur, for his making a judgment, and, decree, as, embodied in Ex. D-10, (c) and, with the successor-in-interest of Ajudhia Dass, wherefrom the plaintiff hence acquired the apposite title, rather failing, to, in the earlier suit in respect whereof Ex.P-10 stood pronounced, hence cast a challenge thereon, (d) thereupon, all the afore failures, on the part of the alienor of the plaintiff also estops, the latter to contest, the, validity of the orders, as, embodied in Ex.D-4 to D-6. In sequel, the judgment and decree pronounced, in Ex.P-10, hence, acquires conclusivity, and, in consonance therewith, all entries, as, find reflections, in the jamabandi(s), qua the suit land, wherein reflections, rather occur qua, a, "shar-e-aam Rasta" existing on a part of the suit land, also hence acquire an alike validity. Dehors the above, even prior to the recording of the afore orders, the land comprised in khasra No. 1963, as, pronounced by Ex.P-4, exhibits whereof comprises, the, copy of apt missal hakiyat, for the year 1972-73, hence, stand described, as, "Shar-e-aam Rasta", (e) and, the afore entries continued, to be reflected in apposite subsequent thereto revenue record(s). Since, all the afore entries appear to be substituted, by an order, made by the settlement Officer, upon, case No.744/SO, on 10.11.1979, wherethrough, the land borne in khasra number 963, was ordered, to be recorded in possession of Sunial Datt and Smt. Geeta Devi, along with Jagdish Ram in equal shares, and, in consonance therewith reflections, were, carried in the copy of jamabandi for the year 1987-88, borne in Ex.P-5, (f) contrarily, hence, the reflections, borne, in the jamabandi appertaining to the year 1987-88, wherethrough, the earlier entries embodied in Ex.P-4, exhibit whereof, comprise, the, jamabandi for the year 1972-73, rather, were, substituted, hence appear to be made, in a slip shod manner, and, without application of

mind, (g) significantly when the earlier existing revenue entries appear to be incorporated, by a valid order, especially when no evidence qua preceding therewith no valid order being recorded, rather exists on record. Furthermore, when the afore corrections were made, during, the pendnecy of the civil suit No. 477 of 1974, upon, which judgment, and, decree, as, embodied in Ex.P-9, stood pronounced, hence rather the apposite corrections, and, substitution, inter se, the reflections in EX.P-5, vis-a-vis, a validly made, Ex.P-4, latter whereof comprises, the copy of missal hakiyat for the year 1972-1973, are, all rather hit by the doctrine of lis pendens, and, are required to be discountenanced, as aptly done, by the learned first appellate Court.

11. The above discussion, unfolds, 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. Accordingly, the substantial questions, of law are answered in favour of the defendants/respondents, and, against the appellants/plaintiff(s).

12. In view of the above discussion, there is no merit in the instant appeal and it is dismissed accordingly. In sequel, the impugned judgment and decree rendered by the learned First Appellate Court, upon, Civil Appeal No. 153-B/XIII/2002 is on all fronts maintained and affirmed. 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.

Nandu Ram & another .....Appellants/defendants.
Versus
Bansi & another ....Respondents/plaintiffs.

RSA No. 241 of 2003.
Reserved on : 12th March, 2019.
Decided on : 15th March, 2019.

Transfer of Property Act, 1882 – Section 58 - Usufructory mortgage – Land already in possession of mortgagee as tenant – Redemption by landlord – Effect - Whether on redemption, tenancy rights would revive? – Held, redemption of usufructory mortgage by landowner will result in extinguishment of pre-existing tenancy only if from terms of mortgage, it can be inferred that parties had intended for surrender of tenancy rights by tenant- Intention of parties relevant – Facts, must disclose that tenant had expressly or impliedly surrendered his tenancy rights in said land when mortgage was executed– On facts, mutation attesting mortgage transaction though not showing plaintiff's predecessor had expressly surrendered tenancy rights in such land in favour of landowner – But no evidence that mortgagee after mortgage, continued to pay rent to land owner or any other payment to be adjusted against interest payable on principal mortgage amount– Implied surrender of tenancy rights in favour of landowner can be inferred – Tenancy was not kept in abeyance during pendency of mortgage- Redemption of mortgage will not revive tenancy. (Paras 9 & 10)

Cases referred:

Gambangi Applaswamy Naidu and others vs. Behara Venkataramanayya Patro and others, 1985 S.L.J. 100

For the Appellants: Mr. Bhupender Gupta, Sr. Advocate with Ms. Rinki Kashmiri, Advocate.

For the Respondents: Mr. B.P. Sharma, Sr. Advocate with Mr. Arun Kumar, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiffs' suit, for, rendition of a decree for declaration, and, also for rendition of a decree for permanent prohibitory injunction, vis-a-vis, the suit khasra number 109, hence, holding an area of 8-16 bighas, stood dismissed by the learned trial Court, and, in an appeal carried therefrom, by the plaintiffs, before the learned First Appellate Court, the latter Court decreed the plaintiffs' suit, and, recorded a verdict declaring the plaintiffs, to be, owners in possession of the suit land, only to the extent of 5.10 bighas, besides in respect thereof, it also rendered a decree of permanent prohibitory injunction, wherethrough, the defendants were restrained, from, interfering with the suit property. The defendants/appellants herein are aggrieved therefrom, hence, institute the instant appeal before this Court.

2. Briefly stated the facts of the case are that one Khindu (deceased plaintiff) had instituted a suit for declaration with consequential relief of permanent injunction against the defendant on the allegations that he had been non occupancy tenancy in possession of suit Khasra No 109. The plaintiff had constructed two houses in the suit land in the year 1936, and, had been residing therein. The plaintiff had also constructed one cattle shed in the suit land in the year 1936. The defendant had created usufruct mortgage of the suit land in favour of the plaintiff in the year 1956 for Rs.100/-. The defendant had redeemed the mortgage in 1981. After redemption, the status as tenant of Sh. Khindu, Plaintiff had been revived, and, he had become non occupancy tenant in possession of the suit land under the defendant. The plaintiff had acquired rights of ownership of the suit land with the application of H.P. Tenancy and Land Reforms Act, 1972. The defendant had been Numberdar of revenue estate Sanaur and some other revenue estates. The defendant had been exercising influence over the officials of the revenue department. The defendant had manipulated deletion of entry of tenancy of the plaintiff after redemption of the suit land in 1981 The plaintiff was bound by wrong and illegal entries of the suit land carried out after 1981. The defendant had started interfering with the ownership and possession of the plaintiff over the suit land w.e.f. 1.5.1989. The defendant had been requested not to do so, but without any result. The plaintiff had, therefore, instituted suit for declaration of his ownership and possession of the suit land. It has also been averred that in case the tenancy of the plaintiff over the suit land was not upheld, he had acquired title to the suit land by adverse possession, since he had been in continuous, open and uninterrupted possession of the suit land w.e.f. 1936. The defendant was sought to be restrained from interfering with the ownership and possession of the plaintiff over the suit land. It had also been averred that in case the defendant was successful in taking forcible possession of the suit land or had been otherwise treated in possession, decree for possession of the suit land be passed in favour of the plaintiff and against the defendant.

3. The defendants contested the suit and filed written statement, wherein they have taken preliminary objections qua maintainability, estoppel, res judicata etc. On merits,

the defendant had refuted the tenancy of the plaintiff over the suit land. It had been averred that in 1936, the defendant as also his predecessor-in-interest Shri Mehlar had not been owner in possession of the suit land. The suit had been mortgaged with possession for Rs.100/- in favour of the plaintiff by the defendant in 1940. Consolidation operations had been carried out in the revenue estate Sanaur in 1955-56. At the time of consolidation operations, entry of mortgage of the suit land in favour of the plaintiff under the defendant against amount of Rs.100/- had been carried out. The defendant had redeemed the mortgage in 1981. After redemption, the defendant had been owner in possession of the suit land. The plaintiff could not have acquired rights of ownership of the suit land under the tenancy Act. It had also been averred that the plaintiff had been allotted Khasra No. 222/45/1, 222/45/2 and 222/43/3, measuring 5-8 bighas in the revenue estate Sanaur vide order dated 25.8.1975 passed by the Tehsildar, Ghumarwin. The plaintiff had given land obtained by him by way of Nautor in exchange to the defendant and had obtained a portion of the suit land described in Khasra No.265/109, measuring 5.10 bighas from the defendant. The plaintiff had constructed two houses and a cattle shed in the suit land after having obtained land described in Khasra No.265/109, measuring 5.10 bighas from the defendant. It had been averred that lateron Nautor grant of the plaintiff had been rejected on the complaint of proprietors. The defendant had been compelled to deliver possession of Nautor grant obtained by him in exchange in favour of the State. As such stage, the defendant had taken possession of the suit land. It had been averred that in case the construction of the plaintiff in the suit land was proved to have been carried out prior to exchange, the defendant was entitled to possession thereof by demolition of the construction of the plaintiff. The plaintiff had started interfering with the ownership and possession of the defendant of land described in Khasra No.109/1 measuring 3-6 bighas. As such, the defendant had instituted civil suit No.271/1 of 1986 against the plaintiff in the Court of Sub Judge 1st Class, Ghumarwin on 25.11.1986. The plaintiff had agreed for decision of afore civil suit of the defendant against him vide statement dated 24.1.1987. As such, civil suit No.271/1 of 1986 of the defendant for permanent injunction had been decreed against the plaintiff. The judgment and consent decree dated 24.1.1987 was stated to be bar to the suit of the plaintiff. The plaintiff could not be said to have acquired title to the suit land by adverse possession since he had been a mortgagee thereof and mortgage stood redeemed in 1981. The plaintiff was not entitled to any relief.

4. The plaintiff filed replication to the written statement 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.

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 in possession of suit land as owner as alleged? OPP.
2. Whether the plaintiff is entitled to a decree for permanent injunction? OPP.
3. Whether the plaintiff in alternative is entitled to a decree for declaration of ownership by virtue of adverse possession? OPP
4. Whether the plaintiff is entitled to a decree for possession, if dispossessed from the suit land during the pendency of the suit? OPP.
5. Whether the suit is not maintianable? OPD.

6. Whether the suit has not been valued for the purpose of court fee and jurisdiction? OPD.
7. Whether this Court has no jurisdiction to hear and decide the suit? OPD
8. Whether the plaintiff is estopped to file the suit by his own act, conduct, omission and commission? OPD.
9. Whether the suit is bad for not filing the better particulars? OPD.
10. Whether the suit is barred by time?OPD.
11. Whether the suit is barred by res-judicata? OPD.
12. Whether the part of the suit land measuring 5.10 bighas was exchanged by the defendant with the plaintiff with his land measuring 5.8 bighas and nautor granted in favour of Sh. Khindu was rejected by A.C. 2nd Grade, as alleged, if so, to what effect? OPD
13. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiff(s)/respondent(s) herein. In an appeal, preferred therefrom, by, the plaintiff(s)/respondent(s) 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(s)/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, on 10th September, 2003, this Court, admitted the appeal, instituted by the defendant(s)/appellant(s) against the judgment and decree, rendered by the learned first Appellate Court, on, the hereinafter extracted substantial question of law:-

1. Whether the conclusion of the learned first Appellate Court that the plaintiffs were the tenants of the suit land prior to mortgage of the suit property and tenancy revived after redemption of the mortgage is dehors the evidence on record and on the basis of assumptions?

Substantial question of Law No.1 :

8. The jamabandi appertaining to the suit land, vis-a-vis, the year 1944-45, borne in Ex.P-6, and, also the subsequent thereto apposite therewith jamabandis hence appertaining, to, 1948-1949 to 1950-1951, all make consistent reflections qua the predecessor-in-interest of the plaintiff, one, Khindu being recorded as non-occupancy tenant in possession, of, the suit land, under one Mehlar, the predecessor-in-interest, of, the defendants. However, Ex.P-3, unfolds qua an order of mutation bearing No. 68 being attested on 9.6.1956, and, therethrough, the predecessor-in-interest of the plaintiffs, hence, standing inducted, as, a mortgagee in possession of the suit land, against a mortgage debt of Rs.100/-. The efficacy, and, the truth of the afore reflections, borne in the afore alluded exhibits, has, remained uncontested, and, evidence, if any, to rebut the presumption of truth thereof, rather is frail and weak, (a) thereupon, the presumption of the truth, garnered by the entries, borne in Ex.P-6, and, also the subsequent therewith entries appertaining to the suit land, as, borne in the jamabandis appertaining to the years 1948-49 to 1950-51, whereunder, the predecessor-in-interest of the plaintiff one Khindu, stands recorded, as a non-occupancy tenant, hence, acquire apt conclusivity. The mortgage qua the suit land, created under mutation No. 68, borne in Ex.P-3, attested, on 9.6.1956, is

thereafter, as unfolded by mutation No.224, attested, on 23.12.1981, borne in Ex.P-4, rather therein echoed to stand hence redeemed. The redemption of the mortgage qua the suit land under, a, mutation attested on 23.12.1981, is undisputedly a mutation, with, possession of the suit land. The redemption of suit land, as, occurred in the year 1981, under an order borne in Ex.P-4, obviously does thereunder, hence, assume, life on 17.11.1981.

9. The learned counsel appearing for the aggrieved defendants/appellants has contended with much vigour (a) that assuming prior to 9.6.1956, whereat under a mutation, borne in Ex.P-3, the suit land was mortgaged, vis-a-vis, the predecessor-in-interest, of one Khindu, despite, all the prior thereto reflections rather, unfolding, qua his being recorded, as, a non-occupancy tenant qua the suit land, rather obviously standing effaced, (b) besides furthermore, the plaintiffs also standing defacilitated to contend that after redemption, of mortgage, made through, mutation, borne in Ex.P-4, hence, attested on 23.12.1981, (c) rather not interdicting qua hence unencumbered possession of the suit land, hence, warranting its being restored, vis-a-vis, the aggrieved defendants. The afore submission, has tacit underlinings, qua the pleaded claim of the plaintiffs, that, in the face of the entries existing, upto 9.6.1956, whereat the mortgage qua the suit land was created, (d) and, theirs carrying reflection(s) qua the predecessor-in-interest of the plaintiffs one Khindu, standing reflected as, a, non-occupancy tenant qua the suit land, rather holding no consequential effect, vis-a-vis, their espoused claim, qua, bestowal, of, apt statutory vestment of title also therethrough enjoining rather vindication.

10. The vigour of the afore submission, is, to be tested, (a) on anvil, of, a judgment rendered by the Hon'ble Apex Court in a case titled as ***Gambangi Applaswamy Naidu and others vs. Behara Venkataramanayya Patro and others***, reported in ***1985, S.L.J., 100***, the relevant paragraphs No.4, 6 and 8 whereof, are, extracted hereinafter, wherein it stand(s) explicitly pronounced (b) that there cannot be merger of a lease and mortgage, and, even when two transactions, are, in respect of same suit property, (c) upon, a lessee in the suit property acquiring also rights of a mortgagee thereunder, (d) thereupon, the recitals in the apposite mortgage deed, being, enjoined to make explicit or implied expressions qua, upon, creation of mortgage, vis-a-vis, the lessee, hence, the, latter impliedly not renouncing his rights, as, a lessee qua the suit land, (e) whereupon, alone the mortgagor, upon, occurrence of redemption by him, vis-a-vis, the mortgaged debt, would hence without any encumbrances, rather stand entitled to restoration of possession, of, the mortgaged land, (f) AND, would be equipped to also contend, that, the lease being kept in abeyance, and, upon, apt redemption, it hence with all consequential statutory bestowals rather surfacing. The relevant paragraphs No.4, 6 and 8 of the judgment supra, read as under:-

> "4. Counsel for the appellants urged upon us to accept the view taken by the learned District Judge that the two transactions namely a lease and a usufructuary mortgage could co-exist and there was othing in the two mortgage deeds to suggest that the appellants' rights as lessee were extinguished either by merger or by implied surrender and in that behalf strong reliance was placed upon the ealrier decision of the Andhra Pradesh High Court in Varada Bongar Raju's case (supra), while counsel for the respondents contended that the High Court, both in second appeal as well as Letters Patent Appeal, was right in restoring the learned District Munsif's decision by relying upon the later decision in P. Satyanarayana's case (supra) and prayed for dismissal of this appeal.

6. In our view the answer to the question raised in this appeal must depend upon whether there was an implied surrender of the lessee's rights when the usufructuary mortgage was executed in his favour by the lessor-mortgagor. And this obviously depends upon what was the intention of the parties at the time of the execution of the mortgage deed in favour of the sitting tenant to be gathered from the terms and conditions of the mortgage transaction in light of the surrounding circumstances of the case. It may be stated that in both the decisions of the Andhra Pradesh High Court on which reliance was placed by the respective counsel of the parties in support of his own contention the question was ultimately decided on proper construction of the terms and conditions of the mortgage transactions; in the earlier decision the court took the view that there was nothing in the mortgage deed to suggest that there was an implied surrender of the lessee's rights while in the later case the court held that the terms of the mortgage deed showed that the lessee had impliedly surrendered his rights. In other words, it all depends upon whether by executing a possessory or usufructuary mortgage in favour of a sitting tenant the parties intended that there should be a surrender of lessee's rights or not, and only if an implied surrender of lessee's rights could be inferred then the mortgagor would be entitled to have delivery of physical possession upon redemption but not otherwise.

8. Three or four things become amply clear on a fair reading of the aforesaid document (1) that through the deed commences by reciting that possession of the land has been delivered thereunder it refers to the fact that the original mortgagee (1st defendant) was actually cultivating the lands as a tenant of the mortgagor on crop share basis; that is to say the rental was payable by the tenant in the shape of a crop share; (2) that the mortgagor had agreed to pay interest at the specified rate of total loan of Rs.250/- and had undertaken to discharge the principal and interest; (3) that the rental of the land payable by the 1st defendant was to be adjusted against the interest payable by the mortgagor under this deed as well as the earlier deed and the cist payable by him to the Government; and excess, if any, to be paid to mortgagor; (4) that when the principal and interest are fully repaid such payment was to be endorsed on this deed and the deed as also the land shall be "delivered to the possession of mortgagor". It may be noted that the last portion of the document is equivocal in that it does not mention whether on redemption physical possession is to be delivered or symbolical possession is to be delivered to the mortgagor. But under the terms of the deed one thing is clear that during the currency of the mortgage the liability to pay rent to the lessor-mortgagor (albeit to be discharged by adjustment) is kept alive. If anything such a term clearly runs counter to any implied surrender of the lessee's rights. Secondly, there is no term fixed for redemption of mortgage property which means that it was open to the mortgagor to redeem the mortgage at any time that is to say even within a very short time and if that be so, would a sitting tenant cultivating the lands under a lease, who has obliged his lessor by advancing monies to him to tide over his financial difficulties give up his rights as a lessee no sooner redemption takes place? In our view, it does not stand to reason that he would do so. This circumstance coupled with a face that the mortgage deed keeps alive the lessee's liability to pay rent during the currency of the mortgage clearly suggests that no implied surrender was intended by the parties."

The afore tests, also, enjoined, the, counsel for the aggrieved defendants, to, from the mortgage attested, under Ex.P-3, (a) hence establish that therein, hence, occurring recitals,

wherefrom, an inference is drawable qua in contemporaneity, vis-a-vis, its recording, one Khindu, the predecessor-in-interest of the plaintiff, impliedly not surrendering or renouncing his rights, as a lessee, in, the mortgaged suit property. However, a reading of the order of mutation creating, a, mortgage, vis-a-vis, the suit property, and, as borne in Ex.P-3, (b) rather omits to make any communication qua, the predecesssor-in-interest of the plaintiffs, either expressly or impliedly, and, in contemporaneity, vis-a-vis, its recording, not surrendering or relinquishing his rights, as a lessee, in, the suit property/mortgaged property. The afore inference is enlivened, and, gets accelerated momentum, from the further factum, that, in the jamabandis with respect to the suit land, especially, the one(s) prepared subsequent to 1956, upto, the redemption of the mortgaged land, as, occurred, in, the year 1981, under Ex.P-4, (c) rather carrying no clear vivid echoings therein, that, the predecessor-in-interest of the plaintiffs, hence, continuing to pay rent in cash or in kind, to the mortgagor, nor any evidence makes, any display, qua the afore defrayments standing adjusted against the interest payable, vis-a-vis, the principal mortgage debt. The further effect thereof, is, (d) that post 1956, whereat the mortgage was created, vis-a-vis, the predecessor-in-interest of the plaintiffs, and, qua the suit property, rather there onwards, the interest(s) as a lessee, qua the suit property, of, the mortgagee rather stood terminated or extinguished or also stand abandoned, or hence the afore Khindu is inferred, to, impliedly surrender his right as a lessee, in, the suit property, (e) besides, upon the attestation of mutation qua redemption of the suit land, in the year 1981, as made under EX.P-4, hence, in contemporaneity thereto, the predecessor-in-interest of the plaintiffs, was, enjoined to handover vacant unencumbered possession, of, the suit property, to the mortgagor, the predecessor-in-interest of the defendants.

11. A perusal, of, plaint, bearing Ex.D-7, instituted in a previous suit, inter se the predecessor-in-interest, of, the defendants, and, one Khindu, and, with apparently in the afore previous lis, inter se, hence parties rather holding analogity, vis-a-vis, the litigating parties hereat, (a) also with the suit khasra number(s) in the afore suit, and, in the extant suit rather being similar, (b) thereupon,with a valid compromise decree, standing drawn therein, and, as borne in Ex. D-8, hence making a disclosure qua the afore suit being decreed, vis-a-vis, the plaintiff therein/defendants herein, and, the afore decree being anvilled (c) upon one Khindu making a statement on oath, as, borne in Ex. D-9, wherein he discloses qua his would not thereafter, interfering, with the possession, of, the predecessor-in-interest, of, the defendants, vis-a-vis, the suit land, (d) thereupon, the afore decree rendered in the year 1987, hence subsequent to the redemption of the suit property hence, earlier thereto occurring in the year 1981, fully estops the plaintiffs/respondents herein to contend that the defendants are not in possession of the suit land, (e) nor they can contend, that, in contemporaneity to the attestation of mutation qua redemption, made vis-a-vis the suit property, the defendants, and, or their predecessors-in-interest, did not acquire hence unencumbered possession thereof. As a corollary, the afore estoppel, hence engendered, through a verdict pronounced in a lis, whereunder the parties hold analogity, vis-a-vis, the parties hereat, (f) also wherein the subject matter is analogous, vis-a-vis the subject matter hereat, therethrough, also a inference stands garnered, qua, the plaintiffs being disempowered to contend, that, after 1956, upto, the redemption of the suit property hence occurring in the year 1981, either they or their predecessor-in-interest, despite, his being a mortgagee, vis-a-vis, the suit land, his or theirs hence continuing to also retain their status, as, a lessee(s) therein, (g) and, further effect thereof is that the legally expostulated necessity, of theirs being enjoined to establish qua theirs, not, impliedly surrendering apt right(s), of, tenancy in the suit property, despite, a mortgage being created in their favour, rather obviously remaining unestablished, reiteratedly rather they are estopped to contend, that, no implied surrender of tenancy hence occurring qua the suit land, (i) significantly also they can not contend, that, the lease initially created qua the suit property, importantly,

pre 1956 being upto the stage of apt redemption, hence kept in abeyance, also nor they can contend that, upon, apt redemption hence their right(s) as a lessee, in the suit property rather reviving.

12. Be that as it may, reiteratedly, the afore tests, enshrined in the judgment supra, remain unsatiated, vis-a-vis, the evidence existing in the extant case, (a) thereupon, the plaintiffs/respondent, cannot claim, that there was, no merger, in their predecessor-in-interest, and, on his demise, in them, of the dual status, of a, mortgagee as well as a lessee, (b) and, nor they can contend that on anvil thereof, theirs being lessee, vis-a-vis, the suit land, through out the life time of their predecessor-in-interest, and, on his demise theirs stepping, into his shoes, (c) nor on anvil of, the, afore purported, irreverable merger, they can contend that, upon apt redemption, either their predecessor-in-interest or on his demise, they, acquired hence, any absolute indefeasible right, title or interest, as tenants, vis-a-vis, the suit land.

13. The above discussion, unfolds, that the conclusions as arrived by the learned first Appellate Court, being not based, upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court has excluded germane and apposite material from consideration. Accordingly, the substantial questions, of law are answered in favour of the defendants/appellants, and, against the respondents/plaintiff(s).

14. In view of the above discussion, the instant appeal is allowed, and, impugned judgment and decree rendered by the learned First Appellate Court, upon, Civil Appeal No. 17 of 1995, is set aside, whereas, the judgment and decree rendered by the learned trial Court, upon, Civil Suit No. 132-1 of 1989 is affirmed and maintained. Consequently, the plaintiffs' suit is dismissed. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

National Insurance Company Ltd. .....Appellant.
Versus
Smt Indu Devi and others .....Respondents.

FAO No. 45 of 2013.
Reserved on : 5th March, 2019.
Decided on : 15th March, 2019.

Motor Vehicles Act, 1988 (Act) - Section-163-A – Motor accident – Claim application - No fault liability - Tribunal allowing application of legal representatives of deceased and imposing liability on insurer – Appeal against – Insurance company contending that deceased was negligent in driving offending vehicle resulting in breach of terms and conditions of policy - Being so, it has no liability – Held, question of negligence on part of driver in proceedings instituted under Section-163-A of Act doesn't arise - Insurance company failing to prove breach of terms and conditions of policy - Appeal dismissed - Award upheld. (Para 4)

Cases referred:
Shivaji and another vs. Divisional Manager, United India Insurance Co. Ltd. and others, 2018 ACJ 2161
United India Insurance Co. Ltd. vs. Sunil Kumar and another, 2018 ACJ 1

For the Appellant: Ms. Devyani Sharma, Advocate.
For Respondents No. 1 to 4: Mr. Anand Sharma, Advocate.
For Respondent No. 5: Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The Insurer of the offending vehicle, has, instituted the instant appeal before this Court, wherethrough, it, casts, a, challenge, upon, the award pronounced by the learned Motor Accident Claims Tribunal, Fast Track Court, Chamba, upon, MAC Petition No. 66/12/11, as stood, cast therebefore, under, the provisions of Section 163-A of the Motor Vehicles Act, 1988 (hereinafter referred to as the Act), (i)whereunder, compensation amount comprised, in, a sum of Rs.4,83,024/-, alongwith interest accrued thereon, at the rate of 7.5% per annum, and, commencing from, the date of petition till realization thereof, stood, assessed, vis-a-vis, claimants, (ii) and, the apposite indemnificatory liability thereof, was, fastened upon the insurer/appellant herein.

2. The learned counsel appearing, for, the appellant/insurer, of, the offending vehicle concerned, has, contended with much vigour (a) that with evidence comprised in FIR, borne in Ex.PW1/A, and, in the statement of PW-1, rather amplifyingly, evidencing, the, factum of deceased Suresh Kumar, suffering his demise, on account of his negligence, in driving the vehicle concerned, (b) hence, when his fault or tort of negligence rather stood proven, (c) thereupon, no compensation was payable to the petitioners, in a petition cast under the provisions of Section 163-A of the Act, (d) and, significantly when the afore statutory mechanism is available only, when, the vehicle concerned, is used in a public place, and, when no negligence or fault, is ascribed, to the driver concerned.

3. The afore submission is rejected, given (a) the claimants pleading qua the relevant mishap being a sequel, of, a latent mechanical defect rather erupting in the offending vehicle, (b) and, with Indu Devi (PW-4), in her cross-examination conducted by the counsel for respondent No.2, meteing, an, answer in the dis-affirmative, vis-a-vis, a suggestion thereat put to her, qua, no mechanical defect rather erupting in the offending vehicle concerned, (c) thereupon, even if, FIR, borne in Ex.PW1/A, ascribes negligence, vis-a-vis, the driver concerned, yet, the afore ascription, does not, attain any formidability, (d) prominently when the FIR, is, lodged at the instance of one Bhagat Ram, who, however, remained unexamined in the Court, (e) and, when PW-1, the police official concerned, who proved the afore FIR, was not, the investigating officer concerned, (f) and, when only, upon, report of the Investigating Officer, standing, placed on record, and, it carrying clear echoings qua the relevant investigations, precluding formation of any inference, qua the afore pleaded ground, being unavailable for espousal by the successors-in-interest, of, the deceased concerned, (g) whereas, the afore report rather not existing on record, thereupon, the afore defence reared by the insurer, is, unespusable.

4. Be that as it may, given the afore pleaded factum, existing in the petition, cast under the provisions of Section 163-A of the Act, and, it making palpable unfoldings qua no ascription, of, negligence being made, vis-a-vis, the deceased, by his successors-in-

interest, (a) and, when hence a petition, cast under the provisions of Section 163-A, of the Act, was hence maintainable, (b) besides preeminently with the afore mechanism being recourseable only in a scenario where, as extantly, fault, is, not ascribed, vis-a-vis, the driver of the offending vehicle concerned, (c) besides with the Hon'ble Apex Court in a case titled as ***United India Insurance Co. Ltd. vs. Sunil Kumar and another***, reported in ***2018 ACJ 1***, and, further with the Hon'ble Apex Court in a verdict rendered in a case titled as ***Shivaji and another vs. Divisional Manager, United India Insurance Co. Ltd., and, others***, reported in ***2018 ACJ 2161,*** (d) maintaining a consistent stand, qua the insurer, being, hence barred, to, upon a petition cast under the provisions of Section 163-A of the Act, rather raise defence of negligence, (d) given thereupon, the, holistic purpose behind the engraftment of the afore statutory provisions, being defeated, and, further that hence it would be self contradictory, and, would also defeat the very legislative intent behind its engraftment. Consequently, the afore rearing, by the insurer, of the defence of negligence, vis-a-vis, the deceased driver, is, unespousable in the extant petition. Consequently, the instant petition is held to be maintainable, and, findings, vis-a-vis, the issue appertaining to the maintainability of the claim petition, as, rendered by the learned tribunal are upheld.

5. The learned counsel appearing for the insurer, further contends with much vigour (a) that with a specific statutory mechanism rather standing contemplated in the Act, for assessing compensation, vis-a-vis, the disabled claimants or vis-a-vis the successors-in-interest, of, the deceased concerned, (b) thereupon, the adoption by the learned tribunal, of, the multiplier method was legally unbefitting. However, the learned counsel, appearing for the parties, fairly submitted at bar, that the compensation amount, as determined by the learned tribunal concerned, upon, its adopting the multiplier method, is, almost at par with, the, compensation as would be assessable, upon, adoption of the statutory formula, contemplated in the Act, (c) thereupon, the afore ground, for the afore reasons, cannot constrain, this Court to interfere with the compensation amount as stood assessed by the learned tribunal, vis-a-vis, the claimants.

6. For the foregoing reasons, there is no merit in the instant appeal, and, it is dismissed accordingly. The award impugned before this Court 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.

Shri Parkash Chand and another ……Appellants/Defendants.
Versus
Sh. Mast Ram (since deceased) through his legal heirs ……Respondents/Plaintiff.

RSA No. 144 of 2007.
Reserved on : 5th March, 2019.
Decided on : 15th March, 2019.

Code of Civil Procedure, 1908 –Order VIII Rule 1A (3) - Order XLI Rule 27 – Additional documents- Production of – Leave of Court – Justification – Plaintiff claiming ownership and possession over suit land by way of its allotment by Government to him as a landless person – Defendants resisting suit on ground of non-joinder of State as party - And disputed land being forest, could not have been allotted to plaintiff – Trial Court decreeing suit - First Appellate Court dismissing defendants' appeal as well as application filed under Order XLI

Rule 27 of Code for adducing additional evidence indicating land as forest land – RSA – Held, documents are relevant to substantiate plea of defendants regarding non-joinder of necessary party– RSA allowed – Matter remanded to Trial Court to permit defendants to place additional documents on record – Liberty reserved to plaintiff to move appropriate application for impleadment of State as party. (Para 9)

For the Appellants: Mr. Janesh Mahajan, Advocate.
For the Respondents: Mr. Hamender Chandel, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiffs' suit for rendition of a decree for permanent prohibitory injunction, and, in the alternative for possession, stands decreed, by the learned trial Court, and, in an appeal carried therefrom by the aggrieved defendants, before the learned First Appellate Court, the latter court has also rendered a verdict hence affirming the verdict made by the learned trial Court. The defendants/appellants herein are aggrieved therefrom, hence, have instituted the instant appeal before this Court.

2. Briefly stated the facts of the case are that the plaintiff filed a s suit with the averments that he is owner in possession of the suit land as detailed in the plaint, and, the defendants have got no right , title or interest over the suit land. It has been averred that the defendants on 2.9.1998 started causing unlawful interference in the suit land by collecting construction material with the aim to raise construction. Despite requesting not to do so, they continued with the interference. It has been averred that the suit land had been allotted to the plaintiff being a landless and is coming in his ownership since the allotment.

3. The defendants contested the suit and filed written statement, wherein, preliminary objections have been taken qua estoppel, cause of action, maintainability, non joinder and misjoinder of necessary parties. On merits, it had been averred that the suit land is forest land and thereby could not be allotted and in case an allotment has been made that is illegal and liable to be cancelled. It had also been averred that the defendant is in possession of part of the suit land comprised in Khasra no.1481 and had constructed a cow shed upon this land. Bamboo plants had also been planted. The possession is since the time of ancestors of defendants and the averments made by the plaintiff are absolutely wrong. The defendants had claimed nothing over the remaining part of the suit land except on Khasra number. It had also been averred that the possession of defendants being open, hostile, continuous and to the knowledge of the plaintiff, the defendant shave become owner by way of adverse possession.

4. The plaintiff filed replication to the written statement of the defendant, wherein, he denied the contents of the written statement(s) 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 plaintiff is entitled for the decree of permanent and prohibitory injunction, as prayed for?OPP
2. Whether plaintiff is entitled for the alternate relief of possession, as prayed for?OPP.

3. Whether the suit is not maintainable? OPD.
4. Whether suit is bad for non joinder and mis joinder of necessary parties? OPD.
5. Whether plaintiff is estopped by his act and conduct from filing the present suit?OPD.
6. Whether plaintiff has no cause of action? OPD.
7. Whether suit is not properly valued for the purpose of court fee and jurisdiction?OPD
8. Whether plaintiff has no locus standi to file the present suit?OPD.

8-A. Whether defendants have become owners of Khasra No.1481 by way of adverse possession, as alleged?OPD.

9. 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, aggrieved defendant(s), 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 defendants/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, on 14.05.2008, this Court, admitted the appeal instituted by the defendant(s)/appellant(s) against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

1. Whether both the courts below committed grave procedural illegality and irregularity in denying the relief of production of documents by arbitrarily rejecting the application under Order 8, Rule 1(3) CPC filed before the trial Court and under Order 41, Rule 27, filed before the lower appellate Court?

2. Whether both the courts below have put wrong reliance on the report of the local commissioner without adverting to the proper procedure and law as envisaged under Order 26 of the Code of Civil Procedure?

Substantial questions of Law No.1:

8. The learned counsel appearing for the aggrieved defendants/appellants herein, has contended with much vigour before this Court, (i) that the order of dismissal, made, by the learned trial Court, on 10.08.2005, upon, an application preferred therebefore, under, the provisions, of, Order 8, Rule 1(3) of the CPC, wherein, the aggrieved defendants sought leave to adduce documents, as also espoused leave, to, adduce evidence thereon, hence is infirm, (ii) and, rather has precluded rendition of apt findings, upon, apposite issue No.4, appertaining to non joinder, and, mis joinder, of, necessary parties. The afore order of dismissal pronounced by the learned trial Court, upon, the afore application, prima facie appears to suffer, from, an infirmity, (iii) given therethrough, the, defendants striving to contest, the, plaintiff's espousal qua the relevant suit khasra numbers being validly allotted to him, by the government of Himachal Pradesh, given his, being a landless person, (iv) AND, though the defendants reared a challenge qua the validity, of, the apposite allotment of the suit khasra numbers, by the government, by theirs in their written statement, hence, pleading qua the relevant suit khasra numbers rather being reflected, as, forest land, in, the revenue papers, thereupon, it being unallotable, vis-a-vis, the plaintiff.

Moreover, the afore challenge, stood also , echoed by the defendants, in their written statement, instituted to the relevant paragraph of the plaint, and, with the revenue records, as, appertaining to the suit khasra numbers, upon, hence bearing evident concurrence therewith, (v) thereupon, the aggrieved defendant(s) would hence hold a right to contest, that, the afore order of dismissal pronounced, by the learned trial Court, (vi) upon, the afore application being unmeritworthy, and, would also be enabled hence to further contend, that, for want of grant, of, espoused leave, (vii) hence, theirs being concomitantly forbidden to adduce evidence qua therewith, thereupon, the findings adversarial to him/them, as, pronounced upon issue No.4, rather warranting interference by this Court. The reasons, qua, pendency, of, a CWP before this Court, wherein challenge, is, made to the relevant allotment, as, assigned by the learned trial Court, for not, considering the defendants' espousal, hence, challenging the allotment of the suit land to the plaintiff, and, hence it declining the apt relief, is also misplaced, as no material, is, placed on record, that, the High Court, when, seized with the matter, also restraining the learned Civil Judge, to proceed with the lis.

9. Furthermore, in the afore endeavour, a perusal of the jamabandi appertaining to the suit land, and, appertaining, to the year 1978-79, and, enclosed in Ex.D-2, (a) discloses that the some of the suit khasra numbers, as, echoed therein rather carrying, the, classification of "Jangal Mahkuba gare Mahduda". In the column of ownership thereof, the State of Himachal Pradesh is recorded as owner, (b) and, in the column of possession, and, cultivation thereof, the, predecessor-in-interest of the plaintiff, and, one Smt. Mansa, besides the forest department are respectively disclosed, to be holding possession thereof. Similarly, Ex.D-3, exhibit whereof, is, a jamabandi appertaining to the suit land, and, appertains to the year 1983-84, hence rather alike therewith echoings occur. However, 10 years therefrom, rather in the jamabandi, for the year 1993-94, embodied in Ex. D-4, the aforesaid entries occurring, in the afore jamabandi, more especially, vis-a-vis, the prior thereto jamabandi, as, appertaining, to, the year 1988-89, rather reflect(s) a palpable change in the afore echoings, vis-a-vis, the suit khasra numbers, (c) wherein the suit khasra numbers, rather are reflected, to, carry, the, classification, of, "Kuhali Abal". It appears that, in, the interregnum, since, the year 1988-89 upto 1993-94, whereat the allotment of land, appears to be made, vis-a-vis the plaintiff, by the State Government, the, plaintiff brought the suit khasra numbers, to cultivation, hence, the afore requisite changes obviously occurred. The afore discussion, unfolds, that the learned trial Court was enjoined, to not, in a perfunctory manner, reject the afore application , rather was required to make, an affirmative order thereon, and, also was required to permit the aggrieved defendants, to, adduce evidence thereon. The afore endeavours would also ensure eruption, of evidence, qua, the validity, of, reflections, vis-a-vis, the suit khsra numbers, at the time contemporaneous, to the, allotment thereof, vis-a-vis, the plaintiff, and, thereupon, would facilitate, rendering, of, apt and befitting findings upon issue No.4, (d) and, also upon an affirmative order being pronounced, upon, the afore application, by the learned trial Court, the, plaintiff may be facilitated, to, move an application cast under the provisions, of, under Order 1, Rule 10, CPC, for, enabling him, to, add in the array of defendants, the, State of Himachal Pradesh. However, the mechanical, dismissal of the afore application, by the learned trial Court, has curtailed and scuttled, the, eruption of the afore dire legal necessity, and, has caused gross injustice, to the aggrieved defendants. Consequently, reiteratedly, the rendition, of, apt findings upon the afore issue is of utmost importance, in making a further determination, whether the plaintiff is entitled, to rendition of a decree for permanent injunction, and, also for a decree for demolition of structure, as, constructed, upon, the suit khasra number.

10. The effect of the afore discussion, is that the concurrent judgments, and, decrees rendered by both the learned Courts below are quashed and set aside. In sequel, substantial question of law No.1 is answered in favour of the appellants, and, against the defendants. Consequently, the matter is remanded to the learned trial Court, with, a direction to permit the aggrieved defendant(s) to adduce evidence in consonance with the afore application, and, thereafter, if the plaintiff, moves an application for adding the State of Himachal Pradesh, as party, in the array of defendants, to also decide the same in accordance with law. The learned trial Court is further directed to complete the aforesaid exercise, within, six months from today, and, to, also render a fresh decision upon the lis. The parties are directed to appear before the learned trial Court, on, 29th March, 2019. All pending applications also stand disposed of. Records be sent back forthwith.

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

Prakash Chand ....Appellant.
Versus
Babu Ram and others ....Respondents.

FAO No. 336 of 2018.
Reserved on : 8th March, 2019.
Decided on : 15th March, 2019.

Employees' Compensation Act, 1923 (Act) - Section 4 (c)(ii) - Schedule I -Motor accident- Claim application- Permanent disability - Loss of earning capacity – Determination of by qualified medical practitioner – Necessity of – Held, provision of law requiring assessment of loss of earning capacity of workman only by qualified medical practitioner resulting from his permanent disability because of injury not specified in Schedule-I of Act is applicable only when injury has not resulted into his permanent total functional disability from performing his avocation, he was doing before accident – And he is still empowered to perform his avocation though there is some diminution or reduction in his earnings due to said disability. (Para 5)

Employees' Compensation Act, 1923 (Act) - Section 4 (c)(ii) - Schedule I- Motor accident – Claim application- Claimant driver by profession – Suffering permanent total disability of right limb – Disability assessed 30% with respect to entire body – Commissioner granting compensation on basis of percentage of assessed disability only - Appeal against – Held, disability certificate showing permanent total loss of functioning of right limb – Claimant being driver cannot drive vehicle at all on account of disability - Medical officer not necessarily to depose that claimant unable to perform callings of his avocation as driver - Commissioner wrong in assessing compensation – Compensation re-assessed by taking it as case of total functional disability. (Para 5)

Employees' Compensation Act, 1923 (Act) - Section 4–A - Motor accident – Payment of compensation – Default by employer – Penalty - Imposition of - Held, when mandate of Section 4-A (1) & (2) of Act is not complied with by employer, Commissioner must invoke these provisions and impose penalty on him for such non-compliance. (Para 6)

Case referred:

Sri Eregowda alias Vasu vs. Divisional Manager, United India Insurance Company Ltd. and another, (2018)15 SCC 246

For the Appellant: Mr. J. L. Bhardwaj, Advocate.
For Respondent No.1 to 3: Mr. B.R. Sharma, Advocate.
For Respondent No.4: Mr. Raman Sethi, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal stands directed, against, the award pronounced, by, the learned Commissioner, Empployee's Compensation, Court No.2, Shimla, upon, Claim Application No. 4/2 of 2015, whereunder, compensation amount, borne in a sum of Rs.5,28,642/- along with interest @12% per annum from 23.10.2013, till its realization, stood assessed, vis-a-vis, the disabled claimant, and, the indemnificatory liability thereof, stood, fastened upon the insurer of the offending vehicle.

2. Upon hearing the learned counsel appearing for the parties, this Court, has, framed the hereinafter extracted substantial questions of law, for, rendering hence an adjudication thereon:-

> "1. Whether the finding recorded by the Ld. Commissioner below that 30% disability of the appellant with respect to his right lower limb cannot be construed 100% disability qua his avocation is sustainable, in view of Ex.PW4/A, i.e. disability certificate where it is specifically mentioned that 30% disability causes permanent loss of function?
>
> 2. Whether the Ld. Commissioner below is right in not awarding the penalty as envisaged under Section 4-A of the Employee's Compensation Act, 1923, especially when the respondents No.1 to 3 being the employers of the appellant did not pay the amount within oe month from the date of accident despite the fact that respondents No.1 to 3 were aware about the accident, and, the appellant sustained injuries, during the course of deployment with them?"

Substantial question of Law No.1.

3. Uncontestedly, the claimant prior to the disabling injuries, as a sequel of the relevant mishap, hence being entailed, upon, him, was engaged as driver, in the relevant vehicle, by respondents No.1 to 3 herein. There is no wrangle about the trite factum of the relevant mishap, hence, occurring during the course of his performing, his employment, under, his afore employers. The disability certificate, borne in Ex.PW4/A, makes a vivid pronouncement qua 30% disability being encumbered, upon, the claimant, and, the afore disability appertaining to the right lower limb, (a) and, also therein, a, further pronouncement is made, that, the afore disabling injuries, in the afore percentum, appertaining to the right lower limb, rather sequeling, a, cent percent disabling effect, upon, the functioning of the afore right lower limb, whereon 30% disability, stood entailed, upon the disabled claimant.

4. PW-4, Dr. Amit Thakur, proved Ex.PW4/A. In his deposition, comprised in his examination-in-chief, he has made candid and vivid echoing qua the disabling injuries, being permanent in nature. Consequently, the learned counsel appearing for the appellant herein, has, contended with much vigour before this Court, that, with there being, a, cent percent loss of functioning of the right lower limb, (a) with a concomitant permanent loss of earning to the disabled claimant, from, his hitherto avocation as driver, (b) thereupon,

rather with a cent percent functional disability, on all facets or quarters, being encumbered, upon, him, (c) hence, in the learned Commissioner, in the impugned award, in proportion to the recited per centum of the disability, rather computing his wages at Rs.24,00/- per month, and, thereafter applying the relevant factor, has, wandered astray, and, has committed a legal impropriety. The learned counsel appearing for the insurer, whereuponwhom, the indemnificatory liability, vis-a-vis, the compensation amount, stood fastened, has, contended with much vigour, before this Court (d) that the afore manner of computation of compensation, by the learned commissioner, is, both proper, and, apt, it, falling within the domain of Section 4(c) (ii), of, the Employee's Compensation Act (hereinafter referred to as the Act), provisions whereof stand extracted hereinafter:-

> "4(c)(ii) In the case of an injury not specified in Schedule I, such percentage of the compensation payable in the case of permanent total disablement as is proportionate to the loss of earning capacity (as assessed by the qualified medical practitioner) permanently caused by the injury)"

(e) wherein with specificity, and, explicity, a mandate is borne qua, vis-a-vis, any injury not specified in Schedule-I, as, is the injury hereat, (f) thereupon the disburseable compensation, computable, vis-a-vis, the permanently disabled claimant, enjoining, it, bearing hence proportion, with, the loss of earning capacity, rather, encumbered upon the disabled claimant, (g) and, the loss of earning capacity, being enjoined to be assessed only, by, a qualified medical practitioner. Furthermore, he submits that hereat the disability, borne in 30%, appertains to the loss of function, of, the right lower limb, (h) thereupon, when the medical practitioner concerned, has not adduced any evidence, vis-a-vis, the consequential therewith proportional loss of earning capacity, hence, being entailed upon the disabled claimant, hence, the reduction, in, to 30%, as, meted by commissioner, vis-a-vis, the wages drawn by the disabled claimant, rather being an appropriate deduction.

5. However, for the reasons to be assigned hereinafter, the afore submission falters, and, is rejected. (a) The afore submission would carry weight, only when, the disabling injuries, as, entailed in the per centum disclosed in the apposite disability certificate, do not, rather completely forbid, the disabled claimant, to, earn any income, from, his hitherto avocation, (b) rather even after, his being encumbered with the apposite disability, he is empowered to perform his hitherto callings, of his apposite avocation, (c) and, upon there being evident diminution or reduction in his earnings, therefrom, (d) or in the absence of the afore evidence, the medical practitioner rather makes an echoing, that, in consequence, to, the entailment of, a, disability, upon, the person of the disabled claimant, he still is equipped to perform the functioning or callings of his avocation, though, his functions being impaired, with a consequent diminution or reduction, in, the earnings derived by him, from, his hitherto avocation. However, contrarily hereat, the disability certificate, as aforestated, amplifyingly, and, with clarity rather makes vivid echoings (e) that the disability encumbered, upon, the disabled claimant, rather sequeling a cent per centum loss of functioning of the right lower limb. The further effect thereof, is that, conspicuously when the disabled claimant, is, a driver, and, when the easy facile movement, of, the right lower limb, is imperative, hence for his performing the callings of his hitherto avocation, as, driver, (f) and, when, the facile movement, of his, right lower limb, is rather cent per centum, (g) thereupon, it is to be concluded, that, the entailment, of, cent per centum apposite functional disability, upon, him, rather did not enjoin, the medical practitioner concerned, to, render any evidence, that, thereafter the petitioner is enabled to perform the callings of his hitherto avocation, as, driver, (h) nor further evidence is required to be adduced, that, there would be, given the cent per centum functional disability entailed upon him, hence, some diminution or reduction in his earnings therefrom, (i) nor it is required to be proven, that, any per centum of reduction or diminution, in earnings therefrom, rather, comprising

the computable compensation to be ordered to be disbursed, vis-a-vis, the disabled claimant. In sequel, this Court rather discountenances the assessment of wages, in, 30% by the learned Commissioner, vis-a-vis, the proven wages drawn by the disabled claimant, and, hence this Court proceeds to assess compensation, vis-a-vis, the disabled claimant, in, the hereinafter extracted manner:-

Monthly wages	Factor	Total Compensation
Rs.8000/-	203.83	Rs.16,30,640/-

In coming to the afore conclusion, this Court finds, support from a decision rendered by the Hon'ble Apex Court, in, a case titled as ***Sri Eregowda alias Vasu vs. Divisional Manager, United India Insurance Company Ltd., and, another,*** reported in ***(2018)15 SCC 246.*** Consequently, substantial question of law No.1 is answered in favour of the appellant, and, against the respondents.

Substantial question of law No.2.

6. The claimant had averred in the claim petition, that, his employers omitted to beget mandate compliance, vis-a-vis, the peremptory mandate borne in sub-sections (1) and (2) of Section 4A of the Act, provisions whereof stand extracted hereinafter:-

> 4A. 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) In cases where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and, such payment shall be deposited with the Commissioner or made to the workman, as the case may be, without prejudice to the right of the workman to make any further claim.
>
> (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 at the rate of 12 per cent per annum or at such higher rate not exceeding the maximum of the lending rate 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 ad interest thereon, pay a further sum not exceeding fifty per cent of such amount by way of penalty."

and, when hence his employers, were, issued notices, of, the claim petition, reared against them by the disabled claimant, (a) and, hence, were heard, thereupon, with evident breach of, the peremptory mandate borne in sub-sections (1) and (2) to Section 4A of the Act, hence emerging, rather necessitated, the, invocation of clause (b) of sub-section (3) of Section 4A, of the Act, (b) hence, in consonance therewith, this Court proceeds to award penalty quantified at 25%, vis-a-vis, the afore compensation amount, and, liability thereof be burdened, upon, the employers of the disabled claimants. Accordingly, substantial question of law No.2 is answered in favour of the appellant, and, against the respondents.

7. For the reasons recorded hereinabove, the instant appeal is allowed and the impugned award is modified in the afore manner. Consequently, the disabled

claimant/appellant herein is held entitled to a total compensation of Rs.16,30,640/- along with interest @12% per annum from 23.10.2013 till the deposit of the entire awarded amount. The aforesaid compensation amount shall be indemnified by the insurer of the offending vehicle, i.e. respondent No.4 herein. Furthermore, the disabled claimant is also held entitled to penalty quantified in 25 per centum of the aforesaid compensation amount, and, the afore quantified sum of penalty shall be, within three months from today, paid by respondents No.1 to 3 to, the disabled claimant. 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.

Ramesh Kumari and others .....Appellants/Plaintiffs.
Versus
Chander Kumar and others. .....Respondents/defendants.

RSA No. 515 of 2004.
Reserved on : 11th March, 2019.
Decided on : 15th March, 2019.

Joint land- Rights inter-se co-sharers- Held, ownership of joint land is vested in all co-sharers- They hold such land under unity of title and community of possession- Co-sharer in exclusive possession cannot appropriate land exclusively to the exclusion of other co-sharers unless their ouster is pleaded and proved- On facts, possession of defendants found to be for and on behalf of all co-sharers including plaintiffs- Plaintiff entitled for permanent injunction for restraining defendants from raising construction till it is partitioned in accordance with law- RSA allowed- Decrees of lower courts set aside- Suit decreed. (Para 8)

For the Appellants: Mr. Romesh Verma, Advocate.
For Respondents No.4 to 7, (a) 8(b) and 9: Mr. Ramakant Sharma, Sr. Advocate with Ms. Soma Thakur, Advocate.
None for other respondents.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiffs' suit for rendition of a decree for permanent prohibitory injunction, vis-a-vis, the suit land, and, against the defendants, stood dismissed, by the learned trial Court. In an carried therefrom by the aggrieved plaintiffs, before the learned First Appellate Court, the latter court has also rendered a verdict hence affirming the verdict made by the learned trial Court. The plaintiffs/appellants herein are aggrieved therefrom, hence, institute the instant regular second appeal before this Court.

2. Briefly stated the facts of the case are are that the plaintiffs instituted a suit for injunction to restrain the defendants from changing the nature of the suit and and from dispossessing the plaintiffs. The allegations were that defendants No.4 to 9 were strangers to the suit land, and, that they in connivance with defendants No.1 to 3, who were co-sharers, were threatening to put the suit land to their exclusive use to which they had not

right. They prayed that the defendants No.1 to 3 be restrained from changing the nature of the suit land in any manner whatsoever, and, in case the defendants are found to have changed the nature of the suit land during the pendency of the suit, relief of mandatory injunction with direction to restore status qua ante be passed. They further pray that the defendants No.1 to 9 be restrained from causing dispossession of the plaintiffs from the suit land in any manner whatsoever which is jointly possessed by the plaintiff and defendants No.1 to 3 and that the defendants No.4 to 9 be restrained from interfering in the suit land in any manner whatsoever.

3. The defendants contested the suit and filed separate written statements. Defendants No.1 to 3 admitted the claim of the plaintiffs, however, they have denied the averment qua theirs conniving with defendants No.4 to 9. Defendants No.4 to 9 , in their written statement averred that they were owners in possession of 3 biswas of land out of the suit land. Their possession over 3 biswas of land had been since the year 1945-46. They had their cow-shed on this piece of land. The possession was peaceful, hostile and continuous. They asserted that they had no connection with the rest of the land. It was also pleaded that defendants No.1 and 2 had filed a suit against defendants No.5 and 6 in respect of this very cow-shed which had ended in a compromise. It was alleged that the suit now filed by the plaintiffs was collusive between the plaintiffs and defendants No.1 to 3.

4. The plaintiff filed replication(s) to the written statement(s) of the defendant(s), wherein, they denied the contents of the written statement(s) 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 entitled for the relief of permanent prohibitory injunction? OPP
2. Whether the suit is not maintainable? OPD.
3. Whether defendants No.4 to 9 have become the owners of the land by way of adverse possession? OPD.
4. 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, aggrieved plaintiffs, 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/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, on 23.03.2005, 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 questions of law:-

1. Whether the inferences and conclusions, as drawn by both the courts below are based upon surmises and conjectures and since the appellants were found to have title over the suit land, therefore, decree for permanent prohibitory injunction was required to be passed and also on the basis of title, decree for possession with respect to 3 biswa of land should have

been passed, as explained in the report of Local Commissioner, Ex.DW9/A and Ex.DW9/B?

2. Whether the appellants being not party to the previous litigation and compromise, Ex.DW2/A, therefore, they are not bound by the same and no benefit could be given to the respondents?

Substantial questions of Law No.1 and 2:

8. Undisputedly, the suit property is undivided inter se, the, all co-owners in the suit, i.e. the plaintiffs, and, defendants No.1 to 3. However, defendants No.4 to 9 are not co-owners in the suit property. Nonetheless, under a compromise, borne in Ex.DW2/A, the afore defendants, rather surrendered their possession, qua defendants No.1 to 3, vis-a-vis, the khasra numbers disclosed therein. As aptly concluded by the learned first appellate Court, that, with the afore exhibit standing drawn, inter se, defendants No. 1 to 3, and, defendants No.4 to 9, and, with the latter defendants, rather not holding, any, pre existing right in the suit property, (a) rather with, the, former defendants hence evidently holding rights, as, co-owners, in, the suit property, (b) thereupon, the afore document, did not, require any compulsory registration, hence for its acquiring, the, requisite efficacy. Even if, the afore exhibit, does acquire any probative vigour, and, obviously when reverence is to be meted thereto, only, for determining, that, rather only possession therethrough, vis-a-vis, the khasra number disclosed therein, hence standing restored, to, defendants No.1 to 3, (c) yet the assumption of possession thereunder by defendants No.1 to 3, would not, dis-entitle the plaintiffs, to make a valid claim, for rendition of a decree for permanent prohibitory injunction. The reason for forming the afore inference, is, sparked by (d) the suit property remaining undivided, and, until dismemberment of the entire suit property rather occurs, by metes and bounds, (e) hence thereupto, the solemn principle ingraining, the, jurisprudential concept of co-ownership, embedded in the canon qua all co-owners, holding unity of title, and, community of possession, vis-a-vis, the entire undivided suit khasra numbers, rather remaining intact. The further effect, thereof being, (f) that, no portion of the undivided suit property being available for exclusive appropriation by any co-owner, even if in exclusive possession thereof, (g) rather any physical or constructive possession of any exclusive tract, of, any undivided suit property hence being construable to be vicarious possession, for or on behalf of all other co-owners, who, however, do not hold any exclusive possession thereof, (h) with the exception that unless complete ouster therefrom of other co-owners hence is pleaded, and, also stands proved, (i) whereas, with the apt complete ouster, vis-a-vis, the suit khasra numbers remaining unpleaded, and, also remaining unproven, (j) thereupon, upon, vindicating the afore solemn principle hence governing the jurisprudential concept, of, uncontestedly hereat undivided suit property, (k) it is concluded that it was insagacious for both the learned courts below to till occurrence, of, partition of the suit property, hence, deny the relief of permanent prohibitory injunction to the plaintiffs, (l) preeminently hence when it would beget, the, ill-consequence qua in garb thereof, the defendants being impermissibly, hence, being leveraged, to, put to their exclusive user, the, yet undivided suit property.

9. The above discussion, unfolds, that the conclusions as arrived by the learned first Appellate Court, as well as, of the learned trial Court being not based, upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first both the learned courts below have excluded germane and apposite material from consideration. Accordingly, the substantial questions, of law are answered in favour of the appellants/plaintiffs, and, against the respondents/defendants. .

10. In view of the above discussion, the instant appeal is allowed, and, the concurrent impugned judgments, and, decrees rendered by both the learned courts below are set aside. Consequently, the plaintiffs' suit is decreed for permanent prohibitory injunction, and, defendants No.1 to 3 restrained from changing the nature besides ousting the plaintiffs, from, constructive/vicarious possession, upon, the suit land, in any manner, whatsoever, till the dismemberment, of, the suit land, by metes and bounds, rather occurs, whereas, defendants No.4 to 9 being strangers to the suit land are also restrained from interfering in the suit land in any manner whatsoever by themselves or through their agents, servants assigns etc. 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 DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.

HPTDC ……Appellant.

Versus

Narinder Kumar ……Respondent

LPA No. 193 of 2016 with
LPA No. 10 of 2019
Decided on: 11.03.2019

Industrial Disputes Act, 1947- Section 25-F – Retrenchment -Notice -Requirement- Employer orally terminating services of workmen without notice- On reference, Labour Court directing their reinstatement and continuity in service but without back wages- Hon'ble Single Bench dismissing writs of employer and upholding award of Labour Court- LPA - Employer contending that workmen were engaged casually and no notice was required to be given to them before dispensing their services-Employer not producing any agreement between it and workmen concerned-Workmen had completed period of 240 days in a calendar year with employer-Workmen could not have been retrenched without serving statutory notice on them- LPA dismissed-Judgment of Hon'ble Single Bench upheld. (Paras 8 and 9)

Cases referred:

Anoop Sharma vs. Executive Engineer, Public Health Division No. 1, Panipat (Haryana), (2010) 5 SCC 497
Gangadhar Pillai vs. Siemens Ltd., (2007) 1 SCC 533
Mackinnon Mackenzie and Company Limited vs. Mackinnon Employees Union, (2015) 4 SCC 544
Municipal Council, Samrala vs. Raj Kumar, (2006) 3 SCC 81
Union of India and others vs. Ramchander and another, (2005) 9 SCC 365

For the appellant: Mr. Shivank S. Panta, Advocate.
For the respondent: Mr. Neel Kamal Sood and Mr. Vasu Sood, Advocates.

The following judgment of the Court was delivered:

<u>Dharam Chand Chaudhary, Judge</u> <u>(Oral)</u>

This judgment shall dispose of both the appeals though decided vide separate judgments, however, involving similar questions of law and facts.

2. The record reveals that respondent No.1 in these appeals-writ petitioners were initially engaged as Beldars on the establishment of the appellant-Corporation w.e.f. 14.05.1997 and 18.04.1997 respectively. They continued, as such, till 30.04.1998. Later on, they were engaged as Junior Draughtsman on daily wage basis w.e.f. 1.5.1998 and continued in this capacity till 18.3.2000, when their services were orally terminated allegedly without assigning any reason. Against their retrenchment, they both approached learned Administrative Tribunal by way of filing original application(s). Since they both have raised demand under the provisions of Industrial Disputes Act also, therefore, the original applications they preferred were disposed of. Subsequently, on failure of the conciliation proceedings, both the writ-petitioners had raised industrial dispute before the appropriate Government which was sent for adjudication to learned Industrial Tribunal-cum-Labour Court. The references made in both the petitions read as follows:-

<u>Reference No. 121 of 2004:</u>

> "Whether the termination of services of Shri Narender Kumar S/o Shri Kuldeep Singh ex daily wages worker by the Managing Director, HP Tourism Development Corporation Ltd. Ritz Annexe, Shimla 171001 (2) the Assistant Engineer, Tourism Development Corporation, Sub Division, Rohroo, District Shimla, HP w.e.f. 8.3.2000 without complying the provisions of Industrial Disputes Act, 1947 as alleged by the workmen is proper and justified? If not, what relief of service benefits Shri Narender Kumar S/o Shri Kuldeep Singh is entitled to?"

<u>Reference No. 64 of 2005:</u>

> "Whether termination of services of Shri Prem Raj S/o Shri Ram Chand, ex daily wage junior draughtsman by the (1) the Managing Director, HP Tourism Development Corporation Ltd., Shimla-1 (2) the Assistant Engineer, Tourism Development Corporation, Sub Division, Barog, Tehsil and District Solan. Now at Holiday Home Hotel, Shimla, HP w.e.f. 8.3.2000 without complying the provisions of Industrial Disputes Act, 1947 is proper and justified? If not, what relief of consequential service benefits including reinstatement, seniority, back wages and amount of compensation, the above aggrieved workman is entitled to."

3. Learned Labour Court after having taken on record the pleadings of the parties and also the evidence they produced, answered the references in affirmative and while holding the termination of the services of the writ-petitioners violative of the provisions contained under Section 25-F of the Industrial Disputes Act has ordered to reinstate them with seniority and continuity, of course without back wages.

4. The respondent-establishment aggrieved by the award passed by learned Labour Court assailed the same by way of filing Civil Writ Petitions No. 1627 of 2010 and 4441 of 2011 in this Court. Learned Single Judge, on appreciation of the record and also affording opportunity of being heard to the parties on both sides, has upheld the impugned award and dismissed the writ petitions vide judgment under challenge in these appeals.

5. The complaint is that learned Labour Court and for that matter learned Single Judge has failed to appreciate that both the writ-petitioners were engaged as casual

labourer on contract basis and their job conditions were being governed by the agreement duly executed between them and the respondent-establishment. Since in the agreement, the period of their engagement was clearly mentioned only for 89 days, of course, though extended from time to time, the writ-petitioners, however, were in the knowledge of their retrenchment at any time. The respondent-establishment has later on decided not to continue/renew the contract, therefore, their services were allegedly dispensed with and no notice was required to be issued.

6. Mr. Shivank S. Panta, learned standing counsel representing the respondent-management (appellant) in these appeals has strenuously contended that the Labour Court has legally erred in answering the reference made by the writ-petitioners in affirmative and reinstating them with continuity as Junior Draughtsman and seniority. It is canvassed that both the writ-petitioners were in the knowledge of their contractual appointment for a specific period and as such, no notice was required to be issued before retrenchment of their services. Learned Single Judge has also stated to be not appreciated the legal as well as factual position while dismissing the writ petitions and after holding the award passed by learned Labour Court.

7. On the other hand, Mr. Neel Kamal Sood, Advocate assisted by Mr. Vasu Sood, Advocate while repelling the submissions so made on behalf of the respondent-management has contended that for want of evidence, learned Labour Court has rightly concluded that engagement of the writ-petitioners was not contractual or governed by the terms and conditions of any agreement. Since they have completed 240 days in a calender year, therefore, according to learned counsel, it was obligatory on the part of the respondent-management to have issued a month's prior notice or paid wages in lieu thereof before resorting to their retrenchment. According to Mr. Sood, the judgment passed by learned Single Judge, in these circumstances, calls for no interference in these appeals.

8. On analyzing the rival submissions and also going through the record as well as the law cited at Bar, we find nothing on record except the ground raised in appeals that engagement of the writ-petitioners on daily wage basis with the respondent was contractual and governed under a duly executed agreement. The agreement(s), if any, executed by the writ-petitioners have not seen the light of the day being not produced during the course of the trial of the reference made by appropriate Government to the Industrial Disputes Act. In para 14 of the impugned award, learned Labour Court has noted the failure of respondent-management to prove on record the engagement of the petitioners on contract basis as the contract/agreement, if any, executed between the writ-petitioners and the respondent-management has not been produced in evidence.

9. Interestingly enough, the writ-petitioners were allowed initially to work as Beldars. Thereafter, as Junior Draughtsman w.e.f. 1997 till 2000. There is no dispute so as to they completed 240 days in a calender year. Being so, the respondent-management should have resorted to the bare minimum requirement i.e. issuance of one month's prior notice as mandatorily required under Section 25-F of the Industrial Disputes Act before resorting to their retrenchment. For want of evidence that engagement of the writ-petitioners was contractual one, there is no substance in the submissions that notice was not required to be issued or that the writ-petitioners were in the knowledge of retrenchment of their services by the respondent-management at any time. Mr. Panta, learned Standing Counsel has placed reliance on the judgment of the Apex Court in ***Municipal Council, Samrala*** V. ***Raj Kumar (2006) 3 SCC 81***. However, the ratio of this judgment is not attracted in this case for the reason that engagement of the writ-petitioners with the respondent-management was on contract basis is not at all proved as pointed out at the very out set. Similar is the ratio of the judgment of the Apex Court in ***Gangadhar Pillai*** V.

Siemens Ltd. (2007) 1 SCC 533, hence, not attracted in the case in hand because neither the writ-petitioners have claimed regularization nor was it the reference made by the appropriate Government to the Labour Court. As a matter of fact, the dispute that the termination of the services of petitioners is violative of the provisions contained under the Industrial Disputes Act or not was the reference made to learned Labour Court for adjudication. Even their services have not been ordered to be regularized by the Labour Court and as per award they have only been reinstated with seniority and continuity in service. The ratio of the judgment rather reveals that in a case where the workman has worked for 240 days in a calender year, the compliance of Section 25-F should be made before retrenchment of his services. The ratio of the judgment again that of the Apex Court in ***Union of India and others*** V. ***Ramchander and another (2005) 9 SCC 365*** is also not applicable in the case in hand, because here the writ-petitioners admittedly have completed 240 days on daily wage basis on the establishment of respondent-management.

10. Now if coming to the law laid down by the Apex Court in ***Anoop Sharma*** V. ***Executive Engineer, Public Health Division No. 1, Panipat (Haryana), (2010) 5 SCC 497***, it has been categorically held that the provisions contained under Section 25-F (a) (b) of the Industrial Disputes Act are mandatory and non-compliance thereof renders the retrenchment of an employee nullity. This judgment reads as follows:-

> *"17. This Court has repeatedly held that Section 25-F(a) and (b) of the Act is mandatory and non-compliance thereof renders the retrenchment of an employee nullity - State of Bombay v. Hospital Mazdoor Sabha AIR 1960 SC 610, Bombay Union of Journalists v. State of Bombay (1964) 6 SCR 22, State Bank of India v. N. Sundara Money (1976) 1 SCC 822, Santosh Gupta v. State Bank of Patiala (1980) 3 SCC 340, Mohan Lal v. Management of M/s. Bharat Electronics Ltd. (1981) 3 SCC 225, L. Robert D'Souza v. Executive Engineer, Southern Railway (1982) 1 SCC 645, Surendra Kumar Verma v. Industrial Tribunal (1980) 4 SCC 443, Gammon India Ltd. v. Niranjan Das (1984) 1 SCC 509, Gurmail Singh v. State of Punjab (1991) 1 SCC 189 and Pramod Jha v. State of Bihar(2003) 4 SCC 619.*
>
> *18. This Court has used different expressions for describing the consequence of terminating a workman's service/employment/ engagement by way of retrenchment without complying with the mandate of Section 25-F of the Act. Sometimes it has been termed as ab initio void, sometimes as illegal per se, sometimes as nullity and sometimes as non est. Leaving aside the legal semantics, we have no hesitation to hold that termination of service of an employee by way of retrenchment without complying with the requirement of giving one month's notice or pay in lieu thereof and compensation in terms of Section 25-F(a) and (b) has the effect of rendering the action of the employer as nullity and the employee is entitled to continue in employment as if his service was not terminated."*

11. The Apex Court again while placing reliance on ***Anoop Sharma's*** case cited supra has held in ***Mackinnon Mackenzie and Company Limited*** V. ***Mackinnon Employees Union (2015) 4 SCC 544***, that in a case where the termination of the services of a workman is violative of the provisions contained under the Industrial Disputes Act, the workman should be allowed to continue with full back wages with all consequential benefits. However, the relief of back wages in this case is declined by learned Labour Court. Even neither any such relief was not claimed before the writ Court nor in these appeals. Therefore, in view of the facts and circumstances of this case, the points in issue in these

appeals are squarely covered by the judgment of the Apex Court in ***Anoop Sharma's*** case cited supra in favour of the writ-petitioners.

12. In view of what has been said hereinabove, we find no illegality or irregularity in the impugned judgment and the same is accordingly affirmed. Both the appeals, as such, fail and the same are accordingly dismissed. Pending application(s), if any, shall also stand disposed of.

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

Vishambhar Isiah Striesand .....Petitioner
Versus
State of H.P. .....Respondent.

Cr.MP(M) No. 198 of 2019
Decided on : 13.3.2019

Narcotic Drugs and Psychotropic Substances Act, 1985- Sections 20, 21 and 37- **Code of Criminal Procedure, 1973** – Section 439 – Regular bail- Grant of- Accused seeking regular bail on ground of co-accused having been granted bail by Court- And what was recovered from him not *Ganja* but only seeds of cannabis plant- Held, accused allegedly found possessing commercial quantity of *Ganja*- FSL report confirming recovered stuff as ganja- Expert report prima facie carries presumption of correctness -Other accused not involved in similar offences- Accused cannot seek parity in given circumstances-Accused not entitled for bail-Petition dismissed. (Para 6)

For the petitioner: Mr. Vijay Chaudhary, Advocate.
For the respondent: Mr. Hemant Vaid Addl. A.G. with Mr. Y.S. Thakur and Mr. Vikrant Chandel, Dy. A.G.
ASI Prem Singh, P.S. Manali is present in person.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The instant petition has been instituted by the bail petitioner under Section 439 Cr.P.C, for, his being ordered to be released from judicial custody, wherein, he is extantly lodged for his allegedly committing offence(s) punishable under Sections 20, 21 and, Section 25 of ND&PS Act, in respect whereof, FIR No. 30 of 2017 of 17.2.2017, is lodged, at Police Station Manali, District Kullu, Himachal Pradesh.

2. The Investigating Officer has recovered, from the alleged conscious and exclusive possession of the bail-applicant, hence contraband, nomenclatured as 'Ganja'. The weight of the afore 'Ganja' is more than 100.20 kg, hence, renders it to fall within commercial quantity thereof. The learned counsel for the bail-applicant, while alluding, to, the definition of 'Ganja' as, occurring in Section 2 (iii) (b) of the NDPS Act, provisions whereof stand extracted hereinafter:-

> "ganja, that is, the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops) by whatever name they may be known or designated;"

(i) and hence thereupon contends, with much vigor, before this Court, that, 'Ganja' includes only flowering or fruiting tops of cannabis, and, excludes the seeds and leaves. (ii) He further proceeds to contend, that, the learned Chief Judicial Magistrate concerned, had inspected the relevant seizure, and, in his report has mentioned, that, the substance/contraband, recovered from the purported conscious and exclusive possession, of, the bail-applicant, rather, carrying only seeds and leaves, (iii) thereupon he proceeds further to make submission before this Court, that, when seeds and leaves are excluded, from, the definition of 'Ganja', hence, the recovery effectuated from the purported conscious and exclusive possession, of, the bail-applicant being not, of, 'Ganja', and hence, the indulgence of bail be granted to the bail-applicant.

3. However, for the reasons to be recorded hereinafter, his submission is straightway rejected: (a) a bare reading of the inspection report, reflects, its being in dis-concurrence, vis-a-vis, the report of the FSL concerned, wherein, the expert concerned, has, reported that the stuff as examined, is 'Ganja', (b) the afore definition of, 'Ganja', standing read in, a, piecemeal manner, by the learned counsel for the bail-applicant, in as much as, though the mandate borne therein enshrines qua seeds and leaves being excludable, for the relevant purpose, yet, with a further rider, that the apt exclusion, of, seeds and leaves, is, to be made, only when, they are not accompanied "by the tops". Consequently, when the CJM concerned hence proceeded to make the afore report, given his merely carrying a visual inspection thereof, and, with his being not possessed, with, the instruments concerned, and, contrarily, with the report of the FSL concerned, the relevant portion thereof is extracted hereinafter, rather with specificity,:-

> "**GANJA**
>
> Various scientific tests such as physical identification, chemical and chromatographic analyses were carried out in the laboratory with the exhibits stated as ganja in cloth parcels marked as **mark-A** & **Mark-B**, with representative & homogeneous samples. The above tests performed indicated the presence of cannabinoids including the presence of tetraphydrocannabinol in both the exhibits. The microscopic examination indicated the presence of characteristic cystolithic hairs in both the exhibits and Ganja specific colour test indicated the presence of Ganja in both the exhibits. The result thus obtained in given below:-
>
> **The exhibits stated as ganja in cloth parcels marked as Mark-A & Mark-B are samples of Ganja.**"

(i) hence illustrating qua various scientific tests, including microscopic examination of the contraband rather being conducted thereon, and, thereafter, it, recording a conclusion qua the presence of 'Ganja' occurring in the exhibits, sent to it, for analyses, (ii) thereupon the report of the FSL concerned, enjoys statutory vigor, as, enshrined in Section 293 of the Cr.P.C., it, being prepared by the Assistant Director, and, when the afore report, of, the FSL, is, appended with the challan submitted, before the Court concerned, thereupon with, the, mandate of Section 294 Cr.P.C. also making, a, clear statutory contemplation, that, the documents appended with the challan being construable to be genuine, inclusive, of, occurrence of signatures thereon, hence, sanctity is to be meted to it. The provisions of Section 293, and, of Section 294 Cr.P.C. are extracted hereinafter:-

"**293. Reports of certain Government scientific experts.-**. (1) Any document purporting to be a report under the hand of a Government scientific expert to whom this section applies, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code.

(2) The Court may, if it thinks fit, summon and examine any such expert as to the subject-matter of his report.

(3) Where any such expert is summoned by a Court and he is unable to attend personally, he may, unless the Court has expressly directed him to appear personally, depute any responsible officer working with him to attend the Court, if such officer is conversant with the facts of the case and can satisfactorily depose in Court on his behalf.

(4) This section applied to the following Government scientific experts, namely:-

(a) any Chemical Examiner or Assistant chemical Examiner to Government;

[(b) the Chief controller of Explosives;

(c) The Director of the finger Print Bureau;

(d) the director, Haffkeine Institute, Bombay;

(e) the Director [Deputy Director or Assistant Director] of a Central forensic Science Laboratory or a State Forensic Science Laboratory;

(f) the Serologist to the Government.

(g) any other Government scientific expert specified, by notification, by the Central Government for this purpose.]"

294. No formal proof of certain documents.- (1) where any document is filed before any Court by the prosecution or the accused, the particulars of every such document shall be included in a list and the prosecution or the accused, as the case may be, or the pleader for the prosecution or the accused, if any, shall be called upon to admit or deny the genuineness of each such document.

(2) The list of documents shall be in such form as may be prescribed by the State Government.

(3) Where the genuineness of any document is not disputed, such document may be read in evidence in any inquiry, trial or other proceeding under this Code without proof of the signature of the person to whom it purports to be signed:

Provided that the Court may, in its discretion, require such signature to be proved."

4. The learned counsel for the bail-applicant, does not, contest the report of FSL or validity, of, signatures borne thereon, hence the report of the FSL, made, upon the relevant, exhibits, and, it carrying a clear pronouncement, qua, the stuff examined, being 'ganga, thereupon at this stage, prima facie sanctity is to be ascribed to it, and, in case the counsel for the bail-applicant opts to cast a challenge thereon, he holds, the, relevant opportunity, not at this stage, rather at the stage when the author of the report, steps into the witness box.

5. The report of the FSL, unveils, that the exhibit sent for analyses to it, also carrying, the seal impression(s), as, embossed thereon by the CJM concerned, who also carried, a, visual inspection, of, the seized substance, hence, the learned counsel for the bail-applicant, is, precluded to contend, that, the report of the FSL, is, not amenable for any credence being meted to it, at this stage, it not standing connected with the seizure, as, occurred at the relevant site.

6. The learned counsel for the bail applicant also contends, on anvil of a verdict, pronounced by Coordinate bench of this Court, wherein, co-accused, in the instant FIR, was, granted the facility of bail, and, that in parity therewith, the, indulgence of bail be also granted to the bail-applicant. The afore submission, is rejected as the co-accused, was, granted the indulgence of bail, merely, upon his renting the relevant premises, to, the bail-applicant, (a) and, further when the Investigating Agency in its final report filed, under, Section 173 of the Cr.P.C., had found him guilty, of having committed offence punishable under Section 25 of the NDPS Act, and, not under Sections 20 and 21 of the NDPS Act, (b) and moreover, while deciding Cr. Revision No. 152 of 2018, the, coordinate Bench has observed that the learned trial Court, has erred in framing charges in, a, most casual and caviler manner, and, has set aside the order of 28.10.2017, thereupon the claim for parity therewith reared by the bail-applicant, is, mis-placed.

7. There is no merit in the instant bail application and the same is rejected.

8. Any observation made herein above shall not be taken as an expression of opinion on the merits of the case and the trial Court shall decide the matter uninfluenced by any observation made herein above.

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

Shri Om Prakash and another ….Appellants.
Versus
Shri Vidya Sagar and others … Respondents.

RSA No. 47 of 2008.
Decided on: 13.03.2019.

Indian Succession Act, 1925 – Section 63 - Will – Due execution – Proof – Plaintiffs claiming succession to estate of 'JR' through Will – Suit dismissed by trial court – Their appeal also dismissed by District Judge – RSA- Plaintiffs arguing that since they having duly proved Will by examining scribe and attesting witnesses, suit ought to have been decreed – Facts revealing (i)testator dying after four days of execution of alleged Will (ii) one of plaintiffs and one of marginal witnesses present at time of attestation of mutation and no reference regarding said Will made by them at that time (iii) story pleaded in plaint to bring suit within limitation palpably wrong (iv) non disclosure about Will at time of attestation of mutation suggesting non existence of Will at that particular time (v) tampering and interpolations in register of document writer regarding Will (vi) one of plaintiffs 'OP' present at time when Will was scribed (viii) statements of marginal witnesses contrary and contradictory to each other- Held, execution of Will shrouded with suspicious circumstances - Findings of lower courts borne out from record – RSA dismissed – Decrees upheld. (Paras 17 to 30)

For the appellants	:	M/s J.L. Bhardwaj and Sanjay Bhardwaj, Advocates.
For the respondents	:	Mr. Bimal Gupta, Sr. Advocate with Mr. Vineet Vishasht for respondent No. 1. None for respondents No. 2 and 3.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this appeal, appellants/plaintiffs have challenged the judgment and decree passed by the Court of learned District Judge, Kullu, in Civil Appeal No. 55 of 2005/8 of 2007, decided on 11.10.2007, vide which learned Appellate Court while dismissing the appeal filed by the present appellants, has upheld the judgment and decree passed by the Court of learned Civil Judge (Senior Division), Lahaul & Spiti at Kullu, dated 31.05.2005, whereby said Court has dismissed the suit filed for declaration and injunction filed by the appellants/plaintiffs.

2. This appeal was admitted on 05.12.2008 on the following substantial question of law:-

> *"Whether the courts below have erred by ot appreciating the provision of law relating to Will when the executor has himself explain in Will it self regarding its execution, whereby vitiating the judgment and decree.?"*

3. Brief facts necessary for adjudication of this appeal are as under:-

Appellants/plaintiffs (hereinafter referred to as 'plaintiffs') filed a suit for declaration and injunction against the respondents/defendants (hereinafter referred to as 'defendants') to the effect that Jagat Ram son of Lotam Chand, who was the real uncle of plaintiffs and defendants No. 2 and 3 and real brother of defendant No. 1, was the owner of the suit land measuring 34-8-9 bighas in Phati Kharahal Kothi Kais, Tehsil and District Kullu. Jagat Ram out of love and affection had executed a Will dated 14.10.1996 in favour of plaintiffs vide which he had bequeathed his entire estate to them. After the death of Jagat Ram, plaintiffs were in possession of his entire estate. In June, 2001, plaintiff No. 1 required certain copies of Jamabandis to raise an agricultural loan. It is then that he came to know that defendant No. 1 at the back of the plaintiffs in connivance with revenue officials had got mutation No. 8240 of Phati Kharahal attested in favour of plaintiffs as also defendants with regard to estate of deceased Jagat Ram. According to the plaintiffs, mutation No. 8240 dated 27.1.1997 warranted cancellation and the entire estate of deceased Jagat Ram was required to be mutated in their name. They filed the suit that they be declared to be owners-in-possession of the estate of deceased Jagat Ram on the basis of Will dated 18.10.1996 and mutation No. 8240, dated 27.1.1997 be declared null and void. Decree of permanent prohibitory injunction was also sought against the defendants for restraining them from interfering with the possession of the plaintiffs over the suit land.

4. The suit was contested by the defendants who *inter alia* took the plea that no Will was ever executed by Jagat Ram in favour of plaintiffs and the Will being propounded by the plaintiffs was a forged and fictitious Will. According to the defendants, Jagat Ram used to live with defendant No. 1 and the relations between plaintiffs and deceased Jagat Ram were quite strained. The alleged Will was forged and set up by plaintiffs with an ulterior motive. As per the defendants, after the death of Jagat Ram his entire estate was inherited by defendant No. 1 as owner and plaintiffs had no concern with the same. According to the

defendants, the mutation to the extent half share of the estate of Jagat Ram stood mutated in favour of plaintiffs was bad.

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

> *"1. Whether late Sh. Jagat Ram executed a valid Will dated 14.10.1996 in favour of the plaintiffs s alleged? OPP*
>
> *2. Whether the plaintiffs are entitled to the declaration prayer for? OPP*
>
> *3. Whether the plaintiffs are entitled to the permanent prohibitory injunction as claimed? OPP*
>
> *4. Whether the plaintiffs have a cause of action? OPP*
>
> *5. Whether the plaintiffs have the locus-standi to sue? OPP*
>
> *6. Whether the suit is not maintainable in the present form? OPD*
>
> *7. Whether the suit is time barred?OPD*
>
> *8. Whether the plaintiffs are estopped from filing the suit by their act and conduct? OPD*
>
> *9. Whether the suit is bad for mis-joinder of the parties, as alleged? OPD*
>
> *10. Whether the defendant No. 1 is the sole heir of late Sh. Jagat Ram as alleged, if so, its effect? OPD*
>
> *11. Relief."*

6. The issues so framed were answered by the learned trial Court in the following manner:-

> *"Issue No.1 : No.*
>
> *Issue No. 2 : No.*
>
> *Issue No. 3 : No.*
>
> *Issue No.4 : No*
>
> *Issue No. 5 : No.*
>
> *Issue No. 6 : Yes.*
>
> *Issue No. 7 :Not pressed.*
>
> *Issue No. 8 :Not pressed.*
>
> *Issue No. 9 :Not pressed.*
>
> *Issue No. 10 :Yes*
>
> *Issue No. 11 :Suit dismissed vide operative portion of the judgment."*

7. Vide its judgment and decree dated 31.05.2005, learned Civil Judge (Sr. Divn.) Lahaul & Spiti, at Kullu, dismissed the suit of the plaintiffs. Learned Court held that perusal of Exhibit P-A demonstrated that the same was copy of Will allegedly executed by late Jagat Ram. It held that it was not the case of the plaintiffs that the original Will had been lost or the same was in possession of their adversaries. It held that even the permission of the Court to prove the copy of the Will was not taken by the plaintiffs. It further held that even if Ext. P-A was considered to be the original Will, yet the same was shrouded with grave suspicious circumstances. Learned lower Court thus concluded that in the absence of original Will having been produced/exhibited by the plaintiffs and further the copy thereof being shrouded by suspicious circumstances, the plaintiffs were not entitled to any relief and in fact there was no cogent and convincing evidence to this effect also that

after the expiry of Jagat Ram, the suit property was under the possession of the plaintiffs. Learned Court below also returned the findings that as it was the admitted case of the parties that Jagat Ram had died issue-less and as he had not left behind any Class-1 heir, his property will devolve by way of natural succession upon Class-II heirs. It further held that defendant No. 1 being real brother of the deceased-owner would inherit the estate of Jagat Ram to the exclusion of plaintiffs and defendants No. 2 and 3 being Class-II heir.

8. Feeling aggrieved, plaintiffs filed an appeal.

9. Record demonstrates that during the pendency of the appeal, an application was filed by plaintiffs under Order 41, Rule 27 of the Code of Civil Procedure to bring on record the original Will, which was allowed by the learned Appellate Court on 19.01.2006. It directed the learned trial Court to record evidence in support of the original Will and thereafter return the record after recording the evidence.

10. Record further demonstrates that in compliance to the order passed by learned Appellate Court, learned lower Court recorded the statements of some of the witnesses.

11. On merit, learned Appellate Court after taking on record the original Will as also the subsequent statements of the parties, which were recorded before the learned lower Court while concurring with the learned trial Court, dismissed the appeal by *inter alia* holding that the Will was shrouded by suspicious circumstances as there were contradictions in the statements of material witnesses.

12. Feeling aggrieved, the plaintiffs have filed this appeal.

13. Mr. Jiya Lal Bhardwaj, learned Counsel for the appellants has argued that the judgments passed by both the learned Courts below are not sustainable in the eyes of law as the learned Courts have erred in not appreciating that there were no material contradictions in the statements of material witnesses and discrepancies, if any, were likely to occur as there was a considerable gap between the date when the Will was executed and when these witnesses appeared in the Court for the purpose of recording their respective statements. He further submitted that the scribe of the Will as also the marginal witnesses were respected persons of the locality and there was no reason to disbelieve their version. As per Mr. Bhardwaj, there was no need to indicate in the Will as to why defendant No. 1 was excluded by the testator because the very purpose of the Will was to bequeath the property in a manner which was different from the mode of natural succession. He further argued that once the beneficiaries had produced the scribe as also the marginal witnesses, then the Court could not have had held the Will to be shrouded with suspicious circumstances and the Will being a pious document ought to have been upheld for all intents and purposes. As per him, the execution of Will stood duly proved and findings returned by the learned Court to the contrary were liable to be set aside.

14. On the other hand, Mr. Bimal Gupta, learned Senior Counsel appearing for respondent No. 1 while supporting the findings returned by both the learned Courts below has argued that learned Courts have rightly held the Will to be shrouded with suspicious circumstances as the same was a fabricated document. According to Mr. Gupta, no Will whatsoever was executed by deceased Jagat Ram and the Will propounded by the plaintiffs was a forged and fabricated document and was correctly ignored by the learned Courts below. He has further argued that simply because the scribe and marginal witness entered the witness box in support of execution of the Will, this does not *ipso facto* means that the Will in question is a valid Will. As per Mr. Gupta, statements made by the scribe as also the marginal witnesses clearly and categorically demonstrate that the Will was a forged and

fabricated document as there were material contradictions in their respective statements with regard to the execution of the Will which have remained unexplained. Besides, as per him active participation of the beneficiaries in the preparation of the forged document was also duly proved. He prays that as there is no merit in the appeal, the same be dismissed with costs.

15. I have heard learned Counsel for the parties at a considerable length and also gone through the record of the case as also the judgments and decrees passed by the learned Courts below.

16. The substantial question of law which this Court has to answer is as under:-

> *"Whether the courts below have erred by not appreciating the provision of law relating to Will when the executor has himself explain in Will it self regarding its execution, whereby vitiating the judgment and decree.?"*

17. Copy of the purported Will of deceased Jagat Ram is on record as Ext. P-A whereas the original of the said purported Will is on record as E-A. It is not in dispute that the Will propounded by the plaintiffs is dated 14.10.1996. It is also not in dispute that testator of the Will, i.e. late Shri Jagat Ram died on 18.10.1996, i.e. four days after the alleged Will was executed. It is a matter of record that mutation of the estate of deceased Jagat Ram was entered in favour of plaintiffs and defendants on 27.01.1997 vide mutation No. 8240. It is also a matter of record that plaintiff No. 1 was present when the mutation was attested and one of the marginal witness to the purported Will namely Shri Ashok Kumar was also present at the time of attestation of the mutation. It is also a matter of record that at the time when the said mutation was attested, no reference of Will was made by the plaintiffs and it was stated by marginal witness Ashok Kumar before the revenue Authorities that plaintiffs and defendants were legal heirs of the deceased. It is also a matter of record that mutation proceedings were not assailed by the plaintiffs before filing of the suit, out of which, the present appeal has arisen and that too in the year 2002.

18. Before I proceed any further it is relevant to refer to para 7 of the plaint, which reads as under:-

> *"7.That after the death of Jagat Ram the plaintiffs are in possession of his entire estate. In June 2001 the plaintiff No. 1 required copies of jamabandi to raise a agricultural loan and came to know that the defendant No. 1 in the absence of plaintiffs in connivance with the revenue officials has got the mutation No. 8240 of Phati Kharahal attested in favour of the parties to this lis though the respondents are not in possession of any share of the estate of deceased Jagat Ram."*

19. As per averments made in the plaint, the plaintiffs wanted the Court to believe that after the death of Shri Jagat Ram, till June 2001, plaintiffs were not aware about the attestation of mutation No. 8240 dated 27.01.1997. These pleadings are palpably incorrect and it appears that said story was introduced in the plaint to bring the suit within limitation. This I say for the reason that plaintiffs could not have pleaded ignorance qua the factum of attestation of mutation dated 27.1.1997 of the estate of deceased Jagat Ram because this mutation was attested in the presence of plaintiff No. 1 Om Prakash. No convincing reply has come forth from the appellants as to why the purported Will was not relied upon by the plaintiffs at the time when mutation No. 8240 was attested in their presence on 27.1.1997 by the revenue authorities. The only inference which can be drawn by the Court in the absence of there being any cogent explanation on behalf of the

appellants is that as on the date when the said mutation was attested, there existed no Will executed by late Shri Jagat Ram in their favour.

20. While holding that the Will propounded by the plaintiffs was shrouded with suspicious circumstances, learned lower Court as also learned Appellate Court have held that there were contradictions in the statements of the material witnesses which shroud the Will with suspicion.

21. It is pertinent to mention that the statements of the scribe as also the marginal witnesses were recorded (a) before the learned trial Court when the civil suit was pending there and (b) by the learned lower Court upon the directions issued by the learned Appellate Court after it allowed the purported original Will to be taken on record.

22. Learned Appellate Court has returned the findings that not only were there contradictions in the statements of the material witnesses, but there were contradictions in the two statements recorded of the same witness too.

23. In order to ascertain as to whether said findings returned by the learned Appellate Court were born out from the records of the case or were perverse, this Court with the assistance of learned Counsel for the parties has carefully gone through the statements of the plaintiffs' witnesses.

24. First I will refer to the statements made by scribe i.e. PW2 Baldev Krishan. He initially deposed in the Court on 17.11.2004 that copy of Will Ext. P-A was entered in his register at serial No. 423, copy of which he produced as Ext. P-B. In his cross examination, he deposed that the original Will was not shown to him in the Court. He further deposed that Ext. P-A was prepared by him in the presence of plaintiff Om Prakash. He also admitted in his cross examination that ink used for entry made at serial No. 423 was different from the one used for entries made at serial No. 422 and 424. Statement of this witness was recorded for the second time in the Court on 27.02.2006. A perusal of his subsequent cross examination demonstrates that he admitted therein that there was no entry in his register with regard to preparation of copy of the original Will. He also admitted it to be correct that entries made in his register from Sr. No. 385 to 422 and 424 to 430 were in the same ink whereas entry made at Sr. No. 423 is in different ink. He justified it by saying that he used to keep 2-3 pens. He stated that plaintiff Om Prakash was present at the time when the Will was scribed by him. He also admitted that the date at Sr. No. 424 of the Register had been altered by way of cutting from 13.10.1996 to 14.10.1996. He also admitted that the ink with which the cutting was carried out, was different from the ink otherwise used for making entry No. 424.

25. The two marginal witnesses to the purported execution of the Will are PW3 Smt. Prabha Devi and PW4 Shri Ashok Kumar.

26. Statement of PW3 Smt. Prabha Devi was initially recorded on 17.11.2004. In her cross examination, she stated that in Ext. P-A, her signatures were at mark 'A' and Mark 'B'. She further stated that except appending her signatures on the two pages of Ext. P-A, she had not signed any other paper on 14.10.1996. She admitted it to be correct that deceased Jagat Ram was having cordial relations with the defendants. This witness for the second time entered the witness box on 27.10.2006. She tendered in evidence her evidence by way of affidavit wherein it is mentioned that on 14.10.1996, late Jagat Ram got scribed Will Ext. E-A from document writer Baldev Krishan and she appended her signatures alongwith Ashok Kumar as attesting witness upon the same. In her subsequent cross examination, she admitted that in her earlier statement recorded on 17.11.2004, she had deposed that on 14.10.1996, she had signed only two pages of Ext. P-A and nothing else.

She further stated in her cross examination that immediately after appending her signatures on Ext. E-A, she had left as Jagat Ram had asked her to leave. She also stated that in her presence no discussion about registration of the Will took place.

27. PW3 Ashok Kumar initially entered the witness box on 17.11.2004 and tendered his evidence by way of affidavit. He stated that he had appended his signatures on Will Ext. P-A on 14.10.1996 as attesting witness, which Will was executed by Jagat Ram. In his cross examination, he admitted that mutation of the estate of Jagat Ram on 28.1.1997 was entered on the basis of his identification. He admitted it to be correct that at the time of the attestation of the mutation, he had stated that Vidya Sagar, Om Prakash, Rajender Praksh, Shanti and Inder were the legal heirs of Jagat Ram. He further stated in his cross examination that copy of the Will was prepared for the purpose of registration. This witness deposed before the Court for the second time on 27.2.2006. In the affidavit filed by him by way of evidence, he stated that on 14.10.1996, Jagat Ram executed Will E-A. It was scribed by document writer Baldev Krishan. He signed the same as a marginal witness in presence of Jagat Ram. In his subsequent cross examination recorded on 17.11.2004, he denied that he had referred to defendant No. 1 as legal heir of deceased Jagat Ram at the time of mutation he feigned ignorance that on 17.11.2004, he had deposed in the Court that he had introduced Vidya Sagar etc. as legal heirs of Jagat Ram. He also denied that Jagat Ram had not executed any Will.

28. Now when we peruse the initial statements of the two marginal witnesses and compare them with the subsequent statement of all these witnesses, one thing which is clearly evident is this that there is no mention of Ext. E-A i.e. the purported original Will in the statement of either of the witnesses. They deposed only about their attesting Ext. P-A which turned out to be a copy of the purported Will. In fact, marginal witness Prabha Devi categorically stated in her cross examination that she had not appended her signatures on any paper except the two pages of Ext. P-A on 14.10.1996. This demonstrates that the subsequent deposition made by them later on that they had also appended their signatures on Ext. E-A, the purported original Will is an afterthought. As far as the other marginal witness Ashok Kumar is concerned, in his subsequent cross examination, he has resiled from the statement he had made in the earlier cross examination of his before the learned trial Court. The conduct of both the said two marginal witnesses thus creates doubt over their credibility as a witness and in my considered view, their statements do not inspire any confidence.

29. Now, these contradictions have to be seen vis-a-vis the statement of the document writer i.e. PW2 Baldev Krishan, who has admitted in his cross examinations that in the register maintained by him whereas entries of the documents scribed by him at serial No. 385 to 422 and 424 to 420 were recorded in same ink however entry at serial No. 423 which pertained to the purported Will in question was in different ink. The explanation given by him that he used to keep 2-3 pens does not inspires confidence because had that been the case then it would not have had been only one solitary entry in different ink and that too pertaining to the purported Will in dispute. Not only this, the cutting which was made in the subsequent entry at Sr. No. 424 to post date the same, is incidentally with the same ink with which entry No. 423 has been made. All this is suggestive of the fact that there has been interpolation made with the Register by PW2 in order to justify the existence of a document which otherwise was not validly existing.

30. In the background of the discussion held herein-above, it cannot be said that the findings returned by both the learned Courts below and especially the learned Appellate Court that the Will was shrouded with suspicious circumstances, are perverse and not borne out from the record of the case. Further it cannot be said that the learned Courts

below have erred by not appreciating the provision of law relating to Will because in the peculiar facts of this case it is clearly borne out from the record that the Will in fact was shrouded with suspicious circumstances and simply because the scribe and marginal witnesses of the purported Will entered the witness box to prove the existence of the Will, the same will not make said document a legal and valid document. Substantial question of law is answered accordingly.

In view of above discussion, as there is no merit in the present appeal, the same is accordingly dismissed with costs. Pending miscellaneous application(s), if any, also stand disposed of. No orders as to costs.

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

Ram Singh and others ….Petitioners.
Versus
Sanjay Mukherjee and others … Respondents.

CMPMO No 299 of 2016
Decided on: 14.3.2019

Code of Civil Procedure, 1908- Order XXI Rule 26 **– HP Tenancy and Land Reforms Act, 1972 (Act) -** Section 118- Decree for possession and permanent prohibitory injunction- Execution thereof - Objections thereto- Judgment debtor contending decree as unexecutable for want of identification of land and decree holder also being non-Himachali ineligible to purchase agricultural land in State - Executing Court dismissing objections- Challenge thereto – Held- Decree itself contains description of land in suit -It also considered objection regarding applicability of Section 118 of Act and found it baseless- No illegality in order of Executing Court – Petition dismissed- Order of Executing Court upheld. (Para 4 & 5)

For petitioners. : Mr. Balwant Singh Thakur, Advocate.
For respondents : Mr. Raman Sethi, Advocate, for respondents No.1 and 3.
: Respondent No.2 ex parte.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J *(Oral)*

By way of this petition, petitioners have challenged order dated 22.6.2016, Annexure P-4, passed by the Court of learned Civil Judge (Sr. Div.) Lahaul-Spiti at Kullu, vide which an application filed under Order 21 Rule 26 of the CPC by present petitioners/judgment debtors for staying the execution petition stands dismissed by learned Executing Court. It is not in dispute that a suit filed for possession, permanent prohibitory injunction and mesne profit by present respondents against the petitioners i.e., Civil Suiit No. 67/12/1996 stood decreed in their favour by the Court of learned Civil Judge (Sr. Division) Lahaul-Spiti at Kullu vide judgment and decree dated 4.7.2012. It is also a matter of record that the appeal preferred by present petitioners against the said judgment and

decree stood dismissed except for mesne profits and the judgment and decree passed by learned lower Court has attained finality with only modification qua grant of mesne profits.

2. Learned counsel for the petitioners has argued that the impugned order is not sustainable in the eyes of law, as the learned Executing Court has erroneously dismissed the application filed by petitioners without appreciating that as the judgment and decree was not clear where the suit land was situated and which portion was to be handed over to the applicants, therefore, the same is not executable. He has further argued that the learned Executing Court has not taken into consideration the fact that respondent/decree holder being non-Himachali could otherwise not have had purchased any agricultural land in the State of Himachal Pradesh in violation of the provisions of Section 118 of the H.P. Tenancy and Land Reforms Act.

3. I have heard learned counsel for the parties and have also gone through the record of the case as well as the impugned order.

4. A perusal of the impugned order demonstrates that both these points which have been urged by learned counsel for the petitioners were not only considered but also answered by learned Executing Court. In para 7 thereof, learned Executing Court has held that perusal of the judgment and decree reveals that decree of possession was for land measuring 18 biswas as reflected in demarcation report Ext. PW3/A and Tatima Ext. PW3/F denoted by Khasra No. 3654/1 situated at Phati Sosan Kothi Kanawar Tehsil and District Kullu, H.P. Learned Executing Court has held that the suit land, possession whereof is sought, therefore, stands clearly described/depicted in the judgment and that being so it could not be said that the suit land was not identifiable. With regard to the second submission made by learned counsel for the petitioners, the same has also been answered by learned Executing Court by holding that this issue was urged by present petitioners before the learned appellate Court and it stood decided against the petitioners by learned appellate Court and judgment debtors could not rake up this issue again and again.

5. In order to satisfy as to whether these findings are borne out from the record, this Court with the assistance of learned counsel for the parties went through the record of the case. A perusal of the decree passed in favour of the plaintiffs and to the extent upheld by learned appellate Court demonstrates that decree for possession granted in favour of decree holder was for land measuring 18 biswas as shown in demarcation report Ext. PW3/A and Tatima Ext. PW3/F denoted by Khasra No. 3654/1 situated at Phati Sosan Kothi Kanawar Tehsil and District Kullu, H.P. This clearly proves that there is no ambiguity with regard to description of land for which decree has been passed in favour of decree holder. The land is clearly described and depicted in the decree and therefore, it cannot be said that the decree is unexecutable. As far as the objection of the decree being unexecutable on the ground that the decree holder could not purchase agricultural land as they were non-agriculturists is concerned, it has been held by learned Courts below that no evidence has been produced by defendants/judgment debtors and the bald statements of the defendants were not sufficient to prove the aforesaid allegations. Even today, learned counsel for the petitioners could not bring to the notice of this Court any evidence which was led before the learned Courts below by the petitioners to substantiate the said allegation.

That being so, in my considered view, there is no merit in the contention of learned counsel for the petitioners that the impugned order is perverse and not sustainable in law, as the findings returned in the impugned order are duly borne out from the record of the case and otherwise also learned Executing Court cannot go behind the decree. Thus as

there is no perversity, illegality or jurisdictional error with the impugned order, the present petition is, therefore, dismissed being devoid of any merit.

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

The Himachal Pradesh Forest Corporation Limited through its Managing Director and another ….Petitioners.

Versus

Sh. Surinder Singh Chauhan ….Respondent.

CMPMO No.: 432 of 2018.
Decided on: 15.03.2019.

Code of Civil Procedure, 1908 - Section 24 – Transfer of suit –Ground of- Petitioner filing application before District Judge and seeking transfer of suit pending before him to Court of Civil Judge (Senior Division) on ground of latter Court having pecuniary jurisdiction – District Judge dismissing application- Petition against- Held, suit having been remanded by High Court to District Judge for disposal in accordance with law-District Judge was right in dismissing application seeking transfer- Petitioner, if aggrieved ought to have filed application for review of judgment of High Court- Petition dismissed. (Paras 2 & 3)

For the petitioners : Mr. Rajesh Verma, Advocate.
For the respondent : Mr. Karan Singh Kanwar, Advocate

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this petition filed under Article 227 of the Constitution of India, petitioner lays challenge to order dated 08.10.2018 (Annexure P-6), passed by the Court of learned District Judge, Shimla, in CMP No. 464-S/6 of 2018, vide which an application filed by the present petitioner for transfer of the suit to the Court of learned Civil Judge (Senior Division), Rampur, on the ground that the said Court was having pecuniary as also territorial jurisdiction to adjudicate upon the matter stands dismissed on the ground that the matter stood remanded to it by the High Court and when clarification was sought by the Court below from the High Court itself, the Court was directed to decide the lis as per the judgment passed by the High Court dated 30.11.2017.

2. Having heard learned Counsel for the parties and having perused the impugned order as also the record of the case, in my considered view, the remedy before the petitioner is not by way of assailing the order passed by the learned Court below but to seek a review of the order passed by this Court dated 30.11.2017 (Annexure P-2), passed in Civil Suit No. 72 of 2005, because it is the High Court that had directed the transfer of the case for adjudication to the Court of learned District Judge, Shimla. In the face of said order, learned District Judge rightly has not passed any order which could be perceived as overreaching the directions passed by this Court.

3. In these circumstances, at this stage, learned Counsel for the petitioner prays that he may be permitted to withdraw this petition with liberty to file a review petition. Ordered accordingly. The petition is accordingly dismissed as withdrawn with liberty as prayed for. Pending miscellaneous application(s), if any, also stand disposed of.

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

Sh. Ashwani Kumar and another ....Petitioners.
Versus
Sh. Sanjay Kumar and others ....Respondents.

CMPMO No.: 311 of 2018.
Reserved on:- 14.03.2019
Decided on: 16.03.2019.

Code of Civil Procedure, 1908 –Order 1 Rule 10 (2) – Impleadment of party – Whether notice to proposed party sought to be impleaded is necessary before deciding application? – Held, in each and every case, where impleadment of party has to be ordered by Court, it is not necessary for it to issue notice to proposed party – However, such person can be impleaded as party having regard to provisions of Rule 9 and 10 (2) of Order 1- If claim against such person is barred by limitation it may refuse to add him as party and even dismiss suit for non-joinder of necessary party – Further held, on facts notice to proposed parties should have been issued before ordering their impleadment – Order of Trial Court directing impleadment of parties without issuing notices to them set aside- Matter remanded with direction to Trial Court to decide application afresh after providing opportunity of being heard to proposed parties. (Para 22)
Code of Civil Procedure, 1908 –Order 1 Rule 10 (2) – Impleadment of co-defendants- Whether suit barred on date of application?- Determination- Stage- Trial Court ordering joining of new defendants without issuing notices to them after holding that question of suit being barred against proposed defendants can be decided subsequently- Petition against- Held, when sole defendant had raised objection of suit being barred by limitation against proposed defendants, Trial Court ought to have decided this point before ordering their impleadment. (Para 22)

Cases referred:
Kasturi vs.Iyyamperumal and Others, (2005) 6 SCC 733
Mumbai International Airport Private Limited vs. Regency Convention Centre and Hotels Private Limited and Others, (2010) 7 SCC 417

For the petitioners	:	Mr. Shrawan Dogra, Sr. Advocate with M/s. Deven Khanna and Harsh Kalta, Advocates.
For the respondents	:	Mr. Romesh Verma, Advocate for respondents No. 1 to 4.
	:	None for respondent No. 5.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this petition filed under Article 227 of the Constitution of India, the petitioner has challenged order dated 12.09.2016, passed by the Court of learned Senior Civil Judge, Rampur Bushahr, in an application filed under Order 1, Rule 10 of the Code of Civil Procedure (hereinafter referred to as 'Code' for short), in Civil Suit No. 52-1 of 2012, titled as Sanjay Kumar and others vs. Kamlesh Kumar, vide which, learned trial Court has ordered the impleadment of the present petitioners as defendants in the said suit.

2. Brief facts necessary for adjudication of the present petition are as under:-

Respondents No. 1 to 4 (hereinafter referred to as plaintiffs) have filed a suit for declaration in the Court of learned Senior Civil Judge, Rampur Bushahr, i.e. Civil Suit No. 52-1 of 2012 on 03.09.2012 to the effect that plaintiffs and defendant were the only legal heirs entitled to inherit the properties and collect money with interest from all bank accounts left behind by late Shri Narayan Dev, son of Shri Chander Shekhar, in equal share and also for recovery of Rs.4,47,932/-from the defendant being the share of the plaintiffs.

3. In the said suit, proforma respondent No. 5 namely Kamlesh Kumar was impleaded as the sole defendant. It was mentioned in para 4 of the plaint that defendant had succeeded in withdrawing more than Rs.4,91,540/- from the bank accounts of the deceased in collusion with the bank officials.

4. In para 2 of the preliminary objections in the written statement, sole defendant stated that late Narayan Dev had appointed nominees and amount was withdrawn by the nominees who were competent to withdraw the same and plaintiffs had no claim with regard to the said amount.

5. During the pendency of the suit, plaintiffs filed an application under Order 1, Rule 10 of the Code for addition of the parties. Averments made in the application dated 22.11.2015 filed before the learned lower Court on 4.11.2015, are reproduced herein-below:-

> *"That the applicants have instituted a suit for declaration and rendition of accounts, qua the assets and liabilities of late Shri Narai Dev against the respondent/defendant and the same is listed for hearing before this Ld. Court today.*
>
> *2. That the applicants did not have the knowledge of disbursement of amount by the banks and post office to the sons of the respondent but while leading evidence, it has surfaced that the sons of the respondent S/Shri Ashwani Kumar and Sandeep Kumar have received the amount from the bank and post office as nominee of deceased Narain Dev, therefore, it is necessary to array them as defendants in the present suit.*
>
> *3. That S/Shri Ashwani Kumar and Sandeep Kumar both sons of Shri Kamlesh Kumar residents of village Ravin, P.O. Sarahan, Tehsil Rampur Bushahr, District Shimla, H.P. are the necessary party to the suit who can only depose about the utilization of money they received.*
>
> *It is, therefore, prayed that this application may be allowed and the persons S/Shri Ashwani Kumar and Sandeep Kumar both sons of Shri Kamlesh Kumar, residents of village Ravin, P.O. Sarahan, Tehsil Rampur Bushahr, District Shimla, H.P., be arrayed as defendant No. 2 and 3 to the suit for just and proper disposal of the suit, in the interest of justice."*

6. Vide impugned order, this application has been allowed by the learned lower Court. It held that plaintiffs had filed the suit for declaration of their right to inherit the property of deceased Narayan Dev including the money deposited by Narayan Dev and had

sought decree for recovery of Rs.4,47,932/- which fell to their share. Defendant had filed written statement wherein he disclosed that deceased Narayan Dev had appointed his nominees to collect money deposited by him in his accounts, but he did not disclose the name of nominees. The Court further held that plaintiffs claimed that they came to know about the names of nominees only during the course of evidence. The claim of sole defendant that plaintiffs' claim is time barred against the proposed defendants, could not be decided without impleadment of Ashwani Kumar and Sandeep Kumar as co-defendants. Issue of limitation can be decided at a later stage after impleading them as co-defendants. As they withdrew amount from the bank accounts of deceased Narayan Dev being his nominees, Ashwani Kumar and Sandeep Kumar were necessary parties and suit cannot be effectively adjudicated in their absence.

7. Mr. Shrawan Dogra, learned Senior Counsel appearing for the petitioner has argued that the impugned order is bad and not sustainable in law as the same stood passed by the learned trial Court without issuance of any notice of the application to the petitioners. As per learned Senior Counsel, this has caused grave prejudice to the petitioners because had they been given an opportunity to oppose the application filed for their impleadment, they would have had persuaded the learned Court below not to allow the application as they were neither necessary nor proper parties for the decision of the suit and assuming that they were so, then also the cause for which their impleadment was sought as defendants was time barred and therefore also, they could not have been impleaded as defendants in the suit. According to Mr. Dogra, as the impleadment of the petitioner as defendants was not at the behest of the Court itself, but was on an application filed by the plaintiffs, it was incumbent upon learned Court, in the peculiar facts of the case, to have had issued notice of the application to them and no order impleading them as party defendants could have been passed at their back. As per Mr. Dogra, by not doing so, great prejudice has been caused to the defendants and they have been unnecessarily dragged in the litigation. He has further argued that principles of natural justice also demanded that before an application filed for their being impleaded as defendants in the suit was allowed, the petitioners at least should have been heard on the same.

8. On the other hand, Mr. Romesh Verma, learned Counsel for respondents No. 1 to 4/plaintiffs has vehemently argued that the petition was without any merit as there was no perversity in the order passed by the learned Court below impleading the petitioners as defendants. Mr. Verma strenuously argued that the petitioners are necessary party and have been rightly impleaded as defendants by the learned Court below. He has argued that at the time when the suit was filed, plaintiffs were not aware as to who had siphoned of their share and even the sole defendant therein who happens to be the father of the present petitioners did not disclose in the written statement the fact that it were his sons who were the nominees and who had withdrawn the money wrongly. He has further argued that there was no question of the claim being time barred against the petitioners because the plaintiffs came to know about this fact only during the course of recording of the statements of PW2 Kehar Singh and PW3 Prakash Thakur who were bank employees and thereafter, with due diligence, application for impleadment of the petitioners as defendants in the suit was filed without delay. He has also argued that there is no necessity as per the Scheme of Order 1, Rule 10(2) of the Code that the proposed defendant has to be heard before allowing an application for impleadment. He has therefore prayed for dismissal of the case.

9. I have heard learned Counsel for the parties and also carefully gone through the impugned order as also the record of the case.

10. The moot issue for consideration before this Court is that in view of the facts of the case in hand, whether learned Court below should have had allowed the application

under Order 1, Rule 10(2) of the Code for impleadment of the petitioners as defendants without issuing them any notice of the application and thus without hearing them?

11. Sub Rule 2 of Order 1, Rule of the Code *inter alia* provides that the Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether the plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

12. Under Sub Rule 2 of Order 1, Rule 10 of the Code, a plaintiff or defendant can either be added on an application by a party or *suo motu* by the Court itself if the conditions stipulated in the Sub Rule are fulfilled. In the present case, the order of impleadment of the petitioners as defendants has not been made at the behest of the Court *suo motu*. The order passed by the learned Court below impleading them as defendants is on an application filed by the plaintiffs.

13. In **Kasturi versus Iyyamperumal and Others**, (2005) 6 Supreme Court Cases 733, a three Judge Bench of Hon'ble Supreme Court has held that two tests which are to be satisfied for determining the question as to who is necessary party are (I) there must be a right to some relief against such party in respect of the controversies involved in the proceedings; (II) no effective decree can be passed in the absence of such party. Hon'ble Supreme Court has also held that jurisdiction of the Court to add an applicant arises only when the Court finds that such applicant is either a necessary party or a property party. It has also held that an application so filed cannot be allowed for adjudication of collateral matters.

14. In **Mumbai International Airport Private Limited versus Regency Convention Centre and Hotels Private Limited and Others**, (2010) 7 Supreme Court Cases 417, Hon'ble Supreme Court has held that in exercising its judicial discretion under Order 1, Rule 10(2) of the Code, the Court has to act according to reason and fair play and not according to whims and caprice. While giving illustration regarding exercise of discretion under the said sub-Rule, Hon'ble Supreme Court in para 24 has held as under:-

> *"24. If a plaintiff makes an application for impleading a person as a defendant on the found that he is a necessary party, the court may implead him having regard to the provisions of Rules 9 and 10(2) of Order 1. If the claim against such a person is barred by limitation, it may refuse to add him as a party and even dismissed the suit for non-joinder of a necessary party."*

15. In the judgments referred to herein-above, Hon'ble Supreme Court has laid down the tests which are to be followed by the Court while allowing application filed under Order 1, Rule 10(2) of the Code. In the backdrop of the tests so laid down by Hon'ble Supreme Court, this Court will now answer the moot issue as to whether in the facts of the present case, issuance of notice of the application filed under Order 1, Rule 10(2) of the Code to the proposed defendants was necessary or not.

16. This Court is purposely using the words "in the fact of present case", because this Court is of the view that it is not as if in each and every case where impleadment of a party has to be ordered by the Court, it is necessary that notice has to be issued to the proposed party.

17. Coming to the facts of this case. Here admittedly when the plaintiffs filed the suit in the year 2012, the petitioners were not impleaded as defendants by them. The Court is not going into the effect of non-impleadment of the petitioners as defendants at the time of filing of the suit because may be, as has been argued by learned Counsel for the respondents/plaintiffs, the plaintiffs were not aware as to who had actually withdrawn the amount which was being claimed by them in the suit.

18. Be that as it may, it is the case of the plaintiffs that when they came to know that the amount stood withdrawn by the present petitioners as nominees of late Narayan Dev, they immediately moved to the Court by filing an application under Order 1, Rule 10 of the Code for impleadment of the defendants.

19. The moment, said application was filed by the plaintiffs before the learned Court below, the Court became duty bound to pass an order upon the same in the light of the tests laid down by Hon'ble Supreme Court. In the absence of any notice of the application having been issued to the proposed defendants, they were not in a position to put forth their stand before the Court and oppose the application.

20. A perusal of the impugned order demonstrates that sole defendant took the objection of the claim being time barred against the proposed defendants, but learned Court rejected the said objection by holding that the issue of limitation can be decided at a later stage after impleading Ashwani and Sandeep Kumar as co-defendants.

21. This finding of the learned trial Court *per se* is not sustainable in law in view of the decision of the Hon'ble Supreme Court in Mumbai International Airport Private Limited supra. In the said case, Hon'ble Supreme Court has categorically held that exercise of judicial discretion by the Court under Order 1, Rule 10(2) of the Code has to be according to reason and fair play and not according to whims and caprice. Hon'ble Court went on to explain that if a plaintiff makes an application for impleading a person as a defendant on the ground that he is a necessary party, the Court may implead him having regard to the provisions of Rules 9 and 10(2) of order 1 of the Code and if the claim of such a person is barred by limitation, it may refuse to add him a party and even dismiss the suit for non-joinder of a necessary party.

22. In my considered view, when the sole defendant had raised the objection of the suit being time barred against the proposed defendants, then it was the duty of the learned Court to have had returned findings on this point and learned Court could not have simply brushed aside the said objection by holding that limitation can be decided at a later stage after impleading the proposed defendants as co-defendants.

23. This, in my considered view, cannot be said to be exercise of judicial discretion under Order 1, Rule 10(2) of the Code according to reason and fair play. The discretion stands exercised by the learned Court on whims and caprice.

24. The suit in issue was filed by the plaintiffs in April 2012. In para 4 of the plaint, the factum of withdrawal of more than Rs.4,91,540/- stood mentioned. Meaning thereby, that this amount stood withdrawn by someone, may be wrongly and illegally, as on the date when the suit was filed. The written statement was filed on 8.8.2012. In the preliminary objections, it stood mentioned that the amount was withdrawn by the nominees who were competent to withdraw the same. There are on record statements of PW2 Kehar Singh and PW3 Prakash Thakur recorded on 18.7.2014 and 2.6.2015 respectively who have disclosed in the Court names of the present petitioners who as nominees withdrew the amount in issue. In this factual matrix when the petitioners were not initially impleaded as defendants and they were sought to be impleaded as defendants on the basis of statements

made by PW2 and PW3, in my considered view, it was incumbent upon the learned Court to have had issued notice of the application filed under Order 1, Rule 10 of the Code and any order upon the same should have been passed by the learned Court only after hearing the petitioners.

25. This Court is not even remotely suggesting as to what order learned Court below should have had passed. All that this Court is observing is that had the notices been issued to the petitioners of the application filed under Order 1, Rule 10 of the Code, then they would have got an opportunity to respond to the same, take all pleas available opposing the said application and the Court would have had then passed a reasoned order whether to implead them or not after taking note of the respective pleas of the parties. Learned Court below having failed to do so has indeed caused grave prejudice to the petitioner.

26. Before parting with the case, this Court would like to observe that though it is not in dispute that Order 1, Rule 10 of the Code expressly does not provides that a proposed party has to be heard before being impleaded but then the said provision can also not be read so as to mean that under no circumstance/situation, notice need not be issued to a proposed party. In my considered view, a harmonious construction of the said provision is that whether or not before impleading a party in a lis, notice to the proposed party should be issued or not, will depend upon facts of the lis itself. In a suit like the present one, where contentious issues are involved, prudence and fair play demands that before order is passed on the application, proposed party should be given an opportunity of being heard. By doing so, while the Court shall be causing no prejudice to the applicant who seeks the impleadment of a new person as a party, justice will also be done to the proposed party as it shall have the satisfaction of having been heard before any order on such an application is passed by the Court. Not only this, because the Court will have the benefit of the view of the applicant as also the proposed party, it will be in a position to pass a speaking order containing reasons explaining its decision.

27. In view of discussion held herein-above, the impugned order impleading petitioners as party defendants to the suit without giving them an opportunity of responding to/opposing the application filed for their impleadment is not sustainable in law and is liable to be quashed and set aside. Ordered accordingly.

28. The application filed under Order 1, Rule 10 of the Code filed by the respondents/plaintiffs shall be decided afresh by the learned Court below after providing petitioners herein an opportunity to file their reply to the same.

29. Learned Court shall pass orders upon the said application on merit after hearing all the parties and thereafter proceed with the suit. It is clarified that while deciding the application filed under Order 1, Rule 10 of the Code of Civil Procedure, learned trial Court shall not be influenced by any observation made by this Court while deciding the present petition. With the above observations and directions, present petition is disposed of. Pending miscellaneous application(s), if any, also stand disposed of accordingly. Parties through their learned Counsel are directed to appear before the learned lower Court 11th April, 2019.

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

Kamlesh Kishore ....Petitioner.

Versus

Vishal and others ….Respondents.

CMPMO No 533 of 2017
Decided on: 19.3.2019

Limitation Act, 1963 – Section 3 – Appeal- Maintainability- Held, time barred appeal can be entertained only if there is an application for condonation of delay caused in filing it- No application seeking condonation of delay filed either along with appeal or at any time during its pendency- Order of dismissal of appeal on ground of its being time barred, not illegal- Petition dismissed. (Para 2)

For petitioners. : Mr. Vinod Thakur, Advocate.
For respondents : Nemo

The following judgment of the Court was delivered:

Ajay Mohan Goel, J *(Oral)*

By way of this petition, the petitioner has assailed order dated 16.10.2017, passed by the Court of learned Civil Judge, Court No. IV, Hamirpur in Panchayat Appeal No. 01 of 2016 dated 16.10.2017, vide which learned Court below has dismissed the appeal filed by present petitioner by holding that as the appeal was time barred and there was no application filed for condonation of delay, therefore, the Court in view of the statutory provisions contained in Section 3(1) of the Limitation Act 1963 had no option, but to dismiss the same.

2. Having heard learned counsel for the petitioner and having perused the impugned order as also record of the case, in my considered view there is no illegality with the findings returned by learned Court below. It is not in dispute that the appeal which was filed before learned Court below was time barred. No application was filed under Section 5 of the Limitation Act, praying for condonation of delay either along with the appeal or at any stage during the pendency of the same. Therefore, in this factual situation, when there was no application, whatsoever, filed by the present petitioner praying for condonation of delay, learned Court below had no option but to strictly proceed in consonance with the mandate of Section 3(1) of the Limitation Act. This is exactly what has been done by learned Court below. Therefore, as impugned order does not suffers from jurisdictional error, this petition is dismissed, so also miscellaneous applications, if any.

3. At this stage, learned counsel for the petitioner submits that he may be permitted to file a fresh appeal along with an application for condonation of delay. In the peculiar facts of this case said liberty cannot be granted. Otherwise also, party may seek recourse if any available in law and for that no liberty need be granted by the Court.

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

Sh. Paras Ram ….Petitioner.
Versus
H.P. State Co-operative, Bank Ltd. ….Respondent.

Cr. Revision No. 320 of 2018
Decided on: 19.03.2019

Negotiable Instruments Act, 1881 – Section 138 – Dishonour of cheque – Complaint – Proof – Trial Court convicting accused for dishonour of cheque – Appellate Court affirming conviction in appeal – Revision – Accused taking plea of debt, if any, being time barred and amount in question not taken as loan by him – Evidence revealing loan account in name of accused – Signature on cheque not denied by him – Issuance of cheque will amount to new agreement inter-se parties to pay debt- Debt not time barred - No infirmity in judgments of Lower Courts – Accused rightly convicted for dishonour of cheque- Revision dismissed. (Paras 3 & 6 to 8)

For the petitioner : Mr. Hardeep Verma, Advocate.
For respondent : Mr. Vikram Singh , Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J *(Oral)*

By way of this revision petition, the petitioner lays challenge to the judgment passed by the court of learned Additional Chief Judicial Magistrate, Court No. (II), Shimla, H.P., passed in Case No. 2866-3 of 14/3 dated 16.05.2017, vide which while allowing the complaint filed by the present respondent under Section 138 of the Negotiable Instruments Act, 1881 (in short 'the Act'), learned Court below convicted the petitioner for committing an offence punishable under Section 138 of the Act and ordered him to undergo simple imprisonment for two months and also to pay fine in the form of compensation amounting to Rs.3,42,000/-, as also to the judgment passed by the Court of learned Sessions Judge, (Forest) Shimla in Criminal Appeal RBT No. 30-S/10 of 2018/2017 dated 23.05.2018, whereby appeal filed by the petitioner against the order passed by learned trial Court stands dismissed.

2. Brief facts necessary for adjudication of the present are that in lieu of the loan taken by the petitioner from the respondent-bank, accused issued a cheque bearing No. 799651 dated 15.06.2013 for part payment of the said loan for an amount of Rs. 3,32,000/- drawn upon State Bank of India, Anaj Mandi, Shimla, in favour of the complainant bank. When the cheque was presented for encashment, it was returned back unpaid on 15.06.2013 on account of insufficient amount in the account of the accused.

3. Complainant bank issued a legal notice dated 08.07.2013 calling upon the petitioner/accused to make the payment within fifteen days. As the accused failed to do so, respondent complainant initiated proceedings under Section 138 of the Act.

4. Learned Trial Court vide judgment dated 16.05.2017, held the petitioner/accused guilty for having committed offence punishable under Section 138 of the Act. It negated the plea of the petitioner/accused that the debt had become time barred and same could not be revived by the issuance of the cheque by holding that the complainant being a Society registered under H.P. State Cooperative Societies Act, there is no limitation of adjudication of disputes involving such like Societies as per the mandate of Section 49 of the Act.

5. Learned Court also negated the plea of the petitioner that the loan was taken by one Mr. Parveen Kumar and not by him by holding that no such suggestion was put to the witness of the complainant who entered the witness and who had duly stated in the Court that the loan was paid into the account of the accused. Learned Court held that the procedure prescribed in the Act was duly followed by the complainant after dishonoring of the cheque before initiating proceedings under Section 138 of the Act and as the accused had failed to pay the cheque amount within fifteen days after receiving legal notice post dishonoring of the cheque, he was liable to be convicted for the offence punishable under Section 138 of the Act.

6. These findings have been affirmed in appeal by the learned Appellate Court. While dismissing the appeal filed by the petitioner, learned Appellate Court held that the plea of the accused that the cheque in issue was a blank cheque which had been obtained from him by the bank was without merit, as such suggestion put by him stood denied by the witness of the bank. It further held that the onus to prove that the handwriting on the cheque was not of the accused was upon him which he had failed to discharge. It also held that so far as the issue of the debt being time barred was concerned, an agreement was made by the accused with the bank to pay the time barred debt to the complainant-bank, which came into existence only on 15.06.2013. Learned Appellate Court thus confirmed the order passed by the learned Trial Court against the petitioner.

7. Feeling aggrieved, he has filed this revision petition.

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

9. Both the learned Courts below on the basis of evidence adduced have held that the cheque in issue stood duly proved by the complainant bank, issuance of statutory notice after the cheque was dishonored also stood duly proved by the complainant bank, receipt of said notice by the accused also stood duly proved by the complainant-bank. Learned Courts below having concurrently held against the petitioner that he has not been able to make out any case that the cheque in issue was a blank cheque allegedly issued by him to the bank which was misused by the bank.

10. During the course of arguments, learned counsel for the petitioner could not point out that the findings returned by the learned Courts below were not duly borne out from the record of the case. That being so, it cannot be said that the judgments impugned suffer from any infirmity.

11. A perusal of the record demonstrates that petitioner-accused has not led any evidence to prove that he did not owe an amount of Rs.3,32,000/- to the complainant-bank. No endeavour was made by him to produce relevant record from the bank itself to prove the said fact. On the other hand complainant-bank placed on record the Statement of Accounts Ext.CW1/B to prove the amount which accused owed to it. Incidentally as per the Statement of Accounts more than Rs.5,00,000/- was outstanding against the loan account of the accused and the petitioner accused has not been able to rebut this evidence. The dishonored cheque in issue is on record as Ext. CW1/A. Petitioner accused has not disputed his signatures upon the same. No evidence has been led by him to prove that the handwriting on the cheque was not his. After the cheque was dishonored, a legal notice was issued to him, which is on record as Ext. CW1/E. Postal receipt of the same is also on record as CW1/F. Thus it is evident from the record also that whereas the complainant was able to prove its claim on the strength of evidence led by it, the accused was not able to prove his defence. Hence also, the judgments passed by both the learned Courts below

cannot be faulted with and as this appeal is without any merit, the same is accordingly dismissed.

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

Thakur Dass .....Petitioner
Versus
Smt. Sunita Rajput .....Respondent

CMPMO No. 325 of 2018
Reserved on 8.3.2019
Decided on 19.3.2019

Code of Civil Procedure, 1908 – Order XXXIX Rules 1 & 2 – Temporary injunction – Grant of- Plaintiff alleging interference of defendant in stair case exclusively meant for his personal use – Defendant claiming right of passage through said land by averring plaintiff having covered said passage by raising over hanging projections over it – On facts, in proceedings under Section 145 of Code of Criminal Procedure, Executive Magistrate restraining plaintiff party from obstructing said path of defendant – Revision against that order dismissed by Sessions Court – Sale deed of defendant to which son of plaintiff was witness, specifically recognizing right of his passage- Plaintiff and defendant having purchased land from same owner – Plaintiff and his sister filing no objection before Executive Magistrate and admitting right of passage of defendant through said land – No alternative path to defendant's property - Held, balance of convenience in favour of defendant – District Judge right in allowing appeal and dismissing plaintiff's application for temporary injunction – Petition dismissed. (Paras 12 to 17)

Case referred:
Dalpat Kumar and Anr. vs. Prahalad Singh and Ors, AIR 1993 SC 276

For the petitioners : Mr. G.R. Palsra, Advocate.
For the respondent : Mr. Susheel Kumar Tiwari, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

By way of instant petition filed under Article 227 of the Constitution of India, challenge has been laid to judgment dated 31.7.2018, passed by the learned District Judge, Kullu in Civil Misc. Appeal No. 4 of 2018, reversing the order dated 19.4.2018, passed by the learned Senior Civil Judge, Lahaul-Spiti at Kullu, H.P. in CMA No. 223-VI/2017, whereby an application filed under Order 39, Rules 1 and 2 CPC having been filed by the petitioner-plaintiff (herein after referred to as "*the plaintiff*"), came to be allowed and respondent-defendant (in short "*the defendant*"), was restrained from causing any interference in the suit land as described herein below.

2. Necessary facts shorn of unnecessary details, are that plaintiff filed a suit for permanent prohibitory injunction, restraining the defendant or her family members, agents ,

servants etc., from causing unlawful interference in the Verandah of his house/building situate on the land comprising of Khata Khatauni No.537 min/778, bearing khasra No.2101/1817, measuring 00-05-00 bighas (herein after referred to as "*the suit land*") and from causing any damage thereto, averring therein that he is owner in possession of the suit land along with his four storeyed house/building existing there on. Plaintiff averred in the plaint that inside the circumference of his house/building and under the eaves of its first floor, his personal stair case leading from Verandah in the ground floor to the first floor exists and as such, defendant has no right, title or interest therein. Plaintiff alleged that defendant threatened her to use his personal stair case to go to her house existing on khasra No. 2723/3330/1871/1 and also threatened to damage the Verandah on the first and ground floor of the suit land so as to pave way to her house. Plaintiff also averred that defendant filed false complaint against one Vijay Raj Gaur under Section 145 Cr.PC, before the learned Sub Divisional Magistrate, Kullu, alleging therein that he had been obstructing the path and had not been allowing her to bring the construction material through the said path. Her complaint was allowed by the SDM vide order dated 19.5.2016. Vijay Raj Gaur being aggrieved with the aforesaid order passed by the SDM, filed revision petition in the Court of learned Sessions Judge, Kullu, which is pending adjudication. Plaintiff alleged that since despite his repeated requests, defendant is hell bent to use his personal stair case, he was compelled to file aforesaid suit alongwith application under Order 39 Rules 1 and 2 CPC, seeking therein restraint order against the defendant.

3. Respondent by way of written statement as well as reply to the stay application filed under Order 39 Rules 1 and 2, refuted the aforesaid claim of the plaintiff and claimed that suit land stands recorded in the ownership of Thakur Sita Ram through its Kardar and same is in possession of the plaintiff as perpetual lessee. Defendant also claimed that plaintiff constructed suit building thereon in complete violation of the approved site plan and she had purchased 4 biswas of land comprised in Khasra No.2723/3330/1817/1, vide sale deed dated 29.4.2009, from one Khem Chand through his General Power of Attorney Ram Krishan Mahant, whereby right of path was expressly conferred upon her. She also claimed that Khem Chand also sworn an affidavit dated 25.8.2009, in support of her two Karam wide path and filed the same in the office of TCP Kullu, who subsequently vide order dated 11.3.2010 approved her plan, wherein the said path was duly recorded and shown in the approved site plan. Defendant claimed that path in question exists in between the houses of the plaintiff and Kamla Devi on the southern side and house of Dhanwanti Devi on the Northern side and connects NH-21 with her house/plot and same is only approach thereto.

4. Defendant claimed that Vijay Raj Gaur, who happened to be son of the plaintiff, wrongly and illegally obstructed the path, as a consequence of which, she was compelled to file complaint under Section 145 Cr.PC in the Court of learned SDM Kullu, who subsequently vide order dated 19.5.2016, restrained Vijay Raj Gaur, from obstructing her path. She further averred that Vijay Raj Gaur, assailed aforesaid order by filing Revision Petition No. 9 of 2017, in the Court of learned Sessions Judge, Kullu, which was also dismissed vide order dated 9.1.2018. The defendant also alleged that the plaintiff alongwith his sister Kamla, gave *no objection* in writing in the proceedings before SDM and expressly admitted her right over the path, however, subsequently, he (plaintiff) at the instance of Vijay Raj Gaur, illegally extended his projection thereover and thereafter wrongly and illegally proclaimed the same to be part of his house/land. In the aforesaid background, defendant sought dismissal of the suit as well as application for stay having been filed by the plaintiff.

5. Learned Senior Civil Judge, Lahaul-Spiti at Kullu, H.P. vide order dated 19.4.2018, allowed the application having been filed by the plaintiff under Order 39 Rules 1 and 2 CPC alongwith main suit and restrained the defendant from causing any interference in the suit land as well as house of the applicant existing thereon and causing any damage thereto till the disposal of the main suit.

6. Being aggrieved and dis-satisfied with the aforesaid restraint order, issued by the Senior Civil Judge, Kullu, H.P., defendant preferred an appeal under Order 43 Rule 1 (r) CPC in the court of learned District Judge, Kullu, who vide order dated 31.7.2018, accepted the appeal having been filed by the defendant and set-aside impugned order dated 19.4.2018, passed by the learned trial Court, as a consequence of which, application filed under Order 39 Rules 1 and 2 read with Section 151 CPC, having been filed by the petitioner-respondent-plaintiff came to be dismissed. In the aforesaid background, plaintiff has approached this Court in the instant proceedings, praying therein for restoration of order dated 19.4.2018, passed by the learned Senior Civil Judge, Lahaul-Spiti at Kullu, District Kullu, in CMA No. 223-VI/2017, after setting aside judgment dated 31.7.2018, passed by the learned District Judge, Kullu, H.P. in CMA No. 4 of 2018.

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

8. Close scrutiny of pleadings as well as material placed on record along with the same reveals that plaintiff is a lease holder (Pattadar), whereas name of Ram Krishan, S/o Kahan Singh stands reflected in the column of ownership. Though factum with regard to existence of abadi on khasra No. 2101/1817 belonging to the plaintiff, has not been specifically denied by the defendant, but admittedly, no material especially patta, if any, granted in favour of the plaintiff by the original owner, ever came to be placed on record by the plaintiff. Similarly, this Court finds that there is no specific challenge, if any, to the ownership of the defendant qua the land comprising khasra No. 2723/3330/1817/1, which defendant purchased from one Khem Chand through General Power of Attorney Ram Krishan Mahant vide sale deed dated 29.4.2009. Defendant with a view to prove her ownership qua the land in question as well as her right to use the path, which is bone of contention inter-se parties, placed on record photo copy of the sale deed, which clearly reveals that land comprising of khasra No. 2723/3330/1817/1, was purchased by the defendant from the original owner of the land of the plaintiff and son of the plaintiff i.e. Vijay Gaur, was one of the witness to the sale deed. Similarly, this Court finds that there is a specific recital in the sale deed regarding the use of path. Defendant purchased land in the year, 2009 from Khem Chand, through his general power of attorney Ram Krishan Mahant and as per averments contained in the written statement as well as reply to the stay application, right of the path was expressly conferred in her favour in the sale deed, which factum can be further substantiated from the affidavit dated 25.8.2009, executed by owner of the land in support of the fact that two karam Wide path was given to the defendant, whereafter site plan was submitted to TCP Kullu, by the defendant. TCP Kullu, approved the plan in the year, 2010, wherein path was duly depicted/recorded. It appears that initially plaintiff or his son Vijay Raj Gaur never obstructed to the use of path by the defendant, but subsequently, in the year, 2016, when construction material was being carried to the land purchased by the defendant through the path in question, Vijay Kumar Gaur, son of the plaintiff, obstructed the path of the defendant, compelling the defendant to file complaint under Section 145 Cr.PC in the court of learned SDM Kullu, who vide order dated 19.5.2016, restrained the son of the plaintiff Vijay Gaur from obstructing the passage of the defendant. Vijay Gaur filed revision petition in the court of learned Sessions Judge, Kullu, laying therein challenge to order dated 19.5.2016, passed by the SDM, but same was

dismissed vide order dated 9.1.2018. It is only after passing of order dated 9.1.2018, whereby an order dated 19.5.2016, passed by the SDM, Kullu, in the proceedings initiated under Section 145 Cr.PC., came to be upheld, plaintiff Thakur Dass filed suit in question. It also emerges from the pleadings as well as material placed alongwith the same that in the proceedings before the learned SDM Kullu, plaintiff alongwith his sister Kamla gave no objection in writing, expressly admitting the right of the defendant over the path. However, subsequently, plaintiff allegedly at the instance of Vijay Raj Gaur, extended the projection over the path and started claiming the path in question to be part of his suit land/property. In the suit at hand, plaintiff claimed that cause of action accrued in his favour on 7.10.2017, when despite repeated requests defendant refused to admit the claim of the plaintiff, whereas it is admitted fact that dispute inter-se parties with regard to usage of passage, started in the month of May, 2016, when defendant filed complaint under Section 145 Cr.PC in the court of SDM Kullu, who on the basis of material made available to him restrained the plaintiff from causing any obstruction in the passage of the defendant.

9. There appears to be considerable force in the argument of Sh. Sushil Kumar Tiwari, learned counsel for the respondent-defendant that plaintiff suppressed material facts from the court while filing the suit for permanent prohibitory injunction, seeking restraint order against the defendant because admittedly bare perusal of the plaint, nowhere discloses factum with regard to furnishing of affidavit by the plaintiff and her sister Kamla Devi in the complaint having been filed by the defendant under Section 145 Cr.PC. in the court of learned SDM, Kullu, and it is only after dismissal of the revision petition filed by Vijay Raj Gaur, who happened to be son of the plaintiff, plaintiff filed suit claiming therein that cause of action accrued in his favour on 7.10.2017, whereas as has been discussed in detail, dispute inter-se parties to the lis with regard to usage of path in question had actually started in May, 2016. Essential ingredient for invoking provisions of Section 145 Cr.PC by the SDM is that there is apprehension of breach of peace due to dispute over any land or water or boundaries thereof. As per sub-section (1) of Section 145 Cr.PC, apprehension of breach of peace must exist at the time of initiation of proceedings under Section 145 Cr.PC. By now it is well settled that enquiry under Section 145 Cr.PC is limited to the question as to who was in actual possession on the date of the preliminary order irrespective of the rights of the parties and courts while exercising its revisionary powers cannot go into the question of sufficiency of material relied upon by the Magistrate to base his/her satisfaction.

10. Section 145 CrPC clearly provides that Magistrate before initiating proceedings, should be satisfied that dispute regarding immovable property exists and such dispute is likely to cause breach of peace, and once he/she is satisfied of aforesaid two conditions, he/she shall proceed to pass preliminary order under sub-section (1) of Section 145 and thereafter make inquiry under sub-section (4) and pass final order under sub-section (6) and it is absolutely not necessary at the time of passing of final order for him/her to record that apprehension of breach of peace continues or exists.

11. True it is that object of Section 145 Cr.PC., is not to provide the parties an opportunity of bringing their civil disputes before a Criminal Court, or maneuvering for possession for the purpose of subsequent civil litigation and the real object of this provision is to arm the Magistrate with an additional weapon for maintaining peace within his/her area, but certainly magistrate while exercising power under Section 145 Cr.PC., is required to decide limited question as to who was in actual possession on the date of passing of preliminary order i.e. when magistrate proceeds to pass preliminary order under sub-section (1) of Section 145 Cr.PC., and thereafter makes inquiry under Section 4 of Section 145 Cr.PC. In the case at hand, as has been taken note herein above, learned SDM on the

complaint having been filed by the defendant restrained plaintiff by way of order dated 19.5.2016, from obstructing the passage of defendant, meaning thereby, magistrate at the time of passing of aforesaid order was satisfied that at the time of filing of complaint by the defendant, she had been using that passage and as such, SDM with a view to ensure that there is no breach of peace, restrained the plaintiff from obstructing the passage of defendant. Reliance is placed upon judgment dated 24.10.2018, passed by this Court in case titled *Smt. Usha Rani Sood v. Bhola Ram and Or*s. in Cr.MMO No. 80 of 2018.

12. Leaving everything aside, Mr. Palsra, learned counsel or the petitioner, was unable to dispute that plaintiff as well as his sister had executed an affidavit in favour of the defendant in the court of learned SDM, Kullu in the proceedings initiated by the defendant under Section 145 Cr.PC., whereby they virtually admitted right of the defendant to use the path in question. Similarly, there is nothing to dispute that land came to be purchased by the defendant through a person, who had sold the land to the plaintiff for construction of the house and at that time, Mr. Vijay Raj Gaur, i.e. son of the plaintiff, was witness to the sale deed and as such, learned District Judge while reversing the finding returned by the learned Senior Civil Judge, rightly arrived at conclusion that principle of estoppel as envisaged under Section 115 of the Indian Evidence Act, is applicable. It clearly emerges from the record that in both the proceedings i.e. under Section 145 Cr.PC., decided by the SDM Kullu and in the suit at hand, plaintiff as well as his son had been contesting the right of the defendant to use the path in question. Moreover, plaintiff did not approach the Civil Court with clean hands and as such, learned District Judge, rightly held him not entitled to the interim relief. In the case at hand, this Court has no hesitation to conclude that since plaintiff after having suffered two orders i.e. firstly, by SDM in proceedings under Section 145 Cr.PC., and thereafter by the learned Sessions Judge, Kullu, in the Criminal Revision, approached the Civil Court for grant of relief, which otherwise stood declined to him in earlier proceedings as has been taken note herein above, as such, no interim injunction could be granted in favour of the plaintiff.

13. Needless to say, while determining prima-facie case, balance of convenience and irreparable loss, which are three conditions necessary for grant of interim injunction, courts are required to decide the matter on the basis of pleadings as well as documents placed on record as photo copies or in the form of affidavits or pleadings because certainly, subsequently these documents are required to be proved in accordance with law by the parties to deny the claim during the course of the trial. This Court is not in agreement with Mr. Palsra, that since only photocopies of affidavits, sale deed and other relevant documents were placed on record, no cognizance, if any, of the same could be taken by the courts below while considering claim of the parties. Though in the case at hand, bare existence of order dated 19.5.2016, passed by the SDM in proceedings initiated by the defendant under Section 145 Cr.PC., which further came to be upheld by learned Sessions Judge, in the Criminal Revision Petition No. 9 of 2017, vide order dated 9.1.2018, is/was sufficient to infer prima-facie case in favour of the defendant, but even otherwise pleadings adduced on record by the defendant, which have been not specifically refuted, are sufficient to conclude that there is no prima-facie case in favour of the plaintiff and as such, Civil Court ought not have issued restraint order against the defendant, who was initially allowed by the plaintiff to carry construction material to her plot using path in dispute.

14. At the cost of repetition, it may be noticed at this stage that though defendant by placing sale deed proved her ownership qua the land comprising khasra No. 2723/3330/1817/1, but no material document, especially patta, if any, granted in favour of the plaintiff ever came to be placed on record and as such, this Court is persuaded to agree with the contention of learned counsel for the respondent-defendant that neither there is

prima-facie case nor balance of convenience in favour of the plaintiff, entitling him to interim injunction, rather documents, which may not be original, placed on record by the defendant clearly suggest that she had purchased land comprising khasra No. 2723/3330/1817/1 vide sale deed dated 29.4.2009 from one Khem Chand through his general power of attorney Ram Krishan Mahant and right of path was expressly conferred therein. Similarly Hem Chand also sworn in affidavit dated 25.8.2009 in support of the claim of the defendant that 2 karam wide path was given to her at the time of execution of aforesaid sale deed. Had there been no path existing at the time of execution of the sale deed, TCP Kullu would not have approved the site plan submitted by the defendant. Tatima, if any, placed on record by the plaintiff to depict the disputed site, is yet to be proved in accordance with law by the plaintiff and as such, trial Court ought not have placed heavy reliance upon the same while granting interim injunction in favour of the plaintiff because question whether tatima annexed by the plaintiff is actually a part of the suit land or is part of other land, is yet to be proved in accordance with law by the plaintiff during trial.

15. The existence of prima-facie right and infraction of the enjoyment of his-her property or the right is a condition for the grant of temporary injunction. Prima facie case is not to be confused with the prima-facie title, which is required to be established on evidence at the trial. Prima facie case is a substantial question raised, bona fide, which needs investigation and decision on merits, Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction, rather court while granting interim injunction is required to satisfy condition that no interference by the court would result in irreparable injury to the party, seeking relief and there is no other remedy available to the party except one to grant injunction. Irreparable injury does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by ways of damages. While determining balance of convenience, court is required to exercise judicial discretion to find the amount of substantial mischief or injury, which is likely to be caused to the parties if the injunction is refused and compare it with that it is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the court considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued. Reliance is placed on judgment passed by the Hon'ble Apex Court in case titled ***Dalpat Kumar and Anr. V. Prahalad Singh and Ors, AIR 1993 SC 276***.

16. In the case at hand, authenticity of documents placed on record by both the sides can be considered at the trial and not at the stage of considering interim injunction. Material placed on record clearly reveals that defendant had been using the path in question after having purchased land comprising Khasra No. 2273/3330/1817/1, which she purchased vide sale deed 29.4.2009 and as such, no irreparable loss would be caused to the plaintiff in case defendant is allowed to use path in question during the pendency of the trial, especially, when there is no other alternative path available to the defendant to go to her property. Plaintiff can be compensated later on by stopping the defendant from using that piece of land in case during the trial plaintiff is able to establish that path in question is his exclusive property. But at the same time, in case injunction order, is granted against the defendant, she will suffer irreparable loss, which may not be compensated later on as the property, which was constructed by her on her land, cannot be used and in case, plaintiff subsequently fails to prove his right over the path in question, loss, which would be accrued to the defendant during the pendency of the proceedings before the learned trial Court, cannot be compensated in any manner.

17. Consequently, in view of the totality of facts and circumstances narrated herein above vis-à-vis reasoning assigned by the learned District Judge while passing impugned judgment, this Court sees no reason to interfere in the same, which otherwise appears to be based upon proper appreciation of facts as well as law and as such, same is upheld. Accordingly, the petition is dismissed.

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

M/s Five Star Builders ….Petitioner
Versus
The State of Himachal Pradesh and others …Respondents

Arbitration Case No. 67 of 2018
Decided on: January 9, 2019

Arbitration and Conciliation Act, 1996 – Sections 14 & 15 – Arbitrator – Appointment – Termination thereof – Unreasonable delay – Held, purpose of arbitration is to provide speedy justice – It is expected of Arbitrator to conclude proceedings expeditiously – Arbitrator did not adjudicate even single claim within three years – Matter adjourned by him on one pretext or other – Arbitrator has become de jure or de facto unable to perform his functions – Appointment of Arbitrator terminated – New Arbitrator appointed – Petition allowed. (Paras 5 & 12)

Case referred:
Union of India and Ors. vs. Uttar Pradesh State Bridge Corporation Limited, (2015) 2 SCC 52

For the petitioner: Mr. Parmod Negi, Advocate.
For the respondents: Mr. S.C. Sharma, Mr. Dinesh Thakur and Mr. Sanjeev Sood, Additional Advocates General with Mr. Amit Kumar, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

By way of present petition filed under Ss. 14 and 15 of the Arbitration and Conciliation Act, 1996, prayer has been made on behalf of the petitioner for terminating the mandate of the arbitrator and for appointment of an independent and impartial arbitrator to adjudicate the dispute *inter se* parties.

2. Undisputed facts, as emerge from the record are that the petitioner-Firm, which is an 'A' class contractor, registered with the Himachal Pradesh Public Works Department, was awarded work namely, Oi) C/o Tikkari to Kitorwari/Kawar road (Portion Larot to Chansel Pass Km. 11/375 to 30/00) package No. HP-09-59 A. and (ii) C/o Tikkar to Kitorwari/Kawar road (Portion Chansel Pass to Dodra Km. 30/00 to 49/500) Package No HP-09-59 B., vide award letter dated 26.4.2006 for a sum of `2,98,15,082/- and time for completion of the work was twelve working months (six months in each year). However, the

fact remains that certain disputes arose *inter se* parties and as such, matter came to be referred to Engineer-in-Chief, HPPWD, Shimla-2, under Clause 24.3 of the Agreement, who subsequently, vide letter dated 18.6.2015, appointed Superintending Engineer, Arbitration Circle, HPPWD Solan, as the sole arbitrator to decide and make his award regarding claims/disputes submitted by the contractor qua the work awarded to it. Copy of letter dated 18.6.2015 is annexed as Annexure P-1. Learned Arbitrator so appointed by the Engineer-in-Chief entered upon reference on 17.6.2015 and fixed date of preliminary hearing on 9.9.2015, whereafter, claimant and respondents filed statement of claim and reply, respectively, in the year 2015 itself. During pendency of the proceedings before the learned arbitrator, claimant preferred an application laying therein challenge to the jurisdiction of the arbitral tribunal to adjudicate upon the counter claims, which were never raised before the competent authority, as per requirement of contract (Annexure P-2). However, the fact remains that such application was never decided by the learned arbitrator and matter came to be repeatedly adjourned by the learned arbitrator on one pretext or the other. Claimant has specifically averred in the petition that since the time, arbitrator has entered upon reference, matter is being adjourned by him, on one ground or the other without any substantial progress in the case. Claimant has alleged that the arbitrator has not concluded hearing of even a single claim in the last more than three years, and dates are being given by the learned arbitrator after three months, thereby entire purpose of resolving the dispute in a speedy manner by arbitration, has been defeated. Petitioner has further submitted that the learned arbitrator has been appointed by the respondents on whole-time basis to adjudicate the disputes, like the present one, however, due to the unpragmatic approach of the learned arbitrator, matter has been delayed for almost three years, since the time, arbitrator entered upon reference, as such, very purpose of resolving dispute through speedy arbitration has been defeated. By way of petition, petitioner has prayed that the mandate of the learned arbitrator is liable to be terminated in view of the matter, in which proceedings are being conducted for the last three years, without any substantial progress. Petitioner has further averred that in view of the amendment to Section 12 of the Arbitration and Conciliation Act, wherein it has been provided that an arbitrator should disclose in writing, circumstances, which are likely to affect his ability to devote sufficient time to arbitration and in particular his ability to complete the entire proceedings within a period of twelve months., mandate of the arbitrator appointed in the instant proceedings deserves to be terminated. Petitioner has further stated in the petition that in view of the amended provisions of S.12 of the Act *ibid*, learned arbitrator i.e. Superintending Engineer, Arbitration Circle, HPPWD, Solan is not legally competent to decide the matter since the proceedings have been delayed for over three years.

3. Respondents, by way of reply, have refuted the claim set up by the petitioner and stated that no ground for terminating the mandate of the learned arbitrator has been made out by the petitioner in the petition. It has been further stated in the reply that appointment of arbitrator was agreed upon by the petitioner and now it can not seek termination of mandate of the learned arbitrator without any ground, as provided in the Act *ibid*. Averments with regard to proceedings being delayed unnecessarily by the learned arbitrator, have been also denied by way of reply by the respondents. It has been stated by the respondents that dates of proceedings are being given on the choice of the parties, with their consent and as such, learned arbitrator can not be accused for any delay in the conclusion of the proceedings. Petitioner, at no point in time, raised issue with regard to delay being caused in the proceedings, rather, petitioner itself is guilty of causing delay in conclusion of the proceedings by the learned arbitral tribunal, appointed with its consent. Respondents have further stated that since the Superintending Engineer, Arbitration Circle,, Solan, came to be appointed as an arbitrator prior to coming into force of the provisions of

S.12 of the amending Act, same are not applicable to the present case, as such, petitioner can not take any advantage on the basis of amended provisions of the Act *ibid*.

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

5. Having heard the learned counsel for the parties and perused material available on record, this court finds that the Superintending Engineer, Arbitration Circle, HPPWD, Solan, came to be appointed as sole arbitrator to decide the dispute *inter se* parties vide Annexure P-1. It is also not in dispute that he entered into reference on 17.6.2015. Very purpose and object of arbitration is to provide speedy justice and as such, it is always expected from the arbitrator so appointed in terms of the agreement entered *inter se* parties to conclude the proceedings expeditiously, without wasting much time. Though, now as per amended provisions of the S.12 of the Act *ibid*, entire proceedings are required to be completed within a period of twelve months, but time for making award can be further extended with the consent of the parties, but, in the case at hand, pleadings adduced on record by the respective parties reveal that no headway has been made by the learned arbitrator appointed by the Engineer-in-Chief, HPPWD, pursuant to agreement *inter se* parties, rather, matter has been repeatedly adjourned, on one pretext or the other. Allegations contained in the petition that till date, learned arbitrator has not concluded hearing on even a single claim for the last three years, have not been specifically denied by the respondents, which certainly compels this court to infer that the learned arbitrator so appointed in terms of the provisions contained in the agreement, has become *de jure* or *de facto* unable to perform his functions and he has failed to act without undue delay.

6. At this stage, it would be profitable to take note of Ss.14 and 15 of the Act *ibid*, which provide as follows:

> "14. Failure or impossibility to act.—
>
> (1) The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if—
>
> (a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and
>
> (b) he withdraws from his office or the parties agree to the termination of his mandate.
>
> (2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.
>
> (3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12.
>
> 15. Termination of mandate and substitution of arbitrator.—
>
> (1) In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate—
>
> (a) where he withdraws from office for any reason; or
>
> (b) by or pursuant to agreement of the parties.
>
> (2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal.

7. Careful perusal of aforesaid provisions of the Act *ibid*, clearly provide that mandate of an arbitrator shall terminate in case, he fails to act without undue delay. Aforesaid provisions of law further provide that where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

8. In the case titled Union of India and Ors. v. Uttar Pradesh State Bridge Corporation Limited, (2015) 2 SCC 52, the Hon'ble Apex Court has held as under:-

11. At this stage, we may take note of the scheme of the Act as well, by noticing those provisions which would be attracted to deal with such a situation. Relevant provisions are extracted below for ready reference:

"14. Failure or impossibility to act.—(1) The mandate of an arbitrator shall terminate if—

(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this section or sub-section (3) of Section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of Section 12.

15. Termination of mandate and substitution of arbitrator.—(1) In addition to the circumstances referred to in Section 13 or Section 14, the mandate of an arbitrator shall terminate—

(a) where he withdraws from office for any reason; or

(b) by or pursuant to agreement of the parties.

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the Arbitral Tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the Arbitral Tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the Arbitral Tribunal.

* * *

32. Termination of proceedings.—(1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the Arbitral Tribunal under subsection (2).

(2) The Arbitral Tribunal shall issue an order for the termination of the arbitral proceedings where—

(a) the claimant withdraws his claim, unless the respondent objects to the order and the Arbitral Tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute,

(b) the parties agree on the termination of the proceedings, or

(c) the Arbitral Tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) Subject to Section 33 and sub-section

(4) of Section 34, the mandate of the Arbitral Tribunal shall terminate with the termination of the arbitral proceedings." (emphasis supplied)

12. As is clear from the reading of Section 14, when there is a failure on the part of the Arbitral Tribunal to act and it is unable to perform its function either de jure or de facto, it is open to a party to the arbitration proceedings to approach the court to decide on the termination of the mandate. Section 15 provides some more contingencies when mandate of an arbitrator can get terminated. In the present case, the High Court has come to a categorical finding that the Arbitral Tribunal failed to perform its function, and rightly so. It is a clear case of inability on the part of the members of the Tribunal to proceed in the matter as the matter lingered on for almost four years, without any rhyme or justifiable reasons. The members did not mend their ways even when another life was given by granting three months to them. Virtually a peremptory order was passed by the High Court, but the Arbitral Tribunal remained unaffected and took the directions of the High Court in a cavalier manner. Therefore, the order of the High Court terminating the mandate of the Arbitral Tribunal is flawless. This aspect of the impugned order is not even questioned by the appellant at the time of hearing of the present appeal. However, the contention of the appellant is that even if it was so, as per the provisions of Section 15 of the Act, substitute arbitrators should have been appointed "according to the rules that were applicable to the appointment of the arbitrator being replaced". On this basis, it was the submission of Mr Mehta, learned ASG, that the High Court should have resorted to the provision contained in Clause 64 of GCC.

13. No doubt, ordinarily that would be the position. The moot question, however, is as to whether such a course of action has to be necessarily adopted by the High Court in all cases, while dealing with an application under Section 11 of the Act or is there room for play in the joints and the High Court is not divested of exercising discretion under some circumstances? If yes, what are those circumstances? It is this very aspect which was specifically dealt with by this Court in Tripple Engg. Works. Taking note of various judgments, the Court pointed out that the notion that the High Court was bound to appoint the arbitrator as per the contract between the parties has seen a significant erosion in recent past. In paras 6 and 7 of the said decision, those judgments wherein departure from the aforesaid "classical notion" has been made are taken note

of. It would, therefore, be useful to reproduce the said paragraph along with paras 8 and 9 hereinbelow: (SCC pp. 291-93)

"6. The 'classical notion' that the High Court while exercising its power under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter for short 'the Act') must appoint the arbitrator as per the contract between the parties saw a significant erosion in ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd. 2007 5 SCC 304, wherein this Court had taken the view that though the contract between the parties must be adhered to, deviations therefrom in exceptional circumstances would be permissible. A more significant development had come in a decision that followed soon thereafter inUnion Of India v. Bharat Battery Manufacturing Co. (P) Ltd. 2007 7 SCC 684 wherein following a three-Judge Bench decision in Punj Lloyd Ltd. v. Petronet Mhb Ltd. Punj Lloyd Ltd. v. Petronet Mhb Ltd., 2006 2 SCC 638, it was held that once an aggrieved party files an application under Section 11(6) of the Act to the High Court, the opposite party would lose its right of appointment of the arbitrator(s) as per the terms of the contract. The implication that the Court would be free to deviate from the terms of the contract is obvious.

7. The apparent dichotomy in ACE Pipeline and Bharat Battery Mfg. Co. (P) Ltd. was reconciled by a three-Judge Bench of this Court in Northern Railway Admn., Ministry of Railway v. Patel Engg. Co. Ltd. Northern Railway Admn., Ministry of Railway v. Patel Engg. Co. Ltd., 2008 10 SCC 240, wherein the jurisdiction of the High Court under Section 11(6) of the Act was sought to be emphasised by taking into account the expression 'to take the necessary measure' appearing in subsection (6) of Section 11and by further laying down that the said expression has to be read along with the requirement of sub-section (8) of Section 11 of the Act. The position was further clarified in Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd. 2009 8 SCC 520 Para 48 of the Report wherein the scope of Section 11 of the Act was summarised may be quoted by reproducing sub-paras (vi) and (vii) hereinbelow: (Indian Oil case, SCC p. 537)

'48.(vi) The Chief Justice or his designate while exercising power under sub-section (6) of Section 11 shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause.

(vii) If circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded, ignore the designated arbitrator and appoint someone else.'

8. The above discussion will not be complete without reference to the view of this Court expressed in Union Of India v. Singh Builders Syndicate Union Of India v. Singh Builders Syndicate , 2009 4 SCC 523, wherein the appointment of a retired Judge contrary to the agreement requiring appointment of specified officers was held to be valid on the ground that the arbitration proceedings had not concluded for over a decade making a mockery of the process. In fact, in para 25 of the Report in Singh Builders Syndicate this Court had suggested that the Government, statutory authorities and government companies should consider phasing out

> arbitration clauses providing for appointment of serving officers and encourage professionalism in arbitration.
>
> 9. A pronouncement of late in Deep Trading Co. v. Indian Oil Corpn. 2013 4 SCC 35followed the legal position laid down in Punj Lloyd Ltd. which in turn had followed a twoJudge Bench decision in Datar Switchgears Ltd. v. Tata Finance Ltd. 2000 8 SCC 151 The theory of forfeiture of the rights of a party under the agreement to appoint its arbitrator once the proceedings under Section 11(6) of the Act had commenced came to be even more formally embedded in Deep Trading Co. subject, of course, to the provisions of Section 11(8), which provision in any event, had been held in Northern Railway Admn. not to be mandatory, but only embodying a requirement of keeping the same in view at the time of exercise of jurisdiction under Section 11(6) of the Act."
>
> (emphasis in original)

9. It is quite apparent from the aforesaid exposition of law that when there is failure on the part of the Arbitral Tribunal to act and it is unable to perform its function either de jure or de facto, it is open to a party to the arbitration proceedings to approach the court to decide on the termination of the mandate. Section 15 provides some more contingencies when mandate of an arbitrator can be terminated. In the case at hand, it is quite apparent that Arbitral Tribunal failed to perform its functions and as such, prayer made in the instant application for termination of mandate and to appoint new arbitrator deserves to be accepted.

10. Though, in the instant case, it is an admitted fact that the Superintending Engineer, Arbitration Circle, HPPWD, Solan, was appointed as an arbitrator prior to amendment to S.12 of the Act ibid, but as has been observed above, Arbitrator appointed by the aforesaid authority failed to act without undue delay and as such, prayer made in the instant application for appointment of an impartial and independent arbitrator deserves to be accepted. Otherwise also, perusal of S. 14 of the Act ibid, already reproduced herein above, suggests that, in the event of failure or impossibility to act, mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay.

11. In the case at hand, respondents have failed to rebut the allegations levelled by the petitioner that the learned arbitrator has failed to conclude hearing even on a single claim despite period of three years having elapsed after the learned arbitrator entered into reference. This court is in agreement with the contentions raised on behalf of the petitioner that the learned arbitrator so appointed by the respondents is not able to devote sufficient time for arbitration and he is not able to complete the arbitration proceedings within a reasonable time and as such, mandate of the learned arbitrator deserves to be terminated.

12. Consequently, in view of aforesaid detailed discussion as well as law laid down by the Hon'ble Apex Court supra, instant petition is allowed and order dated 3.6.2015 (Annexure P-1), whereby Superintending Engineer, Arbitration Circle, HPPWD, Solan came to be appointed as an arbitrator, is quashed and set-aside and with the consent of the learned counsel representing the parties, **Shri N.K. Thakur, Senior Advocate, HP High Court, Shimla**, is appointed as an arbitrator to adjudicate the dispute inter se parties. His consent/declaration under Section 11(8) of the Arbitration & Conciliation Act has been obtained. He has no objection to his appointment as an arbitrator in the present matter. He is requested to enter into reference within a period of two weeks from the date of receipt of a

copy of this order. It shall be open to the Arbitrator to determine his own procedure with the consent of the parties. Otherwise also, entire procedure with regard to fixing of time limit for filing pleadings or passing of award stands prescribed under Sections 23 and 29A of the Act.

13. 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.

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

State of Himachal Pradesh …Petitioner
Versus
Dina Nath Sharma …Respondent

CrMMO No. 171 of 2017
Decided on: February 28, 2019

Indian Penal Code, 1860 – Sections 415 and 420 – Cheating – Necessary ingredients – Explained – Held, person can be said to have committed cheating if he dishonestly induces person deceived to deliver any property to any person or make alter or destroy whole or any part of valuable security etc. - Doing regular law course (Evening Schedule) from an institute during service without taking study leave does not amount to cheating of third party (complainant) or Education Department, where accused was serving or Bar Council of Himachal Pradesh with whom he got enrolled himself - Doing course without taking permission from Department at most matter of departmental inquiry – No action taken by Education Department or Bar Council of Himachal Pradesh against accused – Order of discharge of accused for cheating etc. of trial court as upheld by Additional Sessions Judge, valid and proper - Petition dismissed. (Paras 8 to 13)

For the petitioner Mr. S.C. Sharma, Mr. Dinesh Thakur and Mr. Sanjeev Sood, Additional Advocates General.
For the respondent Mr. Pritam Singh Chandel, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:(oral)

By way of instant petition filed under S.482 CrPC, challenge has been laid to the order dated 17.6.2016 passed by the learned Additional Sessions Judge, Ghumarwin, District Bilaspur, HP. (Camp at Bilaspur) in Cr. Revision No. 18/10 of 2013, affirming order dated 7.2.2013 passed by the learned Judicial Magistrate 1st Class, Bilaspur, Himachal Pradesh in case No. 107/2 of 2009, whereby application filed under S.239 CrPC, by the respondent-accused (hereinafter, 'accused') for his discharge, came to be allowed.

2. Precisely, the facts of the case, as emerge from the record are that a complaint came to be filed against the accused by a person namely Dina Nath son of Shri Prabha Ram, alleging therein that the accused, while serving as a teacher with the Education Department of Himachal Pradesh and posted at Senior Secondary School,

Ghumarwin, had simultaneously obtained a degree in law, from NES Law College (Night College), Jabalpur, Madhya Pradesh, affiliated to Rani Durgawati University. Complainant further alleged that during aforesaid period, accused had drawn full salary from the Department and factum with regard to his having acquired degree in law was also not entered in the service book. Complainant also alleged that the accused, after his retirement from the Department, got himself enrolled with the Bar Council of Himachal Pradesh on 9.5.2000. Complainant also alleged that the accused obtained the law degree as a regular student of three year course, whereas, total period of days, for which he remained on leave was 87. He further claimed that at no point of time, the accused submitted his attendance and moot court certificates with the Bar Council of Himachal Pradesh, despite his having given undertaking to that effect.

3. It emerges from the record that the aforesaid complaint having been filed by Dina Nath was initially inquired into by the Vigilance Department, Police Headquarters, Khalini. DIG Vigilance, Police Hqrs, after having received complaint, got inquiry conducted through Inspector, State Vigilance and Anti Corruption Bureau, Bilaspur, but, since no act of corruption was found to have been committed by the accused, matter was sent for registration of FIR at local Police Station, consequent to which FIR No. 47/08 dated 6.3.2008, came to be registered against the accused under Ss.420, 468 and 471 IPC at Police Station Ghumarwin, Bilaspur, Himachal Pradesh.

4. After completion of investigation, police submitted its final report under S.173 CrPC, in the court of learned Judicial Magistrate 1st Class, Ghumarwin, against the accused for commission of offences punishable under Ss.420, 468 and 471 IPC. During these proceeding, accused filed an application under S.239 CrPC, praying for his discharge on the ground that the charge sheet filed did not disclose prima facie criminal offence, if any, against the accused and as such, he deserves to be discharged. Record further reveals that the prosecution chose not to file any reply to the application and the learned trial Court, vide order dated 7.2.2013, allowed the application for discharge concluding therein that no offence is spelt out in the charge sheet so framed against accused, on the basis of material available on record.

5. Being aggrieved and dissatisfied with the aforesaid order of discharge passed by the learned Judicial Magistrate 1st Class, Bilaspur, petitioner-State preferred a criminal revision under S.397 CrPC laying therein challenge to the order dated 7.2.2013 passed by the learned Judicial Magistrate 1st Class, Bilaspur, however, the same was dismissed, as a consequence of which, order of discharge passed by learned trial Court came to be upheld. In the aforesaid background, State has approached this court in the instant proceedings filed under S.482 CrPC, praying therein to set aside the order of discharge.

6. Having heard the learned Additional Advocate General and perused the material available on record vis-à-vis reasoning assigned by the learned Courts below, while allowing the application having been filed by the accused under S.239 CrPC, for his discharge, this court is not at all persuaded to agree with the contention of Mr. Sanjeev Sood, learned Additional Advocate General that the impugned orders passed by the learned Courts below are not based upon proper appreciation of the material adduced on record by the investigating agency, alongwith its report filed under S.173 CrPC, rather, this court finds that there is no material at all placed on record by the investigating agency to demonstrate that the accused committed offences punishable under Ss.420, 468 and 471 IPC. Admittedly, the complaint having been filed by the complainant namely Dina Nath, at the first instance, came to be investigated by the Vigilance Department of the State, which having inquired into the complaint arrived at a conclusion that no case of corruption is made out against the accused and as such, sent the complaint for registration of an FIR at

local Police Station i.e. Bilaspur, whereafter, FIR detailed herein above came to be lodged against the accused. Admittedly the complaint in the case at hand came to be filed at the behest of a third person, i.e. Shri Dina Nath, who, in no manner could be said to be aggrieved with the offences, if any, committed by the accused. Otherwise also, it is not the case of the complainant that the accused, on the basis of forged degree of law, procured employment in the Education Department, rather, record itself suggests that the degree of law from NES Law College (Nigh College), Jabalpur, Madhya Pradesh, was obtained by the accused, while he was in service. The question whether the accused obtained degree of law from the aforesaid college during his service, after having obtained necessary permission from the Department, could only be determined by way of a departmental inquiry, if any, initiated by the Education Department. Interestingly, in the case at hand, at not point of time, Education Department, even after having discovered the factum with regard to accused having acquired degree in law from NES College, during his service time, thought it proper to investigate the case and thereafter initiate disciplinary proceedings, if any, against the accused. Similarly, factum with regard to lodging of FIR, on the basis complaint having been filed by Dina Nath was very much in the knowledge of the Bar Council of Himachal Pradesh, who, after having scrutinized the documents placed on record by the accused with his application for enrolment, enrolled him as an advocate in the year 2000. It is not in dispute in the present case that neither the Education Department nor the Bar Council of Himachal Pradesh at any point of time lodged a complaint against the accused that he suppressed facts from his employer or the Governing Body of Advocates at the time of enrolment/registration as an advocate. Moreover, there is no material at all suggestive of the fact that the accused committed offence, if any, punishable under Ss.420, 468 and 471 IPC.

7. Complainant alongwith his complaint failed to supply any material to substantiate the averments contained in the same. Similarly, this court finds that the investigating agency also failed to obtain/produce the record with regard to service record of the accused, suggestive of the fact that the factum with regard to accused having degree in law during his service career, was ever brought to the notice of Education Department and at any point of time, accused had applied for Study Leave. Similarly, there is nothing on record, that the accused, after having obtained of degree in law, got the factum with regard to same incorporated in the service record, rather, after his retirement, accused applied for registration with the Bar Council of India, who subsequently, having perused documents made available to it by the accused, enrolled him as an advocate on 9.5.2000.

8. Section 420 IPC provides that, whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. Hence, a person can only be said to have committed offence punishable under S.420 IPC, if he dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security. Moreover, main ingredients of S.420 IPC pertain to property, whereas, offence of cheating is defined under S.415.

9. Interestingly, in the case at hand, there is no material adduced on record to demonstrate that the accused cheated the complainant and thereafter dishonestly induced him or for that matter, Education Department, or the Bar Council of Himachal Pradesh to deliver any property. S.415 provides that, whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to

consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

10. Interestingly, if material placed alongwith charge sheet filed by the police is read juxtaposing the complaint filed by Shri Dina Nath, there is nothing to suggest that the complainant was induced by the accused to do some act or omit something. Even there is nothing on record suggestive of the fact that accused Dina Nath son of Shri Maru Ram induced the Education Department or the Bar Council of Himachal Pradesh to cause harm to them or cause wrongful gain to himself.

11. There is yet another aspect of the matter that though the complainant has submitted that the accused obtained degree in law without obtaining requisite permission from the Government/concerned Department, but, material available on record suggests that the accused had obtained leave from the Department, which certainly relates to the period, while he was allegedly undergoing the law studies at Jabalpur.

12. Leaving everything aside, at no point of time, Department of Education, or the Bar Council of Himachal Pradesh lodged complaint, if any, against the accused, being aggrieved of his aforesaid illegal act, if any. Though, there is nothing on record to suggest that the Department of Education, who admittedly, after retirement of the accused, released pensionary benefits, filed complaint, if any, against the accused, but this court is informed by the learned counsel representing the accused that the complainant Dina Nath had filed a complaint before the Bar Council of Himachal Pradesh, who after proper enquiry, found the complaint to be false and accordingly dismissed the same. Learned counsel appearing for the accused also informed that after the decision by the Bar Council of Himachal Pradesh, complainant also approached Bar Council of India, but his appeal was dismissed.

13. Needles to say, accused can always seek his discharge under S.239 CrPC, if he/she is able to show that no prima facie case at all is made out against him/her. Similarly, by now, it is well settled that the court, while framing charge, is required to sift the material adduced before it alongwith charge sheet to atleast infer prima facie case, if any, against the person sought to be charged, because, a person can not be made to suffer agony of protracted trial, especially, when there is no material warranting framing of charge against him/her, hence, this court sees no reason to interfere with the impugned judgments passed by the learned Courts below, which otherwise appear to be based on proper appreciation of the evidence.

14. Consequently, in view of the above, I find no merit in the present appeal, which is accordingly dismissed. Judgments passed by both the learned Courts below are upheld. Bail bonds, if any, furnished by the accused are discharged. Pending applications, if any, also stand disposed of.

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

Prem Chand ….Appellant

Versus

Oma Chand and others ….Respondents

RSA No. 517 of 2009
Reserved on : February 26, 2019
Decided on: March 5, 2019

Specific Relief Act, 1963 – Sections 5 & 38- Permanent prohibitory injunction and in alternative for possession of land after fixation of boundaries – Grant of – Plaintiff praying for fixation of boundaries of estates of parties and seeking injunction and possession by demolition of structures of defendants– Defendants denying plaintiff's possession and claiming ownership of land is subject to rights of proprietors of village – Trial Court dismissing suit – District Judge upholding decree – RSA – Land though allotted in favour of 'MC' but subject to Bartandari rights of right holders- Sale of land by 'MC' in favour of plaintiff would also be subject to such rights of proprietors- Substantial part of suit land in possession of HP PWD by way of road – HP PWD not made party to suit– Plaintiff not entitled for possession or for permanent prohibitory injunction – RSA dismissed – Decrees of lower courts upheld. (Paras 13 to 17)

Cases referred:
Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264
Parminder Singh vs. Gurpreet Singh, Civil Appeal No. 3612 of 2009, decided on 25.7.2017
Sebastiao Luis Fernandes (Dead) through LRs and Others vs. K.V.P. Shastri (Dead) through LRs and Others, (2013)15 SCC 161

For the appellant	Mr. Ashwani K. Sharma, Senior Advocate with Mr. Ishan Sharma, Advocate.
For the respondents:	Mr. Rajnish K. Lal, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge

By way of instant Regular Second Appeal, appellant has laid challenge to the judgment and decree dated 1.8.2009 passed by the learned District Judge, Hamirpur, (H.P.) in Civil Appeal No. 126/2008, affirming judgment and decree dated 28.6.2008 passed by the learned Civil Judge (Junior Division), Nadaun, District Hamirpur, (H.P.) in Civil Suit No. 324/2001, RBT No. 622/2003, titled Prem Chand versus Oma Chand and others, whereby suit filed by the appellant-plaintiff (hereinafter, 'plaintiff') for fixation of boundary by way of demarcation, came to be dismissed.

2. Necessary facts, which may be relevant for the proper adjudication of the instant appeal, are that the plaintiff filed a suit in the court of learned Civil Judge (Junior Division), Nadaun, District Hamirpur, Himachal Pradesh, for fixation of boundary by way of demarcation, with consequential relief of permanent prohibitory injunction qua the land denoted by Khata No. 5 min. Khatauni No. 15, Khasra No. 564 measuring 0-02-65 Hectares and Khatauni No. 19 min., Khasra Nos. 5, 7, 90 and 563, measuring 0-14-38 Hectares, situated in *Tika* Bhyal, Tappa Balduhak, Tehsil Nadaun, District Hamirpur, Himachal Pradesh (hereinafter, 'suit land'), against the respondents-defendants (hereinafter, 'defendants') and also for possession of the suit land by way of demolition, in case same is found in possession of the defendants. Plaintiff averred in the plaint that as per *Missal Hakiyat* for the years 1992-93, suit land is recorded in the ownership of *Tika* Maheshwar Chand, and he (plaintiff) subsequently vide sale deed No. 741, dated 18.9.1998 purchased

the same from him and thus became owner of the suit land. Plaintiff further averred that though mutation on the basis of aforesaid sale deed was entered in his name but same has been rejected wrongly and illegally. Plaintiff further averred that the defendants, are disputing the boundary of the suit land and they have uprooted the same in the third week of October, 2001. Plaintiff further claimed before the court below that the defendants are threatening to raise further construction over the suit land and controversy inter se parties can not be resolved unless and until demarcation is carried out and boundary is fixed by the competent authority. Plaintiff further averred in the plaint that if defendants are found in possession over any part of suit land during demarcation, he may also be held entitled for possession by way of demolition. While setting up a case that the defendants forcibly and unauthorizedly raised construction over some portion of the suit land, plaintiff also alleged that the defendants got mutation of sale rejected in connivance with the revenue officials. Plaintiff also averred that since he has not claimed any relief against the Public Works Department as well as other estate right holders at this stage, as such they are not necessary and proper parties to the suit.

3. Defendants, by way of written statement, refuted the aforesaid claim put forth by the plaintiff taking preliminary objections qua maintainability, non-joinder of necessary parties, limitation, valuation, estoppel etc. On merits, defendants claimed that the land comprising of Khasra No. 564 is a *Gair Mumkin Abadi* of defendants by way of construction of cattle shed, *Khurli*, septic tank and courtyard, which is being used for tethering the cattle. Defendants claimed that they are in possession over the suit land since the times of their ancestors and so far remaining suit land is concerned, defendants claimed that the same is recorded as *Sarak*, which is existing since the years 1953-54. Defendants claimed that the road existing over the remaining portion of the suit land leads to Rangas and Jihan. Aforesaid road is metalled one and is being used by the public at large and the same has been constructed by the Public Works Department. Defendants further claimed that the Raja of Nadaun, Tika Maheshwar Chand was not the resident of the area and he was simply owner. All the rights over the land in question are with the *Tikadarans* or inhabitants of the area and now the plaintiff can not claim any right, title or interest in the suit land. Defendants further claimed that the sale deed was got effected by the plaintiff just to drag the defendants and other *Tikadarans* into unnecessary litigation, because, Raja of Nadaun was never in possession of the suit land. Defendants, while claiming that they have become owners of the suit land by way of adverse possession, set up a case that their possession over Khasra No. 564 is for the last 100 years and their possession over the same is continuous, hostile and to the knowledge of the plaintiff. Defendants also averred in the written statement that the previous owner was not having any title over the suit land, and as such, sale deed, if any, made in favour of the plaintiff is *void ab initio*, because the same was never accompanied by delivery of possession. Defendants claimed that they never disputed the boundary of the suit land, rather, possession and boundaries are quite clear on the spot. Defendants claimed that the construction of cattle shed, *Khurli*, septic tank and courtyard for tethering of cattle was raised long back and at no point of time, they were objected either by the previous owner or the plaintiff, as such, plaintiff has no right to raise any objection at this stage. With the aforesaid pleadings, defendants prayed for dismissal of the suit. In the replication, plaintiff, while controverting the contentions of the defendants made in the written statement, reiterated the stand taken in the plaint.

4. Learned trial Court, on the basis of aforesaid pleadings adduced on record by the respective parties, framed following issues for determination, on 27.4.2004:

1. "Whether the plaintiff is entitled for fixation of boundaries by way of demarcation as prayed for? OPP

2. Whether the plaintiff is entitled for the possession of the suit land by way of demolition as prayed for? OPP
3. Whether the suit of the plaintiff is within time as alleged? OPP
4. Whether the suit is not maintainable as alleged? OPD.
5. Whether the suit is bad for non-joinder of necessary parties as alleged? OPD.
6. Whether the suit is not properly valued for the purpose of court fee and jurisdiction as alleged? OPD.
7. Whether the plaintiff is estopped by his act and conduct from filing the suit as alleged? OPD.
8. Whether the defendants have become owner of the land comprised in Khasra No. 564 by virtue of adverse possession as alleged? OPD.
9. Relief."

5. Subsequently, the learned trial Court vide judgment and decree dated 28.6.2008, held the plaintiff not entitled to the reliefs as prayed for in the suit having been filed by him for fixation of boundary by way of demarcation as such, dismissed the suit.

6. Being aggrieved and dissatisfied with the aforesaid judgment and decree passed by the learned trial Court, plaintiff filed a civil appeal under S.96 CPC, in the court of learned District Judge, Hamirpur, who, vide judgment and decree dated 1.8.2009, dismissed the same, as a consequence of which, judgment and decree passed by the learned trial Court came to be upheld. In the aforesaid background, plaintiff has approached this court, in the instant proceedings, praying therein to decree his suit after setting aside judgments and decrees passed by learned Courts below.

7. On 30.10.2009, instant Regular Second Appeal having been filed by the plaintiff, came to be admitted on following substantial questions of law:

> "1. Whether on the basis of evidence on record the plaintiff had proved his valid title over suit land and if his title stood proved and established on the strength of sale deed (Ext. PW-2/A), were the defendants entitled to claim their ownership or possession over the same?
>
> 2. Whether in the absence of any proof of the ouster of the plaintiff or his predecessor-in-interest from suit land, the defendants were lawfully entitled to claim their ownership and possession over the same?
>
> 3. Whether the application for additional evidence filed on behalf of appellant/plaintiff under Order 41 Rule 27 CPC during the pendency of first appeal to place on record the copies of jamabandies to prove the nature of the land in dispute in old revenue record was wrongly dismissed?"

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

9. Solely with a view to explore answer to the aforesaid substantial questions of law, this court, while hearing the learned counsel representing the parties, made a sincere effort to peruse the complete record, especially evidence collected on record, be it ocular or documentary, perusal whereof certainly does not compel this court to agree with the contention of Mr. Ashwani Sharma, learned Senior Advocate representing the plaintiff that the judgments and decrees passed by the learned Courts below are not based upon correct

appreciation of evidence, rather, this court finds that both the learned Courts below have dealt with each and every aspect of the matter meticulously.

Substantial questions of law No.1 and 2

10. Since substantial questions of law No.1 and 2 are more or less interconnected, same are being taken up together for adjudication, to avoid repetitive discussion of evidence.

11. In the case at hand, plaintiff by way of suit, mainly prayed for fixation of boundary by way of demarcation, so that controversy inter se parties with regard to boundary dispute is resolved. Though careful perusal of the plaint having been filed by the plaintiff reveals that the main suit was for fixation of boundary but in the relief clause of the suit, plaintiff also prayed that a decree for possession of suit land by way of demolition may also be passed in his favour, in case, suit land is found to be in possession of the defendants. In nutshell, case of the plaintiff is that *Tika* Maheshwar Chand, who is recorded as owner of the suit land, in *Misal Hakiyat Bandobast Jadid Sani* for the years 1992-93, sold him suit land vide sale deed No. 741 dated 18.9.1998, whereafter, he became owner of the suit land, as such, defendants being strangers to the suit land, have no right, title or interest over the same. While praying for second relief of permanent prohibitory injunction and for possession, though the plaintiff made an attempt to set up a case that after purchase of suit land by him from *Tika* Maheshwar Chand, vide sale deed No. 741, dated 18.9.1998, he was put in possession of the same, but, having carefully perused the entire evidence on record adduced by the parties, I am afraid that aforesaid contention put forth by the plaintiff, which has been further reiterated by Mr. Ashwani Sharma, learned Senior Advocate, is tenable. As per own case of the plaintiff, mutation in his name pursuant to aforesaid sale deed was entered but the same was rejected subsequently, wrongly and illegally, by the revenue authorities. Close scrutiny of Ext.PW-2/A i.e. original sale deed though suggests that suit land was sold by *Tika* Maheshwar Chand in favour of the plaintiff and there is recital with regard to delivery of possession of suit land in favour of the plaintiff by previous owner, but, if aforesaid document is read juxtaposing *Misal Hakiyat Bandobast Jadid Sani* for the years 1992-93 (Ext. P-1), it totally belies the stand of the plaintiff, because admittedly in *Misal Hakiyat Bandobast Jadid Sani*, part of suit land is recorded in the name of defendants and rest of suit land has been shown in possession of Public Works Department. Though, *Missal Hakiyat* has been referred to in sale deed, Ext. PW-2/A, but it nowhere suggests that previous owner i.e. *Tika* Maheshwar Chand, who subsequently sold the suit land to the plaintiff, was in possession of the suit land, as such, there is considerable force in the argument of Mr. Rajnish K. Lal, learned counsel representing the defendants that the possession of suit land never came to be delivered to the plaintiff pursuant to sale deed Ext. PW-2/A, as such, there is no question, if any, of his being in possession of the suit land at the time of filing of the suit at hand.

12. Apart from above, careful perusal of certified copy of order dated 30.3.2001 passed by Collector Sub Division, Nadaun, in Case No. 1/2000, titled Prem Chand versus Maheshwar Chand and others, mutation No. 17, dated 12.11.1999 and order dated 20.2.2006 passed by Commissioner, Mandi Division in Case No. 935/2003 titled Prem Chand versus Maheshwar Chand and others (Exts. D4 and D5) clearly reveals that the attestation of mutation was rejected by the Assistant Collector 1st Grade Nadaun, vide order dated 12.11.1999, on the ground that neither the suit land was in the possession of the owner when he executed sale deed in favour of the plaintiff nor plaintiff was put in possession of the same. Record further reveals that the aforesaid finding returned by the Assistant Collector 1st Grade, Nadaun, was laid challenge in appeal before the Financial Commissioner, but the same was dismissed. During arguments in the appeal at hand,

learned counsel representing the defendants, while inviting attention of this court to order dated 23.8.2007, passed by this court in CMPMO No. 23 of 2007, contended that being aggrieved and dissatisfied with the order passed by the Financial Commissioner, plaintiff approached this court. Perusal of order dated 23.8.2007, which is admittedly not a part of the record, clearly reveals that the CMPMO having been filed by plaintiff was dismissed with the observation that the Financial Commissioner has rightly dismissed the petition in *limine* on the ground that since the plaintiff (petitioner therein) was not in possession of the land, as such, mutation could not have been attested in his favour. Aforesaid finding returned by this court and other revenue authorities has already attained finality because, admittedly, no challenge, if any, was laid to the same.

13. While responding to aforesaid argument made by Mr. Rajnish K. Lal, Advocate, Mr. Ashwani Sharma, learned Senior Advocate appearing for the plaintiff argued that mere recital of delivery of possession in the sale deed is sufficient for recording mutation, as such, findings recorded by the revenue authorities are palpably wrong and untenable. Aforesaid argument having been made by Mr. Ashwani Sharma, learned Senior Advocate, does not hold much water, because it has specifically come in the evidence that *Tika* Maheshwar Chand, who sold the suit land to the plaintiff, vide sale deed Ext. PW-2/A, was not in possession of the land at the time of sale, as such, there was no occasion for him to deliver the possession of suit land sold by him to the plaintiff. Bare perusal of the orders passed by revenue authorities (Exts. D4 and D5), clearly suggests that the plaintiff was unable to prove on record that he was delivered possession of the land sold to him by *Tika* Maheshwar Chand, vide sale deed Ext. PW-2/A. Apart from above, perusal of *Missal Hakiyat* Ext. P1, reveals that there is entry in the remarks column showing that the suit land was allotted to Raja of Nadaun, by the Financial Commissioner, Punjab, vide letter No. 1353, dated 11.7.1997, subject to the rights of the estate right holders. Plaintiff, in his cross-examination admitted that Raja of Nadaun is residing in Village Bela, from where suit land is at a distance of 8-10 kms. Plaintiff also admitted that *Gair Mumkin Sarak* exists over the suit land and same is being used by the public at large. He also admitted that the defendants are estate right holders and they are in possession of a part of suit land by way of *Gair Mumkin Abadi* as such, Mr. Lal, learned counsel representing the defendants, is right in contending that there is enough land for the estate right holders for exercise of their *Bartandari* rights. Otherwise also, careful perusal of remarks column of Ext. P1, clearly suggests that *Tika* Maheshwar Chand was allotted suit land subject to rights of estate right holders and as such, it does not give right, if any, to the plaintiff to have possession of the suit land, because he could not have acquired any superior title to that of previous owner. Since predecessor of the plaintiff i.e. *Tika* Maheshwar Chand remained out of possession of suit land right from the time of allotment of suit land in his favour by Financial Commissioner, Punjab, version put forth by plaintiff, while claiming relief of permanent prohibitory injunction against the defendants that he is in possession of the suit land, can not be accepted.

14. Leaving everything aside, if cross-examination conducted upon PW-1 is read in its entirety, he himself admitted that *Abadi* of defendants is existing over the part of suit land comprising of Khasra No. 564, whereas, rest of the suit land comprised of Khasra Nos. 5, 7, 90 and 563 is in the shape of *Gair Mumkin Sarak* constructed by Public Works Department during the years 1953-54. Plaintiff, in his cross-examination, categorically admitted the factum with regard to existence of road over the suit land being used by public at large and also of *Abadi* of defendants for the last 15-20 years. Most importantly, plaintiff, in his cross-examination, admitted that the settlement operation in the area, where the suit land is situate, was conducted in the years 1982-83 and during settlement operation, revenue record was prepared as per factual position on the spot. If cross-examination

conducted upon the plaintiff is read in its entirety, he, in no uncertain terms, admitted possession of the defendants as well as of Public Works Department over the suit land, as such, learned Courts below rightly held him not entitled to maintain the suit for permanent prohibitory injunction against the defendants.

15. Interestingly, in the suit at hand, plaintiff chose not to implead Public Works Department as a defendant, despite having averred in the plaint that there is road existing over the suit land, constructed by the Public Works Department. In his cross-examination, plaintiff admitted that the suit land comprising of Khasra Nos. 5,7, 90 and 563 is in the shape of *Gair Mumkin Sarak* and same has been constructed by the Public Works Department during the years 1954-55, which certainly compels this court to conclude that the plaintiff was in the knowledge of the fact that the suit land is already in possession of the defendants and Public Works Department, who have constructed permanent structures thereupon but despite that he chose to purchase suit land vide sale deed, Ext. PW-2/A.

16. As has been noticed herein above, settlement operation in the area, where suit land is situate, took place during the years 1982-83, whereafter, record was prepared as per factual position on the spot, as such, factum with regard to construction of permanent structures i.e. cattle shed, *Khurli*, septic tank and courtyard was very much in the knowledge of the plaintiff, who subsequently purchased the suit land vide sale deed Ext. PW-2/A, that too after having seen *Misal Hakiyat Bandobast Jadid Sani*, for the years 1992-93 (Ext. P1), wherein part of suit land is recorded in possession of the defendants and rest of the suit land in possession of Public Works Department.

17. Even if submission having been made by Mr. Ashwani Sharma, learned Senior Advocate, that the plaintiff has successfully proved on record that he possessed valid title qua the suit land, especially when plea of adverse possession having been taken by the defendants was not accepted, is taken to be correct, no relief as prayed in the alternative in the suit for permanent prohibitory injunction and possession could be granted in favour of the plaintiff, in light of evidence adduced on record by plaintiff, wherein he miserably failed to prove his possession over the suit land. Though, material available on record suggests that the plaintiff by way of placing on record Ext.PW-2/A i.e. sale deed proved his title to certain extent, but since the plaintiff failed to prove his possession over the suit land, courts below rightly observed that the plaintiff is not entitled to maintain the suit for permanent prohibitory injunction against the defendants. Needless to say, party intending to seek relief of permanent prohibitory injunction is required to prove that he/she is in possession of suit land, and defendant is trying to invade his/her possession and, in case, person seeking such relief, is not able to prove aforesaid material ingredients, he/she can not be held entitled for the relief of injunction, as has been rightly held by the learned Courts below, while placing reliance upon the judgment passed by Hon'ble Apex Court in Sri Thimmaiah vs. Shabira and others.

18. The question, whether the plaintiff is owner of suit land, on the basis of Ext. PW-2/A, could not be gone into in the present suit having been filed by the plaintiff, which was primarily for fixation of boundary by way of demarcation, rather, plaintiff ought to have filed a suit for declaration against the defendants and Public Works Department, seeking therein declaration that he has become owner of suit land, on the basis of sale deed, executed in his favour by *Tika* Maheshwar Chand, vide sale deed, Ext. PW-2/A, against the defendants, who have otherwise successfully proved in the instant proceedings that they are in possession of suit land since the times of their ancestors. Mere rejection of the plea of adverse possession having been taken by the defendants in the instant proceedings, could not be a ground for the plaintiff to claim that he is true owner and is entitled for possession, especially when there is ample material available on record suggestive of the fact that *Tika*

Maheshwar Chand, from whom, plaintiff purchased the suit land was allotted land by Financial Commissioner, Punjab vide letter No. 1353 dated 11.3.1897, subject to rights of the estate right holders, meaning thereby no sale transaction could be effected by him against the rights of the estate right holders like defendants.

19. As far as proof with regard to ouster of plaintiff or his predecessor-in-interest from the suit land is concerned, it is/was not the defendants, who are/were required to prove the ouster of the plaintiff or his predecessor-in-interest, rather, onus to prove possession over the suit land is/was upon the plaintiff, who categorically claimed before the court below that pursuant to sale deed, Ext. PW-2/A, he was delivered possession of the suit land. Suit at hand has been filed by plaintiff, praying therein for alternative relief of possession and permanent prohibitory injunction, and as such, it is/was expected of him to prove that he is in possession of the suit land, and is being ousted forcibly by the defendants, who have no right, title or interest over the same. Substantial questions of law No.1 and 2 are answered accordingly.

Substantial question of law No.3

20. There is no force in the argument of Mr. Ashwani Sharma, learned Senior Advocate that the learned Court below erred in dismissing the application filed by the plaintiff for leading additional evidence under Order 41 Rule 27 CPC, whereby he intended to place on record copies of Jamabandis to prove nature of land and dispute and old revenue record. Close scrutiny of the application filed under Order 41 Rule 27 CPC, reveals that the plaintiff by way of aforesaid application sought permission of the court to place on record copies of old Jamabandis, which show nature of Khasra Nos. 154 and 157 min as *Gair Mumkin Sarak* and *Gair Mumkin* Gohar and Banjar Kadeem etc.

21. Interestingly, plaint if is read in its entirety, it clearly suggests that the plaintiff filed suit with respect to Khasra Nos. 564, 5, 7, 90 and 563 and there is no mention, if any, with respect to aforesaid Khasra numbers in the copies of Jamabandis sought to be placed on record by the plaintiff by way of application under Order 41 Rule 27 CPC, except Khasra No. 157, which corresponds to those Khasra numbers. Moreover, Khasra Nos. 5, 7, 90 and 563 are recorded in the revenue record as road under the control of Himachal Pradesh Public Works Department, whom plaintiff chose not to implead as defendant, as such, learned first appellate Court rightly arrived at a conclusion that the Khasra numbers mentioned in copies of Jamabandis are not relevant and accordingly dismissed the application. Otherwise also, this court, after having perused aforesaid documents, intended to be placed on record by way of additional evidence, has no hesitation to conclude that same are not relevant for the adjudication of the controversy between the parties, especially when no relief is/was sought by the plaintiff against the Public Works Department. Substantial question of law No.3 is also answered accordingly.

22. Now, it would be appropriate to deal with the specific objection raised by the learned counsel representing the defendants with regard to maintainability and jurisdiction of this Court, while examining concurrent findings returned by both the Courts below. Mr. Rajnish K. Lal, Advocate, 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)***

23. 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.

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

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

"24. The principles relating to Section 100 CPC relevant for this case may be summarised thus:

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

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

(iii) The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below

> have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

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

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

> "14) In our considered opinion, the findings recorded by the three courts on facts, which are based on appreciation of evidence undertaken by the three Courts, are essentially in the nature of concurrent findings of fact and, therefore, such findings are binding on this Court. Indeed, such findings were equally binding on the High Court while hearing the second appeal.
>
> 15) It is more so when these findings were neither found to be perverse to the extent that no judicial person could ever record such findings nor these findings were found to be against the evidence, nor against the pleadings and lastly, nor against any provision of law."

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

27. Consequently, in view of detailed discussion made herein above, I find no merit in the appeal at hand, which is accordingly 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 SURYA KANT, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Sh. Rakesh Kumar ....Petitioner

Versus

The Himachal Pradesh State Electricity Board and another ...Respondents

CWP No. 2088 of 2018

Decided on: 19.3.2019

Constitution of India, 1950 – Article 226 – Writ jurisdiction – Electrocution- Compensation – Grant of - Held, on proof of fact that petitioner had suffered injuries in accident on account of negligence of State or its functionaries, Writ Court can grant compensation to him – But, if disputed questions of fact come on record, same cannot be adjudicated by it. (Para 7)

Constitution of India, 1950 – Article 226 – Electrocution – Compensation – Writ jurisdiction – Availability – Petitioner suffered severe electric burns and consequent permanent disability of 55%- Filing writ and claiming compensation for injuries caused to him on account of negligence of Electricity Board – Respondents though admitting accident but denying their negligence- And alleging accident having taken place on account of locale of spot i.e. dangerous hilly slope – Held, extent of negligence of officials of Board and quantum of compensation can be properly examined in suit on leading cogent and convincing evidence by petitioner – Interim compensation granted in sum of Rs.5 lakh in favour of Petitioner – Petition disposed of. (Paras 10 to 14)

Cases referred:

Chairman Grid Corpn. vs. Sukamani Dass, (1999) 7 SCC 298
D.K. Basu vs. State of W.B., (1997) 1 SCC 416
MCD vs. Subhagawanti & Ors., AIR 1966 SC 1750
Rudal Shah vs. State of Bihar, (1983) 2 SCC 746

For the petitioner Mr. Topender Kumar Verma, Advocate.
For the respondents: Mr. Vikrant Thakur, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral)

The petitioner, who is an agriculturist has approached this court by way of instant proceedings filed under Article 226 of the Constitution of India, seeking therein direction to the respondent Himachal Pradesh State Electricity Board to pay him compensation on account of electrocution rendering him 55% permanently disabled.

2. For having a bird's eye view, certain undisputed facts as emerge from the record are that the petitioner, while grazing cattle, came in contact with loose and unattended live H.T. wire touching the earth in the forest namely Chakhra (Junga), as a consequence of which, he suffered multiple burn injuries. Immediately after alleged incident, petitioner was taken to Civil Hospital, Junga, wherefrom he was referred to Indira Gandhi Medical College, Shimla, where he remained hospitalized as an indoor patient with effect from 4.7.2017 to 13.7.2017. Pleadings as well as documents placed therewith further reveal that consequent to aforesaid electrocution, a case under Sections 336 and 337 IPC came to be registered against the delinquent and negligent officials of Himachal Pradesh State Electricity Board Limited, bearing FIR No. 93/17, dated 1.7.2017, at Police Station Junga. Medical Officer, Civil Hospital, Junga issued medico legal certificate (MLC) detailing therein injuries sustained by the petitioner on account of electrocution (Annexure P-1). Allegedly, on account of electrocution, left hand of the petitioner has become completely dysfunctional and he also sustained injuries on head, skull, back and other parts of body.

3. On 6.7.2018, petitioner came to be examined by a duly constituted Board at DDU Hospital Shimla, who, after having medically examined the petitioner, termed disability suffered by the petitioner to be permanent to the extent of 55%. While rendering aforesaid

opinion, the Medical Board, as referred to above, observed as follows: "*Electric Burn (L) hand Ĉ post burn cunfractur and deformed thumb and fingers with joint stiffness*".

4. In the petition at hand, petitioner has claimed that though he is an agriculturist/horticulturist by profession, but besides that he had been also rendering his services as a Carpenter, as such, his monthly income prior to alleged incident was approximately `30,000/- per month. On account of disability suffered by the petitioner in the alleged incident, his income has siphoned to zero and as such, he deserves to be compensated adequately by the respondent Board. Petitioner has also claimed that he has already spent approximately `3.00 Lakh on his treatment including medicines and nutritious diet, as such, he is left with no means to take care of himself. Petitioner has claimed that since the respondents intentionally and deliberately failed to take due care, precaution and safety measures with regard to maintenance and transmission of electricity, he sustained serious injuries, rendering him 55% permanently disabled and, as such, respondents may be directed to award compensation to the tune of `50.00 Lakh in his favour.

5. Respondents in their reply to the petition though have admitted the factum with regard to petitioner's having suffered burns on account of electrocution by an 11 KV high tension line near Ashwani Khadd, but have claimed that the inquiry committee constituted after aforesaid alleged incident has submitted its inquiry report on 2.11.2017, stating therein that the accident happened due to terrain /dangerous location/hill and not due to any negligence of the Himachal Pradesh State Electricity Board Limited or other Department. In nutshell case of the respondents as projected in their reply is that there is no fault on the part of respondents, as such, they can not be held liable to pay damages/compensation, if any, to the petitioner.

6. Having heard learned counsel for the parties and perused material available on record, we find that there is no dispute with regard to multiple injuries having been suffered by the petitioner on account of electrocution, rather, respondents in their reply have admitted the factum with regard to the incident though have suggested that the petitioner met with non-fatal accident due to terrain and dangerous location and there is no fault, if any, of the officials of respondent Board. However, the fact remains that the respondents deliberately failed to take due care and precaution and safety measures with regard to maintenance of transmission line.

7. At this stage, the question which needs to be determined/examined is whether this court, while exercising power under Article 226 of the Constitution of India, can proceed to award compensation on account of burn injuries by way of electrocution. Hon'ble Supreme Court in a catena of cases has ruled that in case it is established on record that the accident occurred due to negligence of the respondent/authority concerned, writ court can proceed to award compensation while exercising power under Article 226 of the Constitution of India. (See **D.K. Basu** v. **State of W.B.** (1997) 1 SCC 416, **Rudal Shah.**v. **State of Bihar**, (1983) 2 SCC 746 and **MCD** v. **Subhagawanti & Ors**. AIR 1966 SC 1750.) However, the Apex Court, in case **Chairman Grid Corpn.** V. **Sukamani Dass**, (1999) 7 SCC 298, has held that if disputed questions of facts come on record, the same cannot be adjudicated by a writ court.

8. At this stage, it would be profitable to take note of the following paras of **Chairman Grid Corpn.** V. **Sukamani Dass** (supra):

> "6. In our opinion, the High Court committed an error in entertaining the writ petitions even though they were not fit cases for exercising power under Article 226 of the Constitution. The High Court went wrong in

proceeding on the basis that as the deaths had taken place because of electrocution as a result of the deceased coming into contact with snapped live wires of the electric transmission lines of the appellants, that "admittedly prima facie amounted to negligence on the part of the appellants". The High Court failed to appreciate that all these cases were actions in tort and negligence was required to be established firstly by the claimants. Mere fact that the wire of the electric transmission line belonging to the appellant No. 1 had snapped and the deceased had come into contact with it and had died was not by itself sufficient for awarding compensation. It also required to be examined whether the wire had snapped as a result of any negligence of the appellants and under which circumstances the deceased had come into contact with the wire. In view of the specific defences raised by the appellants in each of these cases they deserved an opportunity to prove that proper care and precautions were taken in maintaining the transmission lines and yet the wires had snapped because of circumstances beyond their control or unauthorised intervention of third parties or that the deceased had not died in the manner stated by the petitioner. These questions could not have been decided properly on the basis of affidavits only. It is the settled legal position that where disputed questions of facts are involved a petition under Article 226 of the Constitution is not a proper remedy. The High Court has not and could not have held that the disputes in these cases were raised for the sake of raising them and that there was no substance therein. The High Court should have directed the writ petitioners to approach the Civil Court as it was done in OJC No. 5229 of 1995.

7. Reliance placed by the learned counsel for the respondents on the decision of this Court in Shakuntala Devi v. Delhi Electric Supply Undertaking, [1995] 2 SCC 369 is really of no avail to the respondents. Even while entertaining a writ petition under Article 32 of the Constitution, in view of the peculiar facts of that case, this Court observed in clear terms that "the question of negligence of officials of Respondent 1 can be properly examined in a suit where correct facts can be established." In that case, respondent No. 1 was directed to make payment of reasonable amount ex - gratia in exercise of the power under Article 142 of the Constitution and that too becasuse respondent No. 1 had agreed to that course being adopted. The power which is available to this Court under Article 142 is not available to the High Courts, as observed by this Court in Sanchalakshri & Anr. v. Vijayakumar Raghuvirprasad Mehta & Anr. JT (1998) 8 SC 55."

9. It is quite apparent from the aforesaid exposition of law that where disputed questions of facts are involved, petition under Article 226 of the Constitution of India is not a proper remedy. The question re: extent of negligence of the officials of the respondent/authority concerned thus can be properly examined in a suit, where correct facts can be established.

10. Though, in the case at hand, factum with regard to petitioner's having suffered multiple burn injuries on account of electrocution has not been denied but the respondent Electricity Board while referring to some enquiry report submitted by an Enquiry Committee set up after the alleged incident, has taken a stand that the accident did not occur on account of negligence of its officials, rather same happened due to terrain/dangerous location/hill. Hence, we are of the considered view that the degree and extent of negligence on the part of officials of respondent Board is required to be proved in

accordance with law, by the petitioner by leading cogent and convincing evidence in civil proceedings, if any, filed by him.

11. Though, we are fully alive and conscious of the fact that the damages/compensation as claimed in the present petition can not be determined/quantified in the instant proceedings, because question with regard to negligence and dereliction of duty on the part of employees of the respondent Board is required to be proved in accordance with law by the petitioner in the appropriate proceedings of law, but, having taken note of the fact that there is no dispute that the petitioner has suffered multiple injuries on account of electrocution, we deem it fit to award some compensation as an interim measure enabling him to meet his day-to-day expenses as well as legal expenses which he may incur on account of proceedings, if any, filed on his behalf for damages/compensation in the appropriate court of law.

12. Consequently, in view of discussion made herein above, present petition is disposed of with the direction to the respondents to pay a sum of `5.00 Lakh as an interim compensation to the petitioner within a period of four weeks. Needless to say, aforesaid amount awarded to the petitioner as an interim measure would be adjusted /counted towards the compensation, if any, granted in favour of the petitioner, in appropriate proceedings, which may be initiated by him.

13. Before parting with the judgment, we may note that the observations made herein above, shall have no bearing on the decision of the proceedings, which may be filed on behalf of the petitioner before an appropriate forum, which shall be decided on in its own merits.

14. With the aforesaid observations, present writ petition is disposed of alongwith all pending miscellaneous applications.

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

Smt. Chand Thakur ....Objector/petitioner.

Versus

Sh. Vinod Kumar Mehta and another ....Decree holder/respondents.

CMPMO No 350 of 2017
Decided on: 25.3.2019

Code of Civil Procedure, 1908 - Section 47 – Order XVII Rule 3 – Decree- Execution- Objections thereto- – Closure of evidence – Justification- Rent Controller (Executing Court) closing evidence of objector – Petition against – Held, Executing Court had granted four opportunities to objector to lead evidence – One opportunity was even subject to costs – Rent Controller was not expected to wait in perpetuity for objector to lead her evidence – No infirmity in order of Court – Petition dismissed. (Paras 7 & 8)

For the objector. : Mr. Neeraj Gupta, Advocate.
For decree holder. : Mr. Vishal Panwar, Advocate for respondent No.1.
Respondent No.2 ex parte.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J *(Oral)*

By way of this petition, the petitioner assails order dated 01.07.2017, passed by the learned Executing Court (Court of learned Rent Controller, Shimla) District Shimla, H.P. vide which the right to record remaining evidence of the petitioner/objector has been closed on the ground that as petitioner/objector had failed to lead remaining evidence despite four opportunities having been granted, no further opportunity could be granted.

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

3. It is a matter of record that Issues on the Objections filed by the petitioner were framed by the learned Executing Court on 15.03.2017. The case was ordered to be listed on 11.04.2017 for recording the evidence of the Objector. On the said date no evidence was led on behalf of the Objector and prayer made for another opportunity to lead evidence was allowed and the matter was listed for 28.04.2017 to record evidence.

4. On the said date also no evidence was led by the Objector. Another opportunity on the prayer of the Objector was granted and the case was listed for recording the evidence of the Objector for 24.06.2017.

5. On the said date also, the same story was repeated. The Objector did not lead any evidence and again a prayer was made that opportunity be granted to lead evidence. Learned Executing Court acceded to the said request also on imposition of costs of `300/- .

6. The next date for leading the evidence of Objector on self responsibility was fixed for 01.07.2017. On the said date statement of the Objector was recorded. No other evidence was led by the Objector. Another request was made on behalf of the objector for grant of opportunity to lead remaining evidence, which stood declined by learned Executing Court vide impugned Order.

7. Having gone through the record, this Court does not finds any perversity or illegality with the Order so passed. As despite sufficient opportunities having been granted from 11.04.2017 onwards, entire evidence was not led by the Objector then the Court was not expected to wait in perpetuity for the Objector to lead her evidence.

8. Therefore, as learned Executing Court has rightly closed the remaining evidence of the objector, as she failed to lead evidence despite reasonable and sufficient opportunities having been granted, this Court does not finds any perversity with the impugned Order and this petition being devoid of any merit is dismissed.

9. At this stage, Mr. Neeraj Gupta, learned counsel for the petitioner submits that perusal of the order passed by the learned Executing Court dated 01.07.2017 will demonstrate that certain applications stand filed by the Objector on the said date before the learned Executing Court and it may be observed that the Order being passed by the Court today shall have no bearing upon the same. It goes without saying that the applications which find mention in order dated 01.07.2017 shall be decided by the learned Executing Court on their merit totally uninfluenced by any observations made in this Order by the Court. Registry is directed to forthwith return back the record of the case to the learned Executing Court.

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

Som Raj ....Petitioner.

Vs.

Vinod Kumar ....Respondent.

Cr. MMO No.:128 of 2019
Date of Decision: 27.03.2019

Juvenile Justice (Care and Protection of Children) Act, 2000 (Old Act) – Section 52 (2) **- Juvenile Justice (Care and Protection of Children) Act, 2015 (New Act)** – Section 101 – Appeal against acquittal – Maintainability- Juvenile Justice Board (JJB) disposing inquiry by holding accusation not proved against child in conflict with law – Complainant filing appeal before Court of Session which dismissing it on ground of its maintainability – Petition against – Held, matter decided by JJB under old Act – Appeal also preferred by petitioner under old Act – Appeal to be decided under provisions of old Act – Under said Act, no appeal against acquittal recorded by JJB shall lie – No infirmity in judgment of Sessions Judge holding appeal not maintainable – Petition dismissed. (Paras 2 & 3)

For the petitioner: Mr. Goldy Kumar, Advocate.
For the respondent: Nemo.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*:

By way of this petition filed under Section 482 of the Code of Criminal Procedure, challenge is laid to the judgment dated 20.12.2018, passed by the Court of learned Sessions Judge, Kangra at Dharamshala, District Kangra, H.P. in Criminal Appeal No. 48-K/2013, vide which learned Appellate Court has dismissed the appeal filed by the present petitioner on the ground that as the appeal had been filed by the petitioner against the order of acquittal passed by the Juvenile Justice Board in favour of juvenile, appeal was not maintainable under Section 52 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as 'the 2000 Act').

2. Having heard learned counsel for the petitioner and after perusing the impugned judgment, as also the statutory provisions of 2000 Act, this Court finds no infirmity with the judgment passed by the learned Appellate Court.

3. It is not in dispute that the judgment passed by the Juvenile Justice Board, Kangra at Dharamshala in Criminal Case No. 12-II/2011, which was instituted on 03.12.2010, was under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000. It is also a matter of record that feeling aggrieved by the acquittal of the juvenile, present petitioner preferred an appeal under Section 52 of the old Act, i.e., 2000 Act (wrongly mentioned in the judgment passed by the learned Appellate Court as '1986 Act'). Sub-section (2) of Section 52 of the 2000 Act clearly contemplates that no appeal shall lie from any order of acquittal passed by the Juvenile Justice Board in respect of a juvenile alleged to have committed an offence. It is on the basis of the said statutory provision that the appeal stands dismissed by the learned Appellate Court as not maintainable.

4. Learned counsel for the petitioner primarily lays challenge to the said order on the ground that as now the Juvenile Justice (Care and Protection of Children) Act, 2015 is in force, therefore, the judgment passed by the learned Appellate Court is not sustainable, as the learned Appellate Court erred in not appreciating that under the new Act, an appeal is maintainable even against the acquittal orders.

5. There is a fallacy in the contention of the learned counsel for the petitioner, because when the matter was decided under the 2000 Act and the appeal was also preferred against the judgment of acquittal under the 2000 Act, then the appeal was to be decided under the provisions of 2000 Act and not under the provisions of 2015 Act. In this view of the matter, there is neither any perversity nor any jurisdictional error in the judgment of the learned Appellate Court. Accordingly, as there is no merit in the appeal, the same is dismissed being devoid of any merit.

Petition stands disposed of.

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

Rattan Chand ……Appellant.
Versus
State of Himachal Pradesh ……Respondent.

Cr. Appeal Nos. 493 and 176 of 2015
Reserved on : 2.1.2019.
Decided on : 28.03.2019.

Indian Evidence Act, 1872 – Sections 3 & 65 B – Electronic evidence – Admissibility – Requirements – Held, certificate of authorized officer must contain particulars of device involved in production of record, particulars identifying electronic record containing statement and it must be signed by him - It must accompany electronic record like computer printout, compact disc, video compact disc, pen drive etc., pertaining to statement sought to be given in evidence – Record without requisite certificate not admissible – Call detail records between deceased and accused without requisite certificate of Nodal Officer of service provider not admissible in evidence. (Para 13)

Indian Evidence Act, 1872 – Section 3 & 65 B – Electronic evidence – Mandatory requirements – Purpose of – Held, purpose of safeguards provided under law is to ensure source and authenticity – These are hallmarks pertaining to electronic record sought to be used as evidence – Electronic record being more susceptible to tampering, alteration and transposition – Without such safeguards whole trial based on electronic records can lead to travesty of justice (Para 13)

Indian Evidence Act, 1872 – Sections 3, 45 A and 65 B – Electronic record -Authenticity – Held, when electronic record duly produced in evidence, its genuineness can be proved by opinion of examiner of electronic evidence. (Para 16)

Indian Penal Code, 1860 - Sections 302, 376, 404 and 414 – Rape cum murder, theft and receipt of jewellary – Proof – Prosecution filing charge sheet on allegations that accused 'RC' strangled victim with her dupatta when she demanded money from him for coitus he had with her – And thereafter he removed jewellary from her dead body and sold to accused 'VP' – Trial Court convicting 'RC' for murder and removing ornaments from dead body and

accused 'VP' for receiving stolen property from him by relying upon amongst other things, call detail records between 'RC' and deceased of date of incident – Appeal against – On facts, (i) CDR's not accompanying requisite certificate of Nodal Officer (ii) no evidence showing 'RC' having acquaintance with deceased or they were having live-in relation (iii) incriminatory SIM number through which 'RC' allegedly used to talk to her not in his name but issued in favour of 'S' (iv) no evidence that said SIM number extracted from cell phone recovered from 'RC' at time of his arrest (v) mobile phone number of deceased found issued in name of her son (vii) recorded audio version between 'RC' and deceased not taken into possession (vii) foundation of prosecution case that 'RC' had sexual intercourse with deceased before he murdered her, not established even as per Trial Court and prosecution not challenging acquittal of 'RC' for rape (viii) statement of 'DC' a witness of having seen accused going towards jungle during day time found doubtful (xi) ornaments of deceased not got identified as belonging to her from her relatives - Held, no acceptable evidence on record to hold accused guilty of offences – Appeals allowed – Conviction set aside – Accused acquitted. (Paras 18 to 30)

Cases referred:

Anvar P.V. vs. P.K. Basheer and others, AIR 2015 SCC 180
Devinder Singh vs. State of H.P., 1990 (1) Shim. L.C. 82
Hikmat Bahadur vs. State of Himachal Pradesh, Criminal Appeal No. 242 of 2016 decided on September 19, 2017
Shafhi Mohammad vs. State of Himachal Pradesh, (2018) 2 SCC 801
State of Himachal Pradesh vs. Rayia Urav @ Ajay, ILR 2016 (5) (HP) 213
State of Rajsathan vs. Islam & Others, (2011) 6 SCC 343
Sulender vs. State of H.P., Latest HLJ 2014 (HP) 550
T. Subramanian vs. State of T. N., (2006) 1 SCC 401

For the appellant in	Mr. Anup Chitkara, Advocate with both the appeals. Ms. Sheetal Vyas, Advocate.
For the respondent	Mr. Vikas Rathore, Mr. Narender Guleria, Addl. AGs, with Mr. Kunal Thakur and Mr. Sunny Dhatwalia, Dy. AGs.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J.

Appellants, hereinafter called as accused persons, in both the appeals are convicts. The principal accused is Rattan Chand, appellant in Criminal Appeal No. 493 of 2015. He has been convicted by learned Additional Sessions Judge, Chamba, District Chamba, H.P. for the commission of the offence punishable under Sections 302 and 404 of the Indian Penal Code, whereas acquitted of the charge framed against him under Section 376 of the Code. His co-accused Vikash Puri, the appellant in connected appeal No. 176 of 2015 has been held guilty and convicted for the commission of offence punishable under Section 411 of the Indian Penal Code. Accused Rattan Chand has been sentenced to undergo imprisonment for life and to pay Rs.20,000/- as fine for the commission of offence punishable under Section 302 of the Indian Penal Code and further to undergo rigorous imprisonment for three years for the commission of offence punishable under Section 404 of the Code, whereas accused Vikash Puri has been sentenced to undergo rigorous imprisonment for three years and to pay Rs.5000/- as fine for the commission of the offence

punishable under Section 411 of the Indian Penal Code vide judgment dated 10.4.2015, under challenge in these appeals.

2. On 9.5.2012 Gorkhi, a female, aged 42 years, was found dead in Khanera jungle, Pargana Manjer, Tehsil Salooni, District Chamba. The police of Police Station, Kihar received information in this regard at about 7:35 P.M. over telephone which was entered in rapat rojnamcha vide rapat Ext. PW18/C. On receipt of the information, PW23 Sub Inspector Darshan Singh accompanied by ASI Ishwar Dass, HC Varinder (PW9), HC Bhag Singh, C. Satish (PW20), C. Rumel and C. Devi Chand (PW12) left for the spot in official vehicle (Gypsy) No. HP-48-0863. The same was being driven by C. Tilak Raj. On the spot, HC Bhupi Ram. C. Subhash and Lady Constable Ranjana of Police Station, Salooni had already arrived and present. Bal Krishan PW1 son of deceased was also present on the spot. He made the statement Ext.PW1/A which was recorded by PW 23 Sub Inspector Darshan Singh, the then Station House Office, Police Station, Kihar and investigating officer of this case. In a nut shell, the complainant PW1 has disclosed that on 9.5.2012 around 11:30 A.M. all family members had left the home in connection with their respective domestic affairs. He along with his wife also left for village Bhandal to the house of his paternal aunt (Bua) to attend the celebration of birthday of her son there. It is his mother Smt. Gorkhi, the deceased, left behind in the house. She told him that during day time she will go to forest to collect 'Khasrod' (wild vegetable). In the evening when he alongwith his wife returned around 3:30 P.M. to the house his younger brother Dharam Chand PW5 was present there. His mother, however, was not present. He, therefore, called her on her Cell Phone bearing No. 98169-67124. He in turn received the tone "switched off". He contacted his near relations to ascertain as to whether his mother Gorkhi has come to them or not. They all told that she had not come to them. It is on this, he accompanied by his wife Meena Devi went inside the forest adjoining to their house in search of Gorkhi Devi. It is around 6:45 P.M. they noticed that she was lying inside the bushes. On touching her body she was found dead. Her dupatta was found tied around her neck. Blood had oozed out from her nose and mouth. The nose pin, golden ear rings and silver chain were found missing from her nose, ears and neck. Her cell phone bearing No. 98169-67124 was found kept in light yellow coloured bag. However, on checking its SIM was found missing. In the bag, little wild vegetable was also found kept. Her plastic shoes were also found towards the side of her feet. On hearing his cries, the villagers also arrived at that place.

3. In view of the statement Ext. PW1/A the deceased was found to be strangulated with her dupatta and the SIM of the mobile missing. However, who did it and responsible for such gruesome act, nothing has come in the statement Ext.PW1/A nor the complainant PW1 suspected the hand of someone in the commission of this offence. Anyhow, it is during the course of investigation allegedly surfaced that accused Rattan Chand was in touch with the deceased since pretty long time. They both used to speak with each other over cell phones. The accused allegedly used to call the deceased from his cell phone bearing No. 98167-30076 on her cell phone bearing No. 98169-67124. On the fateful day also, he allegedly made four calls to her i.e. 07:16:59, 07:45:05, 10:10:59 and 10:40:48 hours. The call detail reports Ext.PW14/B and Ext.PW14/C have been pressed in service in this regard. As per the further investigation conducted in this matter accused Rattan Chand wanted to subject the deceased to sexual intercourse. She allegedly demanded money from him. He, however, failed to pay money to her and it is for this reasons she did not allow him to commit sexual intercourse with her. It is for this reasons he allegedly killed her by way of strangulating her with her own dupatta and taken away her jewellary i.e. nose pin, silver chain and golden ear rings. He allegedly sold the same to his co-accused Vikash Puri, a jeweller in Mohalla Lahore Gali, Chougan Chamba town. The charge against accused Rattan Chand was framed for the Commission of the offence

punishable under Sections 376, 302 and 404 of the Indian Penal code, whereas against his co-accused Vikash Puri under Section 411 of the code. They, however, pleaded not guilty and claimed trial.

4. The prosecution in order to sustain the charge against him has examined 23 witnesses in all. The material prosecution witnesses are Bal Krishan PW1 and Dharam Chand PW5, both sons of the deceased, PW2 Chamaru Ram a witness to the recovery of shoes, mobile pone of deceased and plucked wild vegetable, PW3 Vinod Kumar a witness to the proof of cell No. 98167-30076 belongs to accused Rattan Chand. PW4 Surinder Kumar is conductor of private bus belonging to Mushtaq Service and as per his version the accused on 9.5.2012 boarded the bus being conducted by him at 7:55 A.M. at Sultanpur (Chamba) for Salooni and alighted at Sundla. PW6 Mohan Lal is a witness to the recovery of Mobile phone make Lawa KKT-34 having duel SIM i.e. 98167-30076 and 08057-11328 and currency notes worth Rs.10 and coin of Rs.5/-. PW7 Rajesh Kumar is a fellow villager who on hearing screams of PW1 Bal Krishan rushed to the spot. Therefore, he is also a witness of the circumstances prevailing on the spot on the recovery of dead body of Gorkhi there. PW8 Sanjesh Kumar is also Conductor of one of bus of Mushtaq service. According to him accused Rattan Chand had boarded the bus at Sundla for Dudhedi at 8:55 A.M. PW10 Ishwar Kumar has also stated that cell phone number of accused Rattan Chand was 98167-30076. Kamal Dev PW13 though a witness to the recovery of the ornaments from accused Vikash Puri, however, turned hostile. PW21 Jagdish is husband of deceased Gorkhi Devi.

5. The remaining prosecution witnesses are, however, formal being official witnesses having remained associated during the course of investigation in one way or the other because PW9 HC Varinder Singh accompanied PW23 on receipt of the information in Police Station, Kihar. PW11 Dr. Harsh Mahajan has conducted the post mortem of the dead body alongwith penal of doctors namely Dr. Dushyant Thakur, Dr. Richa Thakur and Dr. Arti Sharma. PW12 LHC Devi Chand also visited the spot accompanied by PW23 SI Darshan Singh, the Investigating Officer. PW14 Devinder Verma, Nodal Officer, Bharti Airtel Limited, Kasumati, Shimla has proved the documents Ext.PW14/A to Ext. PW14/C, Ext.PW14/D to Ext.PW14/F which he had supplied to Chamba police on the request made by Superintendent of Police Chamba for the purpose. PW15 Yasheen Mohd. is Field Kanungo and PW16 Ramesh Chand is the Patwari, Patwar Circle, Devgarh. They have proved the application moved by the SHO, Police Station, Kihar Ext.PW15/A, the demarcation report Ext.PW15/B, the Akas Tatima Ext.PW16/A and Jamabandi Ext.PW16/B. PW17 Naresh Kumar is the photographer. He has proved the photographs Ext.PW1/B-1 to Ext.PW1/B-6. PW18 HC Ramesh Kumar was Moharar Head Constable in Police Station, Kihar at the relevant time whereas PW19 HHC Diwan Chand while working as General duty constable in the Police Station had taken the case property to Forensic Science Laboratory. PW20 C. Satish Kumar being a member of police party visited the spot had taken the Rukka Ext.PW1/A to police station for registration of FIR. PW22 Dr. Vishal Thakur has conducted the medical examination of accused Rattan Chand. As noticed at the outset PW23 SI Darshan Singh is the Investigating Officer. Since mobile cell phone bearing No. 98167-30076 was registered in the name of Suresh Kumar, therefore said Shri Suresh Kumar has also been examined. According to him, he has never used this Sim.

6. On completion of the prosecution evidence, the statement of accused Rattan Chand was recorded under Section 313 Cr.P.C. The incriminating circumstances appearing against him were put during such examination. He, however, denied the same either for want of knowledge or being incorrect. He has denied that Cell No. 98167-30076 belongs to him. Though it is admitted that he was a tenant of PW10 Ishwar. However, denied that he

used to speak with his landlord through cell number 98167-30076. It is stated that he is innocent and has been implicated falsely in this case.

7. Accused Vikash Puri has also denied all the incriminating circumstances put to him in his statement under Section 313 Cr.P.C. being incorrect. According to him he is working as JSW (Man power out sourcer) and not a Goldsmith.

8. Learned trial Judge on hearing learned Public Prosecutor and learned defence counsel as well as appreciating the oral as well as documentary evidence has held accused Rattan Chand guilty for the commission of offence punishable under Sections 302 and 404 of the Indian penal Code. His co-accused Vikash Puri has been held guilty for the commission of the offence punishable under Section 411 of the Code. They both have been convicted and sentenced accordingly as pointed out in this judgment at the outset. Accused Rattan Chand has, however, been acquitted of the charge framed against him under Section 376 IPC as no case to this fact was found to be made out.

9. Both the accused aggrieved by the impugned judgment and findings of their conviction and sentence have questioned the legality thereof before this Court by filing these appeals. It has been alleged that learned trial Judge has convicted the accused persons on the basis of the evidence which was not at all admissible. The evidence has not been appreciated in its right perspective and to the contrary the findings based on surmises and conjectures. On the face of the record the present is a case where two possible views emerges, however, irrespective of the settled law that the view favourable to the accused must be preferred has been ignored and the benefit of doubt denied to them. Accused Rattan Chand had no motive to commit the offence when he has been acquitted of the charge framed against him under Section 376 IPC. He could have not been convicted and sentenced for the commission of offence punishable under Sections 302 and 404 of the Indian Penal Code. His so called disclosure statement recorded after 4th or 5th day of his arrest after subjecting him to torture being violative of Article 20(3) of Constitution of India could have not been relied upon on while recording the findings of conviction against him. In order to remove all doubts the Investigating Officer was required to investigate the matter scientifically and photographed/video-graphed the recovery of ornaments pursuant to the alleged disclosure statement made by accused Rattan Chand. There was no evidence against accused Vikash Puri that he is a Goldsmith. However, irrespective of it, a false case that he received the stolen articles from his co-accused Rattan Chand has been registered against him. It is, therefore, submitted that the impugned judgment is neither legally nor factually sustainable, the same has been sought to be quashed and set aside.

10. On the completion of the record, we have heard Mr. Anup Chitkara, Advocate assisted by Ms. Sheetal Vyas, Advocate on behalf of the accused-appellants in both the appeals and Mr. Narender Guleria, learned Additional Advocate General on behalf of the respondent-State. Mr. Chitkara has argued with all vehemence that there is no iota of evidence suggesting the involvement of the accused in the commission of the alleged offence. No legal and acceptable evidence is stated to have come on record to establish that the deceased and accused had acquaintance with each other. The scientific investigation and the evidence collected in the shape of the detail of calls made from Cell Number 98167-30076 on Cell Number 98169-67124 and vice-versa for want of certificate required to be tendered in terms of Section 65(B) of the Indian Evidence Act cannot be relied upon. According to Mr. Chitkara the prosecution story that accused Rattan Chand had committed sexual intercourse with the deceased and when she demanded money from him killed her by way of strangulating her with her own dupatta stood discarded by learned trial Judge and the respondent-State has not preferred any appeal against the findings of acquittal of accused Rattan Chand under Section 376 IPC. No case under Sections 302 or 404 IPC is

also made out against him as according to Mr. Chitkara the said accused had no occasion nor any motive to have strangulated the deceased and killed her. He had also no occasion to remove her ornaments allegedly nose pin, ear rings and chain. There being no sign of struggle inside the bushes where dead body allegedly was found lying, it is argued that had the deceased been strangulated and killed there she would have definitely struggled for her survival and thereby left behind some evidence on the spot. That place according to Mr. Chitkara, therefore, cannot be said to be the place of occurrence by any stretch of imagination. It is also pointed out that while cell Number 98167-30076 belong to PW24 Suresh Kumar cell number 98169-67124 to that PW1 Bal Krishan, the complainant. It is thus highly doubtful that the accused and deceased used to talk with each other over these cell phones. In order to remove all doubts in this regard, the voice test atleast of accused Rattan Chand would have been conducted and compared with his voice if recorded while speaking to the deceased over cell phone number 98169-67124. It has thus been urged that the present is a case of no evidence and both accused have been convicted and sentenced illegally by leaned trial Court.

11. On the other hand, learned Additional Advocate General has argued that each and every incriminating circumstance appearing in the prosecution evidence against both accused lead to the only conclusion that it is accused Rattan Chand who has killed the deceased and also removed her ornaments. The evidence according to learned Additional Advocate General further reveals that the ornaments were sold by the principal accused to his co-accused Vikash Puri who allegedly is a Goldsmith and running his shop in Chamba town. Learned trial Judge, as such, has appreciated the evidence available on record in nits right perspective and not committed any illegality or irregularity while recording the findings of conviction against both the accused.

12. 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 have enumerated in a judgment we recently delivered in *Criminal Appeal No. 242 of 2016*, titled ***Hikmat Bahadur*** versus ***State of Himachal Pradesh*** and its connected appeal 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."...

13. The guilt or innocence of the accused has to be determined in the light o the parameters laid down in the case law cited supra as well as the evidence available on record. In the case in hand learned trial Judge on perusal of the oral as well as documentary evidence has culled out the following circumstances allegedly emerges on record:

1. The dead body of the deceased Gorkhi Devi was seen on 9.5.2012 in the Khandera forest in a condition mark of ligature on the neck,multiple coils of Dupatta around the neck with multiple knots on the back side of the neck.
2. The blood from the nose and mouth of the deceased Gorkhi Devi was oozing out which was noticed by Bal Krishan (PW-1) at 7.30 P.M. on 9.5.2012.
3. Dead body was seen by PW-1 Bal Krishan,PW-5 Dharam Chad, PW-7 Rajesh Kumar and PW-21 Jagdish her husband at the spot on the aforesaid date and time.
4. The post mortem of the dead body of the deceased Ex.PW11/B shows that she was strangulated with the Dupatta which leads to azphyxia, shock and death.
5. Accused person was arrested on 13.5.2012 and from his possession in Mobile phone Lawa with dual SIM bearing NO. 9816730076 and 9805711328 having IMEI No. 91113351397225 were recovered from the possession of the accused vide memo Ex. PW6/B in the presence of PW6 Mohan Lal and PW7 Rajesh Kumar.
6. SIM No. 9816730076 which was in the cell recovered from the possession of the accused person was constantly used by the accused person for talking with the telephone No. 9816967124 of the deceased Gorkhi Devi given to her by her son complainant Bal Krishan (PW1).
7. Call details Ex.PW14/Band Ex.PW14/C of the numbers 9817967124 and 9816730076 furnished by the Nodal Officer Bharti Airtel Ltd vide letter Ex. PW14/A and the letters Ex.PW14/E and F shows the location of these phones used and also the addressed of the persons in whose name the SIMs were issued.
8. Call details of both aforesaid numbers shows that accused Rattan Chand was directly in contact with the deceased Gorkhi Devi on her mobile phone. Even on the date of occurrence accused called her on her mobile no.

9816968124 at 7.16.59 hours and they talk about 290 second and thereafter he again made call on her mobile No. at about 7.45.05 and they talk about 19 seconds and third call on her mobile was at about 10.10.59 and they talk about 45 second.

9. Presence of accused person in and around the place of incidence.

10. The disclosure statement of accused person under Section 27 of the Indian Evidence Act EX. PW9/B deposed in the presence of HC Virender Singh (PW9)and C. Rumel Singh vide which accused has stated that he can make the recovery of articles effected stolen by him such as one nose pin, one pair of ear rings (gold) and one silver necklace sold to a jeweller at Dogra Bazar.

11. On the basis of th statement under Section 27 of the Indian Evidence Act of the accused person the recovery of the golden and silver ornaments of the deceased were made effected vide memo Ex. PW12/A in the presence of Kamal Dev (PW13) and C. Devi Singh (PW12).

12. Golden and silver ornaments of the deceased Gorkhi Devi recovered from the shop of co-accused Vikash Puri identified by the husband of the deceased Jagdish (PW21).

13. During the daytime of the date of occurrence PW5 while he was collected the stones in the Khandera forest near his house has seen the accused walking towards the spot where lateron dead body of deceased Gorkhi Devi was recovered.

14. Identification of the spot where the accused Rattan Chand committed the murder of Gorkhi Devi was given by the accused Rattan Chand and memo of identification Ex.PW5/A was prepared in the presence of Dharam Chand (PW5) and Rajesh Kumar (PW7).

15. Carbunculus reddish brown in colour of traumatic injury over the epigastric area of the accused person and as per the Dr. Vishal Thakur (PW22) the hairs on the chest of the accused person appears to have been plucked during the struggle by the other person connect the accused person directly in the alleged offence.

14. As a matter of fact, the above circumstances at serial Nos. 1 to 4 and 7 not implicates accused Rattan Chand or for that matter accused Vikash Puri by any stretch of imagination for the reasons that the evidence as has come on record by way of the testimony of PW1 Bal Krishan, his brother Dharam Chand PW5, father Jagdish PW21, Uncle (Taya) Mohan Lal PW6 and Rajesh Kumar PW7 supported by the photographs Ext.PW1/B-1 to Ext.PW1/B-6 reveal that Gorkhi Devi was lying dead in Khanera forest and ligature around her neck is visible there in the photographs. The team of doctors which has conducted the post mortem of the dead body were also of the opinion that she died due to strangulation which led to asphyxia and shock also. The post mortem report is Ext.PW11/B. The same stand proved from the statement of Dr. Harsh Mahajan PW11, one of the members of the team of doctors which has conducted the post mortem. In the further opinion of the doctors the deceased could have been strangulated with dupatta Ext.P11. PW1 Bal Krishan was present on the spot as his statement was recorded by Sub Inspector and the I.O. of this case PW23 Darshan Singh. Nothing, however, has come in the statement of PW23 that Jagdish PW21 the husband of the deceased and Dharam Chand PW5, her another son were also present there. Though PW23 has stated in his cross-examination that the villagers had gathered on the spot, however, when specifically asked about the presence of PW21 Jagdish, the husband of the deceased, he expressed his inability to tell. Anyhow, even if it is believed to be true that PW5 Dharam Chand, PW7 Rajesh Kumar and PW21 Jagdish were also

present on the spot where the dead body was lying not at all connect accused Rattan Chand with the commission of the alleged offence. The call detail reports (CDR) are Ext.PW14/B and Ext.PW14/C made from cell numbers 98167-30076 and 98169-67124. As per these documents the calls from cell number 98167-30076 on cell number 98169-67124 have been made repeatedly on different dates. The duration of the calls is also in several minutes. PW14 Devinder Verma, Nodal Officer, Bharti Airtel, however, not tendered in evidence certificate in terms of provisions contained under Section 65(B)(4) of the Evidence Act. The Apex Court in ***Anvar P.V.*** *vs.* ***P.K. Basheer and others, AIR 2015 SCC 180*** has held that electronic record though is admissible in evidence, however, subject to fulfillment of certain conditions. This judgment reads as follow:

> "14. Under Section 65B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:
>
> (a) There must be a certificate which identifies the electronic record containing the statement;
>
> (b) The certificate must describe the manner in which the electronic record was produced;
>
> (c) The certificate must furnish the particulars of the device involved in the production of that record;
>
> (d) The certificate must deal with the applicable conditions mentioned under Section 65B(2) of the Evidence Act; and
>
> (e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.
>
> 15. It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.
>
> 16. Only if the electronic record is duly produced in terms of Section 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation, resort can be made to Section 45A – opinion of examiner of electronic evidence.
>
> 17. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65B of the Evidence Act are not complied with, as the law now stands in India."

15. Similar is the ratio of the judgment again that of the Apex Court in ***Shafhi Mohammad*** versus ***State of Himachal Pradesh, (2018) 2 Supreme Court Cases 801.*** This judgment also reads as follow:

> "24. We may, however, also refer to judgment of this Court in Anvar P.V. v. P.K. Basheer and Others, (2014) 10 SCC 473,delivered by a Three-Judge Bench. In the said judgment in para 24 it was observed that electronic evidence by way of primary evidence was covered by Section 62 of the

> Evidence Act to which procedure of Section 65B of the Evidence Act was not admissible. However, for the secondary evidence, procedure of Section 65B of the Evidence Act was required to be followed and a contrary view taken in Navjot Sandh (supra) that secondary evidence of electronic record could be covered under Sections 63 and 65 of the Evidence Act, was not correct. There are, however, observations in para 14 to the effect that electronic record can be proved only as per Section 65B of the Evidence Act.
>
> 25. Though in view of Three-Judge Bench judgments in Tomaso Bruno and Ram Singh (supra), it can be safely held that electronic evidence is admissible and provisions under Sections 65A and 65B of the Evidence Act are by way of a clarification and are procedural provisions. If the electronic evidence is authentic and relevant the same can certainly be admitted subject to the Court being satisfied about its authenticity and procedure for its admissibility may depend on fact situation such as whether the person producing such evidence is in a position to furnish certificate under Section 65B(4).
>
> 26. Sections 65A and 65B of the Evidence Act, 1872 cannot beheld to be a complete code on the subject. In Anvar P.V.(supra), this Court in para 24 clarified that primary evidence of electronic record was not covered under Sections 65A and65B of the Evidence Act. Primary evidence is the document produced before Court and the expression "document" is defined in Section 3 of the Evidence Act to mean any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter........
>
> 29. The applicability of procedural requirement under Section65B(4) of the Evidence Act of furnishing certificate is to be applied only when such electronic evidence is produced by a person who is in a position to produce such certificate being in control of the said device and not of the opposite party. In a case where electronic evidence is produced by a party who is not in possession of a device, applicability of Sections 63and 65 of the Evidence Act cannot be held to be excluded. In such case, procedure under the said Sections can certainly be invoked. If this is not so permitted, it will be denial of justice to the person who is in possession of authentic evidence/witness but on account of manner of proving, such9document is kept out of consideration by the court in absence of certificate under Section 65B(4) of the Evidence Act, which party producing cannot possibly secure. Thus, requirement of certificate under Section 65B(4) is not always mandatory."

16. Therefore, mere tendering the call detail reports Ext.PW14/B and Ext.PW14/C is not sufficient to discharge the onus that the same constitute primary evidence which is legally admissible. Therefore, the circumstances at serial Nos. 1 to 4 and 7 cannot said to be incriminating or implicate accused Rattan Chand by any stretch of imagination nor connect him with the commission of offence. True it is that Gorkhi Devi has died in an unnatural death, however, it is accused Rattan Chand alone who has killed her in the manner as claimed by the prosecution and removed her golden nose pin, golden ear rings and silver chain from her person, nothing can be said from the above said circumstances which have been relied upon by learned trial Judge against him.

17. As a matter of fact, only the following circumstances emerges from the prosecution evidence against accused Rattan Chand and his co-accused Vikash Puri:-

i) Accused Rattan Chand had acquaintances with deceased Gorkhi and they both were also in living relations and as a consequence thereof the accused used to commit sexual intercourse with her.

ii) Accused Rattan Chand was lawful subscriber of Cell No. 98167-30076 and used to speak with the deceased over cell number 98169-67124 which though was in the name of her son PW1 Bal Krishan, however, given to her for being used.

Iii) On the fateful day i.e. 9.5.2012 also the accused had made calls to the deceased in the morning through cell number 98167-30076 on cell number 98169-67124 and as a consequence thereof came to meet her in Khanera forest.

iv) Accused Rattan Chand boarded private bus of 'Mushtaq Bus Service' from Sultanpur and alighted from the bus at Sundla. Also that subsequently he boarded bus of 'Mustaq Bus Service' again at Sundla and alighted at Dudhedi.

v) Accused Rattan Chand thereafter met the deceased and committed sexual intercourse with her and on her demand for money strangulated her with her own dupatta and thereby caused her death.

vi) He removed golden nose pin Ex.P19, golden ear rings Ext.P20 and sliver necklace Ext.P21 from her person and sold to his co-accused Vikash Puri in his shop at Mohalla Lahore Gali, Chougan Chamba town, H.P.

vii) Accused Vikash Puri is a goldsmith by profession and running his shop at Mohalla Lahore Gali, Chougan Chamba and received the jewellary i.e. nose pin, ear rings and chain of the deceased from accused Rattan Chand on payment of consideration.

18. It is now to be seen from the evidence available on record that the circumstances so pressed by the prosecution in service against both the accused stood proved beyond all reasonable doubt and the chain of circumstances is complete so as not to leave any reasonable ground for the conclusion consistence with their innocence and rather that in all probabilities the charge against both of them stood established.

Circumstance No.I.

19. If coming to the first circumstance pressed in service by the prosecution against accused, there is no iota of evidence to show that the accused had acquittance with the deceased. The deceased belongs to village Sukrethi, Tehsil Salooni, district Chamba whereas accused Rattan Chand was resident of village Uchhanu Tehsil Salooni, district Chamba, of course Tehsil same i.e. Salooni. Nothing has come on record as to how they both were acquainted with each other. None of the witnesses have uttered even a single word qua this aspect of the matter. Similarly, there is also no iota of evidence to show that they both were in living relations and as a consequence thereof enjoying sex with each other. The mere assertion that accused Rattan Chand had been speaking with the deceased over her cell number 98167-67124 through his cell number 98167-30076 for the reasons to be discussed hereinafter and also recorded hereinabove are not at all proved nor could have been relied upon against him by learned trial Court. Therefore, there is no legal and acceptable evidence to show that accused Rattan Chand had acquittance with deceased Gorkhi. Also that they were in living relations and having physical relations also with each other.

Circumstance No.II & III.

20. Now if coming to the second and third circumstance, admittedly cell number 98167-30076 is in the name of PW24 Suresh Kumar. Though PW24 while in the witness box has categorically stated that he never got issued this cell phone number in his name nor ever used the same. PW10 Ishwar Kumar in whose house accused Rattan Chand resided as tenant during October, November, 2011 has also stated that said accused used to call him through cell phone number 98167-30076. However, as per his version in cross-examination he has not retained any record of calls so made by accused Rattan Chand to him. PW3 Vinod Kumar has also stated that accused Rattan Chand had been speaking through his cell number 98167-30076. However, in his cross examination this witness has admitted that cell number of the accused is 98057-11328 and not 98167-30076. PW14 Devinder Verma, Nodal Officer, Bharti Airtel Limited has stated that cell number 98167-30076 as per the record is in the name of Suresh Kumar (PW24). In view of such evidence available on record it cannot be said with all exactness and accuracy that cell number 98167-30076 was under the use and occupation of accused Rattan Chand and that it is he alone made calls therefrom to the deceased and for that matter to his landlord Ishwar Kumar PW10 or PW3 Vinod Kumar.

21. Now if coming to the prosecution case qua SIM Number 98167-30076 allegedly extracted from mobile phone set of accused Rattan Chand after his arrest in the presence of PW6 Mohan Lal and PW7 Rajesh nothing of the sort has come in the statements of the said witnesses that the SIM was extracted from the mobile set recovered from the accused. According to them they were not knowing that the SIM extracted from the set was bearing number 98167-30076 and rather as per the testimony of Pw6 he had noticed the number of the SIM 98167-30076 when it was being recorded by the I.O. in the papers which he had reduced into writing. Therefore, it cannot be inferred from the statements of either PW6 or PW7 that SIM number 98167-30076 was extracted from the mobile phone set allegedly recovered from accused Rattan Chand. Even the recovery of the mobile set having taken place in the manner as claimed by the prosecution has also not been established because there is doubt even about the case of the prosecution qua the date and time of the arrest of the said accused. In view of the evidence qua this aspect of the matter produced by the prosecution itself where two views have emerges on record and as per the settled legal principles the view in criminal administration of justice favourable to the accused has to be given preference over and above the view in favour of the prosecution. We may take support in this regard from the judgments of the Hon'ble Apex Court in **T. Subramanian** versus **State of T. N., (2006) 1 Supreme Court Cases 401** and **State of Rajsathan** versus **Islam & Others, (2011) 6 Supreme Court Cases, 343.**

22. Interestingly enough, mobile phone number 98169-67124 was in the name of PW1 Bal Krishan and not in that of his mother deceased Gorkhi. Whether he had given the same to her for use is again doubtful because his sole testimony in this regard cannot taken as a gospel truth. As a matter of fact, the recorded audio version in respect of the call made from cell number 98167-30076 over cell number 98169-67124 should have been taken to establish beyond all reasonable doubts that such version was in the voice of the accused and the deceased. However, no scientific investigation in this regard has been conducted. It is, therefore, difficult to believe that the calls from cell number 98167-30076 over cell number 98169-67124 and vice-versa have been made by accused Rattan Chand and the deceased to each other. Learned trial Judge has ignored this vital aspect of the matter and placed reliance on the prosecution evidence including the call detail reports Ext.PW14/B and Ext.PW14/C while recording findings of conviction against the accused on having been swayed with the factum of the death of Gorkhi, a young lady. Therefore, there is no legal and acceptable evidence to arrive at a conclusion that cell number 98167-30076 was in the exclusive possession and use of accused Rattan Chand and that he used to speak

with the deceased for quite pretty long time. It is also not established that they were acquainted with each other and on 9.5.2012 also they settled their meeting in the forest by speaking over cell phone with each other. The evidence qua recovery of Sim No. 98167-30076 from Mobile set allegedly taken into possession from accused after his arrest in the presence of PW-6 Mohan and his son PW-7 Rajesh Kumar hardly inspires any confidence as the witnesses being brother-in-law (Jeth) and nephew of the deceased, were in her relation, hence interested in the success of the prosecution case.

23. The prosecution case that the accused committed sexual intercourse with the deceased and that when she demanded money strangulated her with her own dupatta and thereby caused her death even has been discarded by learned trial Court also while acquitting accused Rattan Chand of the charge under Section 376 IPC. The respondent-State has not assailed the findings of acquittal so recorded by learned trial Court any further in this Court by way of filing separate appeal. This also substantiate the view of the matter taken by this Court. Therefore, both alleged incriminating circumstances appearing in the prosecution case against accused Rattan Chand has also not been proved from the evidence available on record beyond all reasonable doubt.

Circumstance No.IV.

24. Now if coming to the incriminating circumstance at serial Number (iv) noted hereinabove, we fail to understand as to how the same could have been pressed against accused Rattan Chand even if it is believed that he boarded the bus of “Mushtaq Bus Service” firstly at Sultanpur and alighted therefrom at Sundla and subsequently another bus of the same bus service at Sundla and alighted there from at a place namely Dudhedi and after having alighted from the bus at Dudhedi he went to forest Khanera where the deceased was already present and waiting for him. PW1 Bal Krishan though has stated in his statement under Section 154 Cr.P.C. (Ext.PW1/A) that while living to his maternal aunt house alongwith his family for participating the celebration of birthday of someone there, his mother deceased Gorkhi told that she would be going to forest for collecting Khasrod (wild vegetable) during day time. However, such story seems to have been engineered and fabricated to complete the chain of circumstances, however, unsuccessfully because his bald statement in this regard cannot be believed as a gospel truth. Otherwise also, there seems to be no grain of truth in this part of the statement he made for the reasons that Gorkhi had no occasion to have apprised him that during day time she should be going to forest to collect the wild vegetable being a matter of routine in the case of a house wife. PW-1 as such has rightly admitted that other villagers also used to go to the forest to collect vegetables. The place where the dead body was found lying was not very far away from the house of the complainant party being only one kilometer away therefrom as has come in the statement of PW1. In this view of the matter also the deceased had no occasion to tell PW-1 that during day time she will to to bring Khasrod from the forest as it was nearby situated.

25. Even had the accused after alighting from the bus at Dudhedi went to the forest, the meeting point they allegedly fixed while speaking over cell phone in the morning on that day he would have been seen while going there by someone. In view of the apprehension of other villagers may have also visited the forest to collect the wild vegetable neither the deceased would have taken the risk of allowing herself to be exposed sexually by the said accused nor could he have murdered her in the manner as claimed by the prosecution that too when in living relation with her and also if in love with each other. No sane person is expected to murder his own paramour on the demand of money that too after he having already enjoyed sex with her. In the event of shehaving demanded money from him in normal course he would have left her on the spot itself and left for his abode. No doubt, the another son of the deceased Dharam Chand has stated that accused Rattan

Chand was noticed by him around 3:00 P.M. on that day while going towards the place where the dead body was found lying later on. However, as per his own admission in cross-examination he did not disclose this fact to anyone till 13.5.2012 the day when his statement for the first time was recorded by the police. Surprisingly enough, he having seen the accused going towards the place where the dead body was lying an important fact for the purpose of this case could have not been concealed by him from others for such a long time and rather disclosed at the earliest available opportunity to do so. Not only this, but in his statement recorded under Section 161 Cr.P.C. on 13.5.2012 this fact does not find mention. Therefore, he has not seen accused Rattan Chand going towards forest where the dead body was lying and the story to this fact has also been fabricated and engineered later on to implicate the accused falsely.

26. True it is that as per the testimony of PW 4 Surinder Kumar, the conductor of the bus accused Rattan Chand boarded the bus from Sultanpur and alighted therefrom at Sundla and as per that of PW8 Sanjesh Kumar, the conductor of the same bus service he later on boarded the bus at Salooni and alighted at Dudhedi. However, according to PW4, twenty five other passengers were also travelling in that bus, whereas according to PW8, fifteen other passengers were travelling in the bus which was being conducted by him at that time. In their cross-examination they both have expressed their inability to tell names of such other passengers travelling in the bus. No doubt, PW8 has given the names of two passengers which according to him were travelling regularly in the said bus. Therefore, when both PW-7 and PW-8 could not recollect the names of other passengers who were travelling in the buses being conducted by them on that day how they could have recollect the name of accused Rattan Chand when he was not travelling regularly in these buses. Therefore, PWs 4 and 8 also seems to be stock witnesses and have deposed falsely at the behest of the police to the reasons best known to them.

27. It is thus not proved at all that the accused boarded buses of "Mushtaq Bus Service" on that day from two different places and came to meet the deceased. Learned trial Judge was, therefore, not justified in placing reliance on this aspect of the matter also.

Circumstance No.V.

28. While discussing the incriminating circumstance at serial Number (iv) and recording findings thereon hereinabove, we have already observed that accused Rattan Chand has neither boarded the buses of Mushtaq Bus Services at two different places nor met the deceased on that day. Also that he never contacted her on that day over cell phone and fixed the place of his meeting with her. Therefore, the question does not arise that he committed sexual intercourse with her on that day. Also that she demanded money from him and it is for this reason he strangulated her with her own dupatta and caused her death thereby, we have already observed that had he been in love with the deceased would have never killed her merely on the demand of money by her from him because by that time as per the case of the prosecution itself he has already enjoyed sex with her, therefore, would have left the place leaving her alone behind. Otherwise also the prosecution has failed to prove that accused Rattan Chand had subjected her to sexual intercourse on that day. It is for this reason he has been acquitted of the charge under Section 376 IPC. The story, therefore, in this regard has also been engineered and fabricated. Learned trial Judge has gravely erred while placing reliance upon such circumstances which were not at all proved on record.

Circumstance No.VI.

29. The next circumstance pertains to removal of golden nose pin, golden ear rings and silver chain from the person of the deceased and selling the same to his co-accused Vikash Puri. This circumstance could have not been used against accused Rattan Chand and for that matter accused Vikash Puri also for the reasons that the same belongs to the deceased alone and none else. No legal and acceptable evidence has either been collected or brought on record. The ornaments were not got identified from someone including Bal Krishan PW1 the son of deceased and PW21 her husband who could have seen the same borne by her in ears, nose or neck. Even PW21 while in the witness box has also not stated that the ornaments belongs to his wife. The witnesses to the recovery of the ornaments are PW12 LHC Devi Chand and PW13 Kamal Dev. Though PW12 while in the witness box has stated about the recovery of the ornaments from the shop of goldsmith situated in Dogra Bazar, Chamba town in his presence. However, PW13 has not supported the prosecution case in this regard at all and rather turned hostile. He has been subjected to lengthy cross examination by learned Public Prosecutor, however, nothing material lending support to the prosecution case could be elicited therefrom. On the other hand, the contradictory statements of PWs 12 and 13 qua this aspect of the matter has casted serious doubts qua this part of the prosecution story. Therefore, in view of the judgment of the Apex Court cited hereinabove, the benefit of doubt in this regard should have been given to accused Rattan Chand and this circumstance not used against him.

Circumstance No.VII.

30. Interestingly enough, no legal and acceptable evidence has come on record that accused Vikash Puri is a Goldsmith by profession and running his shop situated at Mohalla Lahore Gali, Chougan, Chamba town. On the other hand, as per his own admission in his statement recorded under Section 313 Cr.P.C. he is JSW by profession and it is his father who is a Goldsmith and running the shop in question. Such version of the accused is nearer to the factual position as there is no evidence to show that he was a Goldsmith and that it is he who was running the said shop from where the recovery was made. Otherwise also, as per the own admission of the I.O. PW23 the ornaments Ex.P19, Ext.P20 and Ext.P21 are normally available with other ladies also. Being so, it cannot be said that the ornaments were of the deceased and that the same were removed by accused Rattan Chand from her person after causing her death and sold to his co-accused Vikash Puri. Therefore, learned trial Judge has committed illegality while using such circumstance against the accused.

31. In view of the discussion hereinabove, we are satisfied that the present is a case of no evidence against the accused persons. Whatever evidence having come on record by way of the statements of the interested witnesses i.e. PW1 Bal Krishan the complainant, PW5, Dharam Chand, PW21 Jagdish and PW6 Mohan Lal as well as PW7 Rajesh Kumar cannot be relied upon as they all being closely related with the deceased were interested in the success of the prosecution case. Learned trial Court has not appreciated the evidence available on record in its right perspective and to the contrary has recorded the findings of conviction against both the accused on the basis of conjectures and surmises. Such an approach has certainly resulted in mis-carriage of justice to the accused. They both are innocent, however, learned trial Judge has convicted and sentenced them while placing reliance on highly inadmissible evidence. The impugned judgment as such is neither legally nor factually sustainable. We, therefore, quash and set aside the same. Consequently, accused Rattan Chand is acquitted of the charge framed against him under Sections 302 and 404 of the Indian Penal Code. His co-accused Vikash Puri is also acquitted of the charge framed under Section 411 of the Code. Accused Vikash Puri is already on bail. In

view of his acquittal of the charge framed against him, personal bonds executed by him will stand cancelled and surety discharged.

32. As regard accused Rattan Chand, he is serving out the sentence. He be released forthwith, if not required in any other case, however, subject to his furnishing personal bond in the sum of Rs.25,000/- with one surety in the like amount to the satisfaction of learned Additional Sessions Judge, Chamba, undertaking specifically therein that in the event of an appeal is preferred against this judgment, he shall appear in the Hon'ble Supreme Court.

33. Both appeals are disposed of accordingly.

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

Cr. Appeal No. 241 of 2016 with
Cr. Appeal No. 457 of 2016
Reserved on: 29.11.2018
Decided on: 11.01.2019

Cr. Appeal No. 241 of 2016

Ram Lal .....Appellant
Versus
State of Himachal Pradesh ......Respondent

Cr. Appeal No. 457 of 2016

State of Himachal Pradesh .....Appellant
Versus
Prakash Chand @ Nikanoo ......Respondent

Indian Penal Code, 1860 – Sections 363, 366 and 376 – **Protection of Children from Sexual Offences Act, 2012**– Section 4– Kidnapping, penetrative sexual assault etc.– Proof – Police filing charge sheet against 'R' for kidnapping and raping victim, a minor- And against 'P' also for raping her– Trial Court convicting 'R' for kidnapping and rape but acquitting 'P' for said charge – Appeals by 'R' against conviction and by State against acquittal of 'P'– Prosecution alleging 'R' having kidnapped victim after executing threats to blackmail her and then raped her in house of 'P'– And 'P' also raped her there– On facts, mobile phone recovered from 'R' not having camera, blue tooth and memory card – Taking and transferring nude photographs of victim through it not possible– Victim using cell phone gifted to her by 'R'– She concealed of his having gifted it to her, from her family- She used to talk to 'R' daily – She knew 'R' since before she left school– She not proved to be below 18 years of age on date of incident– Her medical age found between 17-19 years– Held, Prosecutrix was major at time of alleged incident– 'BR' father of accused 'P' did not see victim visiting their house at relevant time – Raping victim there first by 'R' and then by 'P' becomes doubtful– Victim wholly unreliable – Case of prosecutrix extremely doubtful– 'R' cannot be convicted of said offences on its basis– Appeal of 'R' allowed – Conviction set aside –'R' acquitted of charges– Appeal of State against acquittal of 'P' also dismissed. (Paras 26 to 32)

Cases referred:

Satbir Singh vs. the State of Himachal Pradesh, latest HLJ 2012 (HP) 741

For the appellant(s):	Mr. Diwakar Dev Sharma, Advocate, for the appellant in Cr. Appeal No. 241 of 2016. Mr. Vikas Rathore, Mr. Narinder Guleria, Addl. AGs with Mr. J.S. Guleria and Mr. Kunal Thakur, Dy. AGs, for the appellant in Cr. Appeal No. 457 of 2016.
For the respondent:	Mr. Vikas Rathore, Mr. Narinder Guleria, Addl. AGs with Mr. J.S. Guleria and Mr. Kunal Thakur, Dy. AGs, for the respondent in Cr. Appeal No. 241 of 2016. Mr. Dalip K. Sharma, Advocate, for the respondent in Cr. Appeal No. 457 of 2016.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

Since both these appeals arise out of the impugned judgment dated 01.04.2016, passed by learned Special Judge, Solan, District Solan, H.P., in Sessions Trial No. 14-S/7 of 2013, whereby accused-respondent, Prakash Chand was acquitted for the commission of offence punishable under Section 4 of the Protection of Children from Sexual Offences Act (hereinafter to be called as "POCSO Act"), read with Section 376 of the Indian Penal Code (hereinafter to be called as "IPC"), whereas, accused-respondent, Ram Lal was convicted for the commission of offence punishable under Sections 363, 366 IPC and Section 4 of the POCSO Act, read with Section 376 IPC, they are heard together and are being disposed of by a common judgment.

2. Succinctly, the facts giving rise to the present appeals, as per the prosecution story, are that on 18.06.2013 during night, accused Ram Lal contacted the prosecutrix on mobile of her sister and asked her to accompany him, so as to marry him, to which, the prosecutrix refused. However, accused Ram Lal threatened the prosecutrix to defame her, so, the prosecutrix agreed to accompany him and left her house without informing anyone and met the accused in a *nallah.* The accused took the prosecutrix to forest, where she was subjected to forcible sexual intercourse twice and thereafter she was taken to Drobar *Kainchi,* where one Tata Sumo vehicle was parked, in which, besides driver Feroz Khan, co-accused Prakash Chand was also sitting. The prosecutrix was taken to the house of accused Prakash Chand and she was left there. On 20.06.2013, when accused Prakash Chand returned to his house he also committed forcible sexual intercourse with the prosecutrix. In the meantime, on finding the prosecutrix missing, Naratu Ram (father of the prosecutrix) carried out search for the prosecutrix, but she was not found anywhere. Naratu Ram on suspicion that the prosecutrix had been kidnapped, lodged a complaint with the police, on the basis of which, FIR, Ext. PW-2/A came to be registered at Police Station, Bagha. On 21.06.2013, accused Ram Lal visited the house of Prakash Chand and took the prosecutrix to the house of his cousin at Ropar, where they stayed for a night. On 23.06.2013, the cousin of accused Ram Lal turned the accused and the prosecutrix out from his house and on the same day, while they were waiting for the bus at Slapper in rain shelter, SI Deva Singh accompanied by Naratu Ram, father of the prosecutrix, spotted them. The prosecutrix was identified by Naratu Ram vide memo, Ext. PW-2/C, and site plan of recovery, Ext. PW-21/A was prepared. The prosecutrix on enquiry disclosed that she was kidnapped by accused Ram Lal on 18.06.2013. Thereafter, the prosecutrix and accused Ram Lal were taken to Police Station, Bagha, where on the basis of statement of the prosecutrix,

accused Ram Lal was arrested. On 23.06.2013, medical examination of the prosecutrix was conducted by Dr. Geetanjali Thakur and she was found to have been subjected to sexual intercourse. She issued MLC, Ext. PW-3/B in this regard. The medical officer preserved blood, urine, swab from vulva, swab from introitous, swab from posterior fornix, slides for material from vulva introitous and posterior fornix alongwith clothes, i.e. kurta, salwar, legging, dupatta, underwer, pubic hair, hair from head, nail scratching of the prosecutrix, which were handed over to the police for chemical examination and the prosecutrix was handed over to her father vide memo, Ext. PW-2/D. On an application moved by S.I. Deva Nand, ossification test of the prosecutrix was conducted, according to which, the radiological age of the prosecutrix was found between 17 to 19 years. The statement of the prosecutrix was recorded by learned Judicial Magistrate 1st Class, Arki, in pursuance of application moved by S.I. Deva Nand, in which the prosecutrix alleged that she had been kidnapped by accused Ram Lal and co-accused Prakash Chand and thereafter both of them subjected her to forcible sexual intercourse. On 23.06.2013, medical examination of accused Ram Lal was conducted by Dr. Manjeet Singh Sen, the then Medical Officer, CHC, Darlaghat and he found the accused capable of performing sexual intercourse, regarding which, he issued MLC, Ext. PW-7/B. The undergarments of accused Ram Lal alongwith sample of pubic hair were preserved and handed over to the police. On 26.06.2013, while in police custody accused Ram Lal alongwith the prosecutrix, her father and other police officials went to Jhajjar and identified the place in a forest, where he committed sexual intercourse with the prosecutrix on 18.06.2013, twice. The place was also identified by the prosecutrix, regarding which memo, Ext. PW-2/E, was prepared by ASI Rattan Chand. On 26.06.2013, accused Ram Lal also gave identification of the house of co-accused Prakash Chand, where the prosecutrix was kept by him. The prosecutrix identified the room and bed in that house, where she was subjected to sexual intercourse by accused Prakash Chand. The bed sheet was sealed with nine seals of seal impression 'U', and was taken into possession vide memo, Ext. PW-2/G. Identification memo, Ext. PW-2/F, was prepared alongwith spot map, Ext. PW-20/E, and spot was photographed. On 27.06.2013, accused Prakash Chand was arrested, his medical examination was conducted by Dr. Manjeet Singh Sen and he was found capable of performing sexual intercourse, regarding which, MLC, Ext. PW-7/D was issued. The medical officer preserved underwear, undershirt, pubic hair, swab from glance and shaft of penis of accused Prakash Chand and handed over the same to police for chemical examination. On 30.06.2013, accused Ram Lal identified the house of his cousin, where the prosecutrix was kept by him and was subjected to sexual intercourse during the night of 22.06.2013. The identification memo, Ext. PW-2/H in this regard was prepared. The bed sheet, identified by the prosecutrix, on which she was subjected to rape by accused Ram Lal, after putting in a cloth parcel and sealing with nine seals of seal impression 'H', was taken into possession vide memo, Ext. PW-2/J. The spot was photographed and spot identification map, Ext. PW-20/J, was prepared. On 01.07.2013, while in police custody, accused Prakash Chand identified his house in village Malangan, vide memo, Ext. PW-17/A, where he had committed sexual intercourse with the prosecutrix. Site plan, Ext. PW-20/K, was also prepared in this regard. The date of birth certificate of the prosecutrix alongwith copy of pariwar register and copy of birth and death register was obtained from Gram Panchayat, Mangal, according to which, date of birth of the prosecutrix was 10.01.1997. On an application moved by ASI Rattan Chand, blood samples of both the accused were taken for DNA profiling by Dr. Surinder Singh, which were handed over to the police after sealing the same alongwith sample seal. The vehicle, i.e. Tata Sumo bearing registration No. HP-01-0432 alongwith its documents, was taken into possession vide memo, Ext. PW-4/A. After completion of investigation, *challan* was presented in the Court, under Sections 363, 366-A, read with Section 34 of IPC and Section 4 of POCSO Act, read with Section 376 of IPC.

3. The prosecution, in order to prove its case, examined as many as twenty one witnesses. Statements of the accused persons were recorded under Section 313 Cr. P.C., in which they denied the case of the prosecution in its entirety. In defence, four witnesses have been examined on behalf the accused persons.

4. The learned Court below, vide judgment dated 01.04.2016, acquitted accused Prakash Chand for the commission of offence punishable under Section 4 of POCSO Act, read with Section 376 of IPC, whereas accused Ram Lal was convicted for the commission of offence punishable under Sections 363, 366 of IPC and Section 4 of POCSO Act, read with Section 376 of IPC and sentenced as follows:

> "1) to undergo rigorous imprisonment for a period of seven years and to pay a fine of Rs. 50,000/- under Section 4 of POCSO Act, read with Section 376 of IPC. In case of default of payment of fine, he shall further undergo imprisonment for a period of one year.
>
> 2) to undergo rigorous rigorous imprisonment for two years and to pay a fine of Rs. 10,000/- under Section 363 of IPC. In case of default of payment of fine, he shall further undergo simple imprisonment for a period of six months.
>
> 3) to undergo rigorous imprisonment for three years and to pay a fine of Rs. 20,000/- under Section 366 of IPC. In case of default of payment of fine, he shall further undergo simple imprisonment for a period of six months.

All the substantive sentences were directed to run concurrently, hence the present appeals.

5. Mr. Diwakar Dev Sharma, learned counsel for the appellant-convict has argued that PW-11, Gian Chand, while appearing in the witness box, has not deposed that the prosecutrix told him or the police that she was sexually assaulted by the accused. He has further argued that neither the prosecutrix disclose to her family members that she was being threatened by the accused, nor she told anything about her's being raped to the family members of accused Prakash Chand, where she stayed for three days, and her version which came for the first time in the police report, is not reliable. He has argued that the prosecutrix herself accompanied the accused and as per the prosecution case, she was also using the mobile phone given by the appellant-convict. He has argued that as at the time of alleged occurrence, the prosecutrix was above the age of 18 years, no case is made out against the appellant-convict. Lastly, he has argued that the conviction of appellant Ram Lal is without any evidence and just on the basis of surmises and conjectures and as the prosecution has failed to prove the guilt of the appellant-convict beyond the shadow of reasonable doubt, he is required to be acquitted. On the other hand, Mr. J.S. Guleria, learned Deputy Advocate General has argued that learned Court below has rightly convicted the appellant on the basis of the statement of the prosecutrix, which is reliable and trustworthy and as the prosecution has proved the guilt of respondent-accused Prakash Chand too, he is also required to be convicted and the appeal filed by accused Ram Lal is required to be dismissed.

6. Mr. Dalip K. Sharma, learned counsel for the respondent has argued that learned Court below has rightly acquitted the respondent and the judgment of acquittal, needs no interference.

7. In order to appreciate the rival contentions of the parties, we have gone through the record carefully and in detail.

8. First of all, as far as the act of accused persons are concerned, the statement of the prosecutrix is very material, who appeared in the witness box as **PW-12** and deposed that she left the school in the year 2013 and before leaving the school, she was having acquaintance with accused Ram Lal for 6-7 months. The accused had given her a Samsung mobile, having mobile No. 98058-45431. He used to talk to her on this number and used to ask her to marry him. On 18.06.2013, accused again asked her to go with him so as to marry him and when she refused, he threatened that he would defame her. On this, she agreed to go with him to the *nallah*. When they reached that *nallah*, accused asked her to accompany him towards forest, which she refused, but accused again threatened her, on which, she accompanied him to the forest. In the forest accused committed wrong act with her twice. From there accused took her to the road at Drobar Kainchi, where Tata Sumo vehicle was parked. In that vehicle there were two persons, one was driver and other was Prakash Chand. She was taken in that vehicle to Barthi in the house of accused Prakash chand, where she was left. On 20.06.2013, accused Prakash came there and raped her during night hours, thereafter he left the house. On 22.06.2013, accused Ram Lal came to that house. Again stated that he had come on 21.06.2013 and then took her to Ropar on 22.06.2013, where they stayed for a night and during the night Ram Lal tried to rape her and also slapped her. On 23.06.2013, owner of the house, turned them out from the house. Thereafter, when accused Ram Lal was bringing her back to his house and when they were waiting for the bus at Slapper in the rain shelter, she was spotted by her father and police officials. She was brought to Police Station, Bagha, where her statement was recorded. On 27.06.2013, she was taken to the Court and her statement was recorded by the Magistrate. Thereafter, she was taken to hospital at Arki for medical examination, but no lady doctor was present there, accordingly she was taken to CHC Kunihar. After medical examination, the doctor took her clothes and blood sample into possession. She was also taken to Solan for X-ray examination. Thereafter, she was taken to house of accused Prakash Chand at Piplughat and she identified the house to be the same house, where she was sexually assaulted. The bed sheet of the bed was taken into possession. She also identified the room at Ropar, where she stayed with the accused. The identification memo was prepared and the bed sheet, on which the accused had committed sexual intercourse with her, was taken into possession, vide memo Ext. PW-2/J, which bears her signatures. She also identified the forest, where accused Ram Lal had raped her and memo of identification of that place was prepared, which is Ext. PW-2/E and bears her signatures. The prosecutrix, in her cross-examination, has deposed that accused Ram Lal used to talk to her on mobile at least once in a day. The accused Ram Lal used to threaten her by saying that he would disclose to her family members that he had given her mobile and used to talk to her. She further deposed that in her mobile phone there was a nude photo of her, which was transferred to the mobile phone of the accused, due to which, she used to fear about her being defamed by the accused. This photo was taken about four months back from 17-18th June, 2013. She feigned ignorance as to when this photo was transferred by the accused from her mobile. This photo was taken in her house when she was taking bath. She came to know about this photo only when accused threatened her about this photo on his mobile and thereafter she deleted it. She deposed that the place where accused Ram Lal raped her in the forest was a plain field. She tried to manhandle the accused, when he committed sexual intercourse with her and when she tried to save herself from the accused, she received some scratches on her body, but now they are not visible. As per this witness, the accused raped her twice in the same place and after committing first rape, the accused again raped her after five minutes. She tried to run from there after first rape, but accused caught hold of her from her arms. She did not try to resist the second rape, as her hands were tied with chunni. Accused Ram Lal took her upto the vehicle with tied hands. She deposed that in the house of accused Prakash Chand, there were three persons, i.e. father, mother and *bhabhi* of Prakash Chand.

She stayed in that house from 18th to 21st June, 2013. On 20.06.2013, during night, accused Prakash Chand tried to rape her, but she did not disclose this fact in the morning to his family members. On 22.06.2013, accused Ram Lal took her to Ropar in a bus. She had not requested any passenger, traveling in the bus, to save her.

9. The statement of the prosecutrix also required to be gone into alongwith the statements of other witnesses. **PW-1**, Brij Lal, has deposed that on 20.06.2013, he remained associated with the police for investigation of the case. Nanak Chand was also with him. In their presence, Naratu Ram produced age certificate/school leaving certificate of the prosecutrix to the police, according which, date of birth of the prosecutrix was 10.01.1997. He had also produced a black coloured Samsung mobile set before the police. The mobile and the age certificate were taken into possession by the police in their presence, vide memo, Ext. PW-1/A, which bears his signatures.

10. **PW-2**, Complainant-Naratu Ram (father of the prosecutrix), has deposed that on 16.06.2013, at about 4:00-5:00 p.m., his daughter was talking to someone on mobile phone. He asked her as to whom she is talking and she told him that she is talking to her friend. He took the mobile phone from her and noted the mobile number on which his daughter was talking. The number was 98572-22593. He made a call on that number from his mobile phone and came to know that the person is talking from Mandi. However, the person did not disclose his name. On 18.06.2013, his daughter ran away from the house during night. She did not take anything from the house. He searched for his daughter in his relation, but she was not found anywhere. In her missing, he suspected the involvement of the person with whom his daughter was talking on 16.06.2013 and lodged a report with the police. On 20.06.2013, he went to the school of his daughter and brought her age certificate. Thereafter, he handed over the age certificate and mobile set to the police, which were sealed by the police in cloth parcels, on which he signed as a producer. The age certificate and mobile set were produced by him before the police, in presence of Nanak Chand and Brij Lal. On 23.06.2013, he alongwith police officials went to Slapper and found his daughter and accused Ram Lal sitting in the rain shelter. The police prepared memo of identification and custody, Ext. PW-2/C, and got it signed from him. Thereafter, the police took his daughter to the hospital, first at Darlaghat and then to Kunihar for medical examination. On 18.06.2013, his daughter disclosed that she had been raped 2-3 times in the forest and thereafter, she was taken in a vehicle to the house of Prakash. His daughter took them to the forest and identified the place, where she had been raped by accused Ram Lal. That place in the forest was also identified by accused Ram Lal and identification memo of the spot was prepared by the police. Thereafter, he alongwith police officials went to the house of Prakash, where his daughter identified the bed in the room, where she was raped by both the accused. The police prepared memo of identification of the house of accused Prakash and took into possession the bed sheet, which bears his signatures, signatures of his daughter and accused Ram Lal. He alongwith his daughter and police officials also went to Ropar, where his daughter told him that she and accused Ram Lal had stayed in that house and there also accused committed sexual intercourse with her. The room and the bed sheet on the bed had been identified by his daughter and that bed sheet was also took into possession by the police. Memo of identification of that spot was prepared by the police, which bears his signatures, signatures of his daughter and accused Ram Lal. This witness, in his cross-examination, has deposed that the statement of his daughter was recorded by the police in the rain shelter. He feigned ignorance whether the police obtained signatures of his daughter on such statement or not. He also feigned ignorance as to whether vehicles from Bilaspur side had crossed that rain shelter, where his daughter had been found. He further deposed that the police did not stop any vehicle. From the rain shelter where his daughter was found, people take buses to go to Kol Dam, Harnola, Bohat, Kasol etc. He

could not say anything how big is the house of Prakash. He denied that in the house of accused Prakash, his parents, brother and *Bhabhi* are also residing. He admitted that the house is at a distance of about 30-35 feet from Piplughat chowk. When they reached in the house of accused Prakash, his parents were present there. He feigned ignorance whether the police had conducted verification from some villagers about the other persons residing in the house or not. He also feigned ignorance about the dates of birth of his children. He denied that he got wrong date of birth of his daughter. He admitted that he belongs to *Rajpoot* caste, whereas accused Ram Lal belongs to *Lohar* caste. He denied that as he belongs to higher caste and accused Ram Lal belongs to lower caste, he instituted a false case against him.

11. **PW-3**, Dr. Geetanjali Thakur, Medical Officer, CHC, Kunihar, has deposed that on 23.06.2013, on an application moved by SI/SHO, P.S. Bagha, for medical examination of the prosecutrix, she examined her and observed as under:

> " On history patient unmarried, LMP 28.05.2013, menarche 15 minutes. General physical examination. Patient is conscious, cooperative and well oriented about space, person and time. On examination, pulse 90/minute, B.P. 104/70, respiration rate 20/minute, built average Ht-153 cms, weight 45 K.G.
>
> Secondary Sexual characters developed. Breast developed normal. Pubic hair present. Axillary hair present. No foreign hair or any substance present on body.
>
> Clothing worn at the time of alleged sexual assault.
>
> (1) Kurta frock type of blue and skin coloured and legging skin coloured. No stains of blood found and no any other stain present.
>
> (2) No foreign material found. Tears of cloth found on kurta and legging.
>
> Clothing changed on 19.06.2013 and taken bath. Clothing worn on 20.06.2013, pink and white coloured kurta and salwar with dupatta. Had changed clothes on 22.06.2013 and had taken bath on 21.06.2013 and had washed clothes on 21.06.2013. Undergarments, panty black in colour not washed and changed, no blood stains found.
>
> **Extra Genital examination:**
>
> (1) No marks of injury found on breasts, cheek, lips and thighs.
>
> (2) Abrasion on throat of approximately .5 mm x .5 mm brownish in colour with no oozing of fresh blood.
>
> (3) Abrasion mid clavicular region .5 mm x .5 mm brownish in colour with no oozing of fresh blood.
>
> (4) Abrasion on left shoulder of approximately .5 mm x .5 mm brownish in colour with no oozing of blood.
>
> (5) Abrasion on left arm approximately 14.5 cm below from shoulder joint, brownish in colour with no oozing of fresh blood.
>
> (6) Abrasion on right iliac fossa of approximately 1 mm x .5 mm brownish in colour.
>
> **Genital examination:**
>
> (1) Pubic hair present about ½ cm long not matted.
>
> (2) No abrasion or contusions present on external genetalias labia

major partly lowering labia minora.

(3) Perspeculum no fresh or recent tear over hymen. No signs of bleeding. No injuries present over vagina wall.

(4) Pervaginum introitous admit two finger and is lax. Vagina lax no tenderness. Urine pregnancy test is negative.

(5) Abrasion on left arm approximately 14.5 cm below from shoulder joint, brownish in colour with no oozing of fresh blood.

Specimens taken for biological and chemical examination.

(1) Blood for toxological and blood group for examination.

(2) Urine for HCG and chemical examination.

(3) Swab from valva.

(4) Swab from introtious

(5) Swab from posterior osterior fornix.

(6) Slides for material from vulva introitous and posterior fornix.

(7) Clothes, one kurta of blue and skin coloured. Lagging of skin coloured. Kurta, Salwar and dupatta of pink and white coloured. Panty black in colour. Pubic hair. UPT card, hair from head. Nails scratching. X-ray lower and of humerus. X-ray ulna. X-ray upper and of radius, Metacarpals and proximal phalanges for age determination.

She issued MLC, Ext. PW-3/B, which bears her signatures. On the basis of SFSL report, she opined that there is nothing to suggest that recent sexual intercourse has not taken place. The injuries mentioned in MLC can be caused by a fall and also by nail scratches, but are not possible by forceful act. This witness, in her cross-examination, has deposed that tears of the hymen heal up approximately within 7-10 days. She further deposed that no tears on hymen or injury found on examination of the prosecutrix. She admitted that in case of sexual assault, there are possibility of injuries on thighs and genital of such a victim. She also admitted that in case of admission of two fingers in the vaginal part, the female is exposed to sexual activities even before 18.06.2013. She admitted that the prosecutrix was sexually active prior to the date of examination, may be for some period, exact period cannot be ascertained.

12. **PW-4**, Firoz Khan, has deposed that accused Prakash Chand is known to him. He is resident of Piplughat and his village is at a distance of about 7 kms from his village. He was employed by him as driver. On 18.06.2013, Prakash chand telephonically informed him to take the vehicle for his personal work. After 7-10 days, he received a telephonic message from Police Station Bagha that his vehicle was involved in some case and the same was liable to be impounded. On which, he handed over his vehicle alongwith its documents and keys to the police vide memo, Ext. PW-4/A, which bears his signatures. This witness, in his cross-examination by learned Public Prosecutor, denied that on 18.06.2013 he was asked by accused Prakash Chand to bring the vehicle to Drobar to bring his relative. In cross-examination on behalf of the accused, he admitted that it is entered in the log book that from which place the vehicle is taken to which place and the fare charged is also entered. He denied that accused Prakash had not given him Rs. 1500/- for the said traveling.

13. **PW-5**, Balak Ram, Secretary, Gram Panchayat, Mangal, has deposed that on an application moved by the police, he supplied the date of birth certificate of the prosecutrix to the police. He also supplied the copy of pariwar register of Naratu Ram to the

police. He further deposed that initial birth entry of the prosecutrix, Ext. PW-5/D, has also been prepared and attested by him and the same is correct as per the original record. This witness, in his cross-examination, feigned ignorance on the basis of which document, the original entry, Ext. PW-5/D, has been made in the register. He admitted that whenever intimation regarding birth is given by any of the family members, the same is entered in the record without getting it verified.

14. **PW-6**, Pyare Lal Chauhan, has deposed that on 20.06.2013, he was officiating as Principal of the school. He further deposed that the prosecutrix was student of the school from 07.04.2011 till March, 2013. The certificate, Ext. PW-1/B, was given to the father of the prosecutrix by him on his request, which bears his signatures and is correct as per the original record. This witness, in his cross-examination, has admitted that they enter the date of birth in their records on the basis of pariwar register entry. He deposed that before 9th Class, the prosecutrix was student of Government Middle School, Bagha. The date of birth of the prosecutrix was entered by him on the basis of certificate issued by Bagha School.

15. **PW-7**, Dr. Manjeet Singh Sen, Medical Officer, CHC, Darlaghat, has deposed that on 23.06.2013, on an application moved by the police, he conducted the medical examination of accused Ram Lal and observed as under:

> " Person was brought by police for medical examination with history of accused in rape case. On examination, person is conscious, cooperative, well oriented to time and place. Following points noted. There are no marks of struggle present on body of the person examined:
>
> (1) The genital organs of the person examined are of normal development.
>
> (2) There is no evidence of diseases of testes and epididymes.
>
> (3) There is no evidence of venereal diseases.
>
> (4) There is no evidence of organic diseases of nervous system.
>
> (5) There are well marked secondary sex characters.
>
> (6) Both the testes are present in the scrotum."

After medical examination, he issued MLC, Ext. PW-7/B, and opined that the person examined is capable of performing sexual act.

On 27.06.2013, on an application moved by Police Station, Bagha, he examined accused Prakash Chand and observed as under:

> (1) There are not any struggle marks on body anywhere.
>
> (2) The genital organs of the person examined are of normal development.
>
> (3) There is no evidence of diseases of testes and epididymes.
>
> (4) There is no evidence of venereal diseases.
>
> (5) There is no evidence of organic diseases of nervous system.
>
> (6) There are well marked secondary sex characters.
>
> (7) Both the testes are present in the scrotum."

After medical examination, he issued MLC, Ext. PW-7/D and opined that the person examined is capable of performing sexual act. This witness, in his cross-examination, has deposed that there is no instrument for examination of nervous system in CHC, Darlaghat. He further deposed that for finding out venereal disease, no blood test of the accused had been conducted. He denied that blood test is must for finding out presence of venereal disease.

16. **PW-8**, Constable Rajinder Singh, has deposed that on 26.06.2013, he alongwith ASI Rattan Chand, Lady Constable Meera, Naratu Ram and the prosecutrix went to village Jhajhar in government vehicle, where they were taken across the *nallah*. Accused Ram Lal showed to them a field having grass, where he had committed sexual intercourse with the prosecutrix. The prosecutrix also identified the place and told them that she had been raped by the accused at that place on 18.06.2013. About this, spot identification memo, Ext. PW-2/E, was prepared, which bears his signatures and also the signatures of Naratu Ram, Lady Constable Meera Devi, accused Ram Lal and the prosecutrix. This witness, in his cross-examination, has deposed that the field shown to them was having very small grass, which was plain. He further deposed that the spot was not photographed at that time.

17. **PW-9**, Lady Constable Meera Devi, has deposed that on 26.06.2013, she alongwith accused Ram Lal, the prosecutrix, Naratu Ram, Constable Rajinder Kumar and ASI Rattan Singh, went to the house of Kasu Ram at Piplughat, where accused Ram Lal told to have kept the prosecutrix from 18.06.2013 till 22.06.2013. The prosecutrix also told the police that in the southern room of that house, accused Ram Lal raped her on 20.06.2013. The prosecutrix identified the bed sheet of the double bed and told that on 20.06.2013 the same bed sheet was on that bed. The bed sheet was taken into possession by the Investigation Officer and was sealed in a cloth parcel by affixing nine seals of seal impression 'U'. The seal after use was entrusted to Naratu Ram. The cloth parcel containing bed sheet was taken into possession vide memo, Ext. PW-2/G, which bears her signatures. They also went to village Jhajhar in government vehicle, where they went in a cowshed type room, adjacent to that room there was a grassy field, which accused Ram Lal identified to be the same place, where he stated to have raped the prosecutrix. This spot had also been identified by the prosecutrix. Memo of identification of the place was prepared, which was signed by her, Constable Rajinder Singh, Naratu Ram, the prosecutrix and accused Ram Lal. This witness, in her cross-examination, feigned ignorance about the distance between police station and village Jhajhar. She also feigned ignorance as to how much time they remained at Jhajhar. She deposed that in the house of Kasu at Pilpughat, there were four persons at that time. However, she does not know their names. She feigned ignorance whether the spot at Jhajhar was photographed or not.

18. **PW-10**, Dr. Surinder Singh, Medical Officer, Civil Hospital, Arki, Solan, has deposed that on application, Ext. PW-10/A, moved by the police for taking blood samples of the accused persons for DNA profiling, he took the same, which were handed over by him to the police alongwith prescription slips, Exts. PW-10/B and PW-10/C. He made endorsement on the application, Ext. PW-10/A in red circle. This witness, in his cross-examination, has deposed that whenever blood samples of any person are to be taken, his/her consent is taken, but in this case, he did not take the consent of the accused persons before taking their blood samples. He admitted that in prescription slips, Exts. PW-10/B and PW-10/C, he did not note down the identification mark of the person whose samples are being taken.

19. **PW-11**, Gian Chand, has deposed that he was Pradhan of Gram Panchayat, Malangan till 2011 and on 26.06.2013, remained associated for investigation with the police. He was called by Bali Ram (brother of accused Prakash Chand) and then he went to the house of Bali Ram, where one bed sheet was taken into possession from the bedroom, which was identified by the prosecutrix. The bed sheet was sealed by the police in a cloth parcel and taken into possession vide memo, Ext. PW-2/G, which bears his signatures, also the signatures of other witnesses and the prosecutrix. The spot was photographed. Accused Ram Lal and the prosecutrix identified the house of accused Prakash Chand and memo of identification of the house was prepared by the police, which also bears his signature,

signatures of other witnesses and the prosecutrix. On 01.07.2013, the vehicle and documents of Firoz Khan, driver of Barthi were taken into possession, vide memo, Ext. PW-4/A, which also bears his signatures. This witness, in his cross-examination, has deposed that in the house of accused Prakash Chand, his parents, elder brother and Bhabhi also used to reside. He feigned ignorance as to who used to sleep in that room from where bed sheet was taken into possession. He admitted that accused Prakash is married. He denied that he has some disputes with the family members of the accused.

20. **PW-13**, Constable Amar Nath, has deposed that on 17.07.2013, MHC, Police Station, Bagha, handed over two vials of blood, sealed with a seal 'A' each, alongwith letter addressed to FSL, Junga, which were taken by him to FSL, Junga on 17.07.2013, vide RC No. 09.2013, and were deposited in the same condition. **PW-14**, Constable Vikram Sharma, has deposed that on 03.07.2013, MHC, Police Station, Bagha, handed over three sealed cloth parcels to him. One parcel was having six seals of seal impression 'N'. Again stated the seals were five. The other two parcels were having six seals (each) of seal impression 'U'. He took these parcels, vide RC No. 08/2013, alongwith docket and handed over the same in sealed condition. **PW-15**, Lady Constable Kanta, has deposed that on 30.06.2013, she alongwith ASI Rattan, other police officials, prosecutrix, Naratu Ram and accused Ram Lal, went to Milmil Nagar, Ropar, where the prosecutrix identified the house, regarding which, identification memo, Ext. PW-2/H, was prepared. A bed sheet from the bed, on which the prosecutrix was sexually assaulted, was taken into possession, vide memo, Ext. PW-2/J. On the same day the prosecutrix, also identified Prakash Chand, accused, regarding which, identification memo, Ext. PW-2/K, was prepared.

21. **PW-16**, Lady Constable Kiran Bala, has deposed that 23.06.2013, she alongwith SI/SHO Deva Nand, H.C. Suresh, Constable Shashi, went in search of the prosecutrix. They reached Slapper bridge, at about 1:00 p.m., where toward Kol Dam in the rain shelter they found accused Ram Lal and prosecutrix sitting. Memo of identification of the prosecutrix was prepared, which is Ext. PW-2/C. The statement of the prosecutrix was recorded and thereafter she was handed over to her father, vide memo, Ext. PW-2/D. This witness, in her cross-examination, has deposed that it took them three hours to cover the distance from Police Station, Bagha to Slapper. She feigned ignorance whether any shopkeeper or some inhabitants on the road side had been associated in the proceedings or not. As per this witness, no statement of the prosecutrix was recorded in the rain shelter.

22. **PW-17**, Constable Shashi Pal, has deposed that on 01.07.2013, he alongwith ASI Rattan Chand, Kamaljit, L.C. Kanta, driver Rakesh Kumar and accused Prakash Chand, went to the house of accused Prakash Chand at Malangan in government vehicle. Where he disclosed that he kept the prosecutrix in that house from 18.06.2013 till 22.06.2013. He also disclosed that in the room towards southern side, he had committed sexual intercourse with the prosecutrix. Memo of identification of the house was prepared. Thereafter, they went to Barthi. The prosecutrix was also with them, where the vehicle, its key and documents were taken into possession vide memo, Ext. PW-4/A.

23. **PW-18**, Head Constable Jagdish Chand, has deposed that on 20.06.2013, SI/SHO Deva Nand handed over application, Ext. PW-1/B, to him for generating FIR on computer. This FIR was signed by ASI Rattan Chand. Again stated that application, Ext. PW-1/B was handed over to him by ASI Rattan Chand and not by SI Deva Nand. On 20.06.2013, ASI Rattan Chand deposited one cloth parcel with him, which was sealed with four seals of seal impression 'H', which he entered in malkhana register at Sl. No. 36/13. On 24.06.2013, Lady Constable Kiran deposited four cloth parcels, sealed with six seals (each) of seal impression 'N' with him. In addition to these four cloth parcels, she also deposited three cloth parcels with him, sealed with a seal of seal impression 'N'. Alongwith all these

parcels, a docket and seal impressions had also been deposited by her. All these articles were entered by him in malkhana registered at Sl. No. 38/13. On the same day, Constable Shashi Kumar deposited a cloth parcel with him, sealed with three seals of seal impression of 'U'. Another cloth parcel sealed with five seals of seal impression of 'U' had been deposited alongwith docket and seal impression, which was entered by him in malkhana register at Sl. No. 39/13. On 26.06.2013, ASI Rattan Chand deposited a cloth parcel, sealed with nine seals of seal impression 'U' alongwith sample of seal with him, which was entered by him in malkhana register at Sl. No. 40/13. On 28.06.2013, ASI Rattan Chand deposited a cloth parcel, sealed with nine seals of seal impression 'U' alongwith docket with him, which was entered in malkhana register at Sl. No. 41/13. On 30.06.2013, ASI Rattan Chand also deposited a cloth parcel, sealed with nine seals of seal impression 'H' alongwith sample of seal with him, which was entered by him in malkhana register at Sl. No. 42/13. On 15.07.2013, ASI Rattan Chand again deposited two vials, sealed with seal of seal impression 'A' alongwith docket with him, which were entered by him in malkhana register at Sl. No. 43/13. The case properties entered at Sl. No. 38 to 42, were sent by him to FSL Junga, through Constable Vikram, vide RC No. 8/2013. The case property entered at Sl. No. 43/13 was sent by him to FSL, Junga, through Constable Amar Nath, vide RC No. 9/13, who deposited the same with FSL Junga on the same day.

24. **PW-19**, Constable Sanjog Kumar, has deposed that he conducted videography of the recording of the statement of prosecutrix. He prepared CD of the videography, which is Ext. PW-19/A-1 and Ext. PW-19/A-2. **PW-20**, ASI Rattan Chand (Retired), has deposed that on 20.06.2013, Naratu Ram came to the police station and moved application, Ext. PW-2/B, which was handed over by him to MHC for registering FIR. After FIR, Ext. PW-2/A, he made endorsement, Ext. PW-20/A, on application, Ext. PW-2/B, which bears his signatures. Naratu Ram also produced school leaving certificate and a Samsung mobile set alongwith SIM before him, which were sealed by him in a cloth parcel and were taken into possession vide memo, Ext. PW-1/A. On 26.06.2013, he took custody of accused Ram Lal alias Sonu from Police Station, Darlaghat and brought him to Police Station, Bagha. From Police Station, Bagha, he alongwith accused Ram Lal, the prosecutrix, her father and other police officials went to Jhajhar, where accused Ram Lal and the prosecutrix identified the house and place, where accused Ram Lal stated to have raped the prosecutrix. To this effect, identification memo, Ext. PW-2/E, was prepared. Site plan regarding identification was also prepared, which is Ext. PW-20/C. Thereafter, they went to village Malangan, where the prosecutrix identified the house of accused Prakash Chand and also the bed, where she was stated to have been raped by Prakash Chand on the night of 20.06.2013. The bed sheet, on which she was raped, was sealed in a cloth parcel by affixing nine seals of seal impression 'U' and taken into possession vide memo, Ext. PW-2/G. The identification memo of that place was prepared, which is Ext. PW-2/F. On 27.06.2013, accused Prakash Chand was arrested at Bagha and on 28.06.2013, he was medically examined in PHC, Darlaghat. On 30.06.2013, he alongwith accused Ram Lal, Naratu Ram, prosecutrix and other police officials, went to Minmin Nagar, Ropar, where prosecutrix identified the room and the bed, on which accused Ram Lal raped her on the night of 22.06.2013. The identification memo to this effect was prepared, which is Ext. PW-2/H. The bed sheet of the bed was sealed in a cloth parcel by affixing nine seals of seal impression 'H' and was taken into possession vide memo, Ext. PW-2/J. The spot map of the place was prepared and spot was photographed. On 01.07.2013, he alongwith accused Prakash Chand and other police officials, went to village Malangan, where accused identified the bed in the room of his house, on which he raped the prosecutrix on the night of 20.06.2013. The Ex-Pradhan, Gian Chand was also present there. The identification memo and site plane of that house was also prepared. On 07.07.2013, he moved application, Ext. PW-5/A before Secretary Gram Panchayat Kandar for obtaining birth certificate of the prosecutrix and copy

of pariwar register of birth and death. On 15.07.2013, he moved applicaion, Ext. PW-10/A before Medical Officer, Arki for taking blood sample of both the accused. On 01.07.2013, he took into possession the vehicle, i.e. Tata Sumo, bearing registration No. HP-01-0432 alongwith its key and documents, vide memo, Ext. PW-4/A. In cross-examination, he deposed that in the house of Prakash his father, mother, brother, bhabhi and wife live jointly, but he did not take their statements separately. However, they disclosed him that the prosecutrix told them to be wife of accused Ram Lal. He further deposed that he did not verify from the school record of the prosecutrix, as to how many times she failed in the school. He admitted that he has not taken the call details of mobile numbers 98572-20593, 88943-28845 and 98058-45431.

25. **PW-21**, S.I. Deva Singh, Investigation Officer of the case, has deposed that on a secret information that the prosecutrix and the accused were coming back from Punjab to Himachal, he alongwith complainant Naratu Ram and other police officials went in search of the prosecutrix and the accused in government vehicle. When they reached near Slapper bridge, they found prosecutrix and the accused sitting in the rain shelter. The prosecutrix told them that accused Ram Lal is the same person, who took her with him on 18.06.2013. He prepared recovery memo of the prosecutrix, Ext. PW-2/C, which was signed by the complainant. The site plan of the recovery, Ext. PW-21/A, was also prepared. The prosecutrix and the accused were brought to Police Station, Bagha, where statement of the prosecutrix under Section 161 Cr. PC was recorded. An application for conducting the medical examination of the prosecutrix was moved. Accused Ram Lal was interrogated and was accordingly arrested. On 24.06.2013, medical reports of the prosecutrix were collected and the same day, the prosecutrix was handed over to her father, vide memo, Ext. PW-2/D. On 27.06.2013, application, Ext. PW-21/B was moved before Judicial Magistrate, Arki, for recording the statement of the prosecutrix and after getting her statement recorded, the case file was handed over to ASI, Rattan Chand. On 25.06.2013, an application, Ext. PW-21/C was moved for conducting ossification test of the prosecutrix. After receiving the FSL reports, supplementary challan was filed in the Court. This witness, in his cross-examination, has admitted that on receiving secret information about the coming of the prosecutrix and the accused from Punjab, he did not associate any independent witnesses. He also admitted that the reference of three mobile phone numbers in the *challan* had not been verified by him, nor call details of these numbers were obtained by him.

26. In defence, HC Suresh Kumar was examined as **DW-1**, who deposed about the case property of the accused. **DW-2**, Bali Ram, has deposed that accused Prakash Chand is his younger brother. On 27.06.2013, police visited their house and took into possession the bed sheet from his bed room. He further deposed that in his house six persons reside. He deposed that he saw the prosecutrix for the first time when she visited his house on 27.06.2013 with the police. This witness, in his cross-examination, admitted that his room, room of Prakash Chand and the room of his parents are separate. He denied that on 18.06.2013, the prosecutrix came to his house alongwith accused Ram Lal and Prakash Chand and stayed there till 21.06.2013. **DW-3**, Nand Lal (brother of accused Ram Lal), has deposed that personal search articles of accused Ram Lal were got released by him. It was one Nokia mobile phone, model number 1209, and cash amount of Rs. 300/-. This mobile set does not have bluetooth and camera. DW-4, Neeraj Kumar has deposed that Nokia handset 1209 does not have camera, bluetooth and memory card. He further deposed that no data can be transferred from this mobile to any other mobile and similarly no data can be transferred from other mobile to this mobile.

27. From the statement of the prosecutrix, the allegation which has come against accused Ram Lal, is that, he was threatening the prosecutrix to defame her, as

such, she accompanied him to the *nallah* and thereafter to the forest, where he allegedly raped her. However, as to what type of threat accused was giving to her and why she did not tell anything in this regard to her family members, is unexplained. The other allegation which has come in the statement of the prosecutrix that accused Ram Lal was having her nude photo in his mobile, remains unproved, as the mobile which accused was using, was without bluetooth, camera and memory card and as per DW-4, no data can be transferred from other mobile to this mobile. This story also seems to be concocted and to strengthen the case that it was accused Ram Lal, who took the prosecutrix with him out of threat. The prosecutrix, in her cross-examination, has admitted that she was using the mobile set given to her by accused Ram Lal and she used to talk with the accused at least once a day. She also admitted that she did not tell anyone in her family about the mobile set. If the statement of the prosecutrix is seen in its entirety, it cannot be held that she went with the accused out of threat, rather from her statement it seems that she went with the accused on her own, as she was in acquainted with the accused and was having in relation with him from long time.

28. Further the case of the prosecution was that at the time of alleged occurrence the prosecutrix was less then 18 years of age. However, regarding age of the prosecutrix nothing was said by her father when he appeared in the witness box as PW-2, except that she was born in the year 1997. Every father suppose to know the exact date of birth of his child, but PW-2 only gave the year of birth of his daughter, which makes his statement qua age of the prosecutrix doubtful. To prove the age of the prosecutrix, though the prosecution has also examined PW-6, Pyare Lal Sharma, who issued school leaving certificate of the prosecutrix, but on the basis of this school leaving certificate, it is unsafe to conclude that the prosecutrix was only 16-17 years of age at the time of alleged occurrence. Learned Court below while answering this fact held that there is nothing to infer that date of birth of the prosecutrix has been wrongly recorded in the records maintained in the Panchayat and school, but it is for the prosecution to prove that it was correctly recorded. PW-5, Balak Ram, Secretary, Gram Panchayat in his statement stated that date of birth certificate of the prosecutrix was issued by him as per record of pariwar register, however nothing has been proved by prosecution, who got recorded this date of birth in the pariwar register. When difference is only with respect to small period for the prosecutrix to attain majority, the strict proof is required to establish her exact date of birth, as smallest suspicion in such circumstances is of great significance. In the present case as per the medical opinion the age of the prosecutrix was in between 17 to 19 years at the time of alleged occurrence and in these circumstances it will be unsafe to hold that the prosecutrix was below 18 years of age at the time of occurrence.

29. In **Satbir Singh** vs. **the State of Himachal Pradesh**, latest HLJ 2012 (HP) 741, a coordinate Bench of this Court has held that the entry made in pariwar register regarding date of birth cannot be relied upon, as entry in the pariwar register is not based on birth and death certificate.

30. In **State of Himachal Pradesh** vs. **Negi Ram**, this aspect has further been dealt with in detail, relevant extracts of the judgment is as under:

> " 18. It is well settled at this stage that primary evidence to prove the date of birth of a person is the entries in the register at the time of his/her admission in the primary school. The record qua declaration of date of birth of the child made by his/her parents or guardian at the time of admission in primary school should also be there to substantiate the entries in the register. The name of parent/guardian at whose instance the child was admitted in the school should also be

disclosed. It is only on the basis of such material on record, the date of birth as find mentioned in the record produced in evidence can be believed as true and correct. In the case in hand, it is the certificate Ext. PW-6/A issued by the Headmaster, Primary School, Cheeh has been relied upon. As a matter of fact, the extract from the admission register should have been obtained and produced in evidence. The admission register along with form/declaration made by a person at whose instance the prosecutrix was admitted in the school should have been produced during the course of recording prosecution evidence, in order to prove the extract of parivar register. The certificate Ext. PW-6/A no doubt is stated to be issued on the basis of entries in the admission register, however, for want of declaration and also as to who has disclosed the date of birth of the prosecutrix as 1.5.1994 at the time of her admission in the school, the certificate Ext. PW-6/A cannot be termed to be primary evidence and rather secondary. The apex Court in Sunil Kumar Vs. State of Haryana, AIR 2010 SC 392 has held as under:

> "30. The prosecution also failed to produce any Admission Form of the school which would have been primary evidence regarding the age of the prosecutrix."

19. Hon'ble Apex Court in State of Chhatisgarh Vs. Lekhram, AIR 2006 SC 1746, has held that the register maintained in a school is admissible in evidence to prove the date of birth of the person concerned, if it is proved that the same has been maintained by the authorities in the discharge of their public duty and there is evidence to show as to who had disclosed the date of birth of such person at the time of his/her admission in the school.

31. In the case in hand, the father of the prosecutrix could not disclose exact date of birth of his daughter and when, as discussed above, the evidence led by the prosecution to prove the date of birth of the prosecutrix is unreliable and when medical opinion is that the age of the prosecutrix was in between 17 to 19 years at the time of alleged occurrence and without there being any conclusive proof with regard to her correct date of birth, it is clear that the prosecutrix was major at the time of alleged incident. Accordingly, this Court finds that learned Court below has wrongly appreciated the law to this aspect while holding that the prosecutrix was below 18 years of age. As far as the wrong act committed by accused Ram Lal, as alleged by the prosecutrix, the same has not been proved by the prosecution, because statement of the prosecutrix to that effect is not reliable and trustworthy, in view of the attending facts and circumstances, as disclosed by her in her statement. The allegation of the prosecutrix against co-accused Prakash Chand that he raped her in his house, also seems to be unreliable, because as per the statement of DW-2, Bali Ram, he denied having seen the prosecutrix in his house prior 27.06.2013 and if it is presumed that the prosecutrix stayed in the house of accused Prakash Chand from 18.06.2013 to 21.06.2013, why she did not disclose the wrong act done by accused Prakash Chand with her to his family members, though it has come on record that in that house accused Prakash Chand, reside alongwith his parents, *Bhabhi* and brother. Further the prosecutrix has failed to explain why she did not disclose anyone about her's being kidnapped and raped by accused Ram Lal at the busy place like Ropar and in the bus while traveling to Ropar. Why she keep mum throughout, makes her statement wholly unreliable. The golden principle of criminal jurisprudence system is that benefit of doubt of smallest suspicion is required to be given to the accused.

32. In view of the aforesaid decisions and discussion made hereinabove, we are constrained to hold that the prosecution has failed to prove the guilt of accused Ram Lal beyond the shadow of reasonable doubt. Consequently, the appeal filed by appellant-convict Ram Lal is allowed and he is acquitted of the charge framed against him under Sections 363 and 366 of IPC and Section 4 of POCSO Act, read with Section 376 of IPC. As far as appeal against accused-respondent Prakash Chand is concerned, the same needs no interference and is dismissed as such. Consequent upon the impugned judgment, accused Ram Lal, who is presently serving out the sentence, hence, if not required in any other case, be set free forthwith, subject to his furnishing personal bond in the sum of Rs. 20,000/- with one surety in the like amount to the satisfaction of learned trial Court so that in the event of any appeal against this judgment is preferred, his presence in the appellate Court be secured. The bail bond so furnished shall remain in force for a period of only six months. Release warrant be prepared accordingly. The appeal is finally disposed of.

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

Cr. Appeal No. 356 of 2017 with
Cr. Appeals No. 355 and 357 of 2017
Reserved on: 12.12.2018
Decided on: 05.01.2019

Cr. Appeal No. 356 of 2017

Nimmo Devi …..Appellant
Versus
State of Himachal Pradesh ……Respondent

Cr. Appeal No. 355 of 2017

Lekh Raj …..Appellant
Versus
State of Himachal Pradesh ……Respondent

Cr. Appeal No. 357 of 2017

Mohinder …..Appellant
Versus
State of Himachal Pradesh …Respondent

Indian Penal Code, 1860- Sections 302, 323 and 325 read with 34 - Grievous hurt, murder in furtherance of common intention etc. - Proof - Trial Court convicting all accused of murdering 'BD' and causing injuries to other victims in furtherance of common intention of each other - Appeal against - Accused arguing wrong appreciation of evidence on part of Trial Court in convicting them for murder- Facts revealing (i) dispute arose between parties suddenly because of demolition of their house by complainant party and on account of debris some seepage was being caused to property of accused (ii) all accused appeared at spot together and indulged in altercation with complainant party (iii) during altercation, accused 'M' snatched spade from labourer engaged by complainant party and hit on head of 'BD' with it – Death of 'BD' homicidal in nature- Injury sufficient to cause death in ordinary

course of things - Held, evidence does not indicate that assault on 'BD' with spade by 'M' was in furtherance of common intention of other accused also- Other co-accused did not participate in assault on BD or other injured- 'M' having knowledge that strike on head with spade would cause death of 'BD'- Conviction of 'M' for murder of 'BD' upheld- Other accused acquitted of murdering 'BD' and injuries to others in furtherance of common intention of 'M'- Appeals partly allowed- Convictions of co-accused set aside. (Paras 21 to 23)

For the appellant(s): Mr. Anoop Chitkara and Ms. Sheetal Vyas, Advocates.
For the respondent-State: Mr. Narinder Guleria, Additional Advocate General with Mr. J.S. Guleria and Mr. Kunal Thakur, Deputy Advocates General.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

Since all these appeals arise out of the impugned judgment of conviction and sentence, dated 29.05.2017, passed by learned Additional Sessions Judge (II), Kangra at Dharamshala, H.P., in Sessions Trial No. 5-D/VII/2015, as such, they are heard together and are being disposed of by a common judgment.

2. Succinctly, the facts giving rise to the present appeals, as per the prosecution story, are that on 12.03.2015, Hari Charan informed the Police Post Yol that around 1.30 p.m., when he was busy in dismantling his old house, accused Lekh Raj alongwith his wife Nimmo Devi, Mohinder and his nephew came there and started arguing with respect to accumulation of debris. Hari Charan persuaded them that falling of debris here and there is natural in the process of dismantling the house, but, accused Mohinder snatched the spade from the labourers and assaulted him with it on his head. The wife of Hari Charan (Basla Devi), his sister-in-law and his grandson came to his rescue, however, they were also attacked with *dandas* and spade. On hearing clamor, the people of the vicinity gathered and accused persons on seeing them, fled away from the spot. This information was registered in general diary vide entry, No. 12 of 12.03.2015 and thereafter, the injured were taken to Zonal Hospital, Dharamshala for medical treatment. On the same day, at about 2.45 p.m. accused Lekh Raj and Shilpa Devi informed the police qua beatings given to them by the complainant party, for which general diary entry, No. 14 was recorded and the injured mentioned therein were also taken to Zonal Hospital, Dharamshala for medical treatment. The Medical Officer referred accused Mohinder and Lekh Raj, Kaushalaya Devi, Hari Charan, Mansa Devi and Basla Devi for x-rays and C.T. Scans. Basla Devi and Kaushalaya Devi were further referred to Dr. Rajinder Prasad Government Medical College, Tanda (for short "Tanda Hospital"). Pursuant to aforesaid informations, S.I. Bhupinder Singh went to the spot of occurrence, prepared spot map, photographed the scene of crime and recorded the statement of Lalita Devi under Section 154 Cr. P.C. On the basis of the statement of Lalita Devi, case FIR No. 65/2015, dated 13.03.2015, under Sections 341, 447, 323 and 504 of the Indian Penal Code (for short "IPC") was registered against the accused persons. On 15.03.2015, Basla Devi succumbed to the injuries at Tanda Hospital. Accordingly, accused persons were also charged under Section 302 IPC and were arrested on the same day. On 17.03.2015, Reeta Devi handed over to the police, the slippers, lady shoe, wrist watch and shawl of the accused persons, left by them at the place of occurrence. On 19.03.2015, accused Mohinder gave a disclosure statement regarding weapon of offence, i.e. spade and got recovered the same from his house. Sketch of the weapon of offence was prepared and it was taken into possession by the police. Spot map in

this regard was also prepared. After postmortem, final opinion was obtained from the Medical Officer, who opined that the deceased died due to homicidal traumatic brain injury. The injury sustained by Hari Charan was also found to be grievous in nature, so, the accused persons were also charged under Section 325 of IPC. After completion of investigation, *challan* was presented in the Court, under Sections 302, 323, 325, 341, 447 and 504, read with Section 34 IPC.

3. The prosecution, in order to prove its case, examined as many as twenty six witnesses. Statements of the accused persons were recorded under Section 313 Cr. P.C. The accused persons did not lead any defence in their favour.

4. The learned Court below, vide judgment/order dated 29.05.2017, convicted and sentenced all the accused persons, as follows:

> "1) to undergo imprisonment for life and to pay fine of Rs. 25,000/- under Section 302 of the Indian Penal Code. In case of default of payment of fine, they shall further undergo rigorous imprisonment for a period of one year.
>
> 2) to undergo rigorous imprisonment for seven years and to pay fine of Rs. 10,000/- under Section 325 of the Indian Penal Code. In case of default of payment of fine, they shall further undergo rigorous imprisonment for a period of one year.
>
> 3) to undergo rigorous imprisonment for one year and to pay fine of Rs. 1,000/- under Section 323 of the Indian Penal Code. In case of default of payment of fine, they shall further undergo rigorous imprisonment for a period of two months.
>
> 4) to undergo rigorous imprisonment for three months under Section 447 of the Indian Penal Code.

All the sentences were directed to run concurrently, hence the present appeals.

5. Mr. Anoop Chitkara, learned counsel for the appellants/convicts/accused has argued that the prosecution has not explained the injuries received by the mother of appellants Lekh Raj and Mohinder and mother-in-law of appellant Nimmo Devi. He has further argued that even otherwise also the prosecution has not proved any case against Lekh Raj and Nimmo Devi and their conviction is solely on the basis of Section 34 IPC and as it was a spontaneous act, it cannot be said that there was any meeting of mind, because there was no actual participation of appellants Lekh Raj and Nimmo Devi in the crime. Lastly, he has argued that as the prosecution has failed to connect the accused persons with the commission of offence, they are required to be acquitted.

6. On the other hand, learned Additional Advocate General has argued that the prosecution has proved the guilt of the accused persons beyond the shadow of reasonable doubt and the judgment of conviction, passed by learned Court below is based upon the proper appreciation of evidence, so the judgment of conviction, passed by learned Court below needs no interference.

7. Complainant Lalita Devi while appearing in the witness box as **PW-1**, has deposed that on 12.03.2015, around 1.00 p.m., when Hari Charan and the deceased were dismantling their house, accused Mohinder, Lekh Raj and Nimmo Devi came there and objected for the accumulation of the debris. Thereafter, the accused persons started quarreling with Hari Charan and the deceased by asking them to pick up the debris (*malwa*). Accused Mohinder gave a spade blow on the right forearm of Hari Charan. The

deceased tried to rescue her husband, however accused Mohinder also gave a spade blow on her head. In the meanwhile, Mansa Devi came to the spot and she also tried to rescue Hari Charan and the deceased, but accused Nimmo Devi gave a *danda* blow on her hand. On their clamor, the villagers came there and on seeing them, accused persons fled away from the spot. After the incident, the injured went to Police Post Yol. Police visited the spot on 13.03.2015, prepared spot map and recorded her statement. The deceased was referred from Zonal Hospital, Dharamshala to Tanda Hospital, where she succumbed to the injuries on 15.03.2015. This witness, in her cross-examination, admitted that during the incident, Kaushalaya Devi (mother of accused) also sustained injuries. Though, she feigned ignorance as to which part of her body she sustained injuries, however, stated that she noticed injuries on her face. She volunteered that the injuries were caused to Kaushalaya Devi due to melee going on at the spot. She feigned ignorance whether Kaushalaya Devi remained hospitalized for five days at Tanda hospital. She admitted that she did not mention anything with respect to the injuries on the person of Kaushalaya Devi in her statement, Ext. PW-1/A. She denied that accused Mohinder and Lekh Raj also sustained injuries in this incident. She denied that by accumulation of the debris, there was hindrance on the way, leading to the house of accused persons and it was causing seepage/dampness in the house of the accused. She denied that it was Kaushalaya Devi, who firstly sustained injuries. She also denied that the complainant party were the aggressors.

8. **PW-2**, Mansa Devi (sister-in-law of the deceased), has deposed that her house is in front of the house of Hari Charan. On 12.03.2015, Hari Charan was dismantling his house and had accumulated debris there, upon which, the accused persons raised an objection. Thereafter, accused persons started quarreling with Hari Charan and the deceased. Accused Mohinder lifted the spade lying on the spot and gave its blow on the arm of Hari Charan and also on the head of the deceased. As per this witness, when she went for their rescue, accused Nimmo inflicted a blow on her right forearm with some object, owing to which, she immediately became unconscious. Thereafter, she was taken to Zonal Hospital, Dharamshala, where she was medically examined. This witness, in her cross-examination, admitted that Kaushalaya Devi (mother of accused Mohinder) also sustained injuries on her head and she remained hospitalized for 5-6 days. She denied that accused Mohinder also sustained injuries in the incident. She admitted that due to accumulation of debris, there was seepage/dampness in the house of accused Mohinder and it was causing hindrance of passage to his house. She denied that the complainant party were the aggressors, due to which, entire incident took place. She also denied that it was Kaushalaya Devi, who sustained injuries first.

9. **PW-3**, Reeta Devi, has deposed that on 12.03.2015, at around 1.00 p.m., she had gone to the road side to check the delivery of iron rods (*sariya*) and she returned home when accused persons had left the scene after inflicting injuries to the deceased and Hari Charan. The entire incident was narrated to her by her son Rajat, who also sustained injuries on his lower back. As per this witness, she lifted a watch (Ext. P-2), single hawai Chappal (Ext. P-3), single lady shoe (Ext. P-4) and one lady shawl (Ext. P-5) from the spot and handed them over to the police on 17.03.2015, which were taken into possession by the police vide memo, Ext. PW-3/A. On the same day, she handed over the clothes of the deceased (Exts. P-7 to P-10), worn by her at the time of incident, which were taken into possession by the police vide memo, Ext. PW-3/B. This witness, in her cross-examination, has deposed that she lifted all the articles from the spot on 12.03.2015 and police visited the spot and inquired the facts from her on 13.03.2015. She denied that all the articles were subsequently procured to create false evidence against the accused persons.

10. **PW-4**, Sarup Lal (Ward Panch), has deposed that on 17.03.2015, in his presence, Reeta Devi handed over the articles, Exts. P-2 to P-5 and Exts. P-7 to P-10 to the police, which were taken into possession by the police vide memos, Ext. PW-3/A and Ext. PW-3/B. He further deposed that in his presence, accused Mohinder did not disclose anything to the police. Since this witness has not supported the prosecution case with respect to the disclosure statement made by the accused, thus learned Public Prosecutor cross-examined him, during which, he admitted that accused Mohinder made a disclosure statement to the police that he could get the weapon of offence, i.e. spade, recovered from his house. Accused Mohinder refused to sign his statement. Thereafter, accused Mohinder led him, Neelam Kumar and the police party to this house, took the spade from the top of tin shed and handed it over to the police, which was taken into possession vide memo, Ext. PW-4/B. Accused Mohinder also refused to sign this memo.

11. **PW-5**, Hari Charan, has deposed that on 12.03.2015, he was dismantling his old house with his family members and in that process some debris got accumulated by the side of his house. Around 1.15 p.m., accused Mohinder, Lekh Raj and Nimmo Devi came there and objected to the accumulation of debris by saying that this land belongs to them, upon which, he promised that he will lift the debris from there, however Mohinder caught hold of him from his collar. The deceased tried to rescue him, but accused lifted a spade from the spot and gave its blow on his upper arm. Accused Mohinder also inflicted a spade blow on the head of the deceased. Thereafter, the villagers, including his nephew rushed to the spot. Mansa Devi also tried to rescue them, upon which, accused Nimmo Devi lifted a shovel from the spot and inflicted a blow of it on her forearm. After inflicting injuries, the accused persons fled away from the spot and accused Mohinder also took spade with him. The deceased told him that she was hit by accused Mohinder, that were her last words, thereafter she vomited and never regained conscious. He was medically examined in Zonal Hospital, Dharamshala, whereas the deceased was referred to Tanda hospital, where she succumbed to the injuries on 15.03.2015. This witness, in his cross-examination, has deposed that when he visited Police Post Yol, his wife (deceased) was accompanying him, but she remained seated in the jeep. He denied that at that time, she was conscious. He feigned ignorance as to the fact whether it was Kaushalaya Devi, who firstly sustained injuries on her head. He denied that fight was started by them.

12. **PW-6**, Rakesh Kumar, has deposed that on 24.03.2015, police visited the house of accused Lekh Raj and inspected the spot, whereupon beneath the debris they found a left foot Relaxo Hawai Chappal, having size of 6 number, which was sealed by the police in a parcel and taken into possession vide memo, Ext. PW-6/A. This witness, during his cross-examination, admitted that Hari Charan is his collateral. **PW-7**, Dr. Tilak Bhagra, Radiologist, has deposed that on 13.03.2015, he examined the X-ray films of right forearm and right wrist of Mansa Devi and issued his report, Ext. PW-7/C. He also filmed the X-rays of the right shoulder of Hari Charan and issued his report, Ext. PW-7/E.

13. **PW-8**, Dr. Kumar Sourav, has deposed that on 13.03.2015, he medically examined Hari Charan, Mansa Devi, Rajat Chaudhary and the deceased and issued MLCs, Exts. PW-8/B to PW-8/E. He opined that the injuries on the person of Hari Charan and the deceased are possible with the spade, whereas the injury on the person of Rajat Chaudhary is possible by the pointed side of the spade. This witness, in his cross-examination, has deposed that he did not inspect the CT Scan report of the deceased and it can only be opined after going through the CT Scan report, as to whether the injury was sufficient in the ordinary course of nature to cause death or not. As per this witness, on 13.03.2015, he also examined Kaushalaya Devi vide MLC, Ext. Dx and the injury mentioned in MLC is possible with a *danda* blow.

14. **PW-9**, Saroj Kumari, has deposed that on 12.03.2015, at about 1.15 p.m. when she was returning home, she heard noise of some fight near the house of Hari Charan. She saw accused Mohinder, Lekh Raj and Nimmo Devi arguing with Hari Charan and the deceased. In the meantime, accused Mohinder hit Hari Charan on his left arm with a spade, the deceased on her head and Mansa Devi on her hand. When people started gathering there, the accused persons fled away from the spot. They also took the spade with them. This witness, in her cross-examination, admitted that her statement was recorded by the police after the lapse of one month. She further admitted that Kaushalaya Devi also sustained injuries on her head. As per this witness, the fight did not start in her presence, therefore, she could not say as to who initiated the fight.

15. **PW-10**, Pushpinder Kumar, Circle Patwari, has deposed that he demarcated the scene of crime on an application moved by the police and issued his report, Ext. PW-10/B, on the basis of Jamabandi, Ext. PW-10/C and Aks, Ext. PW-10/D, which are in conformity with the original record. **PW-11**, Sandip Kumar, Store Incharge, Police Station Dharamshala, has deposed that on 18.03.2015, S.I. Bhupinder Singh, deposited with him several sealed cloth parcels, containing clothes of the deceased and other material collected by the Investigating Officer, which he placed in the store vide entry, Ext. PW-11/A. On 19.03.2015, S.I. Bhupinder Singh again deposited a cloth parcel containing the spade with him, which was placed in the store vide entry, Ext. PW-11/B. On the same day, HHC Bas Raj deposited a sealed parcel, containing viscera of the deceased and other documents with him, which he placed in the store vide entry, Ext. PW-11/C. On 24.03.2015, S.I. Bhupinder singh, deposited with him cloth parcel, containing Relaxo Chappal, which he placed in the store vide entry, Ext. PW-11/D. On 20.03.2015, he sent some of these parcels through HHC Ashok Kumar vide RC, Ext. PW-11/E and on 04.04.2015, other parcels were sent through Constable Arjun Kumar, vide RC, Ext. PW-11/F to RFSL, Dharamshala. The parcels sent though Constable Arjun Kumar were returned and were again sent to RFSL, Mandi through HHC Kuldeep Singh, vide RC, Ext. PW-11/G.

16. **PW-18**, Dr. Ankit, has deposed that on 12.03.2015, the deceased was admitted in Tanda Hospital. He on her examination found that there was a lacerated wound of size 2x1 cm over left front parietal region, black eye (left side). CT Scan of head was suggestive of SDH with maximum thickness 6.5 mm along left frontal temporal and parietal region with hemorrhage and no-hemorrhagic multiple contusions left cerebral hemisphere with mass effect and mid-line shift of 9 mm towards right side with traumatic SAH with linear undisplaced fracture of frontal bilateral temporal and bilateral parietal bones. Patient was managed conservatively with consultation with ophthalmology, neurosurgery and anesthesia. Patient was intubated as GCS deteriorated and put on ambubag ventilation. Patient was re-intubated on 14.03.2015 with consultation of anesthesiologist. Patient's condition further deteriorated and could not be revived and declared dead on 15.03.2015 at 9.00 a.m. He issued treatment summary, Ext. PW-18/A. He opined that injuries on the person of the deceased are possible with spade and these injuries are sufficient to cause death in the ordinary course of nature. This witness, in his cross-examination, admitted that the death took place on the fourth day of the occurrence and it was not instantaneous. He further admitted that in Ext. PW-18/A, he did not mention that the injury in question was sufficient in the ordinary course of nature to cause death.

17. **PW-25**, Dr. Rahul Gupta, has deposed that on an application, Ext. PW-25/A, moved by the police, accompanying inquest papers, Exts. PW-25/B and PW-25/C, he conducted the postmortem examination of the deceased and observed following anti-mortem injuries:

(1) A laceration of 2cm x 0.3cm skin deep present vertically over left

side of forehead in region of frontal eminence. Adherent brown scab is present. There is no evidence of grazing over surrounding sin.

(2) A contusion 3 x 3cm purple in colour present over mid of left breast just above nipple.

(3) The black eye is present on both sides.

(4) A contusion 3 x 3cm purple in colour present over middle half of front of left arm.

(5) A contusion 2 x 2cm purple in colour present over middle half of back of left forearm.

This witness, after receipt of the RFSL reports, Exts. PA and PB, opined that the deceased died due to homicidal traumatic brain injury. He further opined that the injuries sustained by the deceased over head are possible with the spade. He issued postmortem report, Ext. PW-25/D, on which he gave final opinion, Ext. PW-25/F, as per which, the injury on the head of the deceased was sufficient to cause her death in the ordinary course of nature. This witness, in his cross-examination, admitted that the injured died on the fourth day of the alleged occurrence and the death was not instantaneous.

18. **PW-26**, Inspector Bhupinder Singh (Investigating Officer of the case), has deposed that on 12.03.2015, on an application moved by Hari Charan, alleging beatings given by the accused persons, G.D. entry, Ext. PW-19/A, was made and Injured persons namely Mansa Devi, Hari Charan, Rajat and the deceased were sent to Zonal Hospital, Dharamshala for medical examination with HHC Parveen Kumar. After their examination, HHC Parveen Kumar handed over to him the MLCs of the injured persons. The deceased was referred to Tanda hospital. On 13.03.2015, he visited the place of occurrence for verifying the correctness of *rapat*, Ext. PW-19/A and recorded the statement of Lalita Devi, on the basis of which, FIR, Ext. PW-20/A was registered. He took photographs of the spot and prepared spot map. Besides the statement of Lalita Devi, he also recorded the statements of Mansa Devi, Hari Charan and Rajat. Thereafter, he went to Tanda hospital and presented an application, Ext. PW-26/C to the Medical Officer qua recording the statement of the deceased, however, the doctor declared her to be unfit to give statement. On 15.03.2015, the deceased expired. He filled up inquest forms, Exts. PW-25/B and PW-25/C and moved an application, Ext. PW-25/A, for conducting the postmortem of the deceased. He charged the accused persons for the commission of offence punishable under Section 302 IPC, interrogated them and on finding sufficient evidence against them, arrested them vide memos, Exts. PW-26/J1 to PW-26/J3. On 17.03.2015, he again visited the spot, where Reeta Devi produced salwar kameej, pajami and shawl worn by the deceased at the time of occurrence, he sealed these articles in a parcel and took them into possession vide memo, Ext. PW-3/B. On the same day, Reeta Devi produced one Relaxo slipper, one brown shoe, sonata watch and a shawl, which were sealed by him in a cloth parcel and took into possession vide memo, Ext. PW-3/B. On 19.03.2015, accused Mohinder, while in police custody, gave a disclosure statement that he could get recovered the spade, which he had concealed in his house. The accused refused to sign the disclosure statement. Pursuant to this statement, accused led the police party and the witness to his house, where he had thrown the spade towards temporary structure near his cowshed. On checking, the spade was found lying over the shed of the said structure, the same was recovered, measured and its sketch was prepared. He also prepared spot map in this regard. The spade was sealed in a cloth parcel and taken into possession vide memo, Ext. PW-4/B. Accused also refused to sign the memo. On 24.03.2015, he again visited the spot, taken into possession one Relaxo chappal and sealed it in a cloth parcel vide memo, Ext. PW-6/A. Spot map in this regard was prepared. The scene of crime was got demarcated through revenue agency and

demarcation report was procured. On receipt of forensic report, he procured final opinion regarding cause of death, vide application, Ext. PW-25/E, alongwith treatment summary, Ext. PW-18/A of the deceased. On 03.06.2015, he moved an application to Medical Officer, Zonal Hospital, Dharamshala and obtained opinion regarding nature of injury received by Hari Charan and on finding the injury to be grievous in nature, he charged accused person under Section 325 IPC. This witness, in his cross-examination, admitted that Kaushalaya Devi had also sustained head injury in the alleged occurrence and she remained hospitalized w.e.f. 12.03.2015 till 17.03.2015 at Tanda Hospital. He also admitted that Kaushalaya Devi was got medically examined at the instance of the police of Police Post Yol in Zonal Hospital Dharamshala, however, her MLC, Ext. DX, was not attached with the police *challan*. He denied that he intentionally not attached the MLC of Kaushalaya Devi with the police *challan* in order to suppress the genesis of the occurrence.

19. Besides aforesaid witnesses, the prosecution has also examined PW-12, HHC Ashok Kumar, PW-13, HHC Kuldeep Singh, PW-14 HHC Sumesh Kumar, PW-15, HHC Parveen Kumar, PW-16, Constable Shiv Charan, PW-17, Constable Sunil Kumar, PW-19, HHC Bishanu, PW-20, HHC Bas Raj, PW-21, ASI Jitender Kumar, PW-22, HC Sant Ram, PW-23, Parveen Kumar and PW-24, Inspector Mool Raj, who are formal witnesses.

20. From the evidence, which has come on record, following facts emerge:

> (i) Accused Mohinder asked Hari Charan to lift the debris of the dismantled house, as it was causing seepage/dampness in their house and Hari Charan promised the accused to lift the same.
>
> (ii) Mother of accused Mohinder and Lekh Raj and mother-in-law of accused Nimmo Devi had also received injuries on her head in the alleged occurrence and she remained hospitalized for five days.

From the aforesaid facts, it appear that when the debris were being stored in the land of accused Mohinder, it was causing seepage/dampness in the house of accused persons. The mother of the accused objected to it and in that altercation, she received injuries, but who started the altercation first, is not clear from the record. However, it appears that some altercation was going on between the accused persons and complainant party and when mother of accused No. 1 and 2 and mother-in-law of accused No. 3 received injuries, accused No. 1 snatched the spade from the labourer of the complainant party and hit the deceased, as a result of which, she died. However, the injuries received by the mother of the accused were not explained by the prosecution, but from the evidence it is evident that she also received injuries in the same incident.

21. Now, second question which arises for consideration is, whether accused No. 2 and 3 were having common intention to kill the deceased? If their participation in the act is analyzed, it appears that neither they participated in the act of beating the deceased, nor they were having any common intention to kill the deceased, as it was a simple case of altercation with regard to the storage of debris, leading seepage/dampness in the house of the accused persons and suddenly without any prior meeting of mind accused Mohinder inflicted injuries on the head of the deceased with spade and due to brain injury, the deceased died after four days. He also in that sudden altercation without any prior meeting of mind with co-accused and without their participation, caused grievous injury to Hari Charan by trespassing his land. So, he is the only person, who is liable to be convicted for the commission of crime.

22. The prosecution has failed to prove the guilt of accused No. 2 and 3 under sections 323, 325 and 447 IPC also, as there is nothing on record that either they caused

grievous hurt or trespassed the land of Hari Charan. Though, Hari Charan in his statement deposed that accused Nimmo Devi inflicted shovel blow to Mansa Devi, however, Mansa Devi has stated that accused Nimmo Devi inflicted a blow on her right forearm with some object and thereafter she became unconscious. There is contradiction in the statements of both these witnesses with respect to unconsciousness and object, with which, a blow was alleged to be given. So, their statements qua accused Nimmo Devi seem to be an afterthought and are not reliable. In these circumstances, it is more than safe to hold that learned Court below has committed illegality in convicting accused No. 2 and 3, under Section 302, 323, 325 and 447 IPC, as they were nothing more than mere spectators.

23. On the other hand, as per learned counsel for the appellants, the act of accused No. 1 was in self defence, as his mother was injured, but while analyzing the evidence, including medical evidence and the postmortem report, it is clear that injuries caused on the head of the deceased were of such a nature which any prudent person will know that these are sufficient to cause death in all probabilities. So, the act of accused Mohinder, giving spade blow on the head of the deceased and that it will cause death in all probabilities, was within his knowledge. There is nothing on record that when he caused the injuries there was any danger to his life or to the life of his mother from the complainant party. Further, there is also conclusive evidence against accused Mohinder that he caused grievous injury on the person of Hari Charan. The defence has failed to prove anything that accused Mohinder has lost control of his senses, rather from the prosecution evidence, it is clear that he with intention to do so, inflicted injuries on the head of the deceased, causing her death. In these circumstances, this Court finds that the learned Court below has committed no illegality in convicting accused Mohinder for the commission of offence punishable under Sections 302, 323, 325 and 447 of IPC, as such, his conviction needs no interference.

24. So, in view of what has been discussed hereinabove, this Court this Court finds no material on record to suggest that accused No. 2 and 3, i.e. Lekh Raj and Nimmo Devi, caused any injury to the deceased or the complainant party, nor anything has been proved which can establish their common intention to kill the deceased. Thus, learned Court below has committed grave illegality in convicting accused No. 2 and 3, applying Section 34 IPC. Consequently, accused No. 2 and 3, i.e. Lekh Raj and Nimmo Devi are acquitted of the commission of offence punishable under Section 302, 323, 325 and 447. They be released forthwith, if not required in any other case, however, subject to their furnishing personal bonds in the sum of Rs. 50,000/- (each), with one surety in the like amount (each) to the satisfaction of learned Additional Sessions Judge (II), Kangra at Dharamshala, undertaking specifically therein that in the event of an appeal is preferred against this judgment, they shall appear before the Hon'ble Supreme Court.

25. The Registry is directed to prepare the release warrants of accused Lekh Raj and Nimmo Devi and send the same to the Superintendent of Jail concerned in conformity with this judgment forthwith.

26. Accordingly, the appeals filed by appellants/convicts Nimmo Devi and Lekh Raj are allowed, whereas appeal filed by accused Mohinder is dismissed. The appeals, so also pending miscellaneous application(s), if any, stand disposed of.

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

Cr. Appeal No. 460 of 2016 a/w
Cr. Appeal No. 26 of 2017
Reserved on: 14.11.2018
Decided on: 02.01.2019

Cr. Appeal No. 460 of 2016

Sanjay Kumar …..Appellant
Versus
State of Himachal Pradesh ……Respondent

Cr. Appeal No. 26 of 2017

Reena Devi …..Appellant
Versus
State of Himachal Pradesh ……Respondent

Indian Penal Code, 1860 – Sections 201 and 302 read with 34 – Murder and destruction of evidence etc.– Proof – Trial Court convicting 'S' and his wife 'R' of murdering 'N' with whom 'R' having extra marital relations, but acquitting co-accused 'A' – 'S' & 'R' also convicted of offence of destruction of evidence of commission of offence – Appeal against – Defence arguing lack of evidence on record and depicting convictions as unwarranted- On facts, (i) 'R' eloped with deceased 'N' and stayed with him for months together (ii) 'R' asking 'N' to leave her otherwise it would not be good for him (iii) on day of incident, presence of 'S' 'R' and 'N' in house of accused established (iv) dead body of 'N' found in house of 'R' & 'S' (v) no explanation as how dead body of 'N' came there (vi) keys of room given by 'R' to police from where dead body of 'N' recovered (vii) 'S' identifying slab of house from where deceased was thrown down (viii) 'S' also identifying place near rivulet where articles including SIM of deceased were burnt (ix) 'S' had motive to commit murder of 'N'- Held, evidence does not indicate participation of 'R' in murder – Her involvement in destruction of evidence of commission of offence proved – Appeal of 'R' partly allowed – She is acquitted of offence of murder but conviction for offence of destruction of evidence maintained – Sentence altered – Conviction of 'S' for murder and destruction of evidence maintained. (Paras 20 to 30)

Indian Evidence Act, 1872 – Section 3– False plea – Evidentiary value – Held, non explanation or false plea can be taken only as an additional circumstance to corroborate links proved by prosecution against accused– It cannot be taken as proof for links missing in prosecution story. (Paras 22 to 24)

Cases referred:

Padala Veera Reddy vs. State of Andhra Pradesh and others, AIR 1990 SC 79
Rajdev alias Raju & another vs. Stae of H.P., Criminal Appeal No. 288 of 2015
Sharad Birdhichand Sarda vs. State of Maharashtra, AIR 1984 SC 1622
State of H.P. vs. Sunil Kumar, Criminal Appeal No. 326 of 2011, decided on 15.06.2017
State of Uttar Pradesh vs. Ram Balak & another, (2008) 15 SCC 551

For the appellant(s): Mr. Kulvir Narwal and Mr. Shashi Bhushan, Advocates, for the appellant in Cr. Appeal No. 460 of 2016.
Mr. Anoop Chitkara and Ms. Sheetal Vyas, Advocates,

	for the appellant in Cr. Appeal No. 26 of 2017.
For the respondent-State:	Mr. Narinder Guleria, Additional Advocate General with Mr. Kunal Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

Both these appeals are maintained against the judgment of conviction and sentence, dated 15.06.2016/16.06.2016, passed by learned Sessions Judge, Sirmaur District at Nahan, H.P., in Sessions Trial No. 11-ST/7 of 2015, as such, they are heard together and are being disposed of by this common judgment.

2. Succinctly, the facts giving rise to the present appeals, as per the prosecution story, are that accused Sanjay Kumar, being resident of Rohtak, solemnized marriage with co-accused Reena Devi resident of Nahan, District Sirmaur and purchased some property, including two storey building at village Moginand in the name of his wife. Thereafter, both of them started residing in their purchased building. However, during the month of May-June, 2014, accused Reena Devi developed extra marital relations with Naresh alias Rinku (deceased) and eloped with him. She started living with the deceased, but after 3-4 months, their relation soured and accused Reena Devi returned to Moginand. On 21.10.2014, the deceased came to Moginand and went to the house of accused Reena. On the same day, accused Sanjay and Ankush alias Shanky also came to Moginand and on account of extra marital relations of the deceased with accused Reena, an altercation took place between accused Sanjay and Naresh. During the altercation, accused Sanjay and Ankush took the deceased to the lintel of the house and thrashed him with stick and they pushed him down from the lintel. The deceased sustained head and back bone injuries, to which he ultimately succumbed. Thereafter, accused persons with a view to destroy the incriminating evidence against them, lifted the corpse of the deceased and kept it in a room on the ground floor of the house and locked it from outside. The wooden stick used by accused Ankush while assaulting the deceased was cut into two pieces with scythe by accused Sanjay and thereafter the same was concealed underneath a bed in the house. Whereas, SIM card and wallet of the deceased were burnt by accused Sanjay on the bank of the adjacent rivulet. Accused Sanjay and Ankush left village Moginand, leaving behind accused Reena. The dead body remained inside the room for 5-6 days and when it started decomposing, accused Reena reported the matter at Police Line, Nahan. She deposed that some foul smell is coming from one of the rooms of her house, which is locked by her husband. On the basis of information given by accused Reena, a telephonic information was given to the Police Station, Kala Amb. SHO Mohar Singh, accompanied by police personnel came to the spot and found dead body of the deceased inside the room. The dead body was identified by Suresh Kumar, brother of the deceased. On the basis of the statement made by Suresh Kumar, a formal FIR, under Section 302, 201, read with Section 34 IPC was registered and investigation ensued. During the course of investigation, site plan was prepared and the spot was photographed. The accused persons were arrested and while in police custody, each of them made disclosure statements. Accused Reena Devi led the police to the lintel where the deceased was assaulted by co-accused persons. Whereas, accused Ankush led the police to one of the rooms and got effected recoveries of broken stick, with which he assaulted the deceased, and the scythe, with which accused Sanjay cut the stick into two pieces. Accused Sanjay, while in police custody made disclosure statement to the effect that he could identify not only the lintel where the deceased was assaulted, the place, from which, his body was thrown down, the room where his accomplice Ankush had

concealed two pieces of the stick, the scythe and also the bank of rivulet where he burnt the SIM card and other belongings of the deceased. During the course of further investigation, spot map of the aforementioned places were also prepared. Statements of the witnesses were recorded and after completion of investigation, challan was presented in the Court.

3. The prosecution, in order to prove its case, examined as many as fourteen witnesses. Statements of the accused persons were recorded under Section 313 Cr.P.C. The accused persons did not lead any defence in their favour.

4. The learned Court below, vide judgment dated 15.06.2016, acquitted accused Ankush for the commission of offences punishable under Sections 302 and 201, read with Section 34 IPC and accused Sanjay and Reena were convicted under the aforesaid Sections and sentenced to undergo life imprisonment for the commission of offence punishable under Section 302, read with Section 34 IPC and to pay a fine of Rs. 10,000/- (each) and in default of payment of fine, they were further ordered to undergo simple imprisonment for one year (each). Whereas, under Section 201, read with Section 34 IPC, both of them were convicted and sentenced to undergo imprisonment for a period of seven years and to pay a fine of Rs. 5,000/- (each) and in default of payment of fine, they were further ordered to undergo simple imprisonment for six months, hence the present appeals.

5. Mr. Kulvir Narwal and Mr. Shashi Bhushan, learned counsel for appellant Sanjay Kumar have argued that the learned Court below has not taken into consideration the fact that no recovery was effected on the basis of disclosure statement made by accused Sanjay Kumar. They have further argued that accused Sanjay Kumar had no intention to kill, as no weapon of offence was with him. It is further argued that the story putforth by the prosecution, involving Sanjay Kumar, is totally unbelievable and learned Court below on the basis of surmises and conjectures, convicted him, without there being any evidence against him and as the prosecution has miserably failed to prove its case, the judgment of conviction against accused Sanjay Kumar is liable to be set aside.

6. Mr. Anoop Chitkara, learned counsel for accused Reena Devi, has argued that there is neither any evidence which connects accused Reena Devi with the alleged offence, nor accused Reena Devi had intention to commit the offence, as she was having extra marital relations with the deceased. He has further argued that there is no evidence against Reena Devi and she only reported the matter to the police, when foul smell started emitting from the room. in these circumstances, judgment of conviction against Reena Devi is liable to be set aside.

7. On the other hand, learned Additional Advocate General has argued that the prosecution has proved the guilt of the accused persons beyond the shadow of reasonable doubt and the judgment of conviction, passed by learned Court below is based upon the proper appreciation of evidence, as there is complete chain of circumstances against the accused persons and there is no other conclusion, except that it was accused Sanjay and Reena, who had committed the offence, so the judgment of conviction, passed by learned Court below needs no interference.

8. In rebuttal, Mr. Kulvir Narwal and Mr. Shashi Bhushan, Advocates, have argued that co-accused Ankush has been acquitted by the learned Court below and as there is no evidence against appellant Sanjay Kumar, he is also required to be acquitted. Mr Anoop Chitkara, Advocate, in rebuttal, has argued that the judgment of conviction against appellant Reena Devi is the result of total misreading of evidence, which has come on record, and in these circumstances, she is required to be acquitted and the judgment of conviction against her is required to be set aside.

9. In order to appreciate the rival contentions of the parties, we have gone through the record carefully and in detail.

10. Narender Kumar, while appearing in the witness box as PW-1, has deposed that he runs a Karyana shop at Moginand and knows accused Sanjay and Reena. He further deposed that in the year 2014, one day prior to Diwali, when accused Reena and the deceased were going on the road in front of his shop, Reena asked the deceased to leave her, otherwise it would not be good for him. He deposed that on 26.10.2014, around 3-4:00 p.m., police came to his shop and asked him to accompany them to the house of accused Sanjay, as they had information that a dead body is lying inside the house of accused Sanjay. Thereafter, he accompanied the police to the house of accused Sanjay and when they reached near the main gate of the house, they felt foul smell. The main gate was locked, so ASI asked Reena to bring the keys. Initially, Reena denied to have the keys, however, when police started to break open the lock, the mother of accused Reena produced the keys. Thereafter, police entered into the premises and when ASI opened the locked room, dead body of a male was found and face of the dead body was covered with a cloth. The face of the dead body was completely disfigured and on suspicion that the dead body might be of Naresh alias Rinku, his brother Suresh Kumar was called to identify the same. Suresh Kumar identified the dead body on the basis of a “tattoo of cobra” etched on the right arm of the deceased. Thereafter, the lock and keys were taken into possession by the police in his presence and the same were put in a cloth parcel, which was sealed with seal impression 'D' and seizure memo, Ext. PW1/A, was prepared. As per this witness, on 30.10.2014, he was again associated in the investigation and on that day accused Reena got recorded her disclosure statement, Ext. PW-1/C, in Police Post Kala Amb and disclosed that she could identify the lintel of her house, where the occurrence took place. Thereafter, accused Reena led police to the said place and identified the lintel. The police prepared identification memo, Ext. PW-1/D, which also bears his signatures. As per this witness on 02.11.2014, he again remained associated in the investigation and on that day, accused Ankush got recorded his disclosure statement, Ext. PW-1/E, with the police and disclosed that he could get recovered a *danda* and a *drat*, which he had kept underneath the bed. Thereafter, accused Ankush led the police to his house and got recovered a *danda* and a *drat* from a room and identification and seizure memos of *danda* and *drat* were prepared. On 04.11.2014, accused Sanjay got recorded his disclosure statement, Ext. PW-1/G, and disclosed that he could get identify the place near Markanda river, where he burnt wallet, SIM card and licence etc. Thereafter, accused Sanjay led police to the said place, however no evidence of burning could be collected due to flow of water. Identification memo, Ext. PW-1/H, bears his signatures. This witness, in his cross-examination, has deposed that he knows the father and brother of the deceased for the last about six years. He further deposed that he has seen accused Ankush, when he came to his shop 15 days prior to the murder of the deceased. He deposed that accused Sanjay had purchased a house at Moginand in the name of his wife. He further deposed that he was called by the police at Police Station Kala Amb on 02.11.2014 and when accused Ankush got recorded his statement, only he, accused Ankush and police officials were there. Self stated that Guman Singh reached later on. When accused Ankush gave demarcation in pursuance of his statement, at that time also, Guman Singh was present there. He deposed that accused Sanjay got recorded his statement on 04.11.2014 in Police Station Kala Amb and on that day also Guman Singh was present there. He further deposed that his shop is situated on the roadside at Moginand and whenever people cross by the side of his shop, he usually notice them. He denied that Suresh Kumar is his friend. He denied that disclosure statements were not made in his presence, nor anything was recovered in his presence.

11. PW-2, Suresh Kumar, has deposed that the deceased was his elder brother and he was an electrician. During the month of May-June, 2014, his brother started living with Reena at Paonta Sahib. He further deposed that on 21.10.2014, he saw his brother at the shop of Balak Ram at Moginand, but he did not talk to him. He deposed that his brother told his mother that Reena returned to Moginand and his mother asked him to return back home, however he did not return. On 26.10.2014, he was called by the police in the house of accused Sanjay to identify the dead body of his brother (deceased) and on the basis of a tattoo of snake etched on the right arm of his brother, he identified the dead body. The police updated the form, on which, his signatures were obtained. Before identification of body, accused Reena said that the clothes and shoes were of Rinku. In his cross-examination, he deposed that he never visited the house, where accused Sanjay and Reena used to reside, nor other members of his family had ever talked to them. As per this witness, they also did not know who else was residing with the accused persons in their house at Moginand. During the month of May-June, 2014, his brother left the house and took his clothes and other articles. He told them he is going to Paonta Sahib for work. After about two months, he himself informed on mobile that he is residing with Reena at Paonta Sahib. He deposed that when he saw his brother at the shop of Balak Ram, he did not talk to him. Self stated at that time, he was on duty. He denied that he was not called at the spot by the police, nor he identified the dead body of his brother.

12. PW-3, Surender Kumar, has deposed that accused Reena is known to him and in the year, 2014, he had gone to her house at Moginand. This witness resiled from his previous statement and was declared hostile. In his cross-examination by learned Public Prosecutor, he admitted that on 25.10.2014, accused Reena had asked him to come to her house, as she wanted to discuss some important matter. He denied that accused Reena told him that her husband had committed a murder. He admitted that Reena told him that on 22.10.2014, accused Sanjay and deceased had a quarrel on the lintel of the house. He also admitted that Reena told him that accused Sanjay called accused Ankush alias Shanky to bring a *danda* on the lintel. He admitted that accused Reena also told him that during the said quarrel, Rinku fell down from the lintel. He further admitted that accused Reena told him that Sanjay and Shanky pushed Rinku from the lintel and later on he died. This witness, in his cross-examination by learned counsel for the accused persons, has deposed that on 22.10.2014, when he reached there, after 20-25 minutes, accused Shanky also came there. He further deposed that he did not stay in the house of accused Reena during the night, as all of them came to Paonta Sahib in a truck. After reaching Paonta Sahib on the morning of 23.10.2014, they came back to Nahan around 11.00 a.m and accused Shanky left in a bus to Yamunanagar. He parted from them at Delhi Gate, Nahan and thereafter, he never met accused Reena or her mother. He feigned ignorance about the truck number, in which they had gone to Paonta Sahib.

13. PW-4, Puran Chand (father of the deceased) has deposed that on 25.10.2014, he received a telephonic call from the police and was asked to come to Moginand, as police found a dead body in the house of accused Sanjay Kumar. Thereafter, he alongwith his son Suresh Kumar (PW-2) went to the house of accused Sanjay Kumar, where his son identified the dead body to be of Rinku (deceased) on the basis of tattoo on his right arm.

14. PW-5, HC Bhagwat, has deposed that he remained posted in Police Station Kala Amb during the year, 2014. On 04.11.2014, accused Sanjay made disclosure statement before the Investigating Officer that he burnt some articles near Markanda River and he could get the said place identified. Disclosure statement, Ext. PW-1/G, bears his signatures. Identification memo of the spot, Ext. PW-1/H, also bears his signatures. In his cross-

examination, he deposed that disclosure statement of accused Sanjay, Ext. PW-1/G, was made in the police station and thereafter they went to the river bed. He further deposed that when SHO was interrogating the accused in his room at Police Station, he and Narender were sitting outside the room and when they were called, they went together inside the room and immediately thereafter, the statement of accused Sanjay was recorded.

15. PW-7, HC Mam Raj, has deposed that on 26.10.2014, HHC Sharafat Ali submitted rukka in Police Station, Kala Amb, on the basis of which, he lodged FIR No. 86/2014, copy of which is Ext. PW-7/A. Endorsement on the rukka qua FIR is Ext. PW-7/B. On the same day, SI/SHO Mohar Singh deposited two parcels, sealed with three seal impressions, alongwith sample of seals with him. Thereafter he deposited the aforesaid case property in Malkhana and incorporated an entry to this effect in Register No. 19, at Sl. No. 142. He further deposed that on 28.10.2014, Constable Bhupender Singh, No. 314, deposited eight parcels with him. Seven parcels were sealed with seal of RH Nahan and one parcel containing clothes did not bear any seal. The samples of seals were also deposited with him. Thereafter, he deposited the case property in Malkhana and incorporated an entry in Register No. 19, at Sl. No. 144. On 02.11.2014, SI/SHO Mohar Singh deposited a *drat* and two pieces of *danda* with him, which were further deposited by him in Malkhana and entry in this regard has been incorporated in Register No. 19, at Sl. No. 147. He deposed that on 31.10.2014, he sent the entire case property alongwith sample seals to SFSL, Junga, for chemical examination, though HHC Kirpal Singh, vide RC No. 96/14. During the period case property remained with him and no tampering was done with the same.

16. PW-8, Constable Bhupender, has deposed that on 28.10.2014, the Medical Officer, Regional Hospital, Nahan, handed over to him a parcel containing viscera of the deceased, which was sealed with seal RH. Seven other parcels were also handed over to him, which were also sealed with seal RH. He further deposed that he took the entire case property to Police Station, Kala Amb and deposited the same with MHC Mam Raj. During the period the case property remained in his custody, it remained intact.

17. PW-9, HHC Jakir Rehman, has deposed that on 26.10.2014 at around 4.00 p.m., accused Reena and her father come to him. Accused Reena told him that her husband had gone to Haryana. She also told him that on 25.10.2014, two persons on a motorcycle came to her and took a sum of Rs. 4,000/- from her and they told her not to open the room of the ground floor, but she said when she was cleaning her house, she felt foul smell from the room of the ground floor.

18. PW-12, Dr. Arvind Kanwar, Medical Officer, Regional Hospital Nahan, has deposed that on 26.10.2014, SHO, Police Station, Kala Amb moved an application, Ext. PW-12/A for conducting the post mortem on the dead body of deceased Naresh Kumar, on the basis of said application, he and Dr. Sumeet Sood, BMO, conducted the post mortem on the body of deceased and opined as under:

> ***"It was an advanced stage of putrefaction with bulging orbits and tongue protruding and discharge liquified fluid blood mix through bilateral nostril. Larva maggots and adult flies covered the face. Abdomen distended with greenish blue discoloration of over lying skin. Entire skin/body appeared marvelled. There is appearance of gaseous blebs over the skin particularly of the abdomen, neck, chest buttocks, due to puterfaction. There was ante mortem laceration of size 1' with irregular margin situated on the occipital area of the skull associated with area of 4 X 4" of subcutaneous heamatoma. With indented fracture of right***

> ***parito occipital bone. There was fracture of C7 vertebra with partial dissection of spinal cord at level at C7 T1 vertebra. The probable duration between death and post mortem was 5 to 7 days and the probable duration between injury and death was 0-15 minutes. The deceased died as a result of hemorrhagic and neurogenic shock, secondary to injuries inflicted upon head and fracture C7 spinal vertebra, with underlying compression of the spinal cord at levels C7 T1."***

He further deposed that he and Dr. Sumeet Sood issued post mortem report, Ext. PW-12/B, which bears his signatures. He admitted that the injuries suffered by the deceased, mentioned in post mortem report, Ext. PW-12/B can be caused with the beatings given with danda and if the victim is thrown from certain height on to the ground. In his cross-examination, he admitted that the injuries, as suffered by the deceased could have been caused by fall or beatings.

19. PW-14, Inspector Mohar Singh, has deposed on 26.10.2014, at around 4.30 p.m., an intimation was received at Police Station from MC Nahan, that one lady, namely Reena came in Police Line, Nahan, and she reported that her husband had gone to Haryana. She also stated that on 25.10.2014 (evening), two persons came to her and demanded Rs. 4,000/- from her. They also told her not to open the room of her house, which is on the ground floor. Thereafter, he alongwith HHC Deep Chand, HHC Sumer Chand, HHC Ram Bhaj, HHC Sharafat Ali and driver Pawan Kumar went to the house of Reena at Moginand and he opened the gate. One room of the house was found locked, from where the foul smell was coming. On opening the door, a dead body was found in the room. Suresh Kumar identified the dead body to be of his brother Naresh. Statement of Suresh Kumar was recorded and sent to the Police Station for registration of FIR. Photographs of the dead body and spot were clicked and form No. 25-25A and 25-35B, were filled. Thereafter, the dead body was sent to RH Nahan for post mortem. Spot map, Ext. PW-14/D, was prepared and lock and keys were taken into possession by putting the same in a parcel, sealed with seal impression, vide seizure memo, Ext. PW-1/A. Towel, which was tied on the face of the dead body was also taken into possession by putting the same in a cloth parcel, which was sealed with seal impression A, vide seizure memo, Ext. PW-1/B. Thereafter, the accused persons were arrested and their arrest memos, Exts. PW-14/E to PW-14/G were prepared. On 30.10.2014, accused Reena gave her disclosure statement, Ext. PW-1/C, and thereafter she took the police to the place of occurrence. Site map of the spot was prepared and photographs were clicked. On 02.11.2014, ASI Rakesh and Constable Dinesh arrested accused Ankush from Haryana and he got recorded his disclosure statement, Ext. PW-1/E. Thereafter, accused Ankush led them to the house of accused Sanjay and got recovered two pieces of danda and a drat from the room, which were under the bed. The danda and drat were taken into possession, vide seizure memo, Ext. PW-1/F. Photographs of the spot were clicked and spot map was prepared. On 02.11.2014, accused Sanjay was arrested and on 04.11.2014, he got recorded his disclosure statement, Ext. PW-1/G, and identified the place near Markanda Rivulet, where he had burnt SIM card, photograph and wallet. Spot identification memo, Ext. PW-1/H, was prepared and photographs of the spot were clicked. He further deposed that he deposited the parcels containing towel, key and lock, stick (two pieces) and drat with MHC, Police Station, Kala Amb alongwith sample seal and recorded the statements of the witnesses.

20. After exhaustively discussing the evidence, it is clear that case of the prosecution mainly rests upon disclosure statement, Ext. PW-1/C, made by accused Reena, according to which, she is alleged to have identified the lintel of her house, where co-accused Sanjay and Ankush assaulted the deceased with a stick and thereafter threw him

down and also the room from where the dead body of the deceased was recovered. The prosecution case also rests upon disclosure statement, Ext. PW-1/E, made by accused Ankush, whereby, he identified the lintel from where deceased was thrown down and the room of the house from where the stick, which was cut into two pieces, had been recovered. Lastly, the prosecution case rests upon disclosure statement, Ext. PW-1/G, made by accused Sanjay that he could also identify the place from where the deceased was thrown down, the place where stick after cutting into two pieces had been concealed and the bank of revulet Markanda, where he burnt the SIM and other articles of the deceased.

21. Now, coming to the statement of PW-1, Narender Singh, with respect to happenings on 26.10.2014. As per the statement of this witness, at around 3-4:00 p.m., police approached him and told him that they had information that a dead body is lying in the house of accused Sanjay and Reena. Thereafter, PW-1 accompanied the police to the house of accused Sanjay and Reena. The main gate was found locked. ASI asked Reena to produce the keys and open the gate. Initially, she denied having keys, however, when police started breaking open the lock, she produced the keys. Thereafter, when door of the locked room was opened, the dead body of the deceased was found there. Similarly, PW-2, Suresh Kumar deposed that on 26.10.2014, he was called by the police to the house of accused Sanjay and Reena and asked to identify a dead body lying in the house of accused Sanjay and Reena. On the basis of tattoo etched on the right arm of the deceased, he identified him to be his brother Naresh alias Rinku. The statements of both these witnesses make it clear that dead body was recovered from the lower storey of the house, belonging to accused Sanjay and Reena and in this regard, accused Sanjay and Reena could not explain their conduct satisfactorily. Accused Sanjay, while replying to question put to him under Section 313 Cr. P.C. tried to show that after his wife eloped, he came to his house at Moginand and since he found the house locked, he left from there and only when the police arrested him, he came to know about the death of the deceased. However, this aspect of his statement does not find any corroboration from the evidence on record. On the other hand, accused Reena tried to show that she reported the matter to the police on 26.10.2014, when she felt some foul smell coming from the room of the ground floor. It is the case of the prosecution that prior to 26.10.2014, accused Reena called PW-3, Surender Kumar to her house to discuss some important matter and she disclosed him qua the quarrel between Rinku and accused Sanjay. She also disclosed to PW-3 that during the said quarrel, Sanjay and Shanky had assaulted Rinku and thrown him down from the lintel. PW-3, during his cross-examination though admitted these aspects, however, during cross-examination on behalf of the accused, he contradicted himself by saying that he visited the house of accused Reena on 22.10.2014 and not on 25.10.2014. PW-3 further deposed that thereafter in the early morning of 23.10.2014 they left in a truck to Paonta Sahib. If statement of PW-3 is believed and conduct of accused Reena is taken into consideration, it shows that after the murder of the deceased, she initially tried to leave her house, however, thereafter she thought it proper to come back, so no one can believe that she was not having any knowledge with respect to the murder. So, she concocted a false story that while cleaning her house, she felt foul smell.

22. From the conduct of both the accused persons it appears that as to how and under what circumstances the deceased sustained injuries and succumbed, were well within their knowledge, as they have failed to show the special circumstances within their knowledge to have kept the dead body in their house. The law on the point of circumstantial evidence is considered and settled by the Hon'ble Courts in the following judgments:

1. ***State of H.P. vs. Sunil Kumar, Criminal Appeal No. 326 of 2011, decided on 15.06.2017;***
2. ***Sharad Birdhichand Sarda vs. State of Maharashtra, AIR 1984 Supreme Court 1622;***
3. **Padala Veera Reddy vs.** ***State of Andhra Pradesh and others, AIR 1990 Supreme Court 79;***
4. ***State of Uttar Pradesh vs. Ram Balak & another, (2008) 15 Supreme Court Cases 551, &***
5. ***Rajdev alias Raju & another vs. Stae of H.P., Criminal Appeal No. 288 of 2015.***

23. In ***State of H.P.*** vs. ***Sunil Kumar, Criminal Appeal No. 326 of 2011, decided on 15.06.2017,*** this Court has held as under:

> ***"13. It is more than settled that in case of circumstantial evidence, the circumstances from which inference as to the guilt of the accused is drawn, have to be proved beyond reasonable doubt and there be a complete chain of evidence consistent only that the hypothesis of guilt of the accused and totally inconsistent with his innocence and in such a case if the evidence relied upon is capable of two inferences then one which is in favour of the accused must be accepted. It is clearly settled that when a case rests on circumstantial evidence such evidence must satisfy three tests:***
>
> ***i) The circumstance from which an inference of guilt is sought to be drawn must cogently and firmly established.***
>
> ***ii) Those circumstances should be of a definite tendency un-erringly pointing out towards the guilt of the accused.***
>
> ***iii) The circumstances taken cumulatively, should form a complete chain so that to come to the conclusion that the crime was committed by the accused.***
>
> ***14. Equally well settled is the proposition that where the entire prosecution case hinges on circumstantial evidence the Court should adopt cautious approach for basing the conviction on circumstantial evidence and unless the prosecution evidence point irresistible to the guilt of the accused, it***

> ***would not be sound and safe to base the conviction of accused person.***
>
> ***15. In case of circumstantial evidence, each circumstances must be proved beyond reasonable doubt by independent evidence and the circumstances so proved, must form a complete chain without giving room to any other hypothesis and should be consistent that only the guilt of the accused (See: Lakhbir Singh vs. State of Punjab, 1994 Suppl. (1) SCC 173)."***

24. The Hon'ble Supreme Court in ***Sharad Birdhichand Sarda*** vs. ***State of Maharashtra, AIR 1984 Supreme Court 1622,*** has held as under:

> ***"48. Before discussing the evidence of the witnesses we might mention a few preliminary remarks against the background of which the oral statements are to be considered. All persons to whom the oral statements are said to have been made by Manju when she visited Beed for the last time, are close relatives and friends of the deceased. In view of the close relationship and affection any person in the position of the witness would naturally have a tendency to exaggerate or add facts which may not have been stated to them at all. Not that is done consciously but even unconsciously the love and affection for the deceased would create a psychological hatred against the supposed murderer and, therefore, the court has to examine such evidence with very great care and caution. Even if the witnesses were speaking a part of the truth or perhaps the whole of it, they would be guided by a spirit of revenge or nemesis against the accused person and in this process certain facts which may not or could not have been stated may be imagined to have been stated unconsciously by the witnesses in order to see that the offender is punished. This is human psychology and no one can help it.***
>
> ***... ... ...***
>
> ***150. It is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this: where***

various links in a chain are in themselves complete than a false plea or a false defence may be called into aid only to lend assurance to the Court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a Court.

... ...

158. It will be seen that this Court while taking into account the absence of explanation or a false explanation did hold that it will amount to be an additional link to complete the chain but these observations must be read in the light of what this Court said earlier, viz., before a false explanation can be used as additional link, the following essential conditions must be satisfied:

(1) various links in the chain of evidence led by the prosecution have been satisfactorily proved.

(2) the said circumstance point to the guilt of the accused with reasonable definiteness, and

(3) the circumstance is in proximity to the time and situation.

159. If these conditions are fulfilled only then a Court can use a false explanation or a false defence as an additional link to lend an assurance to the Court and not otherwise. On the facts and circumstances of the present case, this does not appear to be such a case. This aspect of the matter was examined in **Shankarlal's case (AIR 1981 SC 765) (supra) where this Court observed thus:**

"Besides, falsity of defence cannot take the place of proof of facts which the prosecution has to establish in order to succeed. A false plea can at best be considered as an additional circumstance, if other circumstances point unfailingly to the guilt of the accused."

160. This Court, therefore, has in no way departed from the five conditions laid down

in Hanumant's case (supra). Unfortunately, however, the High Court also seems to have misconstrued this decision and used the so-called false defence put up by the appellant as one of the additional circumstances connected with the chain. There is a vital difference between an incomplete chain of circumstances and a circumstance which, after the chain is complete, is added to it merely to reinforce the conclusion of the court. Where the prosecution is unable to prove any of the essential principles laid down in Hanumant's case, the High Court cannot supply the weakness or the lacuna by taking aid of or recourse to a false defence or a false plea. We are, therefore, unable to accept the argument of the Additional Solicitor-General."

25. The Hon'ble Supreme Court in ***Padala Veera Reddy vs. State of Andhra Pradesh and others, AIR 1990 Supreme Court 79,*** has held as under:

"12. There are certain salient and material features in the present case which are not controverted; they being that A-1 to A-3 and the deceased lived under a common roof, that the deceased had instituted a civil suit against her father, PW-8 and brother PW-9 claiming exclusive possession of the disputed land, that the deceased was found dead on the morning of 7.9.85 and that there were certain visible injuries such as abrasions, nail marks and contusions on the part of the nose, upper lip, chin and neck etc. as noted by the Medical Officers (PWs 5 and 6) in the post-mortem report Ex. P. 9. The appellate Court on the strength of the opinion given by the Medical Officers (PWs 5 and 6) has agreed with the view of the Trial Court that the death of the deceased was of homicidal one and not suicidal and held "therefore suicidal is ruled out." We also very carefully went through the evidence of the Medical Officers and found that the prosecution has convincingly established that the death of the deceased was due to forcible administration of poison and smothering. Hence we are in full agreement with the concurrent findings of the Courts below that it is a clear case of murder.

... ...

15. ***While considering the above circumstances, the appellate Court has expressed its view that the explanation given by the accused that they were at the marriage house of PW-1 throughout the night is nothing but a false explanation and that the culprits who ever they might have been should have administered the poison to the victim and thereby caused her death and that there is very strong suspicion against the accused persons but the prosecution cannot be said to have established the guilt of the accused decisively since the suspicion cannot take the place of legal proof. The relevant portion of the final conclusion of the appellate Court reads thus:***

> ***"There is no evidence whatsoever either from the neighbours or from others to show that the accused at any time ill-treated the deceased or treated her cruelly. In these circumstances, it is not possible to hold that the prosecution has established the guilt on the part of A. 1 to A. 3. Thus, there is no conclusive evidence that the accused committed the offence of murder. It is an unfortunate case where cold-blooded murder has been committed and it is difficult to believe that no inmate of the house had any hand in the offence of murder. But that will be only a suspicion which cannot take the place of proof."***

16. ***We, in evaluating the circumstantial evidence available on record on different aspects of the case, shall at the foremost watchfully examine whether the accused 1 to 3 had developed bad-blood against the deceased to the extent of silencing her for ever, that too in a very inhuman and horrendous manner. The appellant wants us to infer that the deceased should have been subjected to all kinds of pressures and harassments and compelled to institute the suit against her father and brother claiming exclusive right over the landed property in order to grab the said property, that this conduct of the accused should have been resented by the deceased and that on that score the accused should have***

decided to put an end to her life. In our view, this submission has no merit because there is no acceptable evidence showing that there was any quarrel in the family and that the deceased was ill-treated either by her husband or in-laws. The appellate Court while dealing with this aspect of the case has observed that there is no evidence that the accused ill-treated the deceased, which observation we have extracted above. Hence, we hold that there is no sufficient material to warrant a conclusion that the accused had any motive to snatch away the life threat of the deceased. There is no denying the fact that the deceased did not accompany her husband and in-laws to attend the marriage celebrated in the house of PW-1 and remained in the scene house and that she has been done away with on the intervening night of 6th/7th September, 1985. From this circumstance, the Court will not be justified in drawing any conclusion that the deceased was not leading a happy marital life. As observed by the appellate Court, the explanation offered by accused 1 to 3 that they remained in the house of PW 1 throughout the night is too big a pill to be swallowed. But at the same time, in our view, this unacceptable explanation would not lead to any irresistible inference that the accused alone should have committed this murder and have come forward with this false explanation. We have no hesitation in coming to the conclusion that it is a case of murder but not a suicide as we have pointed out supra. The placing of the tin container with the inscription 'Democran, by the side of the dead body is nothing but a planted one so as to give a misleading impression that the deceased had consumed poison and committed suicide. But there is no evidence as to who had placed the tin container by the side of the dead body. Even if we hold that the perpetrators of the crime whoever might have been had placed the tin, that in the absence of any satisfactory evidence against the accused would not lead to any inference that these accused or any of them should have done it. It is the admitted case

that the first accused handed over three letters Ex. P. 6 to P. 8 alleged to have been written by the deceased to the Investigating Officer. The sum and substance of these letters are to the effect that the deceased had some grouse against her parents and that the accused were not responsible for her death. The explanation given by accused No. 1 in this written statement is that by about the time of the arrival of the police, one Sathi Prasad Reddy handed over these letters to him saying that he (Reddy) found them near the place where the dead body was laid and that he (A-1) in turn handed over them to the police. PWs 8 and 9 have deposed that these letters are not under the hand writing of the deceased. But the prosecution has not taken any effort to send the letters to any hand-writing export for comparison with the admitted writings of the deceased with the writings found in Ex. P. 6 to P. 8. Under these circumstances, no adverse inference can be drawn against accused No. 1 on his conduct in handing over these letters.

17. No doubt, this murder is diabolical in conception and cruel in execution but the real and pivotal issue is whether the totality of the circumstances unerringly establish that all the accused or any of them are the real culprits. The circumstances indicated by the learned Counsel undoubtedly create a suspicion against the accused. But would these circumstances be sufficient to hold that the respondents 2 to 4 (accused 1 to 3) had committed this heinous crime. In our view, they are not.

... ...

22. We are of the firm view that the circumstances appearing in this case when examined in the light of the above principle enunciated by this Court do not lead to any decisive conclusion that either all these accused or any of them committed the murder of the deceased, Vijaya punishable under Section 302 read with Section 34 of I.P.C. or the offence of cruelty within the mischief of Section 498-A I.P.C. Hence, viewed from any angle, the judgment of the

appellate Court does not call for interference."

26. The Hon'ble Supreme Court in ***State of Uttar Pradesh*** vs. ***Ram Balak & another, (2008) 15 Supreme Court Cases 551,*** has held as under:

> ***"12. So far as the last seen aspect is concerned it is necessary to take note of two decisions of this Court. In State of U.P. v. Satish, it was noted as follows:***
>
> > ***"22. The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased and the accused were seen together by witnesses PWs. 3 and 5, in addition to the evidence of PW-2."***
>
> ***13. In Ramreddy Rajesh Khanna Reddy v. State of A.P., it was noted as follows:***
>
> > ***"27. The last-seen theory, furthermore, comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. Even in such a case the courts should look for some corroboration."***
> >
> > ***(See also Bodhraj v. State of J&K, (2002) 8 SCC 45)***
>
> ***14. A similar view was also taken in Jaswant Gir v. State of Punjab, 2005 12 SCC 438.***

Factual position in the present case is almost similar, so far as time gap is concerned.

15. ***Out of the circumstances highlighted above really none is of any significance. Learned Counsel for the appellant-State highlighted that the extra judicial confession itself was sufficient to record the conviction. On a reading of the evidence of CW-1 it is noticed that accused Ram Balak did not a say a word about his own involvement. On the contrary he said that he did not do anything and made some statements about the alleged act of co-accused. Additionally, in his examination under Section 313 of Code, no question was put to him regarding his so called extra judicial confession. To add to the vulnerability, his statement is to the effect that after about 11 days of the incidence the extra judicial confession was made. Strangely he stated that he told the police after three days of the incidence about the extra judicial confession. It is inconceivable that a person would tell the police after three days of the incidence about the purported extra judicial confession which according to the witness himself was made after eleven days. Learned Counsel for the State submitted that there may be some confusion. But it is seen that not at one place, but at different places this has been repeated by the witness.***

16. ***Learned Counsel for the appellant also refers to a judgment of this Court in Abdul Razak Murtaza Dafadar v. State of Maharashtra, more particularly para 11 that the Dog Squad had proved the guilt of the accused persons. In this context it is relevant to take note of what has been stated in para 11 which reads as follows: (SCC pp. 239-40)***

> ***"11.*** ***It was lastly urged on behalf of the appellant that the lower courts ought not to have relied upon the evidence of dog tracking and such evidence was not admissible in order to prove the guilt of the appellant. The evidence of tracker dogs has been much discussed. In Canada and***

> ***in Scotland it has been admitted. But in the United States there are conflicting decisions:***
>
> ***'There have been considerable uncertainty in the minds of the Courts as to the reliability of dogs in identifying criminals and much conflict of opinion on the question of the admissibility of their actions in evidence. A survey of the cases however, reveals that most Courts in which the question of the admissibility of evidence of-trailing by blood-hounds has been presented take the position that upon a proper foundation being laid by proof that the dogs were qualified to trail human beings, and that the circumstances surrounding the trailer were such as to make it probable that the person trailed was the guilty party, such evidence is admissible and may be permitted to go to the jury for what it is worth as one of the circumstances which may tend to connect the defendant with the Crime.' (para 378, Am. Juris. 2nd edn. Vol. 29, p. 429.)***

There are three objections which are usually advanced against the reception of such evidence. First, since it is manifest that the dog cannot go into the box and give his evidence on oath, and consequently submit himself to cross- examination, the dog s human companion must go into the box and report the dog s evidence, and this is clearly hearsay. Secondly, there is a feeling that in criminal cases the life and liberty of a human being should not be dependent on canine inferences. And, thirdly, it is suggested that even if such evidence is strictly admissible under the rules of evidence it should be excluded because it is likely to have a dramatic impact on the jury out of proportion to its value. In R. v. Montgomery,1866 NI 160 a police constable observed men stealing wire by the side of a railway line. They ran away when he approached them. Shortly afterwards the police got them on a nearby road. About an hour and half later the

police tracker dog was taken to the base of the telegraph pole and when he had made a few preliminary sniffs he set off and tracked continuously until he stopped in evident perplexity at the spot where the accused had been put into the police car. At the trial it appeared that other evidence against the accused that they had been stealing the wire was inconclusive and that the evidence of the behaviour of the tracker dog was crucial to sustain the conviction. In these circumstances the Court of Criminal Appeal ruled that the evidence of the constable who handled the dog on its tracking and reported the dog s reactions was properly admitted. The Court did not regard its evidence as a species of hearsay but instead the dog was described as "a tracking instrument and the handler was regarded as reporting the movements of the instrument, in the same way that a constable in traffic case might have reported on the behaviour of his speedometer. It was argued in that case that the tracker dog s evidence could be likened to the type of evidence accepted from scientific experts describing chemical reactions, blood tests and the actions of bacilli. The comparison does not, however, appear to be sound because the behaviour of chemicals, blood corpuscles and bacilli contains no element of conscious volition or deliberate choice. But Dogs are intelligent animals with many thought processes similar to the thought processes of human beings and wherever you have thought processes there is always the risk of error, deception and even self-deception. For these reasons we are of the opinion that in the present state of scientific knowledge evidence of dog tracking, even if admissible, is not ordinarily of much weight.

It is submitted by learned Counsel for the appellant that in the said case this Court had upheld the conviction. Though in the said case the conviction was upheld, but that was done after excluding the evidence of Dog Squad. This Court found that the rest of the prosecution evidence proved the charges for which the appellants therein had been convicted."

27. In the instant case, there are following circumstances, which are required to be considered:-

> ***(i) the dead body was recovered from the house of accused Sanjay and Reena;***
>
> ***(ii) accused Reena reported the matter to the police and handed over the keys to the police;***
>
> ***(iii) disclosure statement made by accused Reena, according to which, the deceased was thrown down by co-accused from the lintel after quarrel;***
>
> ***(iv) the extra marital relations of accused Reena with the deceased;***
>
> ***(v) Reena's asking the deceased to leave her otherwise it would not be good for him;***
>
> ***(vi) the non-explanation of the circumstances within the knowledge of accused Reena and Sanjay;***
>
> ***(vii) the belongings of the house to be of accused Reena and Sanjay;***
>
> ***(viii) handing over the keys by accused Reena to the police, when police wanted to break the lock of the door; and***
>
> ***(ix) disclosure statement made by accused Sanjay with regard to burning of belongings of the deceased.***

We, after giving deep thought to the aforesaid circumstances and exhaustively examining the prosecution evidence, hold that conviction of accused Reena under Section 302, read with Section 34 IPC, is required to be interfered with, as the available evidence against her does not involve her under Section 302 IPC. Whereas, accused Sanjay made disclosure statement to the police with regard to the burning of belongings of the deceased and he identified the lintel from where he threw the deceased, owing to which, the deceased received fatal injuries. The property belongs to accused Sanjay, but he remained unable to explain the special circumstances within his knowledge with respect to the dead body of the deceased in his house, as It is amply proved on record that accused Sanjay purchased the house in the name of his wife Reena. At the same point of time, motive of accused Sanjay to kill the deceased is also clear, as his wife co-accused Reena eloped with the deceased and remained with him for 2-3 months. Also accused Sanjay, alongwith co-accused and the deceased was in the house on the fateful day. The chain of circumstances against accused Sanjay is so complete, including motive and ownership of the house leading to only conclusion that he caused death of the deceased. As far as common intention of accused Reena, is concerned, the same is missing in the present case, as it has come on record that she was having extra marital relations with the deceased and she eloped with him. There is also nothing on record to connect accused Reena with the common intention of accused Sanjay to kill the deceased. Further, that the dead body of the deceased is lying in the house of accused Sanjay, was within his special knowledge and burden to prove the special circumstances, under Section 106 of the Indian Evidence Act, was upon accused Sanjay, but he has failed to discharge this burden.

28. So, from the above, it is clear that accused Sanjay had committed the murder of the deceased by beating him and thereafter throwing him down from the lintel of his house on the fateful day. In view of the aforesaid facts, chain of circumstances is complete against accused Sanjay and he had also motive to kill the deceased, as the

deceased had extra marital relations with his wife Reena and she had also eloped with the deceased for some time. Therefore, it is more than safe to hold that accused Sanjay has rightly been convicted and sentenced under Section 302 read with Section 34 IPC, as he had intention to kill the deceased and also the knowledge that his act in all consequences would result into the death of the deceased, so the offence committed by him is culpable homicide, amounting to murder.

29. As far as evidence against accused Reena Devi is concerned, it has come in the statement of PW-1 that one day prior to Diwali, when accused Reena and deceased Rinku were going on the road in front of his shop, Reena asked the deceased to leave her, otherwise it would not be good for him. Now, from this it can easily be inferred that accused Reena was having some apprehension with respect to the security of the deceased, that is why she asked him to leave her. The second evidence against her is that she reported the matter to the police when odour started emitting from the room of her house. Thereafter, when the police reached at her house and started breaking the lock of the room, she provided keys to the police, which is clear from her statement recorded under Section 313 Cr. P.C., while answering question No. 13 put to her. It has also been proved on record that accused Reena was having extra marital relations with the deceased, though, she denied this fact in her statement under Section 313 Cr. P.C., however, on the basis of uncontroverted statements of the prosecution witnesses, it can safely be held that she developed extra marital relations with deceased for some time, owing to which, she even left her husband for some months. It has also come on record that some persons came to her house and she gave some money to them two days prior to informing the police. Now, as far as the evidence against her with regard to causing injury to the deceased, resulting into his death, is concerned, there is no evidence qua her participation in the crime. There is no circumstance against her that she had common intention with accused Sanjay to kill the deceased, as according to PW-1, accused Reena asked the deceased to leave her, otherwise it would not be good for him.

30. The cumulative effect of threadbare reading of facts and law is that the conviction and sentence of accused Sanjay under Section 302, as passed by learned Court below is after properly appreciating the facts and law to their right perspective and the prosecution has proved the guilt of the accused beyond the shadow of reasonable doubt. However, the impugned judgment of conviction rendered by the learned Court below against accused Reena under Section 302, read with Section 34 IPC, is required to be interfered with, as available evidence against her does not involve her under Section 302 IPC and, therefore, accused Reena is acquitted for the commission of offence under Section 302, read with Section 34 IPC.

31. As far as the conviction of accused Sanjay and Reena under Section 201, read with Section 34 IPC, is concerned, both of them concealed the dead body of the deceased in a room of their house and caused disappearance of evidence qua the offence. The provisions with regard to Section 201 IPC reads as under:

> ***"201. Causing disappearance of evidence of offence, or giving false information to screen offender.-Whosoever, knowing of having reason to believe that an offence has been committed, causes any evidence of the commission of that offence to disappear, with the intention of screening the offender from legal punishment, or with the intention gives any information respecting the offence which he knows or believes to be false;***
>
> ***if a capital offence.- shall, if the offence which he knows***

or believes to have been committed is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

if punishable with imprisonment for life.-and if the offence is punishable with [imprisonment for life], or with imprisonment which may extend to ten years shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

if punishable with less than ten years' imprisonment.- and if the offence is punishable with imprisonment for any term not extending to ten years, shall be punished with imprisonment of the description provided for the offence, for a term which may extend to one-fourth part of the longest term of the imprisonment provided for the offence, or with fine, or with both."

A bare reading of Section 201 IPC provides that maximum punishment in case of destruction of evidence in offences of capital punishment has been prescribed as seven years. However, taking into consideration the overall aspects of the case, we deem it fit that the sentence of three years, if awarded under Section 201, read with Section 34 IPC to appellants Sanjay and Reena, the same would be just and proper. Accordingly, the impugned order of sentencing of appellants Sanjay and Reena under Section 201, read with Section 34 IPC is modified and sentence awarded to them is reduced from seven years to three years, with fine of Rs. 20,000/- (each) and in default of payment of fine, they will further undergo simple imprisonment for a period of one year. Fine amount, if recovered, will be disbursed to the mother of the deceased.

32. With these observation, the present appeals, so also pending application(s), if any, stand disposed of.

****

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

Munish Kumar Bali ....Appellant/Plaintiff.

Versus

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

RSA No. 395 of 2018.
Decided on: 19.3.2019

Code of Civil Procedure, 1908- Section 100- Regular Second Appeal **–** Maintainability- Substantial question of law **-** Necessity of –Held, RSA maintainable only if substantial question of law is involved - Dispute of ownership and possession between parties is pure question of fact – No substantial question of law involved in it - Second appeal against judgments and decrees of lower courts dismissing plaintiff's suit seeking declaration of title and possession pursuant to purchase of suit land by her, since does not involve substantial question of law, is not maintainable – RSA dismissed. (Paras 12 & 13)

For the appellant. Mr. Sanjay Kumar Sharma, Advocate.

For respondents Mr. Dinesh Thakur, Additional Advocate General with Mr. R.P. Singh Dy. AG for respondent No.1 and 2.
None for remaining respondents.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J*(Oral)*

By way of this appeal, appellant has challenged the judgment and decree passed by the Court of learned Civil Judge (Junior Division) Court No.2, Nurpur, District Kangra in Civil Suit No. 181/1991 dated 6.6.2012, vide which a suit for declaration filed by his predecessor-in-interest was dismissed by the said Court and also the judgment and decree passed by the Court of learned Additional District Judge-I, Kangra at Dharamshala Circuit Court at Nurpur, District Kangra whereby appeal filed by him against the judgment and decree passed by the learned trial Court stood dismissed.

2. Brief facts necessary for adjudication of the case are that predecessor-in-interest of the appellant, namely, Smt. Raj Rani filed a suit for declaration that she was owner in possession of abadi area comprised in khasra No. 952/797 which during settlement was converted into khasra No. 3585 measuring 255sq. Meters, situated in Up Mohal Rampuri, Ward No.7, Nurpur, Tehsil Nurpur District Kangra and that defendant No.1 neither had any right title or interest over the suit land nor said defendant was entitled to interfere in any manner in the ownership and possession of the plaintiff over the suit land or to dispossess her by demolishing her construction. According to the plaintiff, the residential abadi plot i.e. the suit land was sold to her by one Som Raj on 10.5.1989 vide registered Sale Deed of the even date for a consideration of Rs.6,000/- and thereafter, possession of the suit land was with plaintiff, who along with her husband constructed a residential house upon the same. The suit land was wrongly entered in the name of defendant No.1. The Settlement Collector on an application of Som Raj had ordered correction of revenue entries vide order dated 27.4.1989 and necessary corrections were also incorporated in 'Misal Haquiat Bandobast' for the year 1987-88. Defendants No.3 and 4, who were strangers qua the suit land, but were inimical towards Som Raj filed an application before Divisional Commissioner, Kangra for setting aside the order passed by the Collector and the same was set aside by Divisional Commissioner Kangra on 5.9.1990. As per the plaintiff, this order was null and void, as State was never the owner of the abadi area nor defendant No.1 ever came to be in possession of the same. According to the plaintiff, taking advantage of the order passed by Divisional Commissioner, defendants had starred interfering in her possession and were threatening to demolish the construction carried out by her. In these circumstances, the suit was filed.

3. The suit was contested by the defendants. They took the stand that during settlement operation, Som Raj was not found owner in possession of the suit land at the spot and thereafter the land was rightly entered in the ownership of defendant No.1. According to defendants, Sale Deed executed by Som Raj in favour of plaintiff was nullity in the eyes of law as Som Raj had no right, title or interest to hand over the possession of the suit land to the plaintiff. It was further the case of defendant that the order of Divisional Commissioner, vide which order in favour of Som Raj by Settlement Collector was set aside was a valid order as the suit land was owned by defendant No.1 and not by the plaintiff. It was also the stand of defendants that earlier suit land along with adjoining land belonged to one Golu Tarkhan and Ram Shah Khatri. Ram Shah Khatri was owner of 15 kanals land and he sold the same to Roshan Lal in the year 1976-77. Roshan Lal also purchased khasra No. 3586 & 3587 and during settlement, he dedicated both these khasra numbers

for charity purpose and thereafter they stood recorded in the ownership of the State of Himachal Pradesh. As Golu Tarkhan was issueless, he also dedicated his entire land for the purpose of charity and also constructed a temple over the aforesaid land. Private defendants claimed themselves to be a Collateral of Golu Tarkhan and contended that the suit land was rightly recorded in the ownership and possession of the State of Himachal Pradesh, as the suit land was never ever sold to Som Raj nor was it ever gifted to him. As per defendants, Som Raj had illegally got certain revenue entries made in his favour at the back of the Collaterals of Golu Tarkhan, which illegal entries rightly stood corrected by the order of Divisional Commissioner Kangra.

4. On the basis of pleadings of the parties and material placed on record, learned trial court framed the following issues:-

> "1. Whether the plaintiff is the owner in possession of the suit land, as alleged? OPP
>
> 2. If Issue No.1 is proved, whether the defendant No.1 interferes in the ownership and possession of the plaintiff over the suit land, as alleged? OPP
>
> 3. Whether order dated 5.9.90 passed by the Divisional Commissioner, Kangra at Dharamshala transferring the ownership in the name of defendant No.1 at the instance of defendants No.3 and 4 is wrong, illegal, arbitrary, without jurisdiction, null and void and not binding upon the rights of the plaintiff, as alleged?OPP
>
> 4. Whether the suit is not maintainable in the present form, as alleged? OPD-1
>
> 5. Whether the plaintiff had got no legally enforceable cause of action, as alleged? OPD-1
>
> 6. Whether no legal and valid notice under Section 80 CPC has been served upon the defendant No.1, as alleged?OPD-1
>
> 7. Whether this Court has got no jurisdiction to try the present suit, as alleged?OPD-1
>
> 8. Whether the suit is not properly valued for the purpose of court fee and jurisdiction, as alleged?OPD-1
>
> 9. Whether the plaintiff has no locus standi to sue,as alleged?OPD-3&4.
>
> 10. Whether the suit is bad for non-joinder of necessary parties, as alleged?OPD 3&4.
>
> 10A) Whether the plaintiff being the resident of Punjab was not agriculturist and not entitled to purchase the land within the State of HP on 10.5.1989 and the sale deed if proved is illegal, null and void and against the provisions of Section 118 of HP Tenancy and Land Reforms Act, OPD
>
> 11. Relief."

5. On the basis of evidence both ocular and documentary learned trial court returned the following findings on the said issues:-

> "Issue No.1 :Partly Yes.
>
> Issue No.2 :No.
>
> Issue No.3 :No.
>
> Issue No.4 :No.

Issue No.5	:No.
Issue No.6	:No.
Issue No.7	:No.
Issue No.8	:No.
Issue No.9	:No.
Issue No.10	:No.
Issue No.10A	:Yes..
Relief	:The Suit is dismissed as per operative part of the judgment."

6. Learned trial court held that though plaintiff had failed to prove on record her ownership right over the suit land, but it stood proved on record that she was in possession over the same, which fact stood admitted even by defendant No.4 Tara Chand. Learned trial court also held that the order passed by Divisional Commissioner suffered from no illegality and plaintiff had failed to demonstrate as to how the order of Divisional Commissioner was bad in law. It also held that it stood proved that the order was passed by Divisional Commissioner after following the principles of natural justice and after providing ample opportunities to all the parties to put-forth their case. Learned trial court also held that no responsible person was examined from the locality to prove that Som Raj was ever in possession of the suit land at the time of settlement. The suit filed by plaintiff was thus dismissed by learned trial court by holding that though plaintiff was held to be in possession of the suit, but she was not held to be owner of the same.

7. Learned appellate court upheld these findings. It held that evidence on record demonstrated that plaintiff was not owner of the agricultural land nor plaintiff had entered the witness box to throw light on this aspect of the case. Learned appellate court also held that evidence demonstrated that plaintiff was from Punjab. He was not having any agricultural land in Himachal and plaintiff being a non-agriculturist in Himachal was not competent to purchase the suit land. It further held that though the evidence on record demonstrated that the suit land was in possession of the plaintiff, however, there was nothing on record to demonstrate that plaintiff was also the owner of the same.

8. Feeling aggrieved appellant has filed this appeal.

9. Learned counsel for the appellant has argued that the findings returned by learned courts below are perverse, as both the learned courts below have erred in not appreciating that the plaintiff was owner in possession of the suit land, as the same was duly purchased by the plaintiff from its previous owner namely Som Raj. On these basis, he argued that there are substantial question of law involved in the appeal and the judgments and decrees passed by learned courts below were liable to be set aside.

10. On the other hand, learned Additional Advocate General appearing for the respondents has argued that there was no infirmity with the judgments and decrees passed by learned courts below and as there was no substantial question of law involved in the appeal, the same deserves dismissal at this stage itself.

11. I have heard learned counsel for the parties and have also gone through the record of the case as well as judgments and decrees passed by both learned courts below.

12. Having carefully gone through the judgments and decrees passed by learned courts below, this Court is of the view that there is no substantial question of law involved in this appeal The suit filed by the plaintiff was for declaration that plaintiff was owner in

possession of the suit land, which was part of abadi, on the ground that the same stood purchased by her from its previous owner by way of a valid registered Sale Deed. Both the learned courts below have concurrently held that plaintiff was not the owner of the suit land. It is a matter of record that the suit land was previously owned by Golu Tarkhan and Ram Shah Khatri. Said Ram Shah Khatri sold his share to Roshan Lal. It is also a matter of record that Golu Tarkhan and Roshan Lal had dedicated the suit land for charity purpose and in this background the same stood recorded in the name of the State. The private defendants in the Civil Suit are none other but the Collateral of Golu Tarkhan, who took the stand in the written statement that though they had inherited the estate of Golu Tarkhan, but rather than using it for their personal use they had carried out the tradition of Golu Tarkhan i.e., the land is being used for the benefit of all.

13. During the course of arguments, learned counsel for the appellant could not demonstrate that these findings are either perverse or were not borne out from the record of the case. Both the learned courts below after proper appreciation of evidence on record have returned the findings that order of the Divisional Commissioner setting aside the order of Settlement Collector was a valid order and as the suit land never belonged to Som Raj and therefore he had no right whatsoever to alienate the same by way of Sale Deed in favour of the plaintiff. Whether or not the suit land belonged to defendant No.1 or Som Raj is a question of fact and not of law. Findings stand returned against the plaintiff by both the learned courts below to the effect that Som Raj was not the owner of the suit land and the same belonged to the Government and therefore, Som Raj could not have sold the same to the plaintiff. Learned courts below have returned these findings on the basis of evidence produced on record by the defendants. Thus the core issue involved in this case, whether or not the suit land was owned by defendant No.1, having been concurrently decided in favour of said defendant by both the learned courts bellow, this Court is satisfied that there is no substantial question of law involved in this appeal and the same is liable to be dismissed at admission stage itself.

The appeal is accordingly dismissed. No order as to cost. Pending miscellaneous applications, if any, also stand disposed of.

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

Satish Kumar and others ....Petitioners.

Versus

Mehta Raguvindera Singh and others ....Respondents.

CMPMO No.: 361 of 2018.
Decided on: 19.03.2019

Code of Civil Procedure, 1908 - Order II Rule 2 – Splitting of claims – Leave of court – Requirement – Plaintiffs filing suit for injunction for restraining defendants from interfering in their land – Also filing application seeking leave to file separate suit for damages caused to their property by such interference – Trial court dismissing application on ground that both reliefs being distinct, leave of court was not required – Petition against - Plaint revealing plaintiffs' having specifically pleaded of defendants interfering in their land and causing damage to it – Cause of action to claim both reliefs accrued to plaintiffs on same cause of action – Causes of action not distinct - Subsequent suit for damages can only be filed with

leave of court - Petition allowed – Order of trial court set aside – Leave granted. (Paras 11 to 13)

For the petitioners : Mr. Anirudh Sharma, Advocate.
For the respondents : Mr. Kulwant Singh Katoch, Advocate

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

This petition is directed against order dated 28.05.2018, passed by the Court of learned Civil Judge, Court No. 1, Solan, District Solan, in Civil Suit No. 41-1 of 2015, titled as Satish Kumar and others vs. Mehta Raghuvindra Singh and others, vide which, an application filed by the petitioners/plaintiffs under Order II, Rule 2 of the Code of Civil Procedure (hereinafter referred to as the 'Code') praying for grant of permission to them to reserve their right to file a separate suit for claiming damages stands dismissed by the learned Court below by holding as under:-

> *"The present application has been filed under Order 2 Rule 2 CPC. Order 2 Rule 2 applies only when the different relieves arrives from same cause of action. But, in the present case, the relief of injunction and the relief of damages are different cause of action. Hence, the present application is mis-conceived and is not maintainable under Order 2 Rule 2 CPC. The application is accordingly disposed. Be tagged with the main case file after doing needful."*

2. Brief facts necessary for adjudication of the present petition are as under:-

The petitioners/plaintiffs (hereinafter referred to as 'plaintiffs') have filed a suit for permanent prohibitory injunction against the respondents/defendants (hereinafter referred to as 'defendants') for restraining them from causing any interference, changing the nature, raising any construction on the land, causing damage etc. as well as restraining them from throwing debris, removing valuable trees from the suit land, situated in Mauja Banat, Tehsil and District Solan. According to the plaintiffs, they are owners in possession of the suit land and defendants are strangers to the same.

3. In para 6 of the plaint, it has been averred that defendants have engaged labour and JCB machines for the purpose of constructing a road through the suit land with the intent of dispossessing the plaintiffs and have caused damage to suit land. It is further averred in the said para of the plaint that the plaintiffs were getting the loss assessed and a separate application under Order II, Rule 2 of the Code was being filed by them alongwith the plaint reserving their right to claim damages after the assessment of the same.

4. Said application filed under Order II, Rule 2 of the Code by the petitioners/plaintiffs stands dismissed by the learned Court below vide impugned order.

5. I have heard learned Counsel for the parties and also gone through the impugned order as well as the record of the case.

6. Order II, Rule 2 of the Code provides that 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.

7. The reliefs prayed for by the petitioners/plaintiffs in the suit have been broadly referred by me herein-above. There is a categorical assertion made in the plaint by

the plaintiffs that defendants have caused damage to the suit land. This demonstrates that cause of action to claim damages from the defendants stood accrued as on the date when plaintiffs filed the suit. As said relief is not claimed in the suit, the plaintiffs could not have subsequently claimed the same in the teeth of the provisions of Order II, Rule 2 of the Code unless they sought permission of the Court in this regard.

8. To meet this eventuality, the plaintiffs not only clearly mentioned in the plaint itself that they were reserving their right to claim damages from the defendants, in addition as a prudent litigant, they mentioned in the plaint that a separate application for this purpose under Order II, Rule 2 of the Code was being filed with the plaint and which was actually filed by the plaintiffs. In the application, prayer was that plaintiffs be permitted to reserve their right to file separate suit for damages against the defendants as the quantum of damage was in the process of being assessed through expert.

9. Surprisingly, learned trial Court vide impugned order, on an erroneous interpretation of the provisions of Order II, Rule 2 of the Code has dismissed the application and thus refused the liberty being prayed for by the plaintiffs.

10. The reasoning assigned by the learned trial Court in rejecting the application is perverse. Learned Court below has erred in not appreciating that though relief of injunction and relief of damages are distinct reliefs but if the cause giving arise to both of them is common, then both these reliefs have to be claimed in the same suit unless permission is obtained under Order II, Rule 2 of the Code from the Court.

11. Learned Court below has erred in not appreciating that relief of injunction and relief of damages are different reliefs but the "cause" is both same and common in the present case. The alleged 'Cause' is interference and encroachment upon the suit land by the defendants which allegedly also damaged the suit land.

12 Learned Court has not appreciated that in the light of the pleadings, subsequent suit to claim damages could not have been filed by the plaintiffs in lieu of bar contemplated under Order II, Rule 2 of the Code. The prayers thus made in the application by the plaintiffs seeking liberty reserving their right to file a subsequent suit for damages deserved to be allowed.

13. In view of discussion held above, this petition is allowed. Impugned order dated 28.05.2018, passed by learned Civil Judge, Court No. 1, Solan, is quashed and set aside. The prayer made in the application under Order II, Rule 2 of the Code by the petitioners/plaintiffs is allowed and they are granted liberty to institute a separate suit for damages against the defendants if so advised. The petition stands disposed of in above terms, so also pending miscellaneous application(s), if any. No orders as to costs.

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

Madan Singh ....Petitioner.
Versus
Hira Lal and others ...Respondents.

CMPMO No 160 of 2018
Decided on: 20.3.2019

Hindu Succession Act, 1956 (Act) - Section 14 - **Code of Civil Procedure, 1908** - Section 47- Limited estate – Effect – Decree-holder (DH) obtaining decree of possession against 'A', Hindu widow holding life estate in suit land – Decree passed before commencement of Act – 'A' dying in 2007 - DH filing execution petition - Executing court dismissing objections of legal representatives (LRs) of 'A' - Petition against – Held, no material on record suggesting 'A' having acquired full fledged ownership of suit land under Act – LRs not having become owner by way of adverse possession – Executing court justified in dismissing objections – Petition dismissed. (Para 11)

Cases referred:

Rattan Singh Vs. Vijay Singh, AIR 2001 SC 279

For petitioners.	Mr. Maan Singh, Advocate.
For respondents	Mr. Satyen Vaidya, Sr. Advocate with Mr. Varun Chauhan, Advocate forrespondents No. 2 and 3. Remaining respondents ex parte.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J (Oral)

By way of this petition, the petitioner has assailed order dated 10.1.2018 (Annexure P-9), vide which objections filed by petitioner to the execution filed by decree holders stand rejected by learned Executing Court.

2. Brief facts necessary for adjudication of the present case are as under:- Respondents-decree holders filed an Execution Petition for possession of the suit land comprised in khasra No. 624 (old), new khasra No. 119, situated in Phati Shirad, Tehsil and District Kullu, as per decree dated 5.7.1955 passed in favour of the predecessor-in-interest of decree holders.

3. According to the decree holders, their predecessor-in-interest, Sohan Lal, had filed a suit against the predecessor-in-interest of judgment debtors with regard to khasra No. 624 situated in Phati Shirad, Tehsil and District Kullu measuring 0-7-65 hectares i.e., Civil Suit No. 25/1954 which was decreed vide decree dated 5.7.1955, wherein Sale Deed pertaining to the suit land was set aside by holding that the same was without any need and predecessor-in-interest of decree holders were held entitled to the suit land after the death of Sarsuti Devi predecessor-in-interest of JD No.1 on payment of Rs. 350/-.

4. Sarsuti Devi (original defendant No.2) died on 19.1.2007. JD No.1 was her successor-in-interest, whereas JD No.2 to 9 were legal heirs of Krishan Dass original defendant No.1. JD No.10 was successor-in-interest of JD No.2 Sohan Lal.

5. As per decree holders, JD No. 3 was asked and requested to accept Rs. 350/- and hand over possession of the suit land. As they had not done so, therefore the execution petition was filed.

6. Petitioner Madan Singh filed objections to the execution petition on the following grounds. (a) Smt. Sarsuti Devi was absolute owner of the entire estate and had every right to deal with the same in her capacity as its owner. Decree holders/petitioners were not the legal representatives of deceased Sohan Lal; (b) Sarsuti Devi had become

absolute owner of the suit land after coming into force of Hindu Succession Act, therefore, the decree was not executable; and (c) Judgment debtor Madan Singh had become absolute owner of the suit land by way of adverse possession, as his possession over the suit land was uninterrupted, continuous and hostile.

7. Learned Executing Court on the basis of objections filed to the execution petition framed the following issues:-

"1. Whether Smt. Sarsuti Devi has become absolute owner of the suit land after the death of Abhir Dass? OPP

2. Whether the decree is inexecutable in view of Section 14 of the Hindu Succession Act, 1956, as alleged ? OPO

3. Whether the execution petition is bared by limitation, as alleged ? OP-Objector

4. Whether the objectors/JDs have become owners of the suit land by way of adverse possession, as claimed? OPD

5. Whether the objections are not maintainable and sustainable, as alleged? OPP

6. Relief."

8. Findings returned on the said issues by the learned Executing Court are as under:-

"Issue No.1	No
Issue No.2	No
Issue No.3	No
Issue No.4	No
Issue No.5	Yes
Relief	Objection petition is dismissed per operative portion of the order."

9. Learned Executing Court after discussing the evidence led during the course of execution proceedings held that objectors had failed to prove that Sarsuti Devi had become absolute owner of the suit land after the death of Abhir Dass. Learned Court also held that Hindu Succession Act came into force on 17.6.1956, whereas the decree was passed on 5.7.1955 i.e., before coming into force of Hindu Succession Act. It further held that the objection that JDs had become owners of the suit land by way of adverse possession was not tenable, as they had failed to lead any cogent evidence to prove the same. It went on to negative the contentions of the objectors that execution petition was time barred by holding that the same was executable under Article 136 of the Limitation Act in view of the law laid down by Hon'ble Supreme Court in **Rattan Singh Vs. Vijay Singh**, AIR 2001 SC 279.

10. I have heard learned counsel for the parties and have also gone through the impugned order as well as record of the case.

11. It is not in dispute that a decree was passed in favour of the predecessor-in-interest of respondents-decree holders and against the predecessor-in-interest of the present petitioner. It is not in dispute that the decree passed in favour of the decree holder was that decree holders was held entitled to the suit land after the death of Sarsuti Devi on payment of Rs. 350/-. The objections raised by the petitioner and other objectors have been dealt

with in detail in the impugned order by learned Executing Court. The reasons assigned by learned Executing Court while dismissing the objections are in detail spelt out in the impugned order and learned counsel for the petitioner could not point out that the reasons were not borne out from the record of the case. It is a matter of record that the decree in issue was passed on 5.7.1955, therefore, there is no force in the contention of the petitioner that Sarsuti Devi had become absolute owner of the suit land after the death of Abhir Dass. As far as petitioner having become owner of the suit land by way of adverse possession is concerned, learned counsel could not point out any cogent evidence in this regard on record to prove this fact. He also could not substantiate as to how the execution petition was time barred. On the other hand, learned Executing Court has assigned reasons and also supported its findings on the judgment of Hon'ble Supreme Court as to why execution petition was not barred by limitation.

That being so, apparently there is no perversity in the order passed by learned Executing Court as petitioner has not been able to point out that the findings returned therein are either perverse or not relateable to the record of the case. No jurisdictional error could be attributed to the order impugned during the course of arguments by learned counsel for the petitioner. As the order passed by learned Executing Court is both self speaking and reasoned order and the reasoning assigned therein is duly borne out from the record of the case, this Court does not finds any reason to interfere with the same. Thus as there is no merit in this petition, the same is accordingly dismissed.

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

Varinder Kumar .....Petitioner.
Versus
Santokh Singh .....Respondent.

CMPMO No 534 of 2018
Decided on: 25.3.2019

Code of Civil Procedure, 1908 - Order VI Rule 17 & Order VIII Rule 1 - Amendment of plaint- Whether defendant entitled to file written statement to amended plaint ? – Trial court closing written statement of defendant for not filing it within time as granted by High Court - Plaintiff amending plaint subsequently - Defendant seeking to file written statement to amended plaint - Trial court dismissing defendant's request - Petition against – Held, defendant has right to file written statement – Allowed to file written statement to amended plaint to extent it contains averments newly introduced post amendment. (Para 5)

For petitioner. Mr. Mukul Sood, Advocate.
For respondent M/s. Shilpa Sood & Atul Jhingan, Advocates.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J (Oral)

By way of this petition filed under Article 227 of the Constitution of India, the petitioner has challenged order dated 27.7.2018 passed by the Court of Civil Judge (II),

Amb in CMA No. 49 of 2013 of Civil Suit No. 49 of 2013 (Annexure P-4), vide which while allowing an application filed by respondent/plaintiff under Order 6 Rule 17 read with Section 151 of CPC, learned Court below has not given any opportunity to the petitioner/defendant to file written statement to the amended plaint.

2. Brief facts necessary for adjudication of the present petition are as under:- Respondent/plaintiff has filed a suit for permanent injunction for restraining defendants from forcibly ousting and dismantling the rooms constructed over the suit land. It appears from the record that despite opportunities having been granted to the petitioner/defendant by the Court, no written statement was filed and in these circumstances the defence of the petitioner/defendant was struck off. Said order was assailed by the petitioner/defendant before this Court, but despite opportunity having been granted by this Court to file written statement subject to payment of cost, again petitioner/defendant failed to file any written statement and his defence was again struck off. During the pendency of the suit, respondent filed an application under Order 6 Rule 17 of the CPC for the amendment of the plaint, which stood allowed by learned court below vide the impugned order. However, while allowing the application for amendment of the plaint, no opportunity has been given by learned court below to the petitioner to file reply to the amended written statement, hence this petition.

3. I have heard learned counsel for the parties and have also gone through the impugned order as well as record of the case.

4. It is a matter of record that despite several opportunities having been granted to the petitioner, no written statement was filed by him to the civil suit. When his defence was struck off, he approached this Court and as a matter of indulgence, an opportunity was granted to him to file written statement subject to payment of cost, yet he did not file any written statement and his defence was again struck off. This is what has weighed with the learned trial court while denying opportunity to the petitioner/defendant to file written statement to the amended plaint.

5. In my considered view, the order passed by learned court below, whereby it has refused to grant opportunity to the petitioner/defendant to file reply to the amended written statement is not sustainable in the eyes of law. The right of the petitioner/defendant to file written statement qua the original plaint stands struck off. However, post amendment of the plaint, the amendments which stand incorporated in the plaint, are a new cause and the defendant has a right to file his written statement to the same. However, in the garb of this he cannot be permitted to file written statement to the original contents of the plaint. In other others, even after the amendment of the plaint, though the plaintiff has no right to file written statement qua those contents which earlier also were there in the unamended plaint, however, he has a right to file written statement qua those contents of the plaint, which stand introduced post amendment. This important aspect of the matter has been ignored by learned court below and therefore, the impugned order to this extent is quashed and set aside.

The petition is allowed and disposed of with the direction that petitioner/defendant shall have the right, in accordance with law, to file written statement to the amended plaint to the extent it contains averments newly introduced post amendment. Pending miscellaneous applications, if any, also stand disposed of.

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

Sh. Santosh Kumar and others ….Petitioners.
Versus
Smt. Promila and another …Respondents.

CMPMO No.: 519 of 2018.
Reserved on: 25.03.2019
Decided on: 26.03.2019.

Code of Civil Procedure, 1908 - Order VI Rule 17 & Order VII Rule 14- Amendment of pleadings and production of documents - Permissibility – Held, amendment having no relevance with *lis* cannot be allowed – Documents which have no connection with suit cannot be permitted to be placed on record – Plaintiffs (daughters) filing suit seeking declaration of their status as coparcener vis-a-viz defendants qua suit land – Defendants filing application for amendment of written statement claiming succession to property on basis of Will of father – Also praying for placing copy of Will on record – Validity of Will already subject matter of another suit between parties – Amendment as sought and document intended to be placed on record have no bearing in present *lis* – Trial court justified in dismissing defendant's application - Petition dismissed - Order of trial court upheld. (Paras 8 & 9)

For the petitioners : Mr. Peeyush Verma, Advocate.
For the respondents : Mr. R.M. Bisht, Advocate

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this petition filed under Article 227 of the Constitution of India, petitioners/defendants have assailed order dated 08.10.2018, passed by the Court of learned Civil Judge (Sr. Divn.), Court No. 1, Rohru, in CMAs No. 277-6 of 2018 and 278-6 of 2018 in Civil Suit No. 157/1 of 2014, vide which applications filed by the petitioners/defendants under Order 6, Rule 17 CPC for carrying out amendment in the written statement and under Order 7, Rule 14 CPC for placing on record photocopy of Will dated 5.3.2012, stand rejected.

2. Brief facts necessary for adjudication of this petition are as under:-

Respondents/plaintiffs (hereinafter to be referred as 'plaintiffs') instituted a suit for declaration that they being daughters of Atma Ram, son of Karam Dass, who was impleaded as defendant No. 1, were coparceners alongwith others and were having equal shares in the ancestral properties in the hands of their father Shri Atma Ram. As per them, suit land was jointly owned and possessed by Karam Dass and other recorded co-owners. Said co-owners Karam Dass and Fina Dass, sons of Davi Saran were succeeded by Atma Ram by way of inheritance/succession and after the death of Karam Dass, suit property devolved upon Atma Ram vide mutation No. 5364, dated 30.06.2004. As per the plaintiffs, as Atma Ram was not willing to give to the plaintiffs their share, hence, they were seeking declaration that they were entitled to their respective shares out of the suit property.

3. The case set up by the plaintiffs has been denied and as per averments made in the written statement, plaintiffs are not entitled to any relief as prayed for and further the

suit filed by them is not maintainable. Defendants have denied that plaintiffs are the daughters of Atma Ram or that they are coparceners with Atma Ram qua the suit land or are having equal share by birth in the properties in the hands of Atma Ram. Written statement filed in November, 2014 was supported by the affidavit of Sumesh Chauhan, son of Atma Ram. During the pendency of the suit, defendant Atma Ram died.

4. In September, 2018, petitioners/defendants filed an application under Order 6, Rule 17 CPC with the prayer to allow them to amend the written statement. It was averred in the application that in the course of preparing the case for leading evidence on behalf of the defendants, it transpired that due to *bonafide* oversight and inadvertence, this defence could not be taken earlier that Atma Ram during his lifetime had executed a Will dated 05.03.2012 and had bequeathed his movable and immovable property in favour of his sons, namely, Santosh Kumar and Sumesh Chauhan. The proposed amendment is being reproduced herein-below:-

> *"10. That without conceding any of the defenses raised hereinabove it is submitted on behalf of the defendants that the predecessor-in-interest of the defendants, Sh Atma Ram, who had earlier been arrayed as defendant in the suit, had during his lifetime executed a Will Dated 5.03.2012. the Will dated 5.03.2012 was duly registered in the office of the Sub Registrar Shimla (Urban). By way of the Will the said Sh. Atma Ram has bequeathed his entire movable and immovable properties in favour of the defendants Sh. Santosh Kumar and Sh. Sumesh Chauhan, being his sons and out of natural love and affection. This being so no person other than the abovestated Sh. Santosh Kumar and Sumesh Chauhan can stake any claim in the properties left behind by late Sh Atma Ram, much less the plaintiffs whose claim top the properties of Late Sh Atma Ram is based upon false and concocted allegations. The suit of the plaintiffs thus is liable to be dismissed with costs."*

5. Petitioners/defendants also filed an application to place on record photocopy of Will dated 05.03.2012 of deceased Atma Ram. These application have been dismissed vide impugned order dated 08.10.2018.

6. Feeling aggrieved, petitioners/defendants have filed this petition.

7. I have heard learned Counsel for the parties and also gone through the impugned order as well as the record of the case.

8. A perusal of the impugned order *inter alia* demonstrates that learned Court below has rejected the application filed by the petitioners for amendment of the written statement *inter alia* on the ground that the proposed amendment was not necessary for the adjudication of the case as the cause of action as it stood mentioned by the plaintiffs in the civil suit was completely different and had arisen during the lifetime of Atma Ram itself. Learned Court below held that defendants intended to amend written statement at a belated stage to prolong disposal of the matter. As rights of the parties were to be adjudicated as they existed at the time when Atma Ram was alive and this application filed under Order 6, Rule 17 of CPC was devoid of any merit. It also held that there was no necessity to take on record the copy of Will which otherwise also was subject matter of the Civil Suit No. 27/1 of 2015, wherein the validity of the Will stood assailed separately by the respondents/plaintiffs.

9. In my considered view, there is neither any illegality nor perversity nor jurisdictional error in the order passed by learned Court below rejecting the applications filed by the present petitioners for amendment of written statement as also for placing on record copy of Will dated 05.3.2012. As noted above, respondents/plaintiffs had filed the

suit against the present petitioners as also Atma Ram on the ground that plaintiffs were daughters of Atma Ram, were coparceners with Atma Ram and therefore were having share in the ancestral property, which had come in the hands of Atma Ram from his ancestors. As far as the issue of Will is concerned, it is a matter of record that no reference of the same was made in the written statement whereby the claims of the plaintiffs have been denied. Even otherwise, execution of a Will by late Shri Atma Ram allegedly bequeathing his entire properties, movable as also immovable, in favour of his sons, has nothing to do with the controversy which is the subject matter of the suit filed by the present respondents. Plaintiffs have claimed right over the suit land on the ground that they being daughters of Atma Ram are entitled for their respective shares as the suit land is ancestral and stood inherited by Atma Ram from his ancestors. Whether or not there is merit in the contention of the plaintiffs has got nothing to do with the execution of the Will by Atma Ram with regard to the suit property. In other words, execution of Will qua the suit land by late Atma Ram can have no effect whatsoever over the claim, as has been put forth in the Civil Suit and the same has to be independently decided by the learned Court below on the basis of evidence which is to be led by the parties on the issues which already stand framed. Learned Court below has rightly held that the proposed amendment had got nothing to do with the controversy at hand and it has rightly rejected the application filed by the petitioners for amendment of the written statement. This Court concurs with the findings of learned Court below. In my view also, the proposed amendment in the written statement has no bearing upon the controversy, subject matter of the suit and apparently, applications so filed by the defendants were just to prolong the issues especially when it is not denied that validity of the Will in issue is the subject matter of another suit between the parties. Similarly, there is no illegality with the findings returned by the learned Court below that there was no need to place on record photocopy of the Will dated 5.3.2012. Same had no connection whatsoever with the issue subject matter of the suit before the learned Court below.

Accordingly, as this Court does not finds any merit in this petition and further as the order passed by the learned Court below does not suffers from any illegality, perversity or jurisdictional error, this petition is dismissed. Registry is directed to forthwith return record of the case to learned trial Court. Parties through their learned Counsel are directed to appear before the learned trial Court on 08.04.2019. Pending miscellaneous application(s), if any, also stand disposed of.

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

Sh. Sunil Dutt ...Petitioner.
Versus
Sh. Kedar Nath and others ...Respondents

CMPMO No 141 of 2018
Decided on: 26.3.2019

Code of Civil Procedure, 1908 - Order VIII Rule 1-A (3) - Production of document – Whether defendant without having filed written statement can seek placing of document on record ? –Defendant had not filed written statement in suit – He filing application to place on record Gift Deed, with leave of court – Trial court dismissing defendant's application – Petition against – Held, party not filing pleadings is not entitled to place on record document

and lead evidence – Trial court rightly dismissed defendant's application - Petition dismissed - Order of trial court upheld. (Paras 11 & *14 to 18)*

For the petitioner. Mr. Pawan Gautam, Advocate.
For respondents. Mr. Dheeraj K. Vashishat Advocate for respondents No. 4 and 6.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J (Oral)

By way of this petition filed under Article 227 of Constitution of India, petitioner assails order dated 06.02.2018, passed by learned Senior Civil Judge, Court No.(I), Amb, District Una in Civil Suit No. 69/07 RBT No. 122/14/07, titled as Kedar Nath versus Sat Parkash and others vide which application filed by the present petitioner under Order 8, Rule 1A(3) read with Section 151 of the Civil Procedure Code stands dismissed by the learned Court below.

2. Brief facts necessary for the adjudication of the petitioner are as under:-

Predecessor-in-interest of respondent No. 1 and respondent No. 2 has filed a civil suit which is pending adjudication before learned Senior Civil Judge, Court No.(I) Amb, District Una. The suit is for declaration that plaintiff and proforma defendants (which includes the present petitioner) are owners in possession of land measuring 0-99-77 Hects., situated in Mouza Ghanari Dadwalan, Tehsil Amb, District Una, H.P.,(hereinafter referred to as 'suit land') details whereof are given in the suit and that defendants No. 1 to 4 have no right title or interest over the same and mutation No. 509 and 173 entered and sanctioned in favour of defendants No. 1 to 4 in respect of half share of deceased Smt. Ram Rakhi out of the suit land, dated 28.12.2016 are wrong, illegal, void and ineffective against the rights of the plaintiffs as also proforma defendants. This suit, admittedly, has been filed way back in the year 2007.

3. In June 2017, petitioner filed an application under Order 8, Rule 1A(3) read with Section 151 of the Civil Procedure Code praying for leave of the Court to place on record in evidence a registered Gift Deed, scribed on 15.05.1963 and registered on 16.05.1963, purportedly by late Smt. Ram Rakhi in his favour as also the plaintiffs and other proforma defendants.

4. It was mentioned in the application that Smt. Ram Rakhi had got scribed a Gift Deed on 15.5.1963, which was registered on 16.5.1963. Same pertained to land other than the suit land. The document could not earlier be placed on record as it was lying in a Trunk and due to inadvertence it could not be placed on record at the time of filing of the written statement.

5. Contesting defendants opposed the application. It was mentioned in the reply that as the applicant had not filed any written statement and therefore also he could not be permitted to place on record any documents beyond pleadings.

6. Vide impugned Order, learned Court below has rejected the application inter alia on the ground that as the Gift Deed pertained to land other than the suit land, it was not necessary to bring the same on record for the decision of the suit. Learned Court held that even if it was presumed that the Gift Deed was executed by Smt. Ram Rakhi then also as the same pertained to some other land than the suit land, it was neither relevant, nor

applicant could demonstrate as to how the document was relevant to decide the suit before the Court.

7. Feeling aggrieved, petitioner has challenged the order so passed by the learned Court below by way of this petition.

8. I have heard the learned counsel for the parties and gone through the impugned Order as also the documents placed on record.

9. Order 8 Rule 1A(3) of the Code of Civil Procedure provides that a document which ought to be produced in Court by defendants and is not produced, shall not be received in evidence on behalf of the defendants at the time of hearing of the suit without leave of the Court.

10. In the present case, the petitioner has not filed any written statement to the suit. The reason for the same, but obvious appears to be that the interest of the plaintiff as also the petitioner- (defendant) is the same. Petitioner stands impleaded in the suit as a proforma defendant.

11. Be that as it may, the fact of the matter remains that in the absence of there being any written statement on record on behalf of the defendant, Order 8 Rule 1A(3) of the Code will not per se come into play, because in my considered view, defendant can not place on record a document in the absence of written statement having been filed. Party to a suit is entitled to lead evidence to prove its case. For that, but obvious there have to be on record pleadings which are required to be proved/substantiated by statements of witnesses and/or the documents. In the absence of pleadings being there, no evidence can be led by a party.

12. Even otherwise, the findings returned by the learned Trial Court do not suffer either from any illegality or perversity or jurisdictional error.

13. It is the own case of the applicant that purported Gift Deed which he intended to place on record vide application under Order 8 Rule 1A(3) pertains to land other than the suit land. That being so, there is no perversity with the findings returned by learned Trial Court that placing said document on record was not relevant.

14. During the course of arguments, learned counsel for the petitioner has argued that impugned Order is not sustainable in the eye of law, as learned Court below has erred in not appreciating the document which petitioner intended to place on record was more than 30 years old, therefore, the same was per se admissible in evidence. In my considered view this submission of learned counsel deserves rejections. Section 90 of the Indian Evidence Act cannot be interpreted in the said manner.

15. Hon'ble Supreme Court in Gangamma and others Versus Shivalingaiah, (2005) 9 Supreme Court Cases 359 has held that section 90 of the Indian Evidence Act nowhere provides that in terms there of the authenticity of the recitals contained in any document is presumed to be correct. Hon'ble Supreme Court has further held that mere execution of a document, does not lead to be conclusion that the recitals made therein are correct, and subject to the statutory provisions contained in Section 91 and 92 of the Evidence Act, it is open to the parties to raise a plea contra thereto.

16. Besides this, the suit having been instituted as far back as in the year 2007, no cogent explanation has come forth from the petitioner as to why the application to place on record the document at a belated stage. The justification given in the application that registered Gift Deed was lying in the Trunk is not worth believing.

17. This Court cannot be oblivious to the fact that in exercise of its power of superintendence under Article 227 of the Constitution of India, it cannot interfere with the findings returned by the learned Court below, unless the findings are either perverse or there is a jurisdictional error committed by the learned Court below.

18. As this Court does not find any illegality, perversity or jurisdictional error with the impugned Order, the petition being devoid of any merit, is dismissed. Miscellaneous application(s), if any, also stand disposed of, accordingly.

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

Geeta Ram .....Petitioner.
Versus
Baljeet Singh and another ....Respondents.

CMPMO No 329 of 2017
Decided on: 27.3.2019

Code of Civil Procedure, 1908 – Order 1 Rule 10(2) **-** Necessary party - Held, party whose interest is going to be adversely affected by decree is necessary party to *lis* and ought to be joined in suit. (Para 8)
Code of Civil Procedure, 1908 - Order 1 Rule 10(2) **-** Necessary party – Joining of – Circumstances – Plaintiff purportedly filing suit for himself and on behalf of other co-sharers including 'G' against defendant for injunction by claiming joint possession over suit land – Plaintiff further pleading his having no objection if left out co-sharers join suit as and when they want to - 'G' filing application for his impleadment as co-defendant by alleging plaintiff having no interest in suit land after sale of his share in 'G's favour – Trial court dismissing his application – Petition against – Held, there is dispute between plaintiff and 'G' qua suit land – Decree going to adversely affect 'G' – He is necessary party to *lis* – Order of trial court set aside – Petition allowed - 'G' ordered to be impeaded as co-defendant. (*Paras 6 to 8)*

For the petitioner. Mr. Suneet Goel, Advocate.
For respondents. Mr. Shyam Singh Chauhan, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J (Oral)

By way of this petition, petitioner has assailed order dated 23.6.2017, passed by the Court of learned Civil Judge (Jr. Division), Nahan, District Sirmaur in CMP No. 13516 of 2017, titled as Geeta Ram Vs. Baljeet Singh, whereby an application filed under Order 1 Rule 10(2) of the CPC by the petitioner praying therein that he may be impleaded as party defendant in the suit has been dismissed.

2. Brief facts necessary for adjudication of the present petition are as under:- Respondent No.1, Baljeet Singh alias Gama, has filed a suit against respondent No.2, Kesho Ram, praying for decree of permanent injunction qua the suit land on the ground that he along with other co-sharers, namely, Sh. Gita Ram (present petitioner) and Sh. Nathu Ram

are co-owner in possession of the suit land and that the suit was being filed for the benefit of other co-sharers including the present petitioner and that defendant who was a stranger to the suit land was trying to forcibly dispossess the plaintiff by causing interference in his peaceful possession and an earlier suit filed by petitioner against the plaintiff stood decreed in favour of the petitioner.

3. During the pendency of the suit, petitioner filed an application under Order 1 Rule 10 (2) of the CPC stating therein that part of the suit land stood sold by plaintiff, Baljeet Singh, to him and he (Baljeet Singh) was left with no share or possession over the suit land. Though after the death of one Smt. Shiv Devi, plaintiff (Baljeet Singh) along with his brother Sh. Nathu Ram had succeeded to her estate, but plaintiff was not in possession of the suit land. The pleadings in the suit filed by Baljeet Singh were false and incorrect and to negate the claim of the plaintiff, it was necessary to implead the petitioner as party defendant. This application has been rejected by learned Court below vide impugned order. Learned Court has held that as no relief was claimed against the petitioner, therefore, he was not a necessary party. It held that as the suit was neither for declaration nor for possession, therefore, there was no cause of action against Geeta Ram, i.e., the petitioner to be impleaded as a party defendant as Geeta Ram was neither necessary nor a proper party for the adjudication of the case.

4. Feeling aggrieved, petitioner has filed the present petition.

5. Having heard learned counsel for the parties and having gone through the impugned order as well as record of the case, in my considered view, the order passed by learned trial Court is not sustainable in law. Order 1 Rule 10 (2) of the CPC, inter alia, provides that the Court may, at any stage of the proceedings either upon or without the application of either party, on such terms as may appear to the Court to be just order, name of any party who ought to have been joined to the plaintiff or defendant or whose presence is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

6. In the present case suit filed by respondent, Baljeet Singh, is allegedly on the pleadings that he along with his co-sharers which included the present petitioner is co-owner in possession of the suit land. It is mentioned in the plaint that the suit is being filed for the benefit of other co-sharers also including petitioner Geeta Ram. It is further mentioned in the plaint that other co-sharers, namely Geeta Ram (petitioner) and Nathu Ram could not join the plaintiff for various reasons and are at liberty to join the suit as and when they so desire. It is not spelt out in the plaint as to what were those reasons due to which, other co-sharers including Geeta Ram could not join the plaintiff in filing the suit.

7. Be that as it may, as the plaintiff has himself stated in para 1 of the plaint that other co-sharers including petitioner Geeta Ram are at liberty to join the suit as and when they so desire, it is not understood as to how the plaintiff could have had opposed an application filed for his impleadment as a party defendant by the petitioner. This extremely important aspect of the matter has not been appreciated by learned Court below. Learned Court below has also erred in not appreciating that it was not so very innocuous an act that petitioner was not initially impleaded as a party in the suit. It appears that this was purposely done by the plaintiff, as is apparent from the averments made in the application by the petitioner filed under Order 1 Rule 10 of the CPC, perusal of which demonstrates that there is a dispute between the petitioner and the plaintiff qua the suit land. The findings returned by learned Court below that as plaintiff was not seeking either declaration or possession, no cause had arisen against Geeta Ram are not sustainable in law because learned Court below has erred in not appreciating that any finding returned in favour of the

plaintiff would have had adversely affected the petitioner, as admittedly there is a dispute between the parties, i.e., the petitioner and the plaintiff qua the suit land. Petitioner had clearly mentioned in the application that the suit had been filed by the plaintiff without impleding him as a party, to achieve his illegal objects.

8. In these circumstances, in my considered view, petitioner was a necessary party and his impleadment as such was in fact necessary for appropriate adjudication of the lis before the learned trial Court. Learned trial Court has also erred in not appreciating that had the application filed by the petitioner been allowed, no prejudice would have been caused to the plaintiff and the impleadment of the petitioner would have assist learned Court below in the adjudication of the dispute before it.

In view of the findings returned hereinabove, this petition is allowed. Impugned order dated 23.6.2017 is ordered to be set aside and the petitioner is ordered to be impleaded as defendant in the suit. Petition stands disposed of, so also pending miscellaneous application(s), if any.

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

Kuldeep Chand ….Appellant.
Vs.
Raghubir Singh and others ….Respondents.

RSA No.:55 of 2008
Date of Decision: 28.03.2019

Specific Relief Act, 1963- Section 38- Suit for permanent prohibitory injunction - Plaintiff seeking permanent prohibitory injunction against defendants by claiming exclusive possession over abadi land - Trial court declining injunction - Appeal dismissed by District Judge – RSA - Land recorded in possession of Bashindgan (proprietors) of area - On strength of revenue entries exclusive possession of plaintiff over suit land cannot be inferred simply because he is proprietor of area - Physical possession of plaintiff to exclusion of other Bashindgan must be established – Oral evidence not proving his exclusive possession - Plaintiff not entitled for injunction *qua* abadi land - RSA dismissed- (Paras 11 &12)

For the appellant:	Mr. N.K. Thakur, Senior Advocate, with Mr. Divya Raj Singh, Advocate.
For the respondents:	M/s Sanjeev Kuthiala & Kamlesh Kumari, Advocates.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*:

By way of this appeal, the appellant/plaintiff has prayed for setting aside the judgment and decree dated 30.10.2004, passed by the Court of learned Civil Judge (Junior Division), Court No. 1, Amb, District Una, vide which, suit for permanent prohibitory injunction and in the alternative for possession filed by the appellant was partly decreed, as also for setting aside the judgment and decree dated 30.10.2006, passed by the Court of

learned Additional District Judge, Una, District Una, whereby appeal filed by the appellant against the judgment and decree passed by the learned Court below stood dismissed.

2. Facts necessary for adjudication of this appeal are as under:

Appellant/plaintiff (hereinafter referred to as 'the plaintiff') filed a suit praying for permanent prohibitory injunction for restraining the defendants from taking possession, changing the nature and raising construction over the suit land, measuring 1 Kanal 2 Marlas, comprised in Khewat No. 635 min, Khatauni No. 900 and Khasra No. 905, situated in Village Kuthera, Tehsil Amb, District Una and in the alternative for possession of portion 'ABCD' as per site plan Ex. PW4/A. His case was that land measuring 1-2 Kanals was owned by *BashindganDeh* and there existed ancestral *abadi* of plaintiff and other co-sharers upon the same. As per the plaintiff, over vacant area in possession of plaintiff and co-sharers, he had stacked stones, wood etc. There was a common passage upon land measuring 2-5 Kanals, which was the only passage available to the *abadi* of the plaintiff as also his other land and defendants who had no right, title or interest over the same, were threatening to take forcible possession of the same and block passage by raising construction upon the same.

3. Defendants opposed the suit, *inter alia*, on the ground that plaintiff had no right, title or interest over the suit land comprised in Khasra No. 905. As per the defendants, there existed a path over Khasra No. 907. Khasra No. 905 was stated to be owned by *PanchayatDeh* and was possessed by *BashindganDeh*, over which, old *abadi* of defendants existed, which had fallen down and *KharposhChhaper* stood constructed by defendant No. 1 about 40 years back, who still continued to be in possession over the same. Defendants denied that any ancestral *abadi* of plaintiff existed over the suit land.

4. On the basis of pleadings, learned Trial Court framed the following issues:

"1. Whether the plaintiff is entitled to the relief of injunction? OPP

2. Whether plaintiff has no locus standi to file this suit? OPD

3. Whether plaintiff is estopped from filing suit? OPD.

4. Whether suit is not maintainable? OPD

4A. Whether defendants have raised construction during pendency of suit, if so, its effect? OPP

5. Relief.

5. These issues were decided by the learned Trial Court as under:

Issue No. 1:	*Partly Yes.*
Issued No. 2:	*Partly Yes.*
Issue No. 3:	*No.*
Issue No. 4:	*Partly Yes.*
Issue No. 4A:	*No.*
Relief:	*Suit partly decreed as per operative portion of the judgment.*

6. Learned Trial Court partly decreed the suit of the plaintiff by granting decree for permanent injunction restraining defendants from blocking the passage existing over Khasra No. 907, situated in Village Kuthera, Tehsil Amb, District Una, H.P. However, suit of the plaintiff regarding Khasra No. 905 was dismissed. Learned Trial Court held that evidence demonstrated that ancestors of plaintiff had shifted to Amb many years ago while ancestors

of defendants were residing in the Village. This stood admitted by plaintiff in his cross-examination. It was not the case of the plaintiff that *abadi* was constructed by his ancestors and the same was being used by him after his ancestors left for Village Amb. On these bases, learned Trial Court held that version of plaintiff that he was in possession of Khasra No. 905, wherein a dilapidated structure existed, was highly doubtful. It further held that there was no dispute upon existence of common passage over Khasra No. 907. Whereas plaintiff was stating that defendants were threatening and restraining plaintiff from using the same, defendant Madan Singh had denied the same. Learned Trial Court held that PW-3 Niaz Deen, who was an independent witness and who had no interest with either party, had supported the case of the plaintiff and, therefore, on balance of probability version of plaintiff, as defendants were having no right to restrain the plaintiff from using the common passage, therefore, plaintiff was entitled for permanent injunction for restraining the defendants from blocking the passage existing over Khasra No. 907.

7. As per the record, judgment and decree passed by the learned Court below was not challenged by the defendants, however, plaintiff filed an appeal against the said judgment to the extent relief stood denied to him by the learned Court below.

8. Learned Appellate Court vide judgment and decree dated 30.10.2006, dismissed the appeal of plaintiff by upholding the findings returned by the learned Court below. It held that from the oral testimonies of the witnesses as also documentary evidence led by the parties, it was clear that there was a *'Share Aam Rasta'* over Khasra No. 907, but revenue record did not demonstrate that Khasra No. 905 was in exclusive possession of the plaintiff or for that matter of the defendants. It further held that in such circumstances, Trial Court had rightly held that whereas Khasra No. 907 was a common passage, but Khasra No. 905 was not in the exclusive possession of the plaintiff and, therefore, plaintiff was not entitled to injunction to this effect.

9. Feeling aggrieved, appellant/plaintiff has filed this appeal, which was admitted on the following substantial questions of law:

> *"1. Whether the learned Courts below are legally justified in declining the relief of injunction with respect to the abadi area of Bashindgan Deh on the ground that the name of the plaintiff is not reflected in the revenue record?*
>
> *2. Whether the judgments of the learned Courts below are unsustainable in view of the legal position that in the area of Bashindgan Deh whosoever is in possession is a deemed owner of such portion being the proprietor of the village?"*

10. I have heard learned counsel for the parties and have also gone through the judgments and decrees passed by both the learned Courts below as well as the record of the case.

11. There is a concurrent finding of fact recorded against the appellant/plaintiff by both the learned Courts below that he was not in possession of Khasra No. 905. I have carefully gone through the record of the case. Plaintiff Kuldip Chand, who entered the witness box as PW-1, deposed that he was having *abadi* over Khasra No. 905 and there was a passage over Khasra No. 907. Except his bald statement, there is no substantive evidence on record to substantiate that Khasra No. 905 was in possession of the plaintiff. Ex. P-1, which is copy of Jamabandi of the suit land for the year 1983-1984 demonstrates that the land is owned by Panchayat Deh and in the column of possession, the words mentioned are '*MakbujaBashindganDeh*'. Besides this, *'Gair Mumkin Abadi'* is reflected to be existing over

Khasra No. 905. In Ex. P-2, which is a copy of Khatoni Bandobast, this Khasra number is shown to be '*Banjer Kadim*'. Similarly, Ex. P-6 which is copy of Missal Hakiat for the year 1983-84, Khasra No. 905 is shown as *'Gair Mumkin Abadi'*. In the column of ownership, name of *Panchayat Deh* is there and in the column of possession word used is *'Share Aam'*. Therefore, as has been held by both the learned Courts below, there is no evidence on record to demonstrate that Khasra No. 905 was in the possession of appellant/plaintiff. Simply because plaintiff is a *Bashindgan* of the area and the land is shown to be in the possession of *BashindganDeh*, this does not mean that the inference to be drawn from the said entry is that said Khasra number is in possession of the appellant/plaintiff, as he wants this Court to believe.

12. Even if the said revenue records were to be ignored for a while, then also, it was incumbent upon the appellant/plaintiff to have had placed on record cogent and reliable evidence to demonstrate that Khasra No. 905 was in his physical possession to the exclusion of every other *Bashindgan*. This the appellant has miserably failed to do. Therefore, it cannot be said that learned Courts have wrongly denied the relief of injunction with respect to *abadi* area in favour of the plaintiff. Similarly, it cannot be said that the judgments passed by both the learned Courts below are not legally sustainable, because from the record, the plaintiff has not been able to prove that he in fact was in physical possession of Khasra No. 905 to the exclusion of every other *Bashindgan*. Substantial questions of law are answered accordingly.

13. In view of above discussion, as there is no merit in this appeal, the same is dismissed. Miscellaneous applications, if any, also stand disposed of.

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

Sh. Mohan Verma @ Shillu ....Petitioner.
Versus
Sh. B.M. Thakur ....Respondent.

Cr. Rev. No.:221 of 2017.
Decided on: 28.03.2019.

Negotiable Instruments Act, 1988 - Section 138 – Dishonour of cheque – Complaint - Trial court convicting accused for dishonour of cheque - Sessions Judge upholding conviction - Revision – Accused contending wrong appreciation of evidence – Taking plea of cheque having been given to third person and complainant misusing it - Held, signature of accused on cheque not disputed - Defence that cheque issued to some other person, was actually misused by complainant is bald assertion and not substantiated by any other evidence - No complaint lodged by accused in this context – Accused also agreeing before High Court for paying cheque amount with composition fee but failed in complying undertaking - Petition devoid of merits - Revision dismissed - Conviction and sentence upheld. (Paras 10 & 11)

For the petitioner : Mr. Sumit Himalvi, Advocate vice Mr. D.N. Sharma, Advocate.
For the respondent : Nemo.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

This revision petition is directed against the judgment passed by the Court of learned Additional Chief Judicial Magistrate, Theog, in Case No. 254-3 of 2011, dated 28.10.2015, vide which the petitioner has been convicted for commission of offence punishable under Section 138 of the Negotiable Instruments Act and he has been sentenced to undergo simple imprisonment for a period of two months and to pay compensation to the tune of Rs.3,50,000/- to the complainant and also against the judgment passed by the Court of learned Additional Sessions Judge (CBI), Shimla, Circuit Court Theog, in Criminal Appeal No. 4-T/10 of 2016, dated 01.05.2017, vide which appeal filed by the petitioner against the judgment passed by the learned trial Court stood dismissed.

2. Before proceeding further, it is relevant to take note of the fact that on 04.08.2017, when notice was issued in this case, sentence imposed upon the petitioner was suspended subject to the petitioner furnishing personal bond to the tune of Rs.25,000/- with one surety in the like amount to the satisfaction of the learned trial Court within four weeks from the date of the order. On the said date, petitioner through Counsel had also stated before the Court that he was willing to deposit the entire amount of compensation within four weeks as also 15% of the cheque amount to have the matter compounded. As the petitioner did not comply with the directions issued by this Court, another opportunity was given on 15.09.2017 to do the needful within four weeks. It is a matter of record that till date said order has not been complied with nor steps have been taken by the petitioner to serve the respondent despite several opportunities.

3. In these circumstances, the case was heard on merit today.

4. Brief facts necessary for adjudication of the petition are as under:-

Respondent/complainant (hereinafter referred to as 'complainant') filed a complaint under Section 138 of the Negotiable Instruments Act on the ground that he was an agriculturist and also having an apple orchard and petitioner/accused (hereinafter referred to as 'accused') was known to him. As per the complainant, accused had purchased standing apple crop from the complainant for a sum of Rs.2,50,000/- and in order to discharge said liability, he issued a cheque dated 28.08.2011 for the said amount. When the cheque was presented to the Bank, the same was dishonoured. Immediately upon the receipt of the said information, complainant issued a Legal Notice to the accused dated 21.10.2011, by way of a registered post. Despite issuance of the said notice, accused failed to make good the amount of the cheque. In these circumstances, complainant invoked the provisions of Section 138 of the Negotiable Instruments Act. Complainant entered the witness as CW2 and he produced on record Cheque Ext. C-2, Dishonour Memo Ext. C-3, Legal Notice Ext. C-4 and Postal Receipt Ext. C-5. In addition, one Shri Ashish Thakur, Special Power of Attorney of the complainant, through whom complainant had preferred the complaint, also appeared in the witness box as CW-2. The power of attorney was also produced on record as C-1.

5. Issuance of Cheque Ext. C-2 was admitted by the accused in his statement recorded under Section 313 of the Code of Criminal Procedure, alongwith Dishonour Memo Ext. C-3 and receipt of Legal Notice Ext. C-4. Defence of the accused was that he had never issued any cheque to the complainant and the present cheque was issued to one Surender Verma, who had misused the same.

6. Learned trial Court allowed the complaint and convicted the accused for commission of offence punishable under Section 138 of the Negotiable Instruments Act by

holding that whereas the complainant had produced cogent evidence on record to prove his case beyond reasonable doubt, the accused has failed to bring on record any evidence to rebut the statutory presumption of law to prove his case.

7. In appeal, these findings were confirmed by the learned Appellate Court. It held that whereas the complainant had complied with the statutory provisions of Section 138 of the Negotiable Instruments Act, the accused had failed to prove any cogent evidence on record to belie the case of the complainant. Learned Appellate Court took note of the provisions of Section 139 of the Act that unless contrary is proved, it shall be presumed that holder of the cheque has received the same in discharge of whole or part of any debt or liability.

8. Feeling aggrieved by the said judgments passed by both the learned Courts below, the accused has failed this petition.

9. Having heard learned Counsel for the petitioner at a considerable length and perused the impugned judgments as also the record of the case, in my considered view, there is no infirmity with the judgment of conviction passed against the accused by the learned trial Court as confirmed by learned Appellate Court.

10. In the present case, complainant approached the Court aggrieved by dishonouring of a cheque issued in his favour by the accused, which as per the complainant, was issued to him by the accused on account of a debt due to him from the accused. To satisfy the ingredients of Section 138 of the Negotiable Instruments Act, complainant duly proved on record issuance of the cheque by the accused, its being dishonoured on presentation to the Bank, issuance of statutory Legal Notice by the complainant to the accused, non-payment of the cheque amount by the accused to the complainant despite receipt of the said notice.

11. It is a matter of record that the factum of the signatures of the accused being on the cheque has not been disputed by him. His defence was that he had given the cheque to one Surender Verma which was misused by him. Except this bald assertion of the accused, there is nothing placed on record by him to substantiate this fact. It is not his case that on account of cheque being misused or abused either by Surender Verma or the present complainant, he either lodged any complaint or took recourse to remedies available to him in law. Onus lay heavily upon the accused to belie the case of the complainant once the complainant had satisfied all the ingredients of Section 138 of the Negotiable Instruments Act. Fact of the matter is that he has not been able to belie the case of the complainant and therefore, in view of presumption envisaged under Section 139 of the Negotiable Instruments Act, both the learned Court below have rightly held that the petitioner was guilty of having committed an offence punishable Section 138 of the Negotiable Instruments Act. Said findings returned by learned Courts below are duly borne out from the record of the case and during the course of arguments, learned Counsel for the petitioner could not convince the Court to the contrary.

Therefore, as this Court does not finds any infirmity with the judgments passed by learned Courts below, this revision petition being devoid of any merit is dismissed. Pending miscellaneous application(s), if any also stand disposed of accordingly.

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

Raghubir Singh ….Petitioner.
Versus
Jagdish Ram and others ….Respondents.

Civil Revision No. 189 of 2018
Decided on: 28.03.2019.

Code of Civil Procedure, 1908 – Section 47 - Order XXI Rule 34 - Execution petition – Objections thereto – Mode of disposal – Held, Executing court while disposing objections of Judgment-debtor (JD) must refer to them, contentions raised and discussion thereon by way of reasoned and speaking order – Order of Executing court summarily disposing objections of JD that after purchase of land he has become co-sharer with Decree-holder and latter not entitled for actual possession, set aside - Petition allowed and matter remanded. (Paras 6 to 8)

For the petitioner : Mr. Ajay Sharma, Advocate.
For the respondents : Mr. Ramakant Sharma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this petition, petitioner has prayed for quashing of order dated 07.08.2018 (Annexure P-4), passed by learned Civil Judge (Jr. Divn.), Jawali, District Kangra, HP, vide which, objections filed by the petitioner/J.D. No. 4 stand dismissed.

2. Mr. Ajay Sharma, learned Counsel for the petitioner has argued that the impugned order is *prima facie* not sustainable in the eyes of law as the same can neither be termed as a reasoned order nor the same is a speaking order. On the other hand, learned Counsel for the respondents has supported the order by arguing that as there was no merit in the objections filed by the petitioner, the same stand rightly rejected by the learned Executing Court.

3. I have heard learned Counsel for the parties and gone through the impugned order as also the record of the case.

4. A perusal of the impugned order demonstrates that the objections of the petitioner have been rejected by the Court below by passing the following order:-

> *"Consideration on objections heard. Record perused. In the present execution petition, appearing JDs has filed Objections that they have purchased share of the suit land from co-owners, due to which, they have now became co-sharers with the DH and has alleged that the DH is not entitled for actual possession of the suit land, however, Court found that the alleged claim of the JDs have not supported with any documentary evidence/record, due to which, the objections so raised by the JDs are not sustainable in the eyes of Law and accordingly, the objections filed by the Jds are dismissed.*
>
> *Let steps (If any) be taken within 15 days thereafter, Warrant of Possession be issued to the DC concerned and his report be called for 17-11-2018."*

5. In my considered view, said order is as cryptic as it could have had been and therefore, the same is not sustainable in the eyes of law. The order does not spells out as to what were the objections raised by the petitioner and why the same did not find merit with the learned Executing Court. It is not sufficient for the Court to simply state that as the claim is not supported by any documentary evidence, therefore, the objections are not sustainable

6. The petitioner has raised objections that the judgment debtors were not properly served in the suit and thus decree was passed without affording them proper opportunity of being heard. Another objection raised was that as judgment debtors have purchased part of the suit land from co-owners, therefore, as they had become co-sharers with decree holder, therefore, the decree holder was not entitled for actual possession of the suit land. Record also demonstrates that these objections stand duly responded to by the decree holder.

7. This Court is not even remotely suggesting as to what order should have been passed by the learned Court on the objections. All that this Court is observing is that the respective contentions of the parties should have been referred to in the order, discussion should have been there on the objections so raised and thereafter, a reasoned order upon the objections should have been passed. As this has not been done by the learned Court below while passing the impugned order, the same is not sustainable in law.

8. Accordingly, this petition is allowed. Impugned order dated 07.08.2018, passed by learned Civil Judge (Jr. Divn.), Jawali, District Kangra, HP, is set aside. Learned Executing Court is directed to hear the objections filed by the petitioner afresh and after giving an opportunity of being heard to the parties, pass a speaking order on the same, as expeditiously as possible.

The petition stands disposed of in above terms, so also pending miscellaneous application(s), if any.

****

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

Smt. Ram Dei …..Petitioner.
Vs.
Sh. Sunil and others …..Respondents.

CMPMO No.: 462 of 2018
Date of Decision: 01.04.2019

Code of Civil Procedure, 1908 – Section 151- Adduction of additional documents- Report of Local Commissioner (LC) - Permissibility – Held, report of LC given in earlier suit not *per se* admissible in subsequent suit – Examination of LC necessary – In absence of prayer to examine LC as witness in subsequent suit, application seeking leave to place on record his report cannot be allowed - Petition dismissed - Order of trial court upheld. (Para 6)

For the petitioner: Mr. Naveen K. Bhardwaj, Advocate.
For the respondents: Mr. Sanjeev Kumar, Advocate, for respondents No.1, 6, 7 & 9 to 12.

None for respondent No. 2.
Respondents No. 4, 5 and 13 *ex parte.*

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*:

By way of this petition, the petitioner has challenged order dated 23.08.2018, passed by the Court of learned Senior Civil Judge, Kullu, H.P. in Civil Suit No. 177/12 (R. No. 415/13), titled as *Ram Dei Vs. Sunil and others,* whereby an application filed at a belated stage to place certain documents on record stands dismissed.

2. Brief facts necessary for the adjudication of this petition are that the petitioner herein filed a suit for permanent prohibitory injunction restraining the defendants from selling, alienating, transferring and creating encumbrance upon the suit property situated in Phati Khokhan, Tehsil & District Kullu, H.P. in the year 2012.

3. At the stage of hearing of the case, an application was filed by the petitioner under Section 151 of the Code of Civil Procedure with the prayer that there there was another Civil Suit, i.e., Suit No. 104/2005, titled as Shanti Lal Vs. Budh Ram decided on 19.02.1998 by the Court of learned sub Judge 1st Class, Kullu and in the said suit, a Local Commissioner was appointed, whose report alongwith statements of the parties made before the said Court were necessary for the adjudication of the case.

4. This application was rejected by the learned Court below *inter alia* on the ground that the documents which the petitioner intended to place on record were *per se* not admissible in evidence and in the absence of any prayer having been made to prove the said documents by examining the Local Commissioner etc., no purpose would be served by allowing the application and taking the documents on record. Same stands assailed before this Court.

5. I have heard learned counsel for the parties and have gone through the impugned order as also record of the case.

6. Having heard learned counsel for the parties and after going through the impugned order as also the record of the case, this Court finds no infirmity in the impugned order. It is not in dispute that simple prayer made in the application filed under Section 151 of the Code of Civil Procedure was to place on record certain documents, i.e., report of the Local commissioner as also statements of the parties made before the Court of learned Sub Judge 1st Class, Kullu in Civil Suit No. 104/2005 without there being any corresponding prayer made in the application to examine the Local Commissioner etc. That being so, order dated 23.08.2018, passed by the learned Court below dismissing the application suffers from no illegality, as no purpose would have been served by simply placing those documents on record, as until and unless those documents were duly exhibited before the learned Court below in accordance with law, the same could not have been relied upon by the learned Court below for the purpose of adjudication of the suit.

In view of the above discussion, this 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 CHANDER BHUSAN BAROWALIA, J.

Amar Bahadur …Appellant
Versus
State of Himachal Pradesh …Respondent

Cr. Appeal No. 243 of 2016
Reserved on: 28.03.2019
Decided on: 02.04.2019

Indian Evidence Act, 1872 - Section 3 - Circumstantial evidence - Appreciation of evidence - Held, prosecution should prove each and every circumstance relied upon by prosecution – Evidence as a whole should make out complete chain in manner leading to only conclusion that accused committed offence – However, evidence to be analyzed on parameters of veracity, credibility and genuineness. (Paras 59 & 60)
Indian Penal Code, 1860 - Section 302 - Double Murder – Proof – Accused convicted by trial court for murdering owner of orchard and his mother with whom he was working – Appeal against – Accused contending wrong appreciation of evidence by trial court and submitting that evidence being full of contradictions, conviction is not warranted – On facts, (i) 'N' wife of deceased 'KC', on reaching place of occurrence found accused with axe in his hand and deceased lying on ground (ii) accused admitting his presence at place of occurrence at relevant time (iii) accused fleeing away alongwith his family after incident (iv) accused confessing guilt before 'SD' who alongwith 'K' apprehended accused and his family in forest (v) accused had time and opportunity to commit offence (vi)DNA report proving presence of blood of deceased on axe- Held, evidence on record clearly proves guilt of accused- Appeal dismissed- Conviction and sentence upheld (Paras 14 to 47)
Indian Evidence Act, 1872 - Section 8 – Motive - Absence of evidence – Effect - Held, where evidence is direct and corroborative of guilt of accused, absence of evidence as to motive to commit crime, is inconsequential. (Para 49)
Code of Criminal Procedure, 1973 – Section 313 – Examination of accused - Evidentiary value - Held, answers given by accused can be taken into consideration for drawing inference as to his guilt. (Para 34)

Cases referred:
Musauddin Ahmed vs. State of Assam, AIR 2010 SC 3813
Padala Veera Reddy vs. State of Andhra Pradesh and others, AIR 1990 SC 79
Paramjeet Singh vs. State of Uttarakhand, (2010) 10 SCC 439
Samadhan Dhudaka Koli vs. State of Maharashtra, AIR 2009 SC 1059
Sharad Birdhichand Sarda vs. State of Maharashtra, AIR 1984 SC 1622
State vs. Mahender Singh Dahiya, (2011) 3 SCC 109
State of H.P. vs. Sunil Kumar, Criminal Appeal No. 326 of 2011, decided on 15.06.2017
State of Uttar Pradesh vs. Ram Balak & another, (2008) 15 SCC 551

For the appellant : Mr. Mr. Ravi Tanta, Advocate.
For the respondent : Mr. Vikas Rathore and Mr. Narender Guleria, Additional Advocates General, with Mr. J.S. Guleria and Mr. Kunal Thakur, Deputy Advocates General.

The following judgment of the Court was delivered:

<u>Chander Bhusan Barowalia, Judge.</u>

The present appeal is maintained by the appellant/accused/convict (hereinafter referred to as "the accused"), laying challenge to judgment dated 02.05.2016, passed by learned Additional Sessions Judge (II), Shimla, H.P., in Sessions Trial No. 40-S/7 of 2014, whereby the accused was convicted and sentenced for the commission of offence punishable under Section 302 of Indian Penal Code, 1860 (for short "IPC").

2. The factual matrix of the case, as per the prosecution, can tersely be summarized as under:

On 10.07.2014, at about 09:20 p.m., S.I./SHO Police Station, Jubbal, District Shimla, received information from Police Post Saraswati Nagar that a *Nepali* person killed Krishan Chand and also caused grievous hurt to his mother at Chajpur. Owing to said information a police team rushed to the spot of occurrence. On reaching the spot, the police recorded the statement of Smt. Nisha (complainant) under Section 154 Cr.P.C. Relevant excerpts of her statement, as also noted by the learned Trial Court, are as under:

> ***"That she is resident of aforesaid address and is house wife and agriculturist by profession. She was married to Krishan Chand six years ago. She is having son four years old and residing with her parents-in-law. They owned an apple orchard. On this, her husband and Roshan Lal neighbour had gone to Nepal to bring Gorkha labour 10 days before. On dated 10.7.2014, her husband along with Gorkha labour had reached in the morning. Her husband, Nepali Gorkha, his wife, two elder daughters aged 15-16 years and three tiny toolers, one son and two daughters had reached. Two infants son and daughter are having mother feed. The Gorkha labour was allotted the room adjoining to their residential house. During day time the Nepali Gorkha had cut the wood with an Axe. At about 7:00 p.m. her father-in-law Sh. Mishru Ram had gone to Chikli. She along with her husband and mother-in-law were cooking meal inside the kitchen then at about 7:30 p.m., Gorkha labour called her husband and asked that electric bulb of the room is not working. Husband of the complainant had gone along with accused. After some interval she heard cries of the children and some noise. On this the mother-in-law Smt. Shobha came out side the kitchen and went to the veranda at once. She heard the noise of someone felling down in the veranda. She immediately came out side and found the accused Gorkha Nepali carrying Axe in his hand. Her husband was lying in the veranda. Her mother-in-law was also lying at the some distance at the veranda. On seeing the complainant, the accused after throwing the Axe alongwith his family members had absconded towards the forest. The complainant went to her husband and found that there were two deep cut injuries on his neck. There was profuse bleeding on the spot. She laid some clothes upon him. The mother-in-law of the complainant had also sustained injuries on her head. She was lying unconscious. She made an attempt to call her father-in-law. She could not place the call as she was frightened. She yelled and called her neighbour Pyare Lal Sharma on the spot, who informed the police and the local inhabitants of the***

> ***area. Accused had committed the murder of her husband by striking the blow of an Axe twicely on his neck. Accused also made attempt to commit the murder of the mother-in-law by inflicting the blow of an Axe. Nepali citizen was having description of about 5 feet 2 inch in height, whitish complexion wearing black track suit. The name of the accused is not known. The legal action be initiated against him."***

Thereafter, the statement of the complainant recorded under Section 154 Cr.P.C. was forwarded to Police Station, Jubbal, alongwith *rukka,* whereupon FIR was registered and the investigation ensued. The police lifted scientific samples from the scene of crime and also made recovery of articles. The dead body of deceased Krishan Chand was sent for postmortem examination to CH, Jubbal, and Smt. Sodha Devi was shifted to CH Rohru, wherefrom she was referred to Indira Gandhi Medical College, Shimla, but en route she succumbed to her injuries, so her corpse was brought back to CH, Jubbal, for postmortem examination. The clothes worn by both the deceased were taken in possession and sealed in separate parcels. During the course of postmortem examination, viscera, i.e., parts of various organs, viz., kidney, liver, stomach, blood and urine samples etc. were taken and deposited with MHC. The spot was photographed and spot map was prepared. Inquest reports qua death of the deceased Krishan Chand and Sodha Devi were prepared and the statements of the witnesses were recorded. Police constituted raiding parties for apprehending the accused and on 16.07.2014, SHO, Police Station Chopal informed that a person, having similar description, as disclosed by the complainant, has been apprehended by *gujjars,* Suffrdin and Kasamdin at Tharoch forest Chajpur, alongwith his family members. Consequently, S.I. Kuldeep went to Tharoch and took over the custody of that person (accused). The accused was brought to Police Station, Jubbal, and identified by the complainant and his father-in-law. The clothes worn by the accused were taken into possession and sealed in a parcel. Track suit of the accused and other incriminating articles were sent to FSL, Junga. *Aks sajra* of the place of occurrence was obtained from the concerned Patwari. CIPA certificate was prepared and reports received from FSL, Junga, were tagged with the FIR. On 22.07.2015, after receipt of FSL reports on DNA profiling, supplementary *challan* was presented and on 08.10.2014, on completion of investigation, final report and supplementary report alongwith relevant documents were presented before the concerned Judicial Magistrate, who committed the case to the learned Trial Court, vide its order dated 13.10.2014.

3. The prosecution, in order to prove its case, examined eighteen witnesses. On the closure of prosecution evidence, the statement of the accused was recorded under Section 313 of the Code of Criminal Procedure, wherein he pleaded not guilty and claimed trial. However, in defence, the accused did not examine any witness.

4. The learned trial Court vide its judgment dated 02.05.2016, convicted the accused for the commission of the offence punishable under Section 302 IPC and sentenced him to undergo rigorous imprisonment for life and also to pay fine of Rs. 2,00,000/- (two lacs). In default of payment of fine, he was further ordered to undergo simple imprisonment for five years, in addition to life imprisonment. The fine amount, if realized, was ordered to be paid to the wife of the deceased as compensation.

5. We have heard Mr. Ravi Tanta, Advocate, learned counsel for the appellant/accused and Mr. J.S. Guleria, learned Deputy Advocate General, for the respondent/State.

6. Mr. Ravi Tanta, learned counsel for the appellant has argued that in the case in hand the star prosecution witness is Smt. Nisha (complainant) and her version is not

reliable as there is variance what she stated in the Court and her statement recorded under Section 154 Cr.P.C. He has further argued that the complainant gave different versions with regard to the room where the electrical bulb was to be changed by deceased Krishan Chand. He has argued that the true genesis of the alleged crime has not been brought before the Court and the story of the prosecution is full of contradictions, thus not believable. He has argued that the children and wife of the accused, who were present at the time of the incidence, were not associated as witnesses by the prosecution, so the presumption under Section 114(g) of The Indian Evidence Act, 1872, goes against the prosecution. As far as the death of Sodha Devi is concerned, he has argued that the injuries on her person suggest that it was a case of simple hurt and in all probabilities the accused is required to be acquitted, as the prosecution has failed to prove the guilt of the accused beyond the shadow of reasonable doubt. He has argued that the judgment of the learned Trial Court be set aside and the accused be acquitted. Conversely, Mr. J.S. Guleria, learned Assistant Advocate General, has argued that there were three cut injuries on the throat of deceased Krishan Chand, which were caused by an Axe by the accused. He has further argued that even the injuries on the person of deceased Sodha Devi were sufficient to cause her death in all probabilities and as a result of which she died. He has argued that there is direct evidence against the accused and the prosecution has proved the guilt of the accused beyond the shadow of reasonable doubt. Lastly, he has argued that the accused has been convicted and sentenced after properly appreciating the facts and law, so the judgment of the learned Trial Court needs no interference and the appeal be dismissed.

7. In rebuttal, Mr. Tanta has argued that in the morning of the alleged day of occurrence the accused alongwith his wife, four children, i.e., two grown up daughters, two minors, and deceased Krishan Chand reached from Nepal and the accused had no intention to kill the deceased in the evening. He has further argued that the true geneses of the alleged occurrence have not been brought before the Court, so a presumption will go against the prosecution and in favour of the accused. Thus, the accused is required to be acquitted.

8. The prosecution case has two limbs, **i.e., direct evidence of PW-13, Smt. Nisha, and circumstantial evidence**. At the outset, it would be apt to highlight the law relating to circumstantial evidence, as the major part of the edifice of the prosecution story rests upon circumstantial evidence. The Hon'ble Apex Court, as also this Court, in a catena of judgments culled out the rudimentary principles to deal with cases of circumstantial evidence. In nitty-gritty, the law with respect to circumstantial evidence is that each and every circumstance is required to be proved by the prosecution and the circumstances, as a whole, have to make out a chain in a manner that the only conclusion is that the accused has committed the offence, as alleged by the prosecution. The law on the point of circumstantial evidence is considered and settled by the Hon'ble Courts in the following judgments:

1. ***State of H.P. vs. Sunil Kumar, Criminal Appeal No. 326 of 2011, decided on 15.06.2017;***
2. ***Sharad Birdhichand Sarda vs. State of Maharashtra, AIR 1984 Supreme Court 1622;***
3. **Padala Veera Reddy vs.** ***State of Andhra Pradesh and others, AIR 1990 Supreme Court 79;***
4. ***State of Uttar Pradesh vs. Ram Balak & another, (2008) 15 Supreme Court Cases 551, &***
5. ***Rajdev aliasRaju & another vs. Stae of H.P., Criminal Appeal No. 288 of 2015.***

9. In ***State of H.P. vs. Sunil Kumar, Criminal Appeal No. 326 of 2011, decided on 15.06.2017,*** this Court has held as under:

> ***"13. It is more than settled that in case of circumstantial evidence, the circumstances from which interference as to the guilt of the accused is drawn, have to be proved beyond reasonable doubt and there be a complete chain of evidence consistent only that the hypothesis of guilt of the accused and totally inconsistent with his innocence and in such a case if the evidence relied upon is capable of two inferences then one which is in favour of the accused must be accepted. It is clearly settled that when a case rests on circumstantial evidence such evidence must satisfy three tests:***
>
> a) ***The circumstance from which an inference of guilt is sought to be drawn must cogently and firmly established.***
>
> b) ***Those circumstances should be of a definite tendency un-erringly pointing out towards the guilt of the accused.***
>
> ***iii) The circumstances taken cumulatively, should form a complete chain so that to come to the conclusion that the crime was committed by the accused.***
>
> ***14. Equally well settled is the proposition that where the entire prosecution case hinges on circumstantial evidence the Court should adopt cautious approach for basing the conviction on circumstantial evidence and unless the prosecution evidence point irresistible to the guilt of the accused, it would not be sound and safe to base the conviction of accused person.***
>
> ***15. In case of circumstantial evidence, each circumstances must be proved beyond reasonable doubt by independent evidence and the circumstances so proved, must form a complete chain without giving room to any other hypothesis and should be consistent that only the guilt of the accused (See: Lakhbir Singh vs. State of Punjab, 1994 Suppl. (1) SCC 173)."***

10. The Hon'ble Supreme Court in ***Sharad Birdhichand Sarda vs. State of Maharashtra, AIR 1984 Supreme Court 1622,*** has held as under:

> ***"48. Before discussing the evidence of the witnesses we might mention a few preliminary remarks against the background of which the oral statements are to be considered. All persons to whom the oral statements are said to have been made by Manju when she visited Beed for the last time, are close relatives and friends of the deceased. In view of the close relationship and affection any person in the position of the witness would naturally have a tendency to exaggerate or add facts which may not have been stated to them at all. Not that is done consciously but even unconsciously the love and affection for the deceased would create a psychological hatred against the supposed murderer and, therefore, the court has to examine such evidence with very great care and caution. Even if the witnesses were speaking a part of the truth or perhaps the whole of it, they would be guided by a spirit of revenge or nemesis against the accused person and in this process certain facts which may not or could not have been stated may***

be imagined to have been stated unconsciously by the witnesses in order to see that the offender is punished. This is human psychology and no one can help it.

... ...

150. It is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this: where various links in a chain are in themselves complete than a false plea or a false defence may be called into aid only to lend assurance to the Court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a Court.

... ...

158. It will be seen that this Court while taking into account the absence of explanation or a false explanation did hold that it will amount to be an additional link to complete the chain but these observations must be read in the light of what this Court said earlier, viz., before a false explanation can be used as additional link, the following essential conditions must be satisfied:

> ***(1) various links in the chain of evidence led by the prosecution have been satisfactorily proved.***
>
> ***(2) the said circumstance point to the guilt of the accused with reasonable definiteness, and***
>
> ***(3) the circumstance is in proximity to the time and situation.***

159. If these conditions are fulfilled only then a Court can use a false explanation or a false defence as an additional link to lend an assurance to the Court and not otherwise. On the facts and circumstances of the present case, this does not appear to be such a case. This aspect of the matter was examined in **Shankarlal's case (AIR 1981 SC 765) (supra) where this Court observed thus:**

> ***"Besides, falsity of defence cannot take the place of proof of facts which the prosecution has to establish in order to succeed. A false plea can at best be considered as an additional circumstance, if other circumstances point unfailingly to the guilt of the accused."***

160. This Court, therefore, has in no way departed from the five conditions laid down in Hanumant's case (supra). Unfortunately, however, the High Court also seems to have misconstrued this decision and used the so-called false defence put up by the appellant as one of the additional circumstances connected with the chain. There is a vital difference between an incomplete chain of circumstances and a circumstance which, after the chain is complete, is added to it merely to reinforce the conclusion of the court. Where the prosecution is unable to prove any of the essential principles laid down in

Hanumant's case, the High Court cannot supply the weakness or the lacuna by taking aid of or recourse to a false defence or a false plea. We are, therefore, unable to accept the argument of the Additional Solicitor-General."

11. The Hon'ble Supreme Court in ***Padala Veera Reddy vs. State of Andhra Pradesh and others, AIR 1990 Supreme Court 79,*** has held as under:

> ***"12. There are certain salient and material features in the present case which are not controverted; they being that A-1 to A-3 and the deceased lived under a common roof, that the deceased had instituted a civil suit against her father, PW-8 and brother PW-9 claiming exclusive possession of the disputed land, that the deceased was found dead on the morning of 7.9.85 and that there were certain visible injuries such as abrasions, nail marks and contusions on the part of the nose, upper lip, chin and neck etc. as noted by the Medical Officers (PWs 5 and 6) in the post-mortem report Ex. P. 9. The appellate Court on the strength of the opinion given by the Medical Officers (PWs 5 and 6) has agreed with the view of the Trial Court that the death of the deceased was of homicidal one and not suicidal and held "therefore suicidal is ruled out." We also very carefully went through the evidence of the Medical Officers and found that the prosecution has convincingly established that the death of the deceased was due to forcible administration of poison and smothering. Hence we are in full agreement with the concurrent findings of the Courts below that it is a clear case of murder.***
>
> ***... ... ...***
>
> ***15. While considering the above circumstances, the appellate Court has expressed its view that the explanation given by the accused that they were at the marriage house of PW-1 throughout the night is nothing but a false explanation and that the culprits who ever they might have been should have administered the poison to the victim and thereby caused her death and that there is very strong suspicion against the accused persons but the prosecution cannot be said to have established the guilt of the accused decisively since the suspicion cannot take the place of legal proof. The relevant portion of the final conclusion of the appellate Court reads thus:***
>
> ***"There is no evidence whatsoever either from the neighbours or from others to show that the accused at any time ill-treated the deceased or treated her cruelly. In these circumstances, it is not possible to hold that the prosecution has established the guilt on the part of A. 1 to A. 3. Thus, there is no conclusive evidence that the accused committed the offence of murder. It is an unfortunate case where cold-blooded murder has been committed and it is difficult to believe that no inmate of the house had any hand in the offence of murder. But that will be only a suspicion which cannot take the place of proof."***
>
> ***16. We, in evaluating the circumstantial evidence available on record on different aspects of the case, shall at the foremost watchfully examine whether the accused 1 to 3 had developed bad-blood against the deceased to the extent of silencing her for ever, that too in a very inhuman and horrendous manner. The appellant wants***

us to infer that the deceased should have been subjected to all kinds of pressures and harassments and compelled to institute the suit against her father and brother claiming exclusive right over the landed property in order to grab the said property, that this conduct of the accused should have been resented by the deceased and that on that score the accused should have decided to put an end to her life. In our view, this submission has no merit because there is no acceptable evidence showing that there was any quarrel in the family and that the deceased was ill-treated either by her husband or in-laws. The appellate Court while dealing with this aspect of the case has observed that there is no evidence that the accused ill-treated the deceased, which observation we have extracted above. Hence, we hold that there is no sufficient material to warrant a conclusion that the accused had any motive to snatch away the life threat of the deceased. There is no denying the fact that the deceased did not accompany her husband and in-laws to attend the marriage celebrated in the house of PW-1 and remained in the scene house and that she has been done away with on the intervening night of 6th/7th September, 1985. From this circumstance, the Court will not be justified in drawing any conclusion that the deceased was not leading a happy marital life. As observed by the appellate Court, the explanation offered by accused 1 to 3 that they remained in the house of PW 1 throughout the night is too big a pill to be swallowed. But at the same time, in our view, this unacceptable explanation would not lead to any irrestible inference that the accused alone should have committed this murder and have come forward with this false explanation. We have no hesitation in coming to the conclusion that it is a case of murder but not a suicide as we have pointed out supra. The placing of the tin container with the inscription 'Democran, by the side of the dead body is nothing but a planted one so as to give a misleading impression that the deceased had consumed poison and committed suicide. But there is no evidence as to who had placed the tin container by the side of the dead body. Even if we hold that the perpetrators of the crime whoever might have been had placed the tin, that in the absence of any satisfactory evidence against the accused would not lead to any inference that these accused or any of them should have done it. It is the admitted case that the first accused handed over three letters Ex. P. 6 to P. 8 alleged to have been written by the deceased to the Investigating Officer. The sum and substance of these letters are to the effect that the deceased had some grouse against her parents and that the accused were not responsible for her death. The explanation given by accused No. 1 in this written statement is that by about the time of the arrival of the police, one Sathi Prasad Reddy handed over these letters to him saying that he (Reddy) found them near the place where the dead body was laid and that he (A-1) in turn handed over them to the police. PWs 8 and 9 have deposed that these letters are not under the hand writing of the deceased. But the prosecution has not taken any effort to send the letters to any hand-writing export for comparison with the admitted writings of the deceased with the writings found in Ex. P. 6 to P. 8.

Under these circumstances, no adverse inference can be drawn against accused No. 1 on his conduct in handing over these letters.

17. No doubt, this murder is diabolical in conception and cruel in execution but the real and pivotal issue is whether the totality of the circumstances unerringly establish that all the accused or any of them are the real culprits. The circumstances indicated by the learned Counsel undoubtedly create a suspicion against the accused. But would these circumstances be sufficient to hold that the respondents 2 to 4 (accused 1 to 3) had committed this heinous crime. In our view, they are not.

... ...

22. We are of the firm view that the circumstances appearing in this case when examined in the light of the above principle enunciated by this Court do not lead to any decisive conclusion that either all these accused or any of them committed the murder of the deceased, Vijaya punishable under Section 302 read with Section 34 of I.P.C. or the offence of cruelty within the mischief of Section 498-A I.P.C. Hence, viewed from any angle, the judgment of the appellate Court does not call for interference."

12. The Hon'ble Supreme Court in ***State of Uttar Pradesh vs. Ram Balak & another, (2008) 15 Supreme Court Cases 551,*** has held as under:

"12. So far as the last seen aspect is concerned it is necessary to take note of two decisions of this Court. In State of U.P. v. Satish, it was noted as follows:

> ***"22. The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased and the accused were seen together by witnesses PWs. 3 and 5, in addition to the evidence of PW-2."***

13. In Ramreddy Rajesh Khanna Reddy v. State of A.P., it was noted as follows:

> ***"27. The last-seen theory, furthermore, comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused***

> ***being the author of the crime becomes impossible. Even in such a case the courts should look for some corroboration."***
>
> ***(See also Bodhraj v. State of J&K, (2002) 8 SCC 45)***

14. A similar view was also taken in Jaswant Gir v. State of Punjab, 2005 12 SCC 438. Factual position in the present case is almost similar, so far as time gap is concerned.

15. Out of the circumstances highlighted above really none is of any significance. Learned Counsel for the appellant-State highlighted that the extra judicial confession itself was sufficient to record the conviction. On a reading of the evidence of CW-1 it is noticed that accused Ram Balak did not a say a word about his own involvement. On the contrary he said that he did not do anything and made some statements about the alleged act of co-accused. Additionally, in his examination under Section 313 of Code, no question was put to him regarding his so called extra judicial confession. To add to the vulnerability, his statement is to the effect that after about 11 days of the incidence the extra judicial confession was made. Strangely he stated that he told the police after three days of the incidence about the extra judicial confession. It is inconceivable that a person would tell the police after three days of the incidence about the purported extra judicial confession which according to the witness himself was made after eleven days. Learned Counsel for the State submitted that there may be some confusion. But it is seen that not at one place, but at different places this has been repeated by the witness.

16. Learned Counsel for the appellant also refers to a judgment of this Court in Abdul Razak Murtaza Dafadar v. State of Maharashtra, more particularly para 11 that the Dog Squad had proved the guilt of the accused persons. In this context it is relevant to take note of what has been stated in para 11 which reads as follows: (SCC pp. 239-40)

> ***"11. It was lastly urged on behalf of the appellant that the lower courts ought not to have relied upon the evidence of dog tracking and such evidence was not admissible in order to prove the guilt of the appellant. The evidence of tracker dogs has been much discussed. In Canada and in Scotland it has been admitted. But in the United States there are conflicting decisions:***
>
> > ***'There have been considerable uncertainty in the minds of the Courts as to the reliability of dogs in identifying criminals and much conflict of opinion on the question of the admissibility of their actions in evidence. A survey of the cases however, reveals that most Courts in which the question of the admissibility of evidence of-trailing by blood-hounds has been presented take the position that upon a proper foundation being laid by proof that the dogs were qualified to trail human beings, and that the circumstances surrounding the trailer were such as to make it probable that the person trailed was the***

> ***guilty party, such evidence is admissible and may be permitted to go to the jury for what it is worth as one of the circumstances which may tend to connect the defendant with the Crime.' (para 378, Am. Juris. 2nd edn. Vol. 29, p. 429.)***

There are three objections which are usually advanced against the reception of such evidence. First, since it is manifest that the dog cannot go into the box and give his evidence on oath, and consequently submit himself to cross- examination, the dog s human companion must go into the box and report the dog s evidence, and this is clearly hearsay. Secondly, there is a feeling that in criminal cases the life and liberty of a human being should not be dependent on canine inferences. And, thirdly, it is suggested that even if such evidence is strictly admissible under the rules of evidence it should be excluded because it is likely to have a dramatic impact on the jury out of proportion to its value. In R. v. Montgomery,1866 NI 160 a police constable observed men stealing wire by the side of a railway line. They ran away when he approached them. Shortly afterwards the police got them on a nearby road. About an hour and half later the police tracker dog was taken to the base of the telegraph pole and when he had made a few preliminary sniffs he set off and tracked continuously until he stopped in evident perplexity at the spot where the accused had been put into the police car. At the trial it appeared that other evidence against the accused that they had been stealing the wire was inconclusive and that the evidence of the behaviour of the tracker dog was crucial to sustain the conviction. In these circumstances the Court of Criminal Appeal ruled that the evidence of the constable who handled the dog on its tracking and reported the dog s reactions was properly admitted. The Court did not regard its evidence as a species of hearsay but instead the dog was described as "a tracking instrument and the handler was regarded as reporting the movements of the instrument, in the same way that a constable in traffic case might have reported on the behaviour of his speedometer. It was argued in that case that the tracker dog s evidence could be likened to the type of evidence accepted from scientific experts describing chemical reactions, blood tests and the actions of bacilli. The comparison does not, however, appear to be sound because the behaviour of chemicals, blood corpuscles and bacilli contains no element of conscious volition or deliberate choice. But Dogs are intelligent animals with many thought processes similar to the thought processes of human beings and wherever you have thought processes there is always the risk of

error, deception and even self-deception. For these reasons we are of the opinion that in the present state of scientific knowledge evidence of dog tracking, even if admissible, is not ordinarily of much weight.

It is submitted by learned Counsel for the appellant that in the said case this Court had upheld the conviction. Though in the said case the conviction was upheld, but that was done after excluding the evidence of Dog Squad. This Court found that the rest of the prosecution evidence proved the charges for which the appellants therein had been convicted."

13. After touching the different facets relating to the law laid down by Hon'ble Courts on the subject of circumstantial evidence, the testimonies of the prosecution witnesses need to be examined on the touchstone of veracity and credibility. Besides this, the testimony of PW-13, Smt. Nisha, which is in the shape of direct evidence, also needs meticulous examination so as to reach on a conclusion qua guilt or innocence of the accused.

14. At the very outset, it would be apt to examine the deposition made by PW-17, Dr. Vivek Sahajpal, Assistant Director (DNA), SFSL, Junga, who opined in his report qua DNA profiling as under:

"1. The DNA profile obtained from Exhibit-1 (Axe) matches completely with the DNA profile obtained from Exhibit-9 (blood sample, Krishan Chand).

2. The partial DNA profile obtained from Exhibit-3 (blood scrapped from the spot) is consistent with the DNA profile obtained from Exhibit-16 (blood sample, Shoda Devi).

3. Identical DNA profile was obtained from Exhibit-11a (pants, Krishan Chand) and Exhibit-11b (T-shirt, Krishan Chand) and this DNA profile matches completely with the DNA profile obtained from Exhibit-9 (blood sample, Krishan Chand).

4. Identical DNA profile was obtained from Exhibit-2 (cloth piece/dhatu), Exhibit-18a (jacket, Shoda Devi) and Exhibit-18d (vest, Shoda Devi) and this DNA profile matches completely with the DNA profile obtained from Exhibit-16 (blood sample, Shoda Devi).

5. The partial and mixed DNA profile obtained from Exhibit-1-1a (upper, Amar Bahadur is not consistent with the DNA profile obtained from Exhibit-9 (blood sample Krishan Chand) and Exhibit-16 (blood sample, Shoda Devi).

6. Exhibit-1-1b (lower, Amar Bahadur), yielded highly degraded DNA that did not show amplification with Powerplex 21 PCR Amplification kit, hence no DNA profile could be generated."

15. Now, the statement of Dr. Ankush Sharma, Medical Officer, Civil Hospital Jubbal, who appeared in the witness box as PW-4, is required to be scrutinized. As per this witness, he alongwith Dr. Sunish Chauhan and Dr. Gagan Sharma, conducted the postmortem examination of the deceased persons and as per postmortem report No. 9 of 2014, dated 11.07.2014, deceased Krishan Chand died due to ante-mortem injuries and had

sustained incised wound 3rd on chin of half inch x half inch. He also sustained incised would of 5 inch x 1 inch and 1 inch in depth, incised 5 c.m. external juglar vein. He further sustained incised wound 2.5 inch x 1 inch, and 1 inch in depth incised and external juglar vein and 5 c.m. muscle. The scalp, skull and vertebrae normal membranes-brain congested walls, ribs, cartilages, pleurae, larynx, trachea, lungs, heart, large vessels normal. The abdomen part, i.e. walls, peritoneum, mouth, pharynx, stomach, intestines, liver, spleen, kidneys, bladder and generation organs normal. He deposed that as per the report of chemical analysis of viscera blood, urine received from FSL, Junga, No.-1408-ASFSL Chem(684)/14, dated 08.08.2014, no poison/alcohol was detected in viscera, blood and urine. In their final opinion, the death has occurred due to massive hemorrhage from wounds sides leading to cerebral anoxia and cardio-pulmonary arrest. This witness has further deposed that as per postmortem report No. 10 of 2014, dated 11.07.2014, deceased Sodha Devi died due to ante-mortem injuries and she sustained depressed fracture tempro-pariental region of size 3 inch x 2 inch with ENT bleeding positive. Bruise over the scalp left size 3 inch x 2 inch. Membranes-brain congested. Walls, ribs, pleurae, larynx, trachea normal. Lungs are blackish in colour. Heart grossly normal. Lungs. Abdomen walls peritoneum mouth normal. Stomach contains digested food material, intestines contain semi digested food material, liver, spleen, kidneys, bladder and generation organs grossly normal. He deposed that as per the report of chemical analysis of viscera blood, urine received from FSL, Junga, No.-1408-ASFSL Chem(684)/14, dated 08.08.2014, no poison/alcohol was detected in viscera, blood and urine. In their final opinion, the death has occurred due to cardio-pulmonary arrest. He issued postmortem reports, Ext. PW-4/C and PW-4/D, which bear his signatures and that of Dr. Gagan and Dr. Sunish. This witness, in his cross-examination, denied that the injuries sustained by deceased Krishan Chand are possible by way of fall on sharp object from a distant height and injuries sustained by deceased Sodha Devi are possible by way of fall on hard object. He deposed that postmortem examination was conducted during 6 to 10 hours of the death.

16. PW-1, Lahori Singh, Patwari, visited the spot and prepared *Aks sajra,* Ex. PW-1/A. This witness, in his cross-examination, deposed that spot was identified to him by the police. PW-2, Shri Sufferdin, Shepherd, deposed that on 12.07.2014, when he was in forest, he came to know that a *Nepali* (*Gorkha*)killed a person and his mother during the night of 10.07.2014. On 12.07.2014 he was informed by the police that that *Gorkha* alongwith his family members fled and he is wearing black clothes. On 15.07.2014, at about 09:00 a.m., when he alongwith his brother Kasimdin, Talib Hussain were present outside their *dera,* they noticed the accused alongwith his wife and five children coming towards the *dera.* They inquired about his whereabouts and told him that a *Nepali* after committing murder at Chajpur had fled. He has further deposed that the accused confessed his guilt. They caught hold of the accused and took him to the *dera.* As per the version of this witness, the accused tried to run away. Subsequently, they informed the police and the police arrived there at about 01:00-01:30 p.m. The custody of the accused was handed over to the police. This witness, in his cross-examination, deposed that on 12.07.2014, at about 02:30 p.m., police visited his *dera.* He came to know about the occurrence from the local people of the area. He has further deposed that his statement was recorded by the police after 10-15 days. The police did not show photograph of the accused to him. Sant Ram, police official, visited his *dera* on 12.07.2014 and gave his number to him. As per the version of this witness, he called the police.

17. PW-2, Sufferdin, has deposed that on 12.07.2014 he was informed by the police that a *Nepali* after committing double murder fled away from the spot, who is wearing black clothes and having five children. He further deposed that on 15.07.2014, at about 9.00 a.m., when he alongwith his brothers was standing outside the *dera*, they noticed a

person alongwith his wife and five children coming towards the *dera*. When they inquired from his about his whereabouts, the person told them about the murder committed by him and confessed his guilt. Thereafter, they caught hold of him, took him to the *dera* and informed the police. At about 1.00-1.30 p.m., the custody of the accused was handed over to the police. This witness, in his cross-examination has deposed that the police had not conducted identification parade of the accused in his presence.

18. PW-3, HHC Rajesh Kumar, deposed that on 10.07.2014, at about 09:15 p.m., Shri Pyare Ram Sharma, the then BDC Member, informed the police that murder has been committed in the house of one Shri Mishru Ram, Village Chajpur. As a sequel thereof, *Rapat* No. 15 *roznamcha* dated 10.07.2014, was entered in Daily Diary Register at Police Post Saraswati Nagar. Subsequently, he alongwith ASI Ranjeet, HC Gopal, HHC Surinder, Constable Vinod rushed to the spot. When they reached the spot, Pyare Lal Sharma, Mishru Ram and Nisha Devi alongwith others were on the spot. The dead body of deceased Krishan Chand was lying in the veranda in front of a room next to the residential house of Mishru. The oozed blood of the deceased was found on the floor and there was a cut injury mark on the neck of the deceased. Thereafter, SI/SHO Viri Singh came on the spot and inspected the corpse. Statement of the complainant, Smt. Nisha Devi was recorded under Section 154 Cr.P.C. and he took the same to Police Station Jubbal, whereupon FIR No. 27 of 2014 was registered. He returned to the spot with the case FIR, which he handed over to SI/SHO Viri Singh. This witness, in his cross-examination, deposed that on 13.08.2014, his statement was recorded. He has further deposed that he returned to the spot on 11.07.2014, during early hours of morning. He feigned his ignorance whether the departure report was entered at Police Station Jubbal qua carrying the case FIR from Police Station Jubbal to the spot. He has stated that in his presence, the statement of the complainant was recorded and she gave proper identification of the accused, who perpetrated the crime.

19. PW-5, HHG Bhim Singh, deposed that on 14.07.2014, he being MHC, Police Station, Jubbal, collected the viscera, blood and urine samples alongwith clothes of the deceased persons from Civil Hospital, Jubbal, and handed over the same to MHC, Police Station, Jubbal. This witness, in his cross-examination, denied that he did not collect the viscera, blood and urine samples and clothes.

20. PW-6, Sh. Mishru, husband of deceased Sodha Devi, deposed that he has two houses one at Chajpur and another at Chikli. His son (deceased Krishan Chand) alongwith one Roshan Lal went to Nepal for engaging labour. He has further deposed that on 10.07.2010, they returned home with a *Nepali Gorkha* alongwith his wife, two daughters and three small children. As per the version of this witness, a separate room was given to them. The *Nepali* went to the forest to collect fuel wood and he was having an Axe. As per this witness, at the time of the occurrence, he was at Chikli and when he received a telephonic call from Pyare Lal that a *Nepali* citizen had murdered his son and also inflicted a blow of Axe on the head of his wife, he rushed to village Chajpur. When he reached at the spot, he saw his wife lying unconscious and the blood was oozing from her mouth. Thereafter, he saw his son, having sustained two deep cut wounds on his neck. He was dead. His wife was rushed to the hospital. The police conducted the inquiry from the wife of deceased Krishan Chand and recorded her statement. The rough sketch of the axe was prepared and the axe was sealed after using six seal impressions 'H' and taken into possession vide seizure memo, Ext. PW-6/B. The blood samples of deceased Krishan Chand, which was lying on the wooden plank and floor, were collected and taken into possession vide memo, Ext. PW-6/D. The head wear gown of his wife was sealed and taken into possession vide memo, Ext. PW-6/F. A mobile alongwith battery and sim was taken into possession vide memo, Ext. PW-6/G. All these memos bear his signatures, encircled in circle 'A'. This witness, in his cross-

examination, denied having seen the accused prior to 10.07.2014. As per this witness, the statement of the wife of the accused and his children were not recorded by the police before him. He denied having any dispute between his son and the accused. He also denied that his son misbehaved with the daughters of the accused on the way to Chajpur from Nepal and attempted to rape the daughter of the accused inside the room given to them. He further denied that the accused inflicted the blows of axe to his wife and son in defence.

21. PW-7, Roshan Lal, has deposed that on 02.07.2014, he alongwith deceased Krishan Chand went to Nepal for bringing the *Gorkha* labour and they reached Nepal on 03.07.2014, at about 1.00 a.m. On 08.07.2014 they returned from Nepal and reached Chajpur on 10.07.2014, at about 6.30-7.00 a.m. Thereafter, he alongwith his labour left to his Village Sambhard. Whereas, deceased Krishan Chand left for Chajpur alongwith the family members of the accused. As per this witness, Shri Raj Kumar, Ward Member, telephonically informed him about the death of deceased Krishan Chand and Sodha Devi. When he reached the spot, he found the dead body of Krishan Chand lying in the veranda, having deep cut injury on his throat with sharp edged weapon. The accused also inflicted blow of axe to deceased Sodha Devi, who died en route IGMC, Shimla. This witness, in his cross-examination, has deposed that his statement was recorded by the Police on 10.07.2014. He further deposed that when he reached the spot, axe was lying there. He deposed that Nisha Devi (wife of deceased Krishan Chand) did not tell him about the cause of occurrence. He denied that he and deceased Krishan Chand misbehaved with the daughters of the accused. He feigned his ignorance that the accused, so as to save his daughter and in defence, inflicted the blows of Axe to the deceased persons.

22. PW-8, Constable Jagdeep Singh, has deposed that on 16.07.2014, he remained associated in the investigation of the case. On the same day, accused produced one track suit before the police and the same had blood stains, which were identified by Nisha Devi, wife of the deceased. The track suit was sealed after using five seals having impression 'X' and was taken into possession vide seizure memo, Ext. PW-6/H, which bears his signatures, encircled in circle 'B'. This witness, in his cross-examination, has deposed that the track suit produced by the accused was not worn by him. He further deposed that in his presence, the statements of the wife and children of the accused were not recorded.

23. PW-9, Dr. Rajesh Kumar, Scientific Officer, FSL, Junga, has deposed that on 16.07.2014, HHC Babu Lal, brought twelve sealed parcels bearing three seals having impression of 'CHJ'. Seals were intact and tallied with specimen seals. On examination, in laboratory he and Dr. V.S. Jamwal, prepared report No. 1408-A SFSL Chem.(684)/14, Ext. PW-9/A, which bears his signatures and that of Dr. V.S. Jamwal, encircled in circle 'A'. This witness, in his cross-examination, has admitted that in case the samples are not properly preserved, the possibility of variation of results cannot be ruled out.

24. PW-10, HC Kartar Singh, has deposed that on 14.07.2014, HHG Bhim Singh deposited 16 sealed parcels, sealed with seals having impression 'CHJ', containing viscera of deceased persons, including organs such as heart, lungs kidney, liver etc. alongwith two *Khakhi* envelop in the name of Director FSL, with him, which were entered at Sl. No. 34 in *malkhana* register. On 16.07.2014, SHO Viri Singh deposited one sealed parcel, sealed with five seals having impression 'X', containing track suit of the accused having blood stains and seal sample, which was entered at Sl. No. 37 in *malkhana* register. The case property, which was deposited in the *malkhana,* vide entry No. 33 and 34, except mobile phone and *pithu* bag, were sent to FSL, Junga, vide RC No. 24/14 through HHC Babu Lal. Copy of road certificate is Ext. PW-10/C. On 19.07.2014, the case property, entered vide entry No. 37/14, dated 16.07.2014, was sent to FSL, Junga, vide RC No. 25/14 with HHC Prem Singh. This

witness, in his cross-examination, has deposed that there is a cutting in entry No. 35 to 39, which has been done by him. However, he has not appended his initial to verify this cutting.

25. PW-11, HHC Prem Singh, has deposed that on 11.07.2014, Constable Rajesh brought *rukka* to the police station, on the basis of which FIR No. 27/14, dated 11.07.2014, was registered. The endorsement qua FIR is Ext. PW-11/C. On the same day, SI/SHO deposited six sealed parcels, sealed with seal impression 'H', containing axe, head gown, blood samples, mobile and *pithu* bag, which were entered at Sl. No. 33/14. On 19.07.2014, MHC Kartar Singh handed over one sealed parcel, containing clothes, sealed with five seals having impression 'X', vide RC No. 25/14, which were deposited by him with FSL Junga on the same day. As per this witness, he issued CIPA certificate, which Ext. PW-11/E.

26. PW-13, Nisha (wife of deceased Krishan Chand), has deposed that on the day of occurrence, she alongwith her mother-in-law (deceased Yashoda Devi) was cooking meal in the kitchen, at about 7.00 p.m., the accused called my husband and asked that the electric bulb is not functioning properly, upon which, her husband went outside and after some time, she heard the cries of children. When she went outside, she saw the accused carrying axe in his hand. Her husband was lying in the veranda on his back on the ground, while her mother-in-law was lying in the veranda at some distance. She deposed that the dead body of her husband was lying beneath the electric bulb in front of the room allotted to the accused, whereas, the dead body of her mother-in-law was lying in the veranda towards kitchen side. When she saw the accused, he threw the axe and ran towards the forest alongwith his family members. Thereafter, she called her neighbor Pyare Lal Sharma, who informed the police and the villagers about the occurrence. The police came to the spot and clicked the photographs. The axe was sealed in a parcel by using six seals having impression 'H' and taken into possession, vide seizure memo, Ext. PW-16/B. A bag was recovered from the room of the accused, from which, the clothes and a mobile phone were found, which were taken into possession vide memo, Ext. PW-6/D. On 16.07.2014, one track suit, black in colour was produced vide identification memo, Ext. PW-6/H, which she identified to be worn by the accused at the time of the occurrence. The track suit was having blood stains. Her mother-in-law was rushed to Civil Hospital, Jubbal, wherefrom she was referred to IGMC, Shimla, and en route Shimla she succumbed to her injuries. This witness, in her cross-examination, has deposed that her husband went to Nepal alongwith Roshan Lal on 02.07.2014 in a bus. They returned back after eight days. She feigned ignorance at which places they stayed during to and fro from the native place to Nepal and back. She has further deposed that no identification parade was conducted in this case. She denied having seen the accused prior to 10.07.2014. She deposed that when she identified the accused, he was not wearing the black colour track suit. She denied that her husband tried to commit rape upon the daughter of the accused.

27. PW-14, Joginder Singh, has deposed that on 10.07.2014, at about 9.30 p.m., he received a telephonic call from Pyare Ram, who informed him that one gorkha had murdered Krishan Chand and also caused grievous hurt to deceased Sodha Devi by inflicting axe blow on her head. The dead body of deceased Krishan Chand was lying on the spot with deep cut injury on his neck. Deceased Sodha Devi was lying towards the kitchen and blood was oozing out from her head. As per this witness, he alongwith his son Kuldeep and Virender shifted Shoda Devi to Civil Hospital Rohru, wherefrom she was referred to IGMC Shima and when they reached Pujarali No. 4, deceased Shoda Devi succumbed to her injuries. This witness, in his cross-examination, denied that deceased Krishan Chand molested the daughters of the accused. As per this witness, daughters of the accused were 13-14 years old. He denied that the accused murdered deceased Krishan Chand in a spur of moment and in order to save the girls from the clutches of the deceased.

28. PW-15, Pyare Ram Sharma, has deposed that on 10.07.2014, around 9.00 p.m., when he was in his house, he heard screams of Nisha Devi. When he reached her house, he saw dead body of deceased Krishan Chand lying in the veranda, whereas Sodha Devi was lying near the kitchen. He was told by Nisha Devi that the incident occurred at the instance of *Gorkha Nepali*, who was brought from Nepal by her husband for being engaged as a labourer. She also told him that the accused assaulted his husband and mother-in-law with an axe. As per this witness, he informed the neighbourers, so also the police about the occurrence. Deceased Sodha Devi was breathing, so she was rushed to Civil Hospital Rohru, wherefrom she was transferred to IGMC, Shimla. The police visited the spot and carried out the investigation. This witness, in his cross-examination, denied that axe was not taken into possession in his presence. He also denied that his signatures on the seizure memos were obtained in the police station. This witness has also denied that deceased Krishan Chand molested the daughter of the accused.

29. PW-18, SHO Viri Singh, has deposed that on 10.07.2014, at about 9.30 p.m., he received information from Police Post, Saraswati Nagar, that a *Gorkha* residing in the house of Mishru Ram, murdered his son and caused grievous hurt to his wife. On such information, an entry was carried out in *rapat rojnamcha*, vide No. 26, dated 10.07.2014. Thereafter, a team consisting of ASI Raj Kumar, HHC Tek Chand, Constable Jagdeep and Constable Attar Singh, left for the spot. On their arrival on the spot, he met Mishru Ram, his daughter-in-law, Pyare Lal and other residents of the village. He went to the spot of occurrence and found the dead body of Krishan Chand, having two sharp deep cut marks on throat. He recorded the statement of Nisha Devi, Ext. PW-13/A, who provided him the description of the accused. The statement of Nisha Devi was sent through Constable Rajesh Kumar alongwith *rukka*, Ext. PW-11/A. The information was given to SDPO, Rohru, who was requested to send the information about the tracing of accused with the aforesaid description. On identification of Nisha Devi, axe, Ext. PW-6/A, was taken into possession vide seizure memo, Ext. PW-6/A, which was sealed by using six seals having impression 'H'. The spot was photographed. The blood samples of deceased Krishan Chand were lifted, which were sealed by using three seals having impression 'H' and taken into possession vide seizure memo, Ext. PW-6/D. The head wear gown of deceased Sodha Devi was also lifted from the spot and sealed by using three seals having impression 'H', vide seizure memo, Ext. PW-6/F. From the room of the accused one bag was recovered and searched, in which, a mobile, make Karbonn, and female clothes were found. The mobile phone was sealed into a separate sealed parcel by using three seals having impression of 'H' and the bag was again put in a parcel, which was sealed with six seals having impression 'H' and was taken into possession vide seizure memo, Ext. PW-6/G. The seal, after its use, was handed over to Pyare Lal. The inquest form of the deceased was filled in on the spot. Site plan was prepared. The statements of the witnesses were recorded. At the time of carrying out the investigation, he was told by Nisha Devi that deceased Sodha Devi succumbed to the injuries nearby Pujarali, en route IGMC Shimla. The inquest report of deceased Shoda Devi was filled in at Civil Hospital, Jubbal. The postmortem examinations of both the dead bodies were conducted at Civil Hospital, Jubbal. On 16.07.2014, SHO, Police Station, Chopal, revealed that a similar person alongwith family members with given description was apprehended by the *Gujjars* in Tharoch/Chajpur forest, upon which, ASI Kuldeep Singh alongwith police team went to Throach/Chajpur, where SHO, Police Station, Chopal, handed over the custody of the accused to him. On the same day, Nisha Devi came to the police station and identified the accused to be the same person, who murdered the deceased persons. The clothes, which the accused was wearing on the day of occurrence, were taken into possession and sealed by using five seals having impression 'X', vide seizure memo, Ext. PW-6/H. He moved an application before Naib Tehsildar for identification of the place of occurrence. The concerned *Patwari* prepared *Aks Sajra*, Ext. PW-1/A, before him on the

spot. This witness, in his cross-examination, deposed that he had not recorded the statements of wife and daughters of the accused. He further deposed that electric bulb of veranda was not in working order. As per this witness, family members of the accused did not corroborate the story of replacement of electric bulb. He deposed that the motive in the alleged occurrence, as revealed to him during investigation that the deceased was under the influence of liquor and an altercation took place between him and the accused, owing to which, the accused, who was carrying an axe, assaulted the deceased persons. He admitted that he did not record anywhere that the deceased was consuming liquor. He also admitted that there was no deep cut injury on the person of deceased Sodha Devi.

30. Besides aforesaid witnesses, the prosecution has also examined PW-12, HHC Babu Lal and PW-16, Inspector Mathura Dass, however, they are formal witnesses.

31. After discussing the prosecution evidence in entirety, as the case of the prosecution mainly rests on the deposition of PW-13 and circumstantial evidence, at the cost of repetition, the relevant excerpts of the deposition of PW-13, Smt. Nisha, wife of deceased Krishan Chand, who was present in the house at the time of occurrence, worth thread bare discussion. She has deposed that her husband (deceased Krishan Chand) alongwith one Roshan Lal had gone to Nepal for bringing *Gorkha* labourers and on 10.07.2014, around 07:00 a.m., he returned alongwith Amar Bahadur (accused) and his family members. She has further deposed that accused was with his wife, two elder daughters, three younger children, including a son and two daughters. The accused was given a room and he cut the wood with an axe. As per the deposition of this witness, her father-in-law, Sh. Mishru Lal (PW-6), at about 07:00 p.m., went to Village Mitli. At about 07:30 p.m. when she alongwith her husband (deceased Krishan Chand) and mother-in-law (deceased Sodha Devi) was cooking meal in the kitchen accused called her husband and asked that the electric bulb is not working properly. Her husband went outside and subsequently she heard cries of children, so her mother-in-law also went outside. She heard the clamor of someone calling and when she went outside she saw the accused carrying axe in his hand and her husband was lying in the *verandha.* She has further deposed that she also found her mother-in-law lying in the *verandha* at some distance. The accused threw the axe and fled away towards the forest alongwith his family members. As per the version of this witness, there were two deep cut injuries on the person of her husband wherefrom blood was oozing, so she laid a cloth over him. Her mother-in-law also sustained injuries on her head and she was lying unconscious. She tried to contact her father, but she could not contact out of fear. She called Shri Pyare Ram Sharma, their neighbour, who informed the police and villagers. She has further deposed that the accused murdered her husband. This witness fully corroborated the investigation part of the prosecution case. She, in her cross-examination, has deposed that the accused did not behave badly with her husband and father-in-law. As per this witness, the occurrence took place at abut 07:30 p.m. and it was not dark outside. The room of the accused was lit and the electric bulb of *verandha* was not working. The accused and his wife were obeying the orders. She has further deposed that she disclosed to the police that the accused called deceased Krishan Chand by complaining that the electric bulb is not working. She heard the cries of the children. When she saw the axe and its handle, blood marks were present thereon. This witness denied that the children of the accused cried for help. As per the version of this witness the children of the accused cried on seeing the murder of her husband. When the occurrence took place she was inside the kitchen.

32. After meticulous examination of the testimony of PW-13, Smt. Nisha, it can be said that her version is not marred by discrepancies and contradictions. However, her

version fully supports the circumstantial evidence, which has emanated after thread bare scrutiny of the testimonies of other prosecution witnesses.

33. Mr. Ravi Tanta, learned counsel for the accused highlighted some discrepancies, which, according to him, go to the root of the case and renders the prosecution story doubtful. First discrepancy, as per Mr. Tanta, is with respect to the fact that the Investigating Officer did not notice that what clothes the daughters of the accused were wearing. As per the Investigating Officer family members of the accused did not corroborate the story of replacement of the electric bulb and the motive behind the crime was also altercation. At the same point of time no injury with the sharp edged weapon was found on the person of deceased Sodha Devi. There are contradictions with respect to change of the electric bulb in the room or in the *verandha* by the deceased on the asking of the accused. So, as per Mr. Tanta, all these discrepancies are not ignorable and if these are examined with care, they render the prosecution case doubtful and in all probabilities benefit of doubt is required to be given to the accused.

34. In order to deal with the discrepancies, as pointed out by the learned counsel for the accused, it would be apt to first highlight some of the answers given by the accused in his statement under Section 313 Cr.P.C.:

> ***Q.2. It has come in the prosecution evidence led against you that on 10.07.2014 at about 9.20 PM a telephonic information was received from Chajpur one Gorkha labour murdered Krishan Chand local resident with the help of axe and also gave grievous hurt on the person of his mother Sodha Devi. What you have to say about it?***
>
> ***Ans. Yes Sir.***
>
> ***...***
>
> ***Q.4. It has further come in the prosecution evidence against you that complainant informed the police that Krishan Chand, her husband and Roshan Lal neighborer had gone to Nepal to bring Gorkha Labour 10 days before. What you have to say about it?***
>
> ***Ans. Yes Sir.***
>
> ***Q. 5. It has come in the prosecution evidence led against you that you accused had reached the spot at place Chajpur in the morning hours of 10-07-2014 alongwith your family members exclusive of wife, four daughters and one son. What you have to state about it?***
>
> ***Ans. Yes Sir.***
>
> ***Q. 6. It has come in the prosecutuion evidence led against you that deceased Krishan Chand had allotted one residential room to you near by his residential house. What you have to sate about it?***
>
> ***Ans. Yes Sir.***
>
> ***...***
>
> ***Q.17. It has further come in the prosecution evidence against you that the description of you accused was also delimited by the complainant to be 5 feet 2 inches in height, whiteshing black bearing black track suit. What you have to state about it?***

Ans. Yes Sir.

Q.18. It has further come in the prosecution evidence led against you that on the basis of ruka (PW-11/A) which was sent to P.S. Jubal along with C. Rajesh for the registration of the crime. What you have to state about it?

Ans. Yes Sir.

Q.19. It has further come in the prosecution evidence led against you that on the statement of the complainant FIR No. 27/14 (PW-11/B) was registered with P.S. Jubbal. What you have to state about it?

Ans. Yes Sir.

...

Q.28. It has further come in the prosecution evidence led against you that during search of the room in which the accused was residing one bag P-5, clothes P-6, Mobile phone P-2, sim P-3 were also recovered which were taken into possession vide memo (PW-6/G) which were sealed into a parcel with six seals having impression 'H'. What you have to say about it?

Ans. It is correct.

Q.29. It has further come in prosecution evidence led against you that the case property remained deposited with MHC P.S. Jubbal by the I.O. which was entered into malkhana register the abstract of which is (PW-11/D). What have you to say about it?

Ans. It is correct."

It is settled law that answers given by the accused under Section 313 Cr.P.C. can be used for proving his guilt as much as the evidence given by the prosecution witnesses. In the wake of what has been discussed hereinabove, it would be apt to extract Section 313 Cr.P.C., which provides as under:

"313. Power to examine the accused.

(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court-

(a) may at any stage, without previously warning the accused, put such questions to him as the Court considers necessary;

(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case: Provided that in a summons- case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).

(2) No oath shall be administered to the accused when he is examined under sub- section (1).

(3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.

> ***(4)*** ***The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed."***

The bare reading of Section 313 Cr.P.C. makes it abundantly clear that sub Section (4) of Section 313 Cr.P.C. permits that answers given by the accused may be taken into consideration in the inquiry or trial.

35. In view of the statement made by the accused under Section 313 Cr.P.C. and also noticing the relevant provisions of Section 313 Cr.P.C., it can be safely held that the accused himself proved some of the circumstances, viz., on the day of occurrence he reached Chajpur and deceased Krishan Chand allotted him a residential room.

36. PW-13, in her version unequivocally stated that she saw the accused holding an axe in his hand and the deceased persons were lying on the *verandha.* This witness has further categorically deposed that when the accused saw her, he threw the axe and fled away from the spot alongwith his family members. It has also come in the version of PW-13 that at the time of occurrence she was cooking meal in the kitchen and when she heard cries of children she came outside. Therefore, after careful scrutiny of the testimony of PW-13 coupled with other available material, it is more than safe that the version of PW-13 is not marred by discrepancies, contradictions and lacunae, hence the same is reliable and credible.

37. The next limb of the prosecution case is circumstantial evidence, which form a complete chain of circumstances, so as to rule out any possibility, except the guilt of the accused. The learned Trial Court has rightly framed the incriminating circumstances, which emanates from the prosecution story, so the same are extracted hereunder:

> ***"1. The deceased Krishan Chand had received deep cut injuries on his neck and his body was lying in the pools of blood on the spot.***
>
> ***2. The deceased Sodha Devi had received fatal injury on her head and she succumbed to the injury on her way to IGMC, Shimla.***
>
> ***3. On dated 10.7.2014, during morning hours the deceased alongwith his family members had arrived in the house of the accused to be engaged as labour.***
>
> ***4. The accused was seen with an Axe in his hand by Smt. Nisha Devi (PW-13) and accused on seeing Nisha Devi (Pw-13) after throwing Aze (P-8) had managed to flee or absconded from the spot along with his family members wearing black track suit.***
>
> ***5. The accused was apprehended by Sufferdin (PW-2) and Kasamdin on 15.7.2014 alongwith family members at Tharoch forest, Chajpur.***
>
> ***6. The postmortem examination of the deceased Krishan Chand and Sodha Devi with ante-mortem injuries allegedly proved the use of weapon of offence.***
>
> ***7. The accused after commission of offene made extra judicial confession before (PW-2) Sufferdin which prover proves on record that deceased were murdered by the accused.***

8. ***The alleged recovery of bag containing clothes and mobile of the accused person.***

9. ***Medial evidence coupled with DNA profile and other scientific evidence connected the accused with the commission of alleged crime.***

10. ***Opportunity of the accused to commit offence of double murder.***

11. ***conduct of the accused.***

12. ***Motive for the commission of crime."***

38. FSL report, Ex. PW-16/A, clearly proves that deceased Krishan Chand received injuries with axe (Ex. P-1), as the DNA profile obtained from axe matched completely with the DNA profile obtained from Ex. P-9 (blood sample of deceased Krishan Chand). So, the scientific evidence clearly demonstrates that the deceased received injuries with axe Ex. P-1.

39. PW-4, Dr. Ankush Sharma, deposed that deceased Sodha Devi died as a result of ante mortem injuries and he admitted it to be correct that such injuries are possible by way of fall on hard object. It is on record that deceased Sodha sustained depressed fracture tempro-parietal region of size 3 inch x 2 inch with ENT bleeding positive. Bruise over the scalp left size 3 inch x 2 inch. In view of the above it can be held that the deceased Sodha Devi also died owing to injuries sustained by her.

40. Another circumstance which emanates from the record is that on 10.07.2014, during the morning hours the deceased alongwith his family members reached the house of the deceased persons, as he was engaged as labourer. The accused, while answering question No. 5 in his statement recorded under Section 313 Cr.P.C. admitted that on 10.7.2014 he alongwith his family members reached Chajpur. Thus, this circumstance also stands proved against the accused.

41. PW-13, Smt. Nisha (wife of deceased Krishan Chand) clearly deposed that when she came outside the kitchen after hearing the cries of the children, the accused was holding an axe in his hand and his husband (deceased Krishan Chand) and mother-in-law (deceased Sodha Devi) were lying on the *verandha.* When the accused saw her, he threw the axe and fled away alongwith his family members. Nothing has come on record, which could disprove the testimony of PW-13. In fact, the testimony of PW-13 provides valuable aid to the circumstances, which ultimately rule out any possibility of innocence of the accused.

42. It has also come in the prosecution evidence that on 15.07.2014 PW-2 Sufferdin and Kasamdin apprehended the accused alongwith his family members in Tharoch forest, Chajpur. It stands fully established that he was present on the spot on the day of occurrence and it is also amply clear that after the occurrence he fled away from the spot and was apprehended by some *gujjars* in the forest. In the wake of this, the deposition of PW-2, Shri Sufferdin, is very important. He categorically deposed that on 12.07.2014, when he was in forest, it came to his notice that during the night of 10.07.2014 a *Nepali* (*Gorkha*) killed someone and his mother. On 12.07.2014 he was informed by the police that a *Gorkha* alongwith his family members fled and he is wearing black clothes. He has further deposed that on 15.07.2014, at about 09:00 a.m., when he alongwith his brother Kasamdin, Talib Hussain were present outside their *dera,* they noticed the accused alongwith his wife and five children coming towards the *dera.* They inquired about his whereabouts and told him that a *Nepali* after committing murder at Chajpur had fled. He has further deposed that the accused confessed his guilt. They caught hold of the accused and took him to the *dera.* As per the version of this witness, the accused tried to run away. Subsequently, they informed

the police and the police arrived there at about 01:00-01:30 p.m. The custody of the accused was handed over to the police. There is nothing on record which is contrary to the deposition of PW-2. Thus, the prosecution has successfully proved that on 15.07.2014 PW-2 and Kasamdin apprehended the accused alongwith his family members in Tharoch Forest, Chajpur.

43. Now, adverting to postmortem examinations of the deceased persons. PW-4, Dr. Ankush Sharma, deposed that the deceased persons died owing to ante-mortem injuries. The material on record clearly proves that the accused used axe Ex. P-1 to inflict injuries on the deceased persons. Thus, there is nothing on record which could subtly give air to any other possibility.

44. PW-2, Sufferdin, who allegedly apprehended the accused in Tharoch forest, deposed that the accused before him confessed his guilt, so they apprehended him. Though, this confession of the accused before PW-2, in *stricto senu*, cannot be termed as extra judicial concession, but in the absence of any concrete material against the same, it cannot be lightly overlooked. Thus, this circumstance is also against the accused.

45. The accused in his statement made under Section 313 Cr.P.C., while answering Question No. 28 admitted it to be correct that during the search of the room of the accused a bag (Ex. P-5), clothes (Ex. P-6), mobile phone (Ex. P-2), sim (Ex. P-3) were recovered, which were taken into possession vide memo, Ex. PW-6/G. Now, in view of this, the accused himself proved the recovery of bag from his room and the same bag contained clothes and mobile of the accused. Again, this circumstance is also proved against the accused.

46. The DNA report, Ex. PW-16/A, coupled with other medical evidence, clearly demonstrates that the deceased persons died due to the injuries sustained by them. The DNA profile of the deceased Krishan Chand fully matched with the blood sample collected from axe (Ex. P-1). The DNA report as also the medical evidence has been meticulously discussed above and the combined reading of both brings us to hold that medical and scientific evidence clearly establish that the deceased persons died due to the injuries sustained by them and those injuries were inflicted with axe (Ex. P-1). Thus, the prosecution has successfully established this circumstance as well.

47. The accused had enough time and opportunity to commit double murder, as the circumstances which appear clearly point out that the accused gave fatal blows with axe (Ex. P-1) on the neck of deceased Krishan Chand and on the head of deceased Sodha Devi. Now, if sketch, Ex. PW-6/A, of axe (Ex. P-1) is seen alongwith the photographs, Ex. PW-18/B-1 and Ex. PW-18/B-2, it is clear that injuries caused with axe (Ex. P-1) are sufficient to cause death of two persons successively in a short span of time. Therefore, the prosecution has again successfully proved that the accused had ample time and opportunity to commit the murders of the deceased persons.

48. As noticed above, the accused after committing murders fled away from the spot alongwith his family members and he was apprehended by PW-2, Sufferdin and one Kasamdin in Tharoch Forest. Thus, the conduct of the accused is highly suspicious, as if the accused had not committed the crime, he could not have absconded from the spot. Again, this circumstance also goes against the accused and in turn provides a valuable link in the chain of circumstances.

49. It is a settled law that motive behind the commission of the crime provides valuable aid for concluding innocence or guilt of the accused. However, where there is positive corroborative material against the accused, absence of motive does not render the

prosecution case doubtful and on this score only, the accused cannot escape from the clutches of law.

50. The learned defence counsel tried to create a doubt in the mind of this Court by arguing that there is major contradiction qua electric bulb. As per the learned counsel the electric bulb was in the *verandha* or in the room is a question which remains unanswered. He has further argued that as per the prosecution the electric bulb is the very root of the incident. He has argued that as per the prosecution story the accused allegedly called deceased Krishan Chand at 07:30 p.m. on the pretext that the electric bulb is not working properly. It has been argued that the electric bulb has not been taken into possession.

51. The contradictions which the learned counsel for the accused tried to highlight contradictions which appear in the statement of Smt. Nisha recorded under Section 154 Cr.P.C. and in the testimonies of PW-6, Shri Mishru, PW-13, Smt. Nisha (when she deposed in the Court) and PW-18, SHO Viri Singh. We have meticulously examined all these contradictions and these are trivial and minor contradictions. On the basis of these trivial contradictions the case of the prosecution cannot be thrown as a whole. In fact, such types of minor contradictions are bound to occur, as portrayal of an incident cannot be expected to be with mathematical precision and one cannot repeat in verbatim what he has stated earlier. So, it is held that the contradictions as highlighted by the learned counsel for the accused are trivial in nature and they do not affect in any manner the chain of circumstances, which is complete and emanates from the testimonies of the prosecution witnesses. As far as the story qua electric bulb is concerned, no doubt police did not take into possession the said electric bulb, but on this score only whole of the prosecution case cannot be said to be bale of lies and the accused cannot reap any benefit out of the same.

52. It is cardinal principle of criminal justice that conduct of the accused is material in deciding his guilt or innocence. In the case in hand there is ample evidence which clearly establish that before the occurrence the accused was present at the place of occurrence and after the occurrence he fled alongwith his family members. Subsequently, the accused alongwith his family members was apprehended by one Sufferdin (PW-2) from Tharoach Forest. The conduct of the accused, especially after the occurrence, is highly doubtful and the other circumstances, which form a complete chain of events, clearly points out towards the guilt of the accused. PW-13, Smt. Nisha (wife of deceased Krishan Chand) categorically deposed that when she, after hearing the cries of children, came out, she saw the accused holding axe, Ex. P-1, in his hand and the deceased persons were lying on the *verandha.* She has further deposed that on seeing her, the accused alongwith his family members fled away from the spot. The DNA report further provides a link in the chain of circumstances, as it lucidly says that blood on axe (Ex. P-1) completely matched with the blood sample of deceased Krishan Chand. So, as a whole, all the above enumerated circumstances, which emanate from the testimonies of the prosecution witnesses, clearly establish the guilt of the accused.

53. The learned counsel for the accused, in order to fortify his case, has placed reliance on the following judicial pronouncements:

1. Sharad Birdhichand Sarda vs. State of Maharashtra, AIR 1984 Supreme Court 1622;

2. Samadhan Dhudaka Koli vs. State of Maharashtra, AIR 2009 Supreme Court 1059;

3. Musauddin Ahmed vs. State of Assam, AIR 2010 SC 3813;

4. ***Paramjeet Singh Alias Pamma vs. State of Uttarakhand, (2010) 10 Supreme Court Cases 439; &***
5. ***State vs. Mahender Singh Dahiya, 2011 (3) Supreme Court Cases 109.***

54. In ***Sharad Birdhichand Sarda vs. State of Maharashtra, AIR 1984 Supreme Court 1622,*** the Hon'ble Supreme Court has held that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. It has also been held that the rudimentary principle of criminal jurisprudence is that prosecution must lead certain and explicit evidence. In the present case, the prosecution has clearly established the guilt of the accused by leading certain and explicit evidence. So, the judgment (supra) is not applicable to the facts of the present case.

55. In ***Samadhan Dhudaka Koli vs. State of Maharashtra, AIR 2009 Supreme Court 1059,*** the Hon'ble Supreme Court has held that prosecution must be fair to the accused and fairness in investigation as also trial is a human right of an accused. However, in the case in hand, nothing has come on record which remotely provides a clue that the accused has become a victim of unfair investigation. Therefore, the judgment (supra) is not applicable to the facts of the present case.

56. The learned counsel for the accused has placed reliance on another judgment of Hon'ble Supreme Court rendered in ***Musauddin Ahmed vs. State of Assam, AIR 2010 Supreme Court 3813,*** wherein vide para 13 it has been held as under:

> ***"13. It is the duty of the party to lead the best evidence in its possession which could throw light on the issue in controversy and in case such a material evidence is withheld, the court may draw adverse inference under Section 114, Illustration (g) of the Evidence Act notwithstanding that the onus of proof did not lie on such party and it was not called upon to produce the said evidence (vide Gopal Krishnaji Ketkar v. Mohamed Haji Latif & Ors., AIR 1968 SC 1413)."***

The judgment (supra) is also not applicable to the facts of the present as, as it is evident that no material has been withheld and the prosecution has examined all the material witnesses. As such, there is nothing on record to draw adverse inference against the prosecution case.

57. In ***Paramjeet Singh vs. State of Uttarakhand, (2010) 10 Supreme Court Cases 439,*** the Hon'ble Supreme Court vide para 31 has held as under:

> ***"Abscondence of accused***
>
> ***31. In Matru v. State of U.P., this Court repelled the submissions made by the State that as after commission of the offence the accused had been absconding, therefore, the inference can be drawn that he was a guilty person, observing as under:***
>
> > ***"19. The appellant's conduct in absconding was also relied upon. Now, mere abscondence by itself does not necessarily lead to a firm conclusion of guilty mind. Even an innocent man may feel panicky and try to evade arrest when wrongly suspected of a grave crime such is the instinct of self-preservation. The act of absconding is no doubt relevant piece of evidence to be considered along with other evidence but its value would always***

> ***depend on the circumstances of each case. normally the Courts are declined to attach much importance to the act of absconding, treating it as a very small item in the evidence for sustaining conviction. It can scarcely be held as a determining link in completing the chain of circumstantial evidence which must admit of no other reasonable hypothesis than that of the guilt of the accused. In the present case the appellant was with Ram Chandra till the FIR was lodged. If thereafter he felt that he was being wrongly suspected and he tried to keep out of the way we do not think this circumstance can be considered to be necessarily evidence of a guilty mind attempting to evade justice. It is not inconsistent with his innocence."***

The judgment (supra) is not applicable to the facts of the present case, as the facts of the case in hand are entirely different. In the case in hand, the manner the accused alongwith his family members fled away from the spot and the fact that he had been apprehended from Tharoach Forest and other circumstantial evidence clearly point out towards reasonable hypothesis qua the guilt of the accused. So, the judgment (supra) is of no help to the accused.

58. The learned counsel for the accused has placed reliance on another judgment of Hon'ble Supreme Court rendered in ***State vs. Mahender Singh Dahiya, (2011) 3 Supreme Court Cases 109,*** wherein vide para 24 it has been held as under:

> ***"24. We have examined the submissions made by the learned counsel for the parties, particularly keeping in view the gruesome nature of the crime and the complexities presented in the investigation, as also at the trial of this particular case. Undoubtedly, this case demonstrates the actions of a depraved soul. The manner in which the crime has been committed in this case, demonstrates the depths to which the human spirit/soul can sink. But no matter how diabolical the crime, the burden remains on the prosecution to prove the guilt of the accused. Given the tendency of human beings to become emotional and subjective when faced with crimes of depravity, the courts have to be extra cautious not to be swayed by strong sentiments of repulsion and disgust. It is in such cases that the court has to be on its guard and to ensure that the conclusions reached by it are not influenced by emotion, but are based on the evidence produced in the court. Suspicion no matter how strong cannot, and should not be permitted to take the place of proof. Therefore, in such cases, the courts are to ensure a cautious and balanced appraisal of the intrinsic value of the evidence produced in court."***

True it is, no matter how diabolical the crime is, onus always remains on the prosecution to prove the guilt of the accused. Similarly, it is also true that the Courts have to be extra cautious not to be swayed by strong sentiments of repulsion and disgust in matters of gruesome and horrific crimes. In the case in hand, the judgment (supra) is not applicable, as the circumstantial evidence is of such a quality that it forms an unbreakable chain of events encircling the accused. On the other hand, direct evidence of PW-13, Smt. Nisha

(wife of deceased Krishan Chand) is not marred by any infirmity and the same in turn provides valuable aid to the circumstantial evidence and further strengthens it. So, after balanced reappraisal of the intrinsic value of the evidence with the aid of law, it is more than safe to hold the accused guilty. Thus, the judgment (supra) is of no help to the accused.

59. After analyzing the evidence on the parameters of veracity, credibility and genuineness and also keeping in mind the settle principles of law, it is more than safe to hold that the accused committed gruesome crime by eliminating two lives. His demonic act has manifestly been proved with the degree of evidence required to prove the same.

60. In view of what has been discussed hereinabove, it is clear that the prosecution has proved the guilt of the accused conclusively and beyond the shadow of reasonable doubt. Thus, we are left with no other option to hold that the learned Trial Court has appreciated the facts and law in right and correct perspective, therefore, we find no reason to interfere with well reasoned judgment of the learned Trial Court. However, we deem it apt to modify the sentence, as the learned Trial Court has ordered that in default of payment of fine of Rs.2,00,000/-, the accused shall further undergo simple imprisonment for five years. Thus, we find that the sentence awarded by the learned Trial Court in default of payment of fine of Rs.2,00,000/- is required to be modified. So, it is ordered that the accused (convict) in default of payment of fine of Rs.2,00,000/- shall undergo six months' simple imprisonment. The rest of the sentence awarded by the learned Trial Court remains unchanged. Accordingly, the appeal, which sans merit, deserve dismissal and is dismissed.

61. The appeal, as also pending application(s), if any, stand(s) disposed of.

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

Rajinder Kumar ……Appellant.
Versus
State of Himachal Pradesh ……Respondent.

Cr. Appeal No. 482 of 2017
Reserved on: December 11, 2018.
Decided on: 2nd April, 2019.

Indian Evidence Act, 1872 - Section 35 - Entries in public record – Date of birth – Relevancy – Held, entries of date of birth recorded in Birth and Death Register as well in school admission register being primary evidence, are relevant and admissible as proof of date of birth.(Para 17)

Indian Evidence Act, 1872 - Sections 3 and 154 - Appreciation of evidence – Hostile witness- Evidentiary value – Held, prosecution can rely upon that part of evidence of hostile witness which supports its case - Mere fact of witnesses turning hostile is inconsequential if other independent evidence connects accused with commission of crime. (Paras 27-29)

Indian Penal Code, 1860 – Section 376(2) **- Protection of Children from Sexual Offences Act, 2012 -** Section 6 – Aggravated penetrative sexual assault – Proof – Special Judge convicting accused of committing aggravated penetrative sexual assault on victim and sentencing him to imprisonment for life - Appeal against - Accused arguing that victim and her mother did not support prosecution case during trial – And at any rate sexual

relationship was with consent of victim - Facts revealing that (i) victim and her mother, informant of case though turned hostile but DNA profiling of foetus connecting accused and victim as biological father and mother respectively (ii) entries of date of birth recorded in Birth and Death Register at instance of 'KN', Ward Member of Panchayat and in school admission register at instance of grandfather of victim 'BR' duly proved (iii) birth entries proving victim below 18 years of age at relevant time - Held, notwithstanding victim and her mother not supporting prosecution case during trial, there is enough evidence connecting accused with offence - Conviction upheld - On facts, sentence modified. (Paras 27 to 29)

Cases referred:
Hemudan Banbha Gadhvi vs. The State of Gujarat, 2018 (2) SCC Online 1688
T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401

For the appellant(s) — Mr. Anoop Chitkara, Advocate with Ms. Sheetal Vyas, Advocate.
For the respondent — Mr. Vikas Rathore, Addl. AG with Mr. Narinder Guleria, Addl. AG,
Mr. J.S. Guleria and Mr. Kunal Thakur, Dy. AGs.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J.

Appellant herein is a convict. Learned Special Judge, Bilaspur has convicted him under Section 376(2) of the Indian Penal Code and Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as "POCSO Act" in short) vide impugned judgment dated 15.3.2017 passed in Sessions Trial No. 22/7 of 2015 and sentenced as under:

Under Section 376(2) of IPC	Imprisonment for life and fine of Rs. 10,000/-. In default of payment of fine, to undergo further imprisonment of six months.
Under Section 6 of Protection of Children from Sexual Offences Act, 2012.	Imprisonment for life and fine of Rs. 10,000/-. In default of payment of fine, to undergo further imprisonment of six months.

2. The Himachal Pradesh Voluntary Health Association (Child Line) Shimla, allegedly supported by the Ministry of Women and Child Development, Govt. of India, New Delhi and Child Line India Foundation, Mumbai, has put the machinery into motion in the case in hand. PW-26 Minakshi Kanwar, Coordinator, Child Line Shimla has made an application Ext. PW-26/A on 7.6.2014 to the Station House Officer, PS Ghumarwin, District Bilaspur to the effect that as per call received over telephone at Child Line No. 1098 on 5.6.2014, a girl aged 14 years is pregnant and not going to school. She requested the police to look into the matter and intervene. On the basis of the application Ext. PW-26/A, rapat (Ext. PW-21/A) No. 41(A) dated 7.6.2014 was entered in the Police Station Ghumarwin. Another rapat (Ext. PW-21/B) No. 47(A) was entered in the Police Station on the same day, which reveals that ASI Duni Chand accompanied by LHC Anita and HC Raj Kumar went to the house of the prosecutrix where her mother and grandmother met them. They disclosed that the prosecutrix was not in the house having gone to the house of someone in her

relations. They ensured to produce her in the Police Station on the next day. On this, police party returned to Police Station as the prosecutrix was not found in the house during the search they conducted there. The information was given to Station House Officer and also SDPO Ghumarwin, accordingly.

3. On the next day, i.e. 8.6.2014, PW-2 Meeran Devi, mother of the prosecutrix accompanied by prosecutrix went to Police Station Ghumarwin. At her instance, FIR Ext. PW-14/A came to be recorded. She reported to the police that her husband had already expired about 10-12 years ago. She had three issues born to her from the lions of her deceased husband. After the birth of the elder son, the prosecutrix and another son (twins) have born to her. At the time of incident, the prosecutrix was studying in 10th class. About 15 days ago, she felt pain in her stomach. Her mother-in-law Bimla Devi had taken the prosecutrix to Government Hospital at Ghumarwin. When the ultra sound was got conducted privately, it transpired that she was pregnant. On enquiry about the same from the prosecutrix, she revealed that about 5-6 months ago, on her way to school, a boy had forcibly subjected her to sexual intercourse. That boy was not known to her. She allegedly did not disclose anything about it in the home to anyone being afraid of their wrath. It was also reported by PW-2 Meeran Devi that since she was ill, therefore, she could not visit the police station immediately.

4. After registration of the FIR, PW-16 ASI Sita Ram, Investigating Officer moved application Ext. PW-9/A to the Medical Officer for conducting medical examination of the prosecutrix. MLC Ext. PW-9/B was collected and the opinion Ext. PW-9/E of the doctor also obtained. The prosecutrix had delivered a male dead child on 9.6.2014 in Zonal Hospital, Bilaspur. An application Ext. PW-9/F was made by the I.O. for obtaining medical opinion qua the age of foetus. The opinion Ext. PW-9/G was also obtained. The blood sample of the prosecutrix and baby were taken for chemical examination. On 11.6.2014, the extract of birth and death register Ext. PW-3/A and the birth certificate Ext. PW-3/B was obtained from PW-3 Ravinder Kumar, Secretary, Gram Panchayat, Kothi, Tehsil Ghumarwin, Distt. Bilaspur. Her date of birth was found recorded as 24.6.1998. The date of birth certificate Ext. PW-11/E was also supplied by PW-11 Kiran Lata, Headmaster Govt. Primary School, Glassin, Distt. Bilaspur along with the extract of admission and withdrawal register Ext. PW-11/B and the application submitted for admission is Ext. PW-11/C. The documents Ext. PW-11/B and PW-11/E were also supplied by PW-11 Kiran Lata, Headmaster Govt. Primary School, Glassin, Distt. Bilaspur. In the school record also, the date of birth of the prosecutrix was found mentioned as 24.6.1998. On 17.6.2014, the accused was interrogated on suspicion.

5. PW-17 SI Indu has recorded the statement of the prosecutrix under Section 161 Cr.P.C. on 19.6.2014. According to her, about 5-6 months ago, while on the way to her school around 8:00 AM, one boy came from behind when she was at a place, namely, Chehar. He cought hold of her arm and took her inside the bushes. It was an isolated place. Though, she cried for help but there was none present nearby to help her. That boy removed her clothes (salwar) and subjected her to sexual intercourse forcibly. He, therefore, left the place of occurrence and she went to school. She did not disclose the incident to anyone in the school nor in the house. She was afraid of being scolded by her family members, had the incident been disclosed to them. When she felt pain in her stomach after few months, her grandmother had taken her to hospital. It is in the hospital, the doctor told that she was pregnant. It was also disclosed by the prosecutrix that said boy never met her thereafter nor he is known to her. She even was not in a position to identify his face also.

6. Application Ext. PW-25/A was made to Addl. Chief Judicial Magistrate, Ghumarwin, District Bilaspur with a prayer to record the statement of the prosecutrix under

Section 164 Cr.P.C. Consequently, statement Ext. PW-1/B came to be recorded by learned ACJM, Ghumarwin (PW-25 Sh. Anil Sharma). The blood sample of accused was obtained on 19.6.2014 for DNA profiling. On analysing the same, the Asstt. Director DNA, FSL Junga has submitted the report that the prosecutrix is the biological mother of the still born baby whereas the accused biological father. On this, the investigation was taken in hand by PW-19 ASI Kewal Singh. He interrogated the accused further on 18.11.2014 and on finding the evidence qua his involvement in the commission of the offence, he was arrested. During further interrogation on 21.11.2015, the prosecutrix and her mother identified the room in their house where the accused allegedly subjected her to sexual intercourse thrice. The identification memo is Ext. PW-1/A. The medical examination of the accused was conducted by PW-8 Dr. Bikram Singh and found him capable of committing sexual intercourse.

7. It is on the completion of the investigation, challan was filed in the Court. Learned Special Judge, on appreciation of the challan and documents annexed therewith as well as finding prima-facie that the accused has repeatedly subjected the prosecutrix, a minor below 18 years of age to sexual intercourse, has framed charge against him under Section376(2) of the Indian Penal Code and Section 6 of the Protection of Children from Sexual Offences Act. Since the accused has not pleaded guilty to the charge and claimed trial, therefore, the prosecution has produced the evidence collected during the course of investigation.

8. The material prosecution witnesses are PW-1, the prosecutrix, her mother PW-2 Meeran Devi, PW-3 Ravinder Kumar, Secretary Gram Panchayat Kothi, PW-8 Dr. Bikram, PW-9 Dr. Isha Sharma, PW-10 Dr. Sumeet, PW-11 Kiran Lata, Headmaster, Govt. Primary School Glassin, District Bilaspur, PW-12 Piar Chand, Ward Member, Gram Panchayat Kothi, PW-15 Keshava Nand, the then Ward Member, Gram Panchayat Kothi at whose instance, the entries qua date of birth were made in the birth and death register. PW-20 Parwati though belongs to Reckong Peo, District Kinaur to which Manju Devi (PW-22, the wife of accused belongs), however, married in Tehsil Ghumarwin, District Bilaspur. PW-25 Anil Sharma, learned ACJM, Ghumarwin and PW-26 Minakshi Kanwar, Coordinator, Child Line, Shimla. The remaining prosecution witnesses are police officials/I.Os who remained associated during the investigation of the case in one way or the other.

9. On the other hand, accused in his statement recorded under Section 313 Cr.P.C. has admitted that in relation, he is Uncle of the prosecutrix and also that he was got medically examined by the police, however, denied the remaining incriminating circumstances appearing against him in prosecution evidence being incorrect as according to him, he has been falsely implicated.

10. Learned trial Court, as noticed at the outset, has convicted and sentenced the accused for the commission of the offence punishable under Section 376(2) IPC and under Section 6 of the POCSO Act.

11. Aggrieved by the findings of conviction and sentence recorded against him, the accused has questioned the legality and validity thereof on the grounds inter alia that the evidence available on record has not been appreciated in its right perspective and to the contrary learned Special Judge has based the findings on conjectures and surmises. Without admitting and conceding to the prosecution case, it was pointed out that the prosecutrix had attained the age of discretion and as such competent to give consent for commission of sexual intercourse with her. It is also submitted that under Indian Law, incest is not a penal offence and only exception is the age of consent. The statement made by PW-3 Ravinder Kumar that the prosecutrix had filed a Civil Suit regarding correction of

date of birth has not been taken into consideration by the learned trial Court. The prosecutrix and also her mother, both have stated that the prosecutrix was born on 24.6.1996. While admitting that the prosecutrix and her brother born as twin, the mother also stated that due to illness and weakness, the prosecutrix started schooling at the age of 7 years, however, such evidence has also been ignored. The statement of the prosecutrix that the accused did not commit any wrong act with her is also not taken into consideration. The signatures of the accused on the documents were obtained under threat, hence stated to be violative of Sections 25 & 26 of the Indian Evidence Act and also Article 20(3) of the Constitution of India. The investigating agency has not made any effort to verify the factual position by associating the local residents, therefore, an adverse inference under Section 114(g) of the Indian Evidence Act has been sought to be drawn against the prosecution. The burden of proof that the accused has committed the offence was on the prosecution. The same has not been discharged and as such, the evidence on record not trustworthy should have not been relied upon. The appellant-convict, therefore, has prayed for quashing the impugned judgment and consequently his acquittal of the charges framed against him.

12. Sh. Anoop Chitkara, Advocate assisted by Ms. Sheetal Vyas, Advocate, learned counsel representing the accused has vehemently argued that the prosecutrix and her mother have not at all supported the prosecution case while in the witness-box. According to Mr. Chitkara, no doubt, the prosecutrix at one point of time during her cross-examination by learned Public Prosecutor has admitted that her statement Ext. PW-1/B under Section 164 Cr.P.C. is voluntary and she had signed the same after its contents read over and explained to her, however, when further cross-examined by learned defence counsel she has come forward with the version that no such statement was made by her before learned Magistrate. It has, therefore, been canvassed that the present is a case where the prosecutrix herself has caused major dent in the prosecution story. In view of her statement and the statement of her mother, two possible views have emerged and according to Mr. Chitkara, as per the settled legal principles, in a case of this nature, the view of the matter favourable to the accused has to be taken as compared to the one in favour of the prosecution. In order to buttress the arguments so addressed, Mr. Chitkara has placed reliance on the judgment of the Apex Court in **T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401**. It is further canvassed that a statement recorded under Section 164 Cr.P.C. cannot have overriding effect on the statement recorded on oath by the Court. Therefore, when the prosecutrix has not supported the prosecution case, no findings of conviction could have been recorded on the basis of her statement under Section 164 Cr.P.C Ext. PW-1/B. It has also been alleged that even if sexual assault is believed to have been committed on the prosecutrix on and around 20.3.2014, the prosecutrix was 15 years 8 months and 26 days old, therefore, according to Mr. Chitkara, she has already attained the age of discretion and as such should have disclosed the sexual assault if committed by the accused to other family members. It has also been urged that the oral as well as documentary evidence is not sufficient to show her date of birth as 24.6.1998. She, according to Mr. Chitkara was rather born on 24.6.1996 and it is for this reason, a suit has been filed by her for correction of date of birth. The accused, therefore, has been sought to be acquitted of the charge. In the alternative, the sentence of life imprisonment is stated to be disproportionate to the offence committed as according to him, the prosecutrix was about 16 years of age at the time of occurrence, hence little short of 18 years, the age when in the given facts and circumstances she could have understood to be a consenting party to the alleged sexual intercourse with her. Therefore, in the alternative, the sentence, as such, has been sought to be reduced.

13. On the other hand, Mr. Vikas Rathore, learned Addl. Advocate General for the State has urged that the prosecution with the help of cogent and reliable evidence has

succeeded to prove beyond all reasonable doubt that the accused being in near relation of the prosecutrix and a major person has subjected her to sexual intercourse repeatedly by taking undue advantage of her tender age and resultantly out of his physical relations with her, she became pregnant. As per the scientific investigation got conducted by the Investigating Agency while prosecutrix was biological mother of the foetus, the accused happens to be the biological father. No doubt, the prosecutrix, according to learned Addl. Advocate General has turned hostile to the prosecution, however, her testimony as a whole supports the prosecution case qua it is the accused who subjected her to sexual intercourse. The statement of the prosecutrix Ext. PW-1/B under Section 164 Cr.P.C. and the identification memo Ext. PW-1/A has also been pressed into service in this regard. The appeal, as such, has been sought to be dismissed.

14. On analyzing the record of this case and also the evidence, comprising oral as well as documentary, the present is a case where the father of the prosecutrix has already expired. PW-2 Meeran Devi is her mother. PW-2 Meeran Devi has given birth to twins i.e. the prosecutrix female child and son, a male on 24.6.1998. **The prosecutrix during the year 2013-14 was studying in 10th class. Admittedly, she stopped goi**ng to school on coming to know that she was pregnant. The Child Line Shimla received information in this regard and PW-26 Minakshi Kanwar, its Coordinator has sought intervention of the police in the matter by making application Ext. PW-26/A. As noticed supra, the police swung into action and took the prosecutrix to hospital for her medical examination on 8.6.2014. She was found pregnant and ultimately delivered a male baby, however, dead. As per Ext. PW-9/G, the opinion of the Medical Officer, the still born baby was more than 7 months, however, less than 8 months, meaning thereby that the prosecutrix had conceived the baby somewhere in November/December, 2013.

15. There is again no dispute so as to blood of the prosecutrix and still born baby was preserved for DNA profiling as is apparent from the MLC Ext. PW-9/C. The blood of the prosecutrix and baby and also the blood sample of the accused reveals that the same was found matching with each other. The opinion of the Medical Officer Ext. PW-9/E based upon the scientific investigation hereinabove reveals that the prosecutrix was the biological mother of the baby whereas the accused is biological father. The Medical Officer, on perusal of the report Ext. PW-9/D submitted by FSL has opined that the possibility of sexual intercourse cannot be ruled out. The accused, as per the MLC Ext. PW-8/B was found capable of performing sexual intercourse.

16. It is in this background, this Court has to determine firstly the age of the prosecutrix and secondly the person who assaulted the prosecutrix sexually is the accused or someone else.

17. As a matter of fact, in a case of this nature, it is the age of the prosecutrix which assumes considerable significance. Admittedly, the prosecutrix is one of the twins born to PW-2 Meeran Devi. The date of birth of the prosecutrix and her brother in the birth and death register is mentioned as 24.6.1998. The reference in this behalf can be made to the extract of Register Ext. PW-3/A and the certificate Ext. PW-3/B. Such date of birth of the prosecutrix and her brother has been entered in the birth and death register at the instance of PW-15 Keshava Nand, the then Ward Member, Gram Panchayat Kothi. PW-15 Keshava Nand when appeared in the witness-box has corroborated the prosecution case as according to him, the date of birth of the prosecutrix and her brother as 24.6.1998 was entered in the birth and death register at his instance. The entry qua date of birth in the birth and death register of the prosecutrix thus stands fully proved and we have no hesitation to place reliance on Ext. PW-3/A and Ext. PW-3/B being the primary evidence and admissible under Section 35 of the Indian Evidence Act. The another material piece of

evidence is Ext. PW-11/P, the extract of Admission and Withdrawal Register maintained in Govt. Primary School Glassin, Tehsil Ghumarwin, District Bilaspur. The application made by Balak Ram on 23.4.2003 Ext. PW-11/C for seeking admission of the prosecutrix in first standard also substantiates the prosecution case. The same was accompanied by the date of birth certificate Ext. PW-11/D issued by the Secretary, Gram Panchayat, Kothi on 1.4.2003. The date of birth certificate Ext.PW-11/E issued by PW-11 Kiran Lata, Headmaster Govt. Primary School Glassin, Tehsil Ghumarwin, District Bilaspur is based upon the old record i.e. entries in the Admission and Withdrawal Register. The application supported by date of birth certificate supplied on 1.4.2003 by the Secretary, Gram Panchayat concerned for seeking her admission in first standard in that school was made by Balak Ram, none else but grandfather of the prosecutrix on 23.4.2003. The documentary evidence Ext. PW-11/C to PW-11/E is also primary evidence, hence, legally admissible. The prosecutrix, as such, is born on 24.6.1998. As observed hereinabove, she was sexually exploited somewhere in November/December, 2013. She, at that time was, therefore, 15 years, 7-8 months old, hence below 18 years of age.

18. No doubt, the defence has made an effort to prove otherwise that her correct date of birth is 24.6.1996, however, without producing in evidence the copy of complaint and the averments on the basis of the alleged suit for declaration that she was born on 24.6.1996 was filed. True it is that in a criminal case, the burden to prove its case lies upon the prosecution and the accused is not answerable to the evidence or any plea he raised in his defence, however, in the case in hand, the prosecution has satisfactorily pleaded and proved that the prosecutrix is born on 24.6.1998. Learned Special Judge, as such, has not committed any illegality or irregularity while arriving at a conclusion that the date of birth of the prosecutrix is 24.6.1998 and she was minor, below 18 years of age at the time when sexually assaulted and became pregnant.

19. In a similar situation, in the case of ***Hemudan Banbha Gadhvi vs. The State of Gujarat, 2018 (2) SCC Online 1688,*** where the prosecutrix and the witnesses did not support the prosecution case and turned hostile, however, the close scrutiny of the evidence suggests that the prosecutrix was subjected to sexual intercourse by the accused coupled with the fact that semen found on the clothes of the prosecutrix and that of the accused belong to group B. The same was found sufficient to connect the accused with the commission of the offence. This judgment reads as follows:-

> 8. The family of the prosecutrix was poor. She was one of the five siblings. The assault upon her took place while she had taken the buffalos for grazing. Her deposition was recorded nearly six months after the occurrence. We find no infirmity in the reasoning of the High Court that it was sufficient time and opportunity for the accused to win over the prosecutrix and PW1 by a settlement through coercion, intimidation, persuasion and undue influence. The mere fact that PW2 may have turned hostile, is not relevant and does not efface the evidence with regard to the sexual assault upon her and the identification of the appellant as the perpetrator. The observations with regard to hostile witnesses and the duty of the court in State vs. Sanjeev Nanda, 2012 (8) SCC 450 are also considered relevant in the present context:
>
> > "101.....if a witness becomes hostile to subvert the judicial process, the court shall not stand as a mute spectator and every effort should be made

> to bring home the truth. Criminal justice system cannot be overturned by those gullible witnesses who act under pressure, inducement or intimidation. Further, Section 193 IPC imposes punishment for giving false evidence but is seldom invoked."

9. A criminal trial is but a quest for truth. The nature of inquiry and evidence required will depend on the facts of each case. The presumption of innocence will have to be balanced with the rights of the victim, and above all the societal interest for preservation of the rule of law. Neither the accused nor the victim can be permitted to subvert a criminal trial by stating falsehood and resort to contrivances, so as to make it the theatre of the a bsurd. Dispensation of justice in a criminal trial is a serious matter and cannot be allowed to become a mockery by simply allowing prime prosecution witnesses to turn hostile as a ground for acquittal, as observed in Zahira Habibullah Sheikh vs. State of Gujarat, (2006) 3 SCC 374 and Mahila Vinod Kumari vs. State of Madhya Pradesh, (2008) 8 SCC 34. If the medical evidence had not confirmed sexual assault on the prosecutrix, the T.I.P. and identification therein were doubtful, corroborative evidence was not available, entirely different considerations may have arisen.

10. It would indeed be a travesty of justice in the peculiar facts of the present case if the appellant were to be acquitted merely because the prosecutrix turned hostile and failed to identify the appellant in the dock, in view of the other overwhelming evidence available. In Iqbal vs. State of U.P., 2015 (6) SCC 623, it was observed as follows:

> "15. Evidence of identification of the miscreants in the test identification parade is not a substantive evidence. Conviction cannot be based solely on the identity of the dacoits by the witnesses in the test identification parade. The prose cution has to adduce substantive evidence by establishing incriminating evidence connecting the accused with the crime, like recovery of articles which are the subject matter of dacoity and the alleged weapons used in the commission of the offence."

11. The corroboration of the identification in T.I.P is to be found in the medical report of the prosecutrix considered in conjunction with the semen found on the clothes of the prosecutrix and the appellant belonging to the Group B of the appellant. The vaginal smear and vaginal swab have also confirmed the presence of semen. A close analysis of the facts and circumstances of the case, and the nature of the evidence available unequivocally establishes the appellant as the perpetrator of sexual assault on the prosecutrix. The serologist report was an expert opinion under Section 45 of the Evidence Act, 1872 and was therefore admissible in evidence without being marked an exhibit formally or having to be proved by oral evidence.

20. A coordinate Bench of this Court in Cr. Appeal No. 620 of 2015 titled ***Krishan Chand vs. State of Himachal Pradesh*** decided on 16.3.2018, a similar case where the prosecutrix, her mother and grandmother did not fully support the prosecution case, however, during scientific investigation it surfaced **that the semen on the clothes of the prosecutrix was that of the accused, has upheld the findings of conviction and sentence recorded against the accused and dismissed the appeal.**

21. Now, if coming to the controversy that it is the accused who has subjected her to sexual intercourse, the prosecution has placed reliance on the identification memo Ext. PW-1/A prepared at the instance of the prosecutrix, her statement Ext. PW-1/B under Section 164 Cr.P.C. and also the report Ext. PW-9/D. As per Ext. PW-1/A, the prosecutrix and her mother identified the bed room in the upper floor of the house where she was subjected to sexual intercourse, most probably on 20.3.2014 by the accused. He, according to her subjected her to sexual intercourse twice during day time and once during night. She as per this document was, therefore, subjected to sexual intercourse thrice by the accused. While in the witness-box, she has admitted her signature encircled "A" on this document. Her mother PW-2 Meeran Devi, however, expressed her ignorance that the signature encircled red at point "B" is of her or not. Anyhow, Ext. PW-1/A stands proved because the prosecutrix has admitted her signature thereon and she has not been cross-examined qua this aspect of the matter, therefore, as per this document it is the accused who subjected her to sexual intercourse thrice.

22. Now, if coming to Ext. PW-1/B, the statement of the prosecutrix recorded under Section 164 Cr.P.C., in her cross-examination conducted by learned Public Prosecutor, she has admitted the said statement having been made in the Court without any fear etc. Not only this, but she has also admitted that the contents thereof were read over and explained to her and it is after acknowledging the same, she appended her signature on it. She has also admitted her signature on Ext. PW-1/B encircled red at point "A". No doubt, in her examination-in-chief, the version of the prosecutrix is that the accused, her real Uncle in relation has not committed wrong act with her. In her cross-examination conducted by learned defence counsel also, she has denied that the statement Ext. PW-1/B has been made by her in the Court. She has denied portion 'A' to 'A' and 'B' to 'B' thereof as incorrect. She has rather admitted that at the time of recording her statement in the Court, she stated that accused had not committed sexual intercourse with her. Therefore, she has blown hot and cold in the same breath. However, her admission during her cross-examination by learned Public Prosecutor that the statement Ext. PW-1/B was given by her in the Court without any fear and that she signed the same after acknowledging the contents thereof read over and explained to her coupled with the testimony of PW-25 Sh. Anil Sharma, the then ACJM, Ghumarwin, the only inescapable conclusion would be that before recording her statement, the Magistrate made her aware that she was not bound to make any statement and in case she opt for it, such statement can be used against her. It is thereafter she made the statement Ext. PW-1/B voluntarily, the contents whereof were read over and explained to her which she has also admitted while in the witness-box as PW-1. She has acknowledged the statement so made and put her signature thereon at point 'A' encircled red. Nothing contrary has come in his statement in the cross-examination that Ext. PW-1/B is not recorded in accordance with law, hence not legally admissible. True it is that the statement recorded in the Court on oath has evidentiary value as compared to a statement recorded under Section 164 Cr.P.C. The present, however, is a case where irrespective of the prosecutrix having denied the accused subjected her to sexual intercourse, admitted in her cross-examination conducted on behalf of the prosecution by learned Public Prosecutor that she had made the statement Ext. PW-1/B in the Court. The statement Ext. PW-1/B reveals that it is the accused who had subjected her to sexual

intercourse. No doubt, the prosecutrix tried to confuse the whole issue, may be due to pressure of family members because the accused is none else but her real Uncle with a view to save him from his prosecution, however, her admission that identification memo bears her signature and that the statement Ext. PW-1/B was given by her in the Court without any fear and signed the same after acknowledging its contents which were read over and explained to her, coupled with the expert opinion i.e. report of Forensic Science Laboratory Ext. PW-9/D and the opinion based upon the same given by PW-9 Dr. Isha Sharma, learned trial Judge has rightly concluded that the accused has subjected her to sexual intercourse.

23. Otherwise also, there is no denial so as to the prosecutrix was subjected to sexual intercourse and became pregnant. The factum of the pregnancy came to the notice of grandmother and ultimately to her mother PW-2 Meeran Devi when on complaint of pain in her stomach, she was taken to hospital and on the basis of ultra sound got conducted, the doctor told that she was pregnant. The matter was not reported to the police, may be the honour of the family was at stake because it is the accused, her real Uncle has subjected the prosecutrix to sexual intercourse. Although, the mother of the prosecutrix PW-2 Meeran Devi while lodging FIR Ext. PW-14/A and stating that on account of her illness, the matter could not be reported earlier has made an effort to explain such unbecoming behavior as normally on coming to know that her daughter is pregnant, the report should have been lodged in the Police Station, however, unsuccessfully because the explanation so forthcoming is nothing but an attempt to save the accused from his prosecution. It is for this reason that in the FIR also, he has not named an offender and rather some unknown boy is stated to have subjected the prosecutrix to sexual intercourse when she was on her way to school. This part of the statement of PW-2 Meeran Devi in the FIR Ext. PW-14/A and while in the witness-box as PW-2 cannot be believed to be true by any stretch of imagination. Therefore, the statement of the prosecutrix and her mother PW-2 Meeran Devi that the accused never subjected her to sexual intercourse and rather it is some unknown person who committed sexual intercourse with her when she was going to school is bound to fall to the ground having no legs to stand.

24. It is significant to note that PW-12 Piar Chand who has been associated by the prosecution during the course of investigation of the case has stated that it is in his presence, the prosecutrix disclosed that the accused used to do wrong acts with her during the year 2013-14 in the room of upper floor of their house which she had identified vide memo Ext. PW-1/A.

25. If coming to the testimony of PW-20 Parwati, her parents' house is situated at Reckong Peo. PW-22 Manju Devi, wife of the accused also belongs to district Kinnaur. The later came to the former on one day around 12 midnight and disclosed that her husband (accused) had illicit relations with his sister-in-law (PW-2 Meeran Devi) and also with the prosecutrix. Also that the prosecutrix became pregnant due to accused subjected her to sexual intercourse. PW-22 Manju Devi, however, has not supported the prosecution case as according to her they are not in visiting terms with the family of PW-2 Meeran Devi. She also seems to have deposed falsely to save the accused from his prosecution being her husband.

26. In view of what has been said hereinabove, it is proved beyond all reasonable doubt that the prosecutrix born on 24.6.1998 was minor below 18 years of age when subjected to sexual intercourse by none else but her real Uncle (Chacha). She incurred pregnancy and came to know about it when complained pain in stomach and taken to hospital by her grandmother. No report was lodged with the police and rightly so because everybody in the family may be interested to save the accused from his prosecution. However, fortunately, it is Child Line, Shimla which came to know that the prosecutrix

subjected to sexual intercourse has stopped going to school on account of being pregnant. The complaint made to the police is Ext. PW-26/A. The author thereof is none else but PW-26 Minakshi Kanwar. This has led to the registration of FIR Ext. PW-14/A. However, during the course of investigation, the person who subjected the prosecutrix to sexual intercourse was found to be none else but her real Uncle, the accused. It is satisfactorily proved that the biological mother of the still born male baby was prosecutrix whereas biological father, the accused. The report Ext. PW-9/D, the identification memo Ext. PW-1/A and the statement Ext. PW-1/B and also the part of the statement of the prosecutrix while in the witness-box as PW-1 amply substantiate that the offender was none else but the accused alone who has subjected the prosecutrix to sexual intercourse thrice.

27. No doubt, the prosecutrix and her mother PW-2 Meeran Devi turned hostile to the prosecution, however, as per the legal position well settled at this stage, that part of the statement of a hostile witness which supports the prosecution case if inspires confidence can be relied upon. Since in the case in hand, the prosecutrix has admitted her signature on the identification memo Ext. PW-1/A and also that the statement Ext. PW-1/B was made and signed by her in the Court, lead to the only conclusion that she has supported the prosecution case on all material aspects and also that she has been subjected to sexual intercourse by the accused because it is so recorded in both the documents referred to hereinabove. Learned trial Judge, as such, has rightly concluded that the hostile statement of the prosecutrix and her mother cannot be taken as ground to disbelieve the prosecution story especially when the scientific investigation and the link evidence available on record connect the accused with the commission of offence. It is worth mentioning that the evidence as has come on record by way of the testimony of official witnesses supplies necessary links in support of the prosecution case, because PW-5 HC Mohinder Singh, the then MHC, Police Station Ghumarwin has supported the prosecution case qua the case property deposited with him and the same later on was forwarded by him to FSL. There is nothing to disbelieve his version as has come on record. PW-4 HHC Dinesh Chand has supported the prosecution case qua the case property i.e. one vial duly sealed in a parcel deposited by him in RFSL at Mandi vide RC No. 103/14. PW-6 LC Anita Devi has deposed that the samples preserved by the doctor and handed over to her were given by her to ASI Sita Ram. She remained on duty with the prosecutrix during her hospitalization on 8/9.6.2014 in the hospital at Bilaspur. The case property was handed over to PW-7 Const. Suneel Kumar vide RC No. 226/14 and as per his statement, he deposited the same in safe condition in SFSL, Junga. PW-13 SI Mehar Singh has obtained the extract of birth register Ext. PW-3/A and the date of birth certificate Ext. PW-3/B from PW-3 Ravinder Kumar, Secretary Gram Panchayat, Kothi. PW-19 ASI Kewal Singh has investigated the case. On receipt of the FSL report Ext. PW-9/D from SFSL, Junga, according to which the prosecutrix and the accused were found to be the biological mother and father of the still born child, the accused was arrested by this witness after interrogation. He has also prepared the memo Ext. PW-1/A on identification of the room where the prosecutrix was subjected to sexual intercourse by the accused thrice on the identification given by her. It is he who moved to the Medical Officer for conducting medical examination of the accused and obtained the MLC Ext. PW-8/B as per which the accused was found to be capable of committing sexual intercourse. PW-26 Minakshi Kanwar has made the application to the police.

28. The oral as well as documentary evidence produced by the prosecution, therefore, has established the guilt of accused beyond all reasonable doubt. He, as such, has rightly been convicted for the commission of the offence punishable under Section 376(2) IPC and under Section 6 of the POCSO Act.

29. In the matter of quantum of sentence, we, however, are in agreement with the submissions made by Mr. Anoop Chitkara, learned defence counsel for the reason that the age of the prosecutrix at the relevant time was little less than 16 years because in case the date when she conceived is taken as 20.3.2014 as she gave in her statement, she was about 15 years 9 months old at that time. Of course, the prosecutrix was minor and as such the arguments that she had attained the age of discretion and consenting party to the sexual act, hardly carry any substance. However, while considering the question of quantum of sentence, this Court will be failing in its duty if not take into consideration the conduct of the prosecutrix that even after subjected to sexual intercourse thrice by the accused she did not opt for apprizing her mother PW-2 Meeran Devi or anyone else in the family, including her grandmother about such an act committed by the accused with her. The prosecution though has made an attempt to show that the accused was in physical relations with the mother of the prosecutrix (his Bhabhi) also, however, unsuccessful because Manju, his wife who allegedly told PW-20 Parwati in this regard did not support the prosecution case while in the witness-box as PW-22 and rather turned hostile to the prosecution. In the totality of the circumstances, more particularly, the age of the prosecutrix, it is not a rarest of the rare case where maximum sentence i.e. imprisonment for life for the commission of offence punishable under Section 376(2)(f) & (n) IPC and Section 6 of the POCSO Act should have been passed against the accused.

30. For all the reasons hereinabove, this appeal partly succeeds and the same is accordingly allowed. Consequently instead of life imprisonment, the appellant-convict shall undergo rigorous imprisonment for a period of 10 years and also to pay a sum of Rs. 50,000/- as fine under Section 376(2)(f) & (n). In default to pay the fine amount, he shall further undergo simple imprisonment for a period of one year. He is also sentenced to undergo rigorous imprisonment for a period of 10 years and also to pay Rs. 50,000/- as fine for the commission of the offence punishable under Section 6 of the POCSO Act. On his failure to pay the fine amount, he shall further undergo simple imprisonment for a period of one year. Both the sentences, however, shall run concurrently. The amount of fine, if deposited by the appellant-convict shall be paid to the prosecutrix through her mother PW-2 Meeran Devi as compensation. The impugned judgment shall stand modified accordingly.

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

Ravinder Sharma @ Ravi ……Appellant.
Versus
State of Himachal Pradesh ……Respondent.

Cr. Appeal No. 532 of 2016 &
Cr. Appeal No. 516 of 2016.
Reserved on: March 28, 2019.
Decided on: 2nd April, 2019.

Indian Evidence Act, 1872 - Section 35 - Entries in public record - Date of birth - Mode of proof – Held, entries of date of birth recorded in school admission register must be proved by examining person at whose instance these entries were made - Authenticity of such entries depends upon deposition of person at whose instance these were recorded.(Paras 19 to 21)

Indian Evidence Act, 1872 - Section 35 - Entries in public record - Date of birth – School admission register – Probative value –Date of birth entries in high school register recorded on basis of school leaving certificate issued by primary school in absence of production of admission form of primary school showing at whose declaration such entries were made, not relevant. (Para 19)

Indian Evidence Act, 1872 - Section 35 - Entries in public record - Date of birth – Parivar register – Relevancy- Date of birth not specifically mentioned in parivar register – Column meant for recording birth entries found scratched – Held, document cannot be accepted as proof of age of victim. (Para 20)

Indian Penal Code, 1860 - Sections 342 & 376 (2) (n) **Protection of Children from Sexual Offences Act, 2012-** Section 6 – Wrongful confinement, rape and aggravated penetrative sexual assault – Proof – Accused convicted by Special Judge for repeatedly raping victim, a minor - Appeal against – On facts, (i) victim not proved to be below eighteen years of age on date of offence (ii) she was taken in car to different places and raped by accused 'R' (iii) seminal stains on under garment of victim matched with accused (iv) hair collected from car also matched with hair of victim (v) medical evidence proving assault on victim (vi) visitor register of hotel proving visit of 'R' with female at relevant time (vii) victim taken by accused from place nearby her school by dragging and intimidation – Held, evidence proving guilt of accused – Conviction altered to offence under Section 376 (2) (n) instead of 376 D of Code in view of acquittal of co-accused – Sentence modified. (Paras 34 to 40)

Cases referred:

Madan Mohan Singh and others Vs. Rajni Kant and another, AIR 2010 SC 2933
Ravinder Singh Gorkhi vs. State of U.P. AIR 2006 SC 2157
State of Chhatisgarh Vs. Lekhram, AIR 2006 SC 1746
State of H.P. vs. Phurva & others, Latest HLJ 2011 (HP) 490
Sunil Kumar Vs. State of Haryana, AIR 2010 SC 392

For the appellant(s) : Mr. Saurav Rattan, Advocate for appellant in Cr. Appeal No. 532 of 2016.
Mr. Prashant Sharma & Mr. Ajit Sharma, Advocates for appellant in Cr. Appeal No. 516 of 2016.

For the respondent :Mr. Narinder Guleria, Addl. AG.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J.

Appellants Ravinder Sharma @ Ravi and Birbal herein are convicts. Learned **Special Judge, Kullu, District Kullu has convicted both of them for the commission of offence punishable under Sections 363, 366-A, 376-D, 342, 506 of Indian Penal Code and Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as "POCSO Act" in short)** and sentenced them to undergo rigorous imprisonment for a period of 20 years each for the commission of the offence punishable under Section 376-D of Indian Penal Code, a graver offence and there being the provisions of the sentence of greater degree as compared to the offence punishable under Sections 363, 366-A, 342 and 506 of the Code and also under Section 6 of the POCSO Act.

2. They are **aggrieved** by their conviction and sentence, hence approached this Court for quashing and setting aside the same **on the grounds *inter alia* that undue weightage has been given to the evidence not worthy of credence produced by the prosecution as compared to most trustworthy and dependable evidence produced by them in their defence.** Learned trial Court is, therefore, stated to have not appreciated the evidence available on record in its right perspective. Their conviction in such circumstances is stated to be unwarranted and unsustainable. The arguments addressed by learned defence counsel have also not been appreciated and as such the impugned judgment does not stand for the test of judicial scrutiny. The impugned judgment rather is stated to be based upon surmises and conjectures. The contradictions in the statements made by witnesses examined by the prosecution have been ignored and not taken into consideration. The prosecution story is stated to be absolutely false and concocted one.

3. Now, if coming to the factual matrix, FIR Ext. PW-1/A came to be recorded on the statement made by the prosecutrix (name withheld) before the police of Police Station Banjar, District Kullu on 10.10.2013. She visited the police station accompanied by her parents. According to her, in the year 2013, she was studying in 10th class in Government School at Chanoun, Tehsil Banjar. On 9.10.2013, around 9:30 AM, she was on her way to the school from house. At a distance of 1 km, behind the school one white coloured Car arrived there and stopped near to her. In the Car, except driver, one more person was also sitting. They opened the door of the Car and dragged her inside. Thereafter, the driver started driving the same at a high speed towards Aut side. The Car was being driven by appellant-convict Ravinder Sharma @ Ravi and the other occupant was appellant-convict Birbal. They both are residents of Village Gharatgar. They were known to her. She asked as to where she was being taken by them and why? On this they told that she was being taken by them towards Kullu side on a pleasure trip. She wanted to cry, however, they threatened that in case she did so, not only she but they will kill her all family members. They reached near Aut at about 11:30 AM. At that place, they took out knife from their pocket and shown the same to her. They also threatened her that in case she cried or made any effort to inform anyone in her house, they will not only do away with her life but also all the members of her family. She allegedly was locked inside the vehicle and they themselves went to meet someone there. She tried to break open the window screen of the vehicle, however not succeeded to do so. Therefore, being helpless and afraid of them, she could not do anything to save her. It is after about 2 hours, they both came back and she was taken to an unknown and isolated place. There they both subjected her to sexual intercourse turn by turn against her will and without her consent. They made her to remain in that Car throughout the night and continued subjecting her to sexual intercourse turn by turn against her will and without her consent. They told her that they were dealing in the business of Charas and having handsome money with them and also that, they will make her happy and comfortable throughout.

4. On 10.10.2013 in the morning, she was taken by them in the same Car and made to alight at a place nearby the School. They threatened to kill her and also her entire family in case she disclosed the incident to anyone. She requested the police of Police Station Banjar that since both Ravi and Birbal have abducted and kidnapped her on 9.10.2013 at 9:30 AM while on her way to School intentionally to subject her to sexual intercourse and they subjected her to sexual intercourse turn by turn at different places throughout the night repeatedly against her will and without her consent and due to which she suffered lot of pain, therefore, she be got medically examined and the proceedings to prosecute them in accordance with law be also initiated.

5. On registration of the FIR, the police swung into action. The investigation was taken in hand by PW-13 SI Chint Ram, SHO Police Station Banjar. Application Ext. PW-4/A was made to the Medical Officer with a prayer to conduct the medical examination of the prosecutrix. The medical was conducted by PW-4 Dr. Kiran and MLC Ext. PW-4/B collected from the hospital and placed on the file. On 11.10.2013, the place, namely, Sadri Chanoun from where the prosecutrix was kidnapped by the accused was identified by her to the police. The same was photographed vide photograph Ext. PW-14/A-1 and the spot map Ext. PW-13/A was prepared. That place was also videographed and CD prepared. The supplementary statement of the prosecutrix was also recorded on 11.10.2013. The demarcation of the place where the prosecutrix was dropped by the accused persons on 10.10.2013 was also conducted and the spot map Ext. PW-13/B prepared. That place was photographed vide photographs Ext. PW-13/A-2 and A-3 and videography was also done. The demarcation of unknown and isolated place near temple of **Akash Mata**, in and around Aut was also identified by the prosecutrix to the police. The map thereof Ext. PW-13/C was prepared. The photographs Ext. PW-13/A-4 to A-5 were also taken and the videography done. At Kullu, the prosecutrix identified **Hotel New Kailash** in Akhara Bazar and took the police to Room No. 27 of the said hotel where both accused raped her turn by turn. It is at that place her school dress was also got changed by them and new dress brought for her from the bazaar. She identified bed sheet which was taken into possession vide memo Ext. PW-1/B. The spot map Ext. PW-13/D was also prepared there. The extract of the Hotel register Ext. PW-11/A was also obtained. It is thereafter the prosecutrix had led the police party to **Balaji hotel** at Sarwari bazaar in Kullu. She identified Room No. 1 of the said hotel and disclosed that she was sexually assaulted by both the accused. Map of that place Ext. PW-13/F was also prepared. Photographs of **Hotel New Kailash** Ext. PW-13/A-6 to A-8 and that of **Hotel Balaji** are Ext. PW-13/A-9 to A-12. One piece of mattress was taken as sample from room No. 1 of Balaji Hotel vide memo Ext. PW-1/C.

6. On 12.10.2013, the prosecutrix produced her clothes in the Police Station which were taken into possession vide memo Ext. PW-1/D. The same were also sealed in a parcel of cloth. On 18.10.2013, vehicle No. HP-33-A-9265 was produced before the police by Tek Chand, brother of accused Birbal in the Police Station. The same was also taken into possession vide memo Ext. PW-9/A along with its invoice. Its seat covers were also taken into possession vide memo Ext. PW-9/B. Hairs lying in the vehicle were also taken into possession vide memo Ext. PW-9/C. On 19.10.2013, both accused were arrested vide memos Ext. PW-13/M and PW-13/N. Certified copy of Pariwar Register Ext. PW-12/A and that from the School register qua date of birth of the prosecutrix were also obtained by submitting applications Ext. PW-13/O and Ext. PW-3/A to the Secretary, Gram Panchayat Chanoun and Principal of the School, respectively. The case property was sent to the laboratory for analysis. Both the accused were also got medically examined. The MLC of accused Birbal Ext. PW-5/B and that of accused Ravinder Sharma Ext. PW-5/C were also collected. The report submitted by the Chemical Examiner is Ext. PX.

7. On completion of the investigation and finding a case under Sections 363, 366-A, 376-D, 342, 506 of Indian Penal Code and Section 6 of the POCSO Act made out against both the accused, the police has filed the report under Section 173 Cr.P.C. against them.

8. Learned Trial Judge, on appreciation of the report and documents annexed therewith and on being satisfied prima-facie that they have committed the offence punishable under Sections 363, 366-A, 376(2)(i)(n) read with Section 376-D, 342, 506 of Indian Penal Code and Section 6 of the Protection of Children from Sexual Offences Act has framed charge against both of them accordingly. They, however, pleaded not guilty to the

charge and claimed trial. Therefore, learned trial Court has called upon the prosecution to produce evidence in support of its case against the accused. The prosecution in turn has examined 13 witnesses in all. The material prosecution witnesses are PW-1, the prosecutrix, her father PW-6 Puran Chand, PW-2 Geeta Devi, Secretary of Gram Panchayat Chanoun, PW-3 Chander Prakash, Principal Govt. Sr. Secondary School Chanoun, PW-4 Dr. Kiran, who has examined the prosecutrix and issued MLC Ext. PW-4/B. PW-5 Dr. Satish Rana has examined accused Ravinder and Birbal and issued MLC Ext. PW-5/B and Ext. PW-5/C, PW-7 Naveen Kumar shop keeper Akhara bazaar Kullu from whom clothes were purchased for prosecutrix by the accused and PW-11 Puran Chand, Manager of Hotel Kailash, Akhara Bazar, Kullu.

9. The remaining prosecution witnesses PW-8 LC Anjana, PW-9 HC Brij Bhusan, PW-10 HC Sunil Kumar, PW-12 LHC Tarsem are, however, police officials who remained associated in the investigation of the case in one way or the other. The Investigating Officer is PW-13 SI Chint Ram.

10. The statements of both the accused under Section 313 Cr.P.C. were also recorded. They have denied the entire prosecution case either for want of knowledge or being incorrect. According to them, they are innocent and have been implicated falsely in this case. In their defence, they have examined DW-1 Leela Devi, Post Graduate Teacher, Govt. Sr. Secondary School, Chanoun, DW-2 SI Vijay Kumar, Reader to S.P. & (SV & ACB), Mandi and DW-3 Smt. Sonam Dolma, Ward Sister, Community Health Centre Banjar, Distt. Kullu.

11. Learned trial Judge, on appreciation of the oral as well as documentary evidence produced by the prosecution and also the accused and after hearing learned Public Prosecutor as well as learned defence counsel has concluded that the prosecution case stands proved beyond all reasonable doubt against the accused. They were convicted for the commission of the offence punishable under Section 376-D as pointed out at the outset.

12. S/Sh. Prashant Sharma and Saurav Rattan, Advocates learned counsel representing the appellants-convicts have vehemently argued that in the nature of the evidence available on record, the prosecution has failed to prove its case against either of the accused beyond all reasonable doubt. It has thus been urged that no findings of conviction could have been recorded against the appellants-convicts.

13. Mr. Prashant Sharma, Advocate learned counsel representing the appellant-convict Birbal has additionally argued that evidence produced in defence suggesting that the prosecutrix and her relations were inimical to said Sh. Birbal has been brushed aside without assigning any cogent and valid reasons. According to Mr. Sharma, the complaint Ext. DW-2/A made by appellant convict Birbal against ASI Narpat Ram and Guddi Devi (wife of Dev Raj, maternal Uncle of the prosecutrix) forwarded vide letter Ext. DW-2/B by the Superintendent of Police, State Vigilance and Anti Corruption Bureau, Mandi to Superintendent of Police Mandi for enquiry and appropriate action and the testimony of DW-1 Smt. Leela Devi lead to the only conclusion that accused Birbal was not travelling in the offending Car which as per the version of DW-1 Leela Devi was being driven by appellant-convict Ravinder Sharma @ Ravi. It has also come in the FIR Ext. PW-1/A that the vehicle was being driven by accused Ravinder Sharma @ Ravi. Said Birbal, according to learned counsel as such has been implicated falsely at the instance of the relations of the prosecutrix and ASI Narpat Ram who were inimical to him on account of the complaint Ext. DW-2/A made by him to Superintendent of Police (State Vigilance and Anti Corruption Bureau), Mandi. Both the accused, therefore, have been sought to be acquitted of the charges framed against each of them.

14. On the other hand, Mr. Narinder Guleria, learned Addl. Advocate General has urged that the judgment under challenge is speaking and reasoned one. The same, according to Mr. Guleria has been passed by learned Trial Judge on appreciation of the evidence in its right perspective. It is pointed out that the own testimony of the prosecutrix which remained un-shattered even in her cross-examination also, the charges framed against each of the accused persons stand established. The remaining evidence as has come on record by way of testimony of her father and PW-4 Dr. Kiran as well as report of the chemical examiner Ext. PX, proves beyond reasonable doubt that the appellants-convicts have assaulted the prosecutrix, a minor aged 15 years at different places, including two hotels after abducting her in a planned manner while on her way to school. The offence they allegedly committed is not only heinous but also grievous in nature. Therefore, according to Mr. Guleria, they both have been rightly convicted and sentenced vide judgment under challenge in these appeals, which according to him, calls for no interference by this Court.

15. The nature of the offence, the accused allegedly committed is not only heinous but grievous also because as per the allegations, they have not only removed the prosecutrix, a minor from lawful guardianship of her parents, but also subjected her to sexual intercourse repeatedly in the Car and also at different isolated places, including the two hotels i.e. Hotel New Kailash, Akhara Bazar, Kullu and Hotel Balaji at Sarwari Bazar, Kullu.

16. The apex Court while taking into consideration the gravity and seriousness of the offence, in a catena of judgments, including ***State of Punjab Vs. Gurmeet Singh & others, AIR 1996 SC 1393,*** has held that the own statement of the prosecutrix if inspires confidence is sufficient to bring the guilt home to the accused. The apex Court in order to ensure that an innocent person may not be implicated in the commission of an offence of this nature, while taking note of the judgment in ***Gurmeet Singh's*** case supra has however diluted the ratio thereof in ***Ranjit Hazarika Vs. State of Assam, (1998) 8 SCC 635*** and held that the ratio thereof cannot be universally and mechanically applied to the facts of every case of sexual assault, as in its opinion in such cases, the possibility of false implication can't also be ruled out. Similar was the view of the matter taken again by the apex Court in ***Vimal Suresh Kamble Vs. Chaluverapinake Apal S.P. and another, 2003) 3 SCC 175.***

17. Therefore, the legal position as discussed supra makes it crystal clear that irrespective of an offence of this nature not only grievous but heinous also, the Court should not get swayed merely by passion and influenced only on account of the offence has been committed against a woman and rather keep in mind the cardinal principle of criminal administration of justice, that an offender has to be believed to be innocent unless and until held guilty by the Court after satisfying its judicial conscience on the basis of given facts and circumstances of each case as well as proper appreciation of the evidence available on record.

18. Now, if coming to the evidence available on the record of this case, the age of the prosecutrix has been claimed to be 15 years on the date of occurrence i.e. 9.10.2013. The present has also been claimed to be a case of gang rape within the meaning of Section 376-D of the IPC. She allegedly, a minor has been subjected to sexual intercourse repeatedly by both the accused persons. If it is proved to be so, it is only in that situation the appellants-convicts can be said to have committed the offence punishable under Section 376 (2)(n) read with Section 376-D IPC.

19. We propose to decide the question as to whether the date of birth of the prosecutrix is 18.3.1999 as claimed by the prosecution because it is in that eventuality, she

could have been said to be about 15 years of age i.e. 14 years 7 months and 9 days. Otherwise also, it is the age of the prosecutrix in a case of this nature which assumes significance. In order to prove the date of birth of the prosecutrix as 18.3.1999, reliance has been placed on the certificate Ext. PW-3/B issued by PW-3 Chander Prakash, Principal, Govt. Sr. Secondary School, Chanoun, District Kullu, H.P. On the face of this document, she was admitted in the said School on 21.4.2009, meaning thereby that prior to it, she must have studied in Primary School somewhere else and the proof qua her date of birth disclosed either in the admission form by way of making declaration or the certificate qua her date of birth obtained from the Municipality/Gram Panchayat where the register of birth and death used to be maintained. In High/Senior Secondary Schools, a student is admitted on the basis of School Leaving Certificate issued by the concerned Primary School and in said certificate, the particulars as to who had declared the date of birth of a student while taking admission in first standard and the declaration so made was is supported by a certificate issued by Municipality/Gram Panchayat concerned. Therefore, the certificate Ext. PW-3/B cannot be treated as primary evidence so far as the date of birth of the prosecutrix as 18.3.1999 is concerned. It is worth mentioning that under Section 35-A of the Indian Evidence Act, a certificate qua date of birth of a person issued by the authorities from the School record is admissible only in case the person at whose instance the date of birth of the child admitted in the school was disclosed and the proof of declaration of the date of birth. Therefore, the primary evidence qua the date of birth of the prosecutrix would have been the certificate if obtained from the Primary School along with the extract of the admission register and copy of the admission form which contains, the declaration qua the date of birth made by the parents/guardians accompanying the child to the School at the time of his/her admission. Additionally, the certificate issued by the Municipality/Gram Panchayat on the basis whereof declaration qua date of birth of a child is made is also required to be produced. Therefore, the certificate Ext. PW-3/B cannot be taken to form an opinion that the prosecutrix is born on 18.3.1994.

20. The another document relied upon by the prosecution is Ext. PW-2/A, an extract of the Pariwar Register. The alleged date of birth 18.3.1999 of the prosecutrix does not find mention in this document. The column against which her date of birth was entered rather has been scratched. Such a situation on the face of the record makes it highly doubtful that the prosecutrix is born on 18.3.1999. Otherwise also, the entries qua the birth of a person made in ordinary course of business by a competent authority constitute primary evidence qua the age of a person. Their used to be column in birth and death register in which the name of the person at whose instance the entries qua the date of birth are made and his/her relation with the newly born finds mention. Therefore, such entries in the birth and death register if obtained by the prosecution would have given an idea about the correct date of birth of the prosecutrix and her exact age. The investigating agency has, however, not obtained the birth certificate on the basis of the entries made in the birth and death register in the manner as stated hereinabove nor placed on record the abstract of such register for being produced in evidence. As regards the entries in the Pariwar Register, the same in our considered opinion, cannot be taken to conclude that prosecutrix was about 15 years of age at the time of occurrence. Therefore, learned defence counsel have rightly pointed out that for want of cogent and reliable evidence, the prosecutrix cannot be said to be of 15 years age or below 18 years.

21. It is well settled at this stage that primary evidence to prove the date of birth of a person is the entries in the register at the time of his/her admission in the primary school. The record qua declaration of date of birth of the child made by his/her parents or guardian at the time of admission in primary school should also be there to substantiate the entries in the register. The name of parent/guardian at whose instance the child admitted

in the school should also be there in the record relating to admission of the child. It is only on the basis of such material on record the date of birth as find mention in the record produced in evidence can be believed as true and correct. In the case in hand, it is the certificate Ext. PW-3/B issued by the Principal Govt. Sr. Secondary School, Chanoun which has been relied upon. As a matter of fact, the extract from the admission register should have been obtained and produced in evidence. The admission register along with form/declaration made by a person at whose instance the prosecutrix was admitted in the school should have been produced during the course of recording prosecution evidence, in order to prove the exact date of birth of the prosecutrix.

22. The conclusion so drawn by this Court is supported by the judgment of the apex Court in ***Sunil Kumar Vs. State of Haryana, AIR 2010 SC 392*** wherein it has been held as under:

> "30. The prosecution also failed to produce any Admission Form of the school which would have been primary evidence regarding the age of the prosecutrix."

23. Hon'ble Apex Court in ***State of Chhatisgarh Vs. Lekhram, AIR 2006 SC 1746,*** has held that the register maintained in a school is admissible in evidence to prove the date of birth of the person concerned, if it is proved that the same has been maintained by the authorities in the discharge of their public duty and there is evidence to show as to who had disclosed the date of birth of such person at the time of his/her admission in the school.

24. The birth Certificate Ext. PW-3/B from the record of Government Sr. Secondary School, Chanoun has been produced. The birth certificate from the record of Primary School where she may have studied has neither been obtained nor produced in evidence. In the absence of the admission form/declaration qua her date of birth, Ext. PW-3/B cannot be believed to be true and correct to arrive at a conclusion that the prosecutrix was born on 18.3.1999. If coming to the extract of pariwar register Ext. PW-2/A, the same has no evidentiary value nor on the basis thereof, it can be said that the date of birth of the prosecutrix is 18.3.1999. As a matter of fact, it is the entries made in the birth and death register maintained by the Municipalities/Gram Panchayats which can be treated to be primary evidence qua the date of birth of a person, however, in a case of this nature, the extract of such register with supporting evidence as to who has disclosed the date of birth at the time of making birth entries in the register is required to be produced in evidence. Mere production of the register and abstract is not sufficient and rather the examination of such person at whose instance the entries were made in the register is also relevant. It is held so by the Apex Court in ***Ravinder Singh Gorkhi vs. State of U.P. AIR 2006 SC 2157.*** The judgment reads as follows:

> "17. …………The said school leaving certificate was not issued in ordinary course of business of the school There is nothing on record to show that the said date of birth was recorded in a register maintained by the school in terms of the requirements of law as contained in Sec. 35 of the Indian Evidence Act. No statement has further been made by the said Head Master that either of the parents of the appellant who accompanied him to the school at the time of his admission therein made any statement or submitted any proof in regard thereto.
>
> ………………

[21] Determination of the date of birth of a person before a court of law, whether in a civil proceeding or a criminal proceeding, would depend upon the facts and circumstances of each case. Such a date of birth has to be determined on the basis of the materials on records. It will be a matter of appreciation of evidence adduced by the parties. Different standards having regard to the provision of Sec. 35 of the Evidence Act cannot be applied in a civil case or a criminal case.

[26] In Birad Mal Singhvi V/s. Anand Purohit, this Court held:

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

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

"[18] Therefore, a document may be admissible, but as to whether the entry contained therein has any probative value may still be required to be examined in the facts and circumstances of a particular case. The aforesaid legal proposition stands fortified by the judgments of this Court in Ram Prasad Sharma Vs. State of Bihar, 1970 AIR(SC) 326; Ram Murti Vs. State of Haryana,1970 AIR(SC) 1020; Dayaram & Ors. Vs. Dawalatshah & Anr., 1971 AIR(SC) 681; Harpal Singh & Anr. Vs. State of Himachal Pradesh, 1981 AIR(SC) 361; Ravinder Singh Gorkhi Vs. State of U.P., 2006 5 SCC 584; Babloo Pasi Vs. State of Jharkhand & Anr., 2008 13 SCC 133; Desh Raj Vs. Bodh Raj, 2008 AIR(SC) 632; and Ram Suresh Singh Vs. Prabhat Singh @Chhotu Singh & Anr., 2009 6 SCC 681. In these cases, it has been held that even if the entry was made in an official record by the concerned official in the discharge of his official duty, it may have weight but still may require corroboration by the person on whose information the entry has been made and as to whether the entry so made has been exhibited and proved. The standard of proof required herein is the same as in other civil and criminal cases.

………………

[16] So far as the entries made in the official record by an official or person authorised in performance of official duties are concerned, they may be admissible under Section 35 of the Evidence Act but the court has a right to examine their probative value. The authenticity of the entries would depend on whose information such entries stood recorded and what was his source of information. The entry in School Register/School Leaving Certificate require to be proved in accordance with law and the standard of proof required in such cases remained the same as in any other civil or criminal cases."

26. Therefore, in the light of the law laid down by the Apex Court in the judgments cited supra and also the evidence discussed, it is difficult to form an opinion that the prosecutrix was below 18 years of age on 9.10.2013, the date when she was kidnapped and subjected to sexual intercourse.

27. As per the radiological age of the prosecutrix, the same as per the opinion of the Radiologist Ext. PW-4/C is 15-17 years. The margin of error while determining the radiological age is 2-3 years on either side, however, it has been held by the apex Court in ***State of H.P. vs. Phurva & others, Latest HLJ 2011 (HP) 490,*** that the benefit of such error should be given to the accused as compared to the prosecution. The opinion Ext. PW-4/C has been produced in evidence by the prosecution itself. Therefore, this document also supports the defence version that the prosecution has failed to prove beyond all reasonable doubt that the prosecutrix on the day of occurrence was about 15 years of age, hence below 18 years. It, therefore, takes out the present case from the rigor of 6th situation below Section 375 of the IPC. The prosecutrix in such a situation has to be treated as major and not minor below 18 years of age. Moreover, in the record of CHC Banjar, District Kullu produced by DW-3 Sonam Dolma, Ward Sister, the age of the prosecutrix on 15.1.2016 when admitted in the said hospital, being pregnant for delivery, is recorded as 21 years. In her cross-examination, she has admitted that her age as 21 years in hospital record was recorded at her instance.

28. Now comes the question as to whether the present is a case of gang rape defined within the meaning of Section 376-D of the Indian Penal Code or not.

29. As per the prosecution case, the prosecutrix was kidnapped/abducted by both the convicts while on the way to school and by dragging her forcibly inside the Car firstly subjected her to sexual intercourse at an isolated place near and around Aut, District Mandi and thereafter on the side of kutcha road where she was taken in the vehicle. She thereafter allegedly was subjected to sexual intercourse in Hotel New Kailash, Akhara Bazar, Kullu in room No. 27, however, only by the principal accused Ravinder Sharma @ Ravi and the allegations are that accused Birbal remained outside the Hotel. Then she allegedly was taken to Hotel Balaji at Sarwari, Kullu and in the said Hotel subjected to sexual intercourse by both the convicts turn by turn. She was taken from Hotel Balaji at Sarwari to different unknown places and subjected to sexual intercourse throughout the night by both the accused turn by turn. The prosecutrix though has disclosed the names of both the accused in the FIR Ext. PW-1/A, however, while in the witness box denied any such statement having been made by her to the police. According to her, rather she came to know the names of the convicts lateron from her maternal Uncle Dev Raj, meaning thereby that in the FIR, the names of the convicts would have been entered may be at the instance of her parents accompanying her. In such a situation, it is doubtful that accused Birbal was also in the vehicle and abducted her. On the other hand, DW-1 Leela Devi, who was Post Graduate Teacher in Govt. Sr. Secondary School, Chanoun and taken lift in the offending car on that day tells us that only accused Ravinder Sharma @ Ravi was in the Car and driving the same. She has denied that convict Birbal was also in the car. The dent caused by this witness casts clouds on the prosecution story qua accused Birbal was also the occupant of the vehicle and subjected the prosecutrix to sexual intercourse. As per the prosecution case itself in Hotel New Kailash, Akhara Bazar, Kullu, he did not subject the prosecutrix to sexual intercourse and was rather standing outside. The extract of visitors' register Ext. PW-11/A reveals that Room No. 27 was occupied by accused Ravinder Sharma @ Ravi, the principal accused in this case and by one female accompanying him. Therefore, in this Hotel, accused Birbal has not subjected the prosecutrix to sexual intercourse as per the own case of the prosecution. As per the testimony of prosecutrix, from Hotel New

Kailash, Akhara Bazar, Kullu she was brought to Hotel Balaji at Sarwari and subjected there by both the accused to sexual intercourse turn by turn. The record of this hotel regarding visit of the accused and the prosecutrix has, however, not been obtained though the prosecutrix identified the said hotel and also room No. 1 thereof. The entry showing that the accused booked room No. 1 in the said hotel, however, has not been produced in evidence. Therefore, it is difficult to believe that at Hotel Balaji at Sarwari, the prosecutrix was subjected to sexual intercourse by the accused persons.

30. Now, if coming to the evidence produced in defence, it is proved that accused Birbal had made the complaint Ext. DW-2/A to Superintendent of Police (SV & ACB) Mandi apprehending therein that ASI Narpat Singh of Police Post Bahli Chowki and Guddi Devi (wife of Dev Raj, the maternal uncle of the prosecutrix) may have implicated him in a false case as the ASI at the behest of Guddi Devi had searched his vehicle without any rhyme or reason on several occasions. The complaint is dated 7.5.2013. The Superintendent of Police (SV & ACB), Central Range Mandi had forwarded the same vide letter dated 13.5.2013 Ext. DW-2/B to Superintendent of Police, Mandi for holding enquiry into the allegations therein. ASI Narpat Singh, as per these documents, was In-charge Police Post Bahli Chowki at that time. Guddi Devi is admittedly the wife of Dev Raj, maternal uncle of the prosecutrix. Said Sh. Dev Raj after his conviction in a case under the ND & PS Act was convicted by a Court at Panipat in Haryana. It has also come in evidence that he had absconded though ultimately arrested consequent upon his conviction and presently serving out the sentence in the jail at Panipat. As per the own case of the prosecution, the prosecutrix on 10.10.2013 was taken by her parents to the house of Proju Devi, none else but her real maternal grandmother. Dev Raj is son of said Proju Devi, therefore, real maternal Uncle of the prosecutrix. Likewise, Guddi Devi is the wife of Dev Raj. In such a situation, the contents of the complaint Ext. DW-2/A seems to be genuine and as accused Birbal had made the complaint against aforesaid Guddi, who was inimical to the said accused because of under the impression that it is at his instance her husband Dev Raj was booked by the police for the commission of the offence punishable under the provisions of the ND & PS Act, therefore, the version of accused Birbal in his defence that he neither abducted the prosecutrix nor subjected her to sexual intercourse is nearer to the factual position. Interestingly enough, the report of chemical examiner Ext. PX is silent about the availability of blood or semen on his underwear (Ext. 12) which was analyzed in the laboratory whereas the underwear (Ext. 13) of accused Ravinder Sharma @ Ravi was found to be having the semen stains thereon. Therefore, the scientific investigation conducted in this case also does not substantiate the change against him. In this view of the matter, the possibility of accused Birbal having been implicated in this case falsely due to enmity cannot be ruled out.

31. True it is that the offending vehicle Indigo white coloured Car registration No. HP 33-A-9265, belongs to accused Birbal. The same has been produced before the police by his brother Tek Singh on 18.10.2013 and taken into possession by the police along with its documents vide seizure memo Ext. PW-9/A and Ext. PW-9/B, respectively. The circumstances as to how it was being driven by accused Ravinder Sharma @ Ravi has remained un-explained.

32. As noticed hereinabove, accused Ravinder Sharma @ Ravi was driving the Car. It is stated so by DW-1 Leela Devi and even find mention in the FIR Ext. PW-1/A recorded at the instance of the prosecutrix. The vehicle on the other hand was of accused Birbal. How accused Ravinder Sharma @ Ravi was driving the same should have been explained by the prosecution. Though accused Birbal has also not said anything in his defence qua this aspect of the matter, however, as per the settled legal position, the

prosecution should have stood on its own legs and lacunae if any, in its case, benefit must go to the accused. It is, however, proved that the vehicle was being driven by accused Ravinder Sharma @ Ravi and it is doubtful that accused Birbal was also occupying the same. In this view of the matter, the only inescapable conclusion would be that accused Birbal was not in the vehicle hence neither had any hand in the abduction of the prosecutrix nor he had subjected her to sexual intercourse. The present, as such, is not a case of gang rape within the meaning of Section 376-D of the Indian Penal Code. Learned trial Judge has failed to appreciate the evidence available on record qua this aspect of the matter in its right perspective and wrongly convicted accused Birbal for the commission of the offence punishable under Section 376-D IPC. As a matter of fact, charge framed against the said accused is not proved beyond all reasonable doubt. He, therefore, deserves acquittal.

33. Otherwise also, in view of such type of evidence which is inconsistent and contradictory also, two possible views qua involvement of the accused Birbal in the commission of the offence emerge on record. As is well settled at this stage, in a case where two possible views emerge on record, the view favourable to the accused should be preferred as compared to the view favouring the prosecution and the benefit of doubt given to the accused and not to the prosecution. We are drawing support in this regard from the judgments of the apex Court in **T. Subramanian versus State of T. N., (2006) 1 Supreme Court Cases 401 and State of Rajsathan versus Islam & Others, (2011) 6 Supreme Court Cases, 343.**

34. The evidence as has come on record by way of sole testimony of the prosecutrix, however, implicate accused Ravinder Sharma @ Ravi in the commission of the offence with which he has been charged. As already held, the age of the prosecutrix has not been proved below 18 years. She, therefore, has to be believed to be major. The evidence to be discussed hereinafter amply demonstrate that accused Ravinder Sharma @ Ravi had kidnapped her by dragging inside the car. Though DW-1 Leela Devi while in the witness-box has stated that the prosecutrix alighted from the Car with her near the school and went inside. She, however, failed to point out that the prosecutrix actually attended the classes on that day. On the other hand, the prosecutrix has categorically stated that she was dragged by the accused inside the car. There is no reason to dis-believe her testimony in this regard. She has identified the place (Sadri Chanoun) from where she was kidnapped by the accused. The spot map is Ext. PW-13/A and photograph is Ext. PW-13/A-1. She has also identified the isolated place hillock (Dhank) where she was subjected to sexual intercourse for the first time. The spot map is Ext. PW-13/C. Similarly, the photographs of this place are Ext. PW-13/A-4 and A-5. She has also identified room No. 27 of Hotel New Kailash, Akhara Bazar, Kullu. The extract of Visitors' register and the statement of PW-11 Puran Chand, the Manager of the Hotel, reveals that room No. 27 was booked in the name of accused Ravinder Sharma @ Ravi. He was accompanied by one female. She was subjected to sexual intercourse in room No. 27 of the Hotel also stands proved from her own testimony and also the extract of the visitors register Ext.PW-11/A. The prosecutrix has identified room No. 27 and spot map Ext.PW-13/D was prepared. Not only this, but it is in Akhara Bazar, Kullu the accused purchased a **shirt** and **caprie** for her and made her to wear the same because she was in school dress and he may have apprehension of being caught with her on suspicion by someone, including the police. PW-7 Parveen has identified the shirt Ext.P-6 and caprie Ext.P-7 having been purchased from his shop. As regards her ravishment in Hotel Kailash, Sarwari Bazar, Kullu for want of the entries in the Guests' register of the hotel and the evidence of someone, including the Manager, though it cannot be said that she was taken there, however, she is justified in stating that the said accused took her to various places and subjected to sexual intercourse throughout the night. She could not identify those places and rightly so because of the odd hours.

35. Now, if coming to the scientific investigation conducted in this matter, her underwear Ext. 2(a) and underwear of accused Ravinder Sharma @ Ravi Ext. 13 were found to be having semen stains. The hair recovered from the rear seat of the car on comparison with her hair were found consistent and comparable with each other. The piece of cloth recovered from the Car was found having blood which reveals that the same oozed out when subjected to sexual intercourse and the said piece of cloth used for cleaning purposes. The defence though has tried to persuade us that as per the evidence available on record, the prosecutrix had menstruation which she also admits, however, according to her that was last day. Anyhow, the recovery of piece of cloth from the Car reveals that the same may have been used either on account of she was in menstruation period or for cleaning her private parts after she was subjected to sexual intercourse. In view of the sexual assault committed upon her repeatedly, the possibility of bleeding due to that was also obvious.

36. Therefore, irrespective of the prosecution has failed to prove that the prosecutrix was minor below 18 years of age, she has to be taken as major. The present, however, is not a case of consensual sexual intercourse with her and rather accused Ravinder Sharma @ Ravi has subjected her to sexual intercourse repeatedly against her will and without her consent. The offence he committed, therefore, falls under Section 376(2)(n) IPC. It is also proved beyond all reasonable doubt that the accused threatened her to do away with her life and also the life of other members in her family had she disclosed the incident to anyone. The evidence further reveals that she was subjected to sexual intercourse under threat. Otherwise also, she being a helpless girl of tender age had no option but to have succumbed to the pressure and threat of the accused because he did not release her on 9.10.2013 throughout the day and throughout the night intervening 9/10.10.2013. True it is that she was taken to Akhara Bazar, Kullu, a thickly populated area and she did not raise any hue and cry, it may be because of the threatening given by the accused and by that time she was subjected repeatedly to sexual intercourse by him at isolated place(s). It is not the case of the accused in defence that she was consenting party to the act of sexual intercourse committed by him with her. He rather has denied all the incriminating circumstances appearing against him either being wrong or for want of knowledge. The accused, in such circumstances acted smart.

37. True it is that no benefit can be taken from the lacunae, if any, in the case of the defence, however, when the prosecution has proved its case qua abduction of the prosecutrix and subjecting her to sexual intercourse against her will and without her consent, the silence of the accused speaks in plenty qua his act, conduct and behavior. The present, as such, is a case where the accused has repeatedly subjected the prosecutrix to sexual intercourse against her will and without her consent and has therefore, not only committed the offence punishable under Section 376(2)(n) IPC but also 506 IPC. For want of proof of the age of the prosecutrix that she was below 18 years of age, no case for the commission of offence punishable under Sections 363 and 366A IPC is, however, made out. Similarly, the charge framed against the accused under Section 6 of the POCSO Act also fails.

38. In view of what has been said hereinabove, convict Ravinder Sharma @ Ravi has committed the offence punishable under Sections 342, 376 (2)(n) and 506 IPC. He, therefore, is convicted for the commission of the offence punishable under Sections 342, 376 (2)(n) and 506 IPC and acquitted of the charge framed against him under Sections 363 and 366A IPC.

39. In the matter of sentence, the offence i.e. under Section 376 (2)(n) is graver in nature as compared to the offence punishable under Sections 342 & 506 IPC. The offence under Section 376(2)(n) is punishable with rigorous imprisonment for a term which shall not

be less than 10 years but may extend to imprisonment for life i.e. the imprisonment for the remainder of natural life and also with imposition of fine. Learned trial Judge while holding him guilty for the commission of the offence punishable under Section 376-D IPC has convicted him to undergo rigorous imprisonment for a period of 20 years and also to pay Rs. 10,000/- as fine. In view of the findings hereinabove, the sentence so passed against him has to be altered keeping in view the offence he has been found to have committed as per this judgment. The minimum sentence for the commission of such offence is 10 years. Although, the abduction and ravishment of the prosecutrix repeatedly is a gruesome act on his part, yet keeping in view his young age as he was 25 years of age at the time of commission of the alleged offence, we feel that the punishment to undergo rigorous imprisonment for 10 years with payment of Rs. 50,000/- as fine by him would serve the ends of justice. On his failure to deposit the fine amount, he shall further undergo rigorous imprisonment for a period of one year. The fine, if deposited by him, shall be paid to the prosecutrix to compensate her towards pains, mental agony and torture she suffered on account of sexual assault made by the convict upon her. The impugned judgment stands modified accordingly.

40. Consequently, Cr. Appeal No. 532 of 2016 filed by convict Ravinder Sharma @ Ravi partly succeeds and the same is partly allowed. He is acquitted of the charge framed against him under Sections 363 & 366-A IPC whereas convicted for the commission of the offence punishable under Sections 342, 376 (2)(n) and 506 IPC and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay fine of Rs. 50,000/- as fine for the commission of the offence punishable under Section 376 (2)(n) IPC. In default to deposit the fine so imposed upon him, he shall further undergo rigorous imprisonment for a period of one year. The fine, if deposited shall be paid to the prosecutrix as compensation. However, Cr. Appeal No. 516 of 2016 filed by convict Birbal is allowed and he is acquitted of the charge framed under Sections 363, 366-A, 376(2)(i)(n) read with Section 376-D, 342, 506 of Indian Penal Code and Section 6 of the Protection of Children from Sexual Offences Act. Consequent upon his conviction, he is serving out the sentence in jail. He, therefore is ordered to be released from custody forthwith, if not required in any other case, however, subject to furnishing personal bond in the sum of Rs. 25,000/- with one surety in the like amount to the satisfaction of learned trial Court so that in the event of any appeal agaisnst this judgment is preferred, his presence in the appellate Court can be secured. The bail bonds to be so furnished shall, however, remain in force only for a period of six months from today. Release warrant be prepared accordingly.

41. Before parting, we would like to reproduce here the order passed in these appeals on 23.3.2018:

> "Heard in part. It transpires from the records that copy of birth certificate of prosecutrix has not been annexed along with the challan, although copies of Parivar Register and some certificate of school, that have been exhibited as Ext.PW2/A and Ext.PW3/B, are on record. Even the Investigating Officer PW13 SI/SHO Chint Ram in examination-in-chief has categorically stated that he has obtained the birth certificate of prosecutrix.
>
> Therefore, let the Investigating Officer explain as to why the copy of birth certificate which is stated to have been obtained from Gram Panchayat, Chahari, Tehsil Banjar, District Kullu has not been annexed with the challan. Let the needful be done within three weeks.
>
> List on 13.4.2018."

42. Order dated 20.4.2018 which is also relevant reads as follows:

> "An affidavit in compliance to the order passed by this Court on 23.3.2018 has been filed by Mr. Chint Ram, Investigating Officer. The same is taken on record, which shall form part and parcel of the record and contents thereof shall be considered at the time of final hearing of the appeal(s). His personal appearance for the time being is dispensed with.
>
> List for hearing on 4.5.2018."

43. The I.O. PW-13 SI Chint Ram, in the affidavit he filed consequent upon the orders ibid, has stated as follows:

> "2. That in the above titled case the deponent has not obtained the birth certificate on the basis of death and birth register of the prosecutrix reason being that same was not available in the panchayat record and only copy of pariwar register of prosecutrix family was available which was obtained from the Panchayat Secretary of Gram Panchayat, Chanaun, Tehsil Banjar, District Kullu, H.P. The copy of the statement of Panchayat Secretary to this effect under Section 161 Cr.P.C. was recorded and the same is enclosed as Annexure A/1.
>
> 3. That the deponent has also categorically stated this fact of pariwar register (birth certificate) of prosecutrix in the case diary (jivni) No. 9 dated 20.10.2013. Copy of case diary is also enclosed as Annexure A/2.
>
> 4. That due to bonafide mistake while the deponent was examined in the Court on oath it has been written in examination-in-chief that the deponent obtained birth and school certificate of the prosecutrix, whereas it ought to have been "copy of pariwar register and school certificate of the prosecutrix" and only the copy of pariwar register is exhibited as PW-2/A.
>
> 5. That since there is no birth entry of the prosecutrix in the birth and death register in the Gram Panchayat, Chanaun as the deponent tried his level best to obtain the copy of birth certificate but same could not be obtained as it is not existing in panchayat record."

44. In support of his version reproduced hereinabove, the statement of Bhim Ram, Secretary, Gram Panchayat Kothi Chaihni recorded on 20.10.2013 has also been placed on record as Annexure A-1. Annexure A-2 is rapat No. 6 in the jimni that entries qua date of birth of the prosecutrix is not made in the birth register.

45. In view of the explanation so forthcoming, we are satisfied that the entries qua birth of the prosecutrix may have not been made by the parents of the prosecutrix in birth register maintained by the Gram Panchayat. The present, as such, is not a case of dereliction of any duty by the I.O. PW-13 the then SI/SHO Chint Ram, Police Station Banjar who has not only recorded the statement Annexure A-1 to the affidavit in this regard but also made entries in the jimni that the Secretary Gram Panchayat has informed about no entry having been made qua the birth of the prosecutrix in the birth register. Therefore, no other and further action against PW-13 SI/SHO Chint Ram, is required. Consequently, show-cause notice issued against him is discharged and the proceedings dropped.

****

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

Hi Tech Satluj Pvt. Ltd ....Appellant.
Versus
North Star Cable Q Data.com Pvt. Ltd. ....Respondent.

Cr. Appeal No.11 of 2019
Decided on: 3.4.2019

Code of Criminal procedure, 1973- Section 256 –Dismissal of complaint in default – Acquittal - Trial court dismissing complaint for non-appearance of complainant or his counsel on date fixed and acquitting accused- Appeal against – Held, complainant showing sufficient cause for not appearing before trial court on date fixed as his counsel having noted down wrong date in his diary – Petitioner infact was serious in pursuing complaint demonstrated in filing appeal by him against acquittal resulting from its dismissal – In every case, complaint is not to be dismissed in default and accused acquitted for non-appearance of complainant and his counsel – It is mandate of law to adjourn case to some other date by recording reasons – Appeal allowed - Acquittal set aside – Complaint ordered to be restored. (Paras 5 to 9)

Cases referred:
Mohd. Azeem Vs. A. Venkatesh and another, (2002) 7 Supreme Court Cases 726

For the appellant. : Mr. Nitin Thakur, Advocate.
For respondent : None.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J *(Oral)*

This appeal has been filed by the petitioner against the order of learned Judicial Magistrate 1st Class, Court No. IV, Hamirpur, H.P. in case titled as Hi-Tech Satluj Motors Pvt. Ltd., Vs. North Star Cable Q Data com Pvt. Ltd., dated 07.04.2018 vide which the complaint filed by present appellant was dismissed by learned Court below on the ground that neither anyone had put in appearance on behalf of the complainant nor steps for summoning the accused were taken. Learned Court below also discharged the accused for the commission of offence punishable under Section 138 of the Negotiable of Instruments Act (in short 'the Act').

2. Despite service of the respondent no one has appeared on its behalf.

3. Learned counsel for the appellant has argued that the impugned order is not sustainable in the eyes of law as the learned Court below has erred in not appreciating that non-appearance of learned counsel for the complainant before learned Court below was a bonafide mistake, as the date fixed before learned trial Court was wrongly noted by learned counsel as '7.5.2018' instead of '7.4.2018'. Learned counsel has further argued that the impugned order is further not sustainable in the eyes of law, as learned Magistrate has wrongly come to the conclusion that complaint was fit to be dismissed as per the mandate of Section 256 of the Criminal Procedure Code.

4. I have heard learned counsel for the appellant and have also gone through the record of the case.

5. Section 256 of the Code of Criminal Procedure deals with non-appearance or death of complainant. This Section, inter alia, provides that if summons have been issued on complainant on a day appointed for appearance of accused or any day subsequent thereto for which hearing may be adjourned, in case complainant does not appears, the Magistrate shall acquit the accused unless for some reason, he thinks it appropriate to adjourn the hearing of the case to some other day. Thus, it is not as if on account of non-appearance of the complainant in every case accused has to be acquitted. Learned Court has the statutory mandate to adjourn the hearing of the case to some other date by recording reason.

6. In the present case on the day when the impugned order was passed, complainant was not present in the Court nor his counsel appeared before the Court. The reason for this, as it finds mention in the present petition, is that counsel for the petitioner wrongly noted down the date as '7.5.2018' instead of '7.4.2018'. The fact that petitioner has assailed the order of acquittal of the accused on account of non-appearance of the petitioner before this Court, demonstrates that the petitioner is serious about pursuing the complaint filed by him. This Court has no reason to disbelieve his version as why he could not appear before the Court on 7.4.2018.

7. Even otherwise, in cases such like this, in my considered view, learned Court below rather than hastily discharging/acquitting the accused on account of non-appearance of the complainant or his counsel on a solitary date should adjourn the hearing to some other day after recording reason and if even thereafter, either the complainant or his counsel does not appears then appropriate orders can be passed by the Court.

8. Hon'ble Supreme Court of India in **Mohd. Azeem Vs. A. Venkatesh and another**, (2002) 7 Supreme Court Cases 726 has deprecated the practice of acquitting the accused only for absence of complainant on one day and refusing to restore the complaint when sufficient cause for absence was shown by the complainant. In the said case also the complaint filed was under Section 138 of the Negotiable Instruments Act and the reason as to why the complainant could not appear before the Court below was on account of wrong date being noted. Hon'ble Supreme Court held that if the cause shown by the complainant has not been disbelieved then the same should have been held to be a valid ground for restoration of the complaint.

9. Coming to the facts of this case, as in my considered view, the cause shown by the complainant of his absence that he had wrongly noted the date cannot be disbelieved, therefore, this is a valid ground for setting aside the impugned order and restoring the complaint filed by him.

Accordingly, this appeal is allowed. Impugned order dated 7.4.2018 whereby complaint has been dismissed and accused discharged is set aside and the complaint is ordered to be restored to its original number with direction to learned Court below to proceed with the matter, in accordance with law. Appellant to appear through his counsel before learned Court below on 6.5.2019 and thereafter learned Court shall proceed with the matter in accordance with law.

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

Khajan Singh Tomar ....Petitioner.
Versus
Ramesh Kumar and others ....Respondents.

CMPMO No 492 of 2018
Decided on: 3.4.2019

Code of Civil Procedure, 1908 - Order VI Rule 17 – Amendment of pleadings after commencement of trial – Permissibility – Held, after commencement of trial amendment in pleadings not to be allowed unless court comes to conclusion that despite due diligence such amendment could not have made by party – Defendant filed written statement after four and half years of institution of suit – Nothing mentioned in application that such amendment was not possible before commencement of trial despite due diligence on his part – Amendment will result in withdrawal of admissions by him as also in fresh trial – Order of trial court dismissing defendant's prayer for amendment upheld – Petition dismissed. (Paras 8 to 14)

For petitioners. Mr. O.P. Sharma, Sr. Advocate with Mr. Gurmeet Bhardwaj, Advocate.
For respondents Ex parte.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J (Oral)

By way of this petition filed under Article 227 of Constitution of India, the petitioner assails order dated 20.11.2018 passed by the Court of learned Civil Judge (Senior Division) Nahan, in CMA No. 585/6 of 2018 of Civil Suit No. 101/1 of 2013, vide which an application filed under Order 6 Rule 17 of CPC by petitioner-defendant praying for permission to amend the written statement has been dismissed.

2. Brief facts necessary for adjudication of present petition are that respondents No. 1 to 4 have filed a suit against petitioner and proforma respondents praying for following relief:-

> "It is, therefore, respectfully prayed that a decree for declaration for setting aside and cancelling the sale deed No. 55 dated 23.02.1987and Mutation No. 226 dated 14.08.1987 and further trust deed No. 38 dated 20.04.1987 and Mutation No. 229 dated 19.01.1988 be passed in favour of the plaintiffs and against the defendants. The defendants be further restrained from causing any kind of interference in the suit land which is in possession of plaintiffs being owner and they be also restrained from alienating the suit property in any manner. And or any other relief which this Ld. Court deems fit be also passed in favour of the plaintiffs and against the defendants. An affidavit is attached".

(Relief clause has been extracted from the copy of plaint handed over to the Court by learned counsel for the petitioner.)

3. This suit was instituted in June, 2013. Written statement to the suit instituted in June, 2013 was filed on behalf of petitioner/defendant No. 1 in March, 2018. Meaning thereby that written statement to the suit apparently was filed after more than four and half years.

4. Be that as it may, this Court is not going into the issue as to why written statement was filed at such a belated stage.

5. After the filing of the written statement in October, 2018, an application was filed under Order 6 Rule 17 by petitioner/defendant No. 1 praying for permission to amend written statement on the ground that proposed amendments were necessary for adjudication of the suit and the reason as to why proposed amendments earlier be not incorporated in the written statement was unintentional mistake. This application was opposed by non-applicant/plaintiffs on the ground that proposed amendments if allowed would change the entire nature of the case and defendant intended to withdraw the admissions which were made in the written statement and therefore, if the application was allowed it would cause serious prejudice to the plaintiffs.

6. Learned Court below vide order under challenge has dismissed the application on the ground that proposed amendment if permitted would not only change the entire stand of defendant No. 1, but would also lead to fresh trial. It also weighed with the learned trial Court that the application to amend written statement had been filed after framing of the issues and the evidence of plaintiff was closed. Learned Court also held that no due diligence was exercised by the defendant so as to permit the application filed for amendment of the written statement and on these bases, learned trial Court dismissed the application.

7. I have heard learned Senior counsel for the petitioner and have also perused the impugned order, as well as record of the case.

8. Order 6 Rule 17of the CPC provides that Court may at any stage of the proceeding allow either party to alter or amend his pleadings in such manner and on such term 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 commencement of trial.

9. As I have already taken note of above, the suit was filed in the year 2013. The written statement filed by defendant No. 1 to the said suit is dated 03.1.2018, but as is evident from the order passed by learned trial Court, it was filed in the Court on 23.03.2018. Meaning thereby that it took almost four and half years for the defendant to file written statement to the suit. It is only after the Issues stood framed and evidence of the plaintiff stood recorded that an application was filed under Order 6 Rule 17 of the CPC for amendment of the written statement.

10. A perusal of the contents of application demonstrates that there is nothing mentioned therein as to why despite due diligence what is intended to be incorporated by way of amendment could not earlier be incorporated in the written statement.

11. This is more so important in the factual matrix of this case, wherein it took almost four years for the petitioner/defendant No. 1 to file written statement to the Civil Suit itself.

12. A perusal of the application demonstrates the only reason mentioned in the application as to why proposed amendments could not be incorporated earlier is that the "facts were part of the document which was inadvertently left out despite best efforts."

13. In my considered view, such kind of pleadings in the application cannot be termed to be due diligence and an act of omission on the part of party is not an act of due diligence.

14. Even otherwise, having perused the contents of written statement and having perused the proposed amendment intended to be incorporated in the written statement, this Court concurs with the findings returned by learned Court below that in case the proposed amendment is allowed not only the admissions made by the defendant in the written statement would be permitted to be withdrawn, but the same would also result in fresh trial. The contention of learned Senior Counsel appearing for the petitioner that proposed amendment is nothing but a clarification does not holds any merit because the proposed amendment intends to introduce new facts which were not earlier incorporated in the written statement and therefore, it cannot be said that the proposed amendments were just clarificatory in nature.

Therefore, as this Court does not finds any merit in the petition, the same is dismissed. Pending miscellaneous application(s), if any, also stand disposed of.

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

Uttam Chand ....Petitioner.
Vs.
Desh Raj and others ....Respondents.

Cr. MMO No. 101 of 2017
Date of Decision: 03.04.2019

Code of Criminal Procedure, 1973 – Sections 156(3) & 482 **–** Complaint seeking registration of FIR – Dismissal in default – Sustainability – Trial court dismissing complaint for non-prosecution by complainant or his counsel on date fixed – Petition against – On facts, complainant found admitted in hospital for eye surgery some days prior to date fixed in case - Complainant absent for first time in trial court – Held, trial court hastily dismissed complaint for non-prosecution for one solitary date - It should have adjourned case for another date and had complainant or his counsel not appeared before it on next date also, then appropriate order should have been passed – Petition allowed - Order set aside – Complaint ordered to be restored. (Paras 5 to 7)

For the petitioner:	Mr. Ajay Sharma, Senior Advocate, with Mr. Rakesh Chaudhary, Advocate.
For the respondents:	Mr. Lalit K. Sharma, Advocate, for respondent No. 1. Mr. Lovneesh Kanwar, Advocate, for respondents No. 2 to 4.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this petition, the petitioner assails order dated 30.01.2017, passed by the Court of learned Chief Judicial Magistrate, Hamirpur, H.P. in Cr. MA No. 171-IV/16, vide which, an application filed by him under Section 156(3) of the Code of Criminal Procedure has been dismissed on account of non-presence of the applicant and non-prosecution of the case on the said date before the learned Trial Court.

2. Petitioner filed an application under Section 156(3) of the Code of Criminal Procedure for registration of a case under Sections 415, 420 and 120-B of the Indian Penal Code against the persons named in the said application. This application is dated 24th November, 2016. As per record, the application was presented before the learned Court below on 25th November, 2016. It appears that on 30th January, 2017, when the case was listed, neither the applicant appeared before the learned Court below nor he was represented by any counsel. Learned Court below dismissed the case for non-presence of the applicant as also for non-prosecution of the case. Feeling aggrieved, the petitioner has filed the present petition.

3. Learned counsel for the petitioner has argued that impugned order is harsh, as learned Court below has erred in dismissing the application on account of non-presence of the applicant/petitioner and non-prosecution of the case as on the date in issue, the petitioner personally was not in a position to appear before the learned Court below, as he was admitted in a hospital at Gurgaon on account of an eye surgery from 27.01.2017 to 30.01.2017. The reason as to why his counsel did not appear before the learned Court below was not within his control, as he himself was confined to a hospital. He submits that before dismissing the case for non-presence of the applicant or his counsel, in the interest of justice, learned Court below should have given at least one adjournment and/or issued summons to the applicant and had even thereafter, the applicant or his counsel not appeared before the Court below, then the application could have been dismissed for non-presence and non-prosecution. Accordingly, he prays that as the impugned order is harsh and not in consonance with the provisions of Section 256 of the Criminal Procedure Code, the same may be set aside and directions be issued to the learned Court below to decide the application filed by the petitioner under Section 156(3) of the Criminal Procedure Code on merit.

4. I have heard learned counsel for the parties and have also gone through the impugned order as also the record appended with the petition.

5. On the basis of record, it cannot be disputed that on account of his eye surgery, the petitioner was admitted in an Eye Care Centre at Gurgaon, Haryana from 27.01.2017 up to 30.01.2017. This is evident from Annexure P-3. It is also not in dispute that as on the date when the application was dismissed by the learned Court, notice had not yet been issued to the respondents/accused. Record does not suggest that on previous date(s), applicant or his counsel had not appeared before the learned Trial Court, meaning thereby that non-presence of the applicant on 30.01.2017 was for the first time. In these circumstances, in my considered view, learned Trial Court rather than hastily dismissing the application for non-presence and non-prosecution of the case on behalf of the applicant for one solitary date, should have adjourned the case for another date and had the applicant and/or his counsel not appeared before the learned Court below on the said date also, then appropriate order should have been passed on the application.

6. This Court is not oblivious to the fact that learned counsel engaged by the petitioner had a duty to appear before the learned Court below, but as this Court is not

aware as to whether the non-appearance of learned counsel was bonafide or intentional, this Court is of the view that petitioner could not be made to suffer for the act of omission of learned counsel. Had the petitioner not been serious with regard to the application so filed by him, then he would not have had approached this Court under Section 482 of the Code of Criminal Procedure assailing the order passed by the learned Court below, vide which his application has been dismissed for non-presence of the applicant as also for non-prosecution of the case.

7. Accordingly, this petition is allowed. Impugned order dated 30.01.2017 is set aside and the learned Court below is directed to decide the application under Section 156(3) of the Code of Criminal Procedure afresh in accordance with law. It is clarified that this Court has not expressed any view on merits of the case and the application shall be decided by the learned Court below completely uninfluenced by any observation made in this order. Registry is forthwith directed to return back the record of the case to the learned Court below. Petitioner is directed to appear before the learned Court below on ***1st May, 2019.*** Learned Court below thereafter shall proceed with the matter in accordance with law.

Petition stands disposed of in above terms. Miscellaneous applications, if any, also stand disposed of.

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

Rahul Malik ....Petitioner
Versus
State of Himachal Pradesh ....Respondent

Cr.MP(M) No. 216 of 2019
Decided on: 5th April, 2019

Constitution of India, 1950 – Article 21 - **Code of Criminal Procedure, 1973 -** Section 439 –Personal liberty - Regular bail – Grant of - Held, personal liberty as guaranteed under Article 21 of Constitution of India is to be respected but within confines of law- Offence under Section 302 of IPC being serious one, petitioner not entitled for bail- Petition dismissed.(Paras 7 & 9)

Cases referred:
Dataram Singh vs. State of Uttar Pradesh & another, (2018) 3 SCC 22
Dipak Shubhashchandra Mehta vs. Central Bureau of Investigation & another, (2012) 4 SCC 134
Kalyan Chandra Sarkar vs. Rajesh Ranjan @ Pappu Yadav & another, (2005) 2 SCC 42
Prasanta Kumar Sarkar vs. Ashis Chatterjee & another, (2010) 14 SCC 496.
Saint Asha Ram vs. State of Rajasthan, 2017 STPL 3185 SC
Sanjay Chandra vs. Central Bureau of Investigation, (2012) 1 SCC 40
State of Kerala vs. Raneef, (2011) 1 SCC 784
State of U.P. through CBI vs. Amarmani Tripathi, (2005) 8 SCC 21
Vinod Bhandari vs. State of Madhya Pradesh, (2015) 11 SCC 502

For the petitioner:	Mr. R.K. Bawa, Sr. Advocate, with Mr. Ajay Kumar Sharma, Advocate.
For the respondent/State:	M/s. S.C. Sharma and Shiv Pal Manhans and P.K. Bhatti, Additional Advocates General with Mr. Raju Ram Rahi, Deputy Advocate General.
For the complainant:	Mr. Anand Shamra, Sr. Advocate, with Mr. Karan Sharma, Advocate. SI/SHO Layak Ram, Police station Dharampur, District Solan, H.P.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge. *(oral).*

The present bail application has been maintained by the petitioner under Section 439 of the Code of Criminal Procedure seeking his release in case FIR No. 68 of2016, dated 27.06.2016, under Section 302, 307, 147, 148, 149 IPC and Section 25 of the Arms Act, registered at Police Station Dharampur, District Solan, H.P.

2. In the instant case, the present petitioner has been taken in custody by the police and as per the prosecution story, which formed basis for the custody of the petitioner, can tersely be encapsulated as under:

On 26.06.2016 Smt. Taran Jeet Kaur (complainant) got her statement recorded under Section 154 Cr.P.C. The complainant stated that she alongwith her husband, Shri Param Jeet Singh (deceased) used to run a restaurant (*dhaba*) at Sanawara and the said *dhaba* was being looked after by her, her husband and nephew Hansdeep. On 26.06.2016, when she was washing clothes, around 05:00 p.m., 10/15 persons of a tourist group were in the *dhaba* and they were attended upon by Naresh Kumar (attendant). There arose a dispute qua the freshness of the meals and the scuffle ensued. One of the persons from the tourist group went to the vehicle, brought a pistol and fired on her husband (Shri Param Jeet Singh). Shri Hansdeep was also hit with gun shot on his chest. Thereafter, all the persons fled away from the spot in their vehicle, having registration number of Uttar Pradesh. The husband of the petitioner and Shri Hansdeep was rushed to the CHC, Dharampur. The husband of the petitioner was declared dead and Shri Hansdeep was referred to PGI, Chandigarh. On the basis of the statement of the complainant, police registered a case and the investigation ensued. Postmortem examination on the corpse of the deceased was conducted. Police prepared the spot map and clicked photographs of the spot. CCTV footage was obtained and police recovered empty cartridges, sword like weapon, having blood, pieces of carton etc. During the course of investigation, it was unearthed that the Rahul Malik (petitioner herein) alongwith other accused persons fled away from the spot in vehicle, having registration No. UP14FT-3871. The petitioner was arrested on 27.06.2016 and he was medically examined. Police collected the scientific evidence for analysis. Other accused persons were also arrested. Scientific samples collected from the spot were chemically examined in Forensic Science Laboratory, Junga. CCTV footage was also examined, which shows the presence of the petitioner and the other accused persons on the spot. During the course of investigation, it was unearthed that the petitioner alongwith other accused persons was on tour to Dharamshala and Shimla and while returning they stopped in the *dhaba* of the deceased. The petitioner and the other accused persons were not satisfied with the food quality, so a quarrel started and the petitioner fired on the deceased. It has further come in the investigation that the petitioner is not eligible for appearing on examination of LL.B. 6th semester. As per the prosecution, *challan* stands

presented in the Court and now the case is listed before the learned Trial Court on 17 and 18th April, 2019. Lastly, it is prayed that the bail application of the petitioner be dismissed, as the petitioner was involved in a serious offence and in case he is enlarged on bail, he may tamper with the prosecution evidence and may also flee from justice. The prosecution objected the petition on the ground that there exists *prima facie* or reasonable ground that the petitioner committed the murder of the deceased, the offence of which the petitioner is accused of is grave and there is possibility that the accused, in case enlarged on bail, may abscond. Simultaneously, the prosecution is objecting the bail application on the premises that in case the petitioner is enlarged on bail, he may try to influence the witness and there is possible danger of justice being thwarted by granting the petitioner bail.

3. I have heard the learned Senior Counsel for the petitioner, learned Additional Advocate General for the State, learned Senior Counsel for the complainant and gone through the record, including the police report, carefully.

4. The learned Senior Counsel for the petitioner has argued that the petitioner has to complete law, so he be enlarged on bail by exercising the discretionary powers vested in this Court. He has further argued that following the settled legal dictum of law the personal liberty of the petitioner, which has been guaranteed by Article 21 of the Constitution of India, should not be curtailed till the pendency of the case. He has argued that the petitioner is ready and willing to abide by the conditions, if any, imposed by this Court for granting bail and the petitioner is neither in a position to tamper with the prosecution evidence now in a position to flee from justice. In order to strengthen his case, the learned Senior Counsel has placed reliance on the following judicial pronouncements:

1. ***Kalyan Chandra Sarkar vs. Rajesh Ranjan @ Pappu Yadav & another, (2005) 2 SCC 42;***
2. ***State of U.P. through CBI vs. Amarmani Tripathi, (2005) 8 SCC 21;***
3. ***State of Kerala vs. Raneef, (2011) 1 SCC 784;***
4. ***Sanjay Chandra vs. Central Bureau of Investigation, (2012) 1 SCC 40;***
5. ***Dipak Shubhashchandra Mehta vs. Central Bureau of Investigation & another, (2012) 4 SCC 134;***
6. ***Vinod Bhandari vs. State of Madhya Pradesh, (2015) 11 SCC 502; &***
7. ***Dataram Singh vs. State of Uttar Pradesh & another, (2018) 3 SCC 22.***

Conversely, learned Additional Advocate General has argued that there is reasonable ground to believe that the petitioner had committed the crime. He has further argued that the offence is grievous and in case the petitioner is enlarged on bail, he may abscond and may also influence the witnesses. He has further argued that bail application of the petitioner is required to be dismissed in the above backdrop.

5. Learned Senior Counsel appearing on behalf of the complainant has argued that the petitioner is main accused and has committed a serious offence. He has further argued that the petitioner in broad day light murdered the deceased and fled from the spot. He has argued that in case the petitioner is enlarged on bail, there is likelihood that he may abscond, as he is resident of Uttar Pradesh and he may also influence the witnesses and thwart justice, as the complainant party is being approached through intermediaries and is being pressurized. He has argued that the petitioner is ineligible for appearing in the

examination of LL.B. He has vehemently argued that in view of the nature and gravity of the offence and eminent danger of petitioner's fleeing from justice and also the witnesses being won over by the petitioner, the present bail application may be dismissed. In order to draw lateral support to his arguments, the learned Senior Counsel has placed reliance on the following judicial pronouncements:

1. ***Saint Asha Ram vs. State of Rajasthan, 2017 STPL 3185 SC; &***
2. ***Prasanta Kumar Sarkar vs. Ashis Chatterjee & another, (2010) 14 SCC 496.***

6. In rebuttal the learned Counsel for the petitioner has argued that the petitioner cannot be kept behind the bars for an unlimited period. He has further argued that the petitioner is neither in a position to tamper with the prosecution evidence nor in a position to flee from justice, so he may be enlarged on bail.

7. After hearing the learned Senior counsel and learned Additional Advocate General for the respective parties and after going through the law as cited by the learned Senior Counsel for the parties, it emerges that bail is sought on the ground that the personal liberty, as guaranteed under Article 21 of the Constitution of India, cannot be taken away. However, bail is opposed on the premise that a person can be deprived of personal liberty by the procedure established by law. Article 21 of the Constitution of India postulates that personal liberty of a person cannot be taken away, except in accordance with the procedure established by law. Learned Senior Counsel for the petitioner has argued that there is presumption of innocence at pre-conviction stage. Indeed, there is presumption of innocence of accused at pre-conviction stage, but a person is kept in custody for ensuring his availability to face trial and to receive the sentence, if passed. The pre-conviction custody and during trial custody is not punitive in nature, but preventive. A person can be taken in custody for non-bailable offence and can be kept in custody during the pendency of trial, such custody cannot be said to be curtailing or taking away the personal liberty of a person. A person can only be deprived personal liberty under the procedure established by law. The law, as cited by the learned Senior Counsel for the parties, has been considered. The gist of the above cited law is that the personal liberty of a person, as guaranteed under Article 21 of the Constitution of India, is to be respected, but within the confines of law. Section 302 IPC, for which the petitioner has been booked, is a serious offence. Thus, after analyzing the law, the following rudimentary principles have to be borne in mind by the Courts for granting or rejecting the bail application of an accused:

- ***(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 realeased 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.***

Thus, each bail application has to be examined on the touchstone of the above settled rudimentary principles.

8. Certainly, personal liberty is constitutional guarantee provided under Article 21 of the Constitution of India. However, Article 21 simultaneously excogitate that such liberty can be curtailed by the procedure established by law. Therefore, this Court has to examine the prayer of the petitioner on the above enumerated settled contours for granting bail.

9. At this stage, after threadbare examination of the police record, viz-a-viz allegations against the petitioner, and without discussing the same and after examining the law cited by the learned Senior Counsel for the parties, this Court finds that there is reasonable ground to believe that the petitioner alongwith other accused persons was involved in the offence, the offence is of grave nature, there is possibility of petitioner's absconding, in case he is enlarged on bail and there is strong apprehension that he may influence the witnesses and try to thwart the justice. So, after analyzing the arguments of the learned Senior Counsel for the petitioner and also examining the law, the present is not a fit case where the judicial discretion to admit the petitioner on bail is required to be exercised in his favour.

10. In view of the above, the petition, which sans merits, deserves dismissal and is accordingly dismissed.

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

Shri Rahul Sharma …Petitioner.
Versus
Smt. Rajni Devi and another …Respondents.

CRMMO No. 555 of 2018
Decided on: 05.04.2019.

Protection of Women from Domestic Violence Act 2005 - Sections 12 and 23 –Interim maintenance – Nonpayment of – Consequences – Parties compromising dispute before High Court – Liberty granted to parties to revive proceedings if compromise is not honoured by them –Husband not taking wife to matrimonial home nor paying maintenance to her and child – Trial court reviving proceedings on wife's application and sending husband to civil imprisonment for not paying maintenance – Petition against – Trial court found having granted many opportunities to husband to pay maintenance even after revival of proceedings - No explanation given for non-payment of amount – Application filed by him for directing wife to join his company nothing but an attempt to prolong case – No fault can be found with order of trial court sending husband to civil imprisonment for non-payment of maintenance – Petition dismissed – Order upheld (Paras 9 to 11)

For the petitioner : Mr. Ashok Kumar Verma, Advocate.
For the respondents : Respondent No. 1 is present in person for herself and for her minor daughter (respondent No. 2).

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

This petition has been filed by the petitioner against order dated 23.04.2018, passed by the Court of learned Chief Judicial Magistrate, Sirmaur District at Nahan, vide which, application filed by the petitioner for conciliation of the dispute has been dismissed and in default to pay maintenance to the respondents, he has been sent to imprisonment for one month.

2. Brief facts necessary for adjudication of this petition are as under:

Petitioner is the husband of respondent No. 1 and father of respondent No. 2. A complaint under Section 12 of the Domestic Violence Act (hereinafter referred to as the 'Act'), i.e. Complaint No. 36/15, titled as Rajni Devi vs. Rahul Sharma, was filed by respondents against the petitioner alongwith an application under Section 23 of the Act, praying for interim maintenance. Learned Court ordered payment of maintenance at the rate of Rs.7,000/- per month in favour of wife and the minor child.

3. This order was assailed by the petitioner before this Court by way of Cr.MMO No. 242 of 2017. Said petition was disposed of by this Court vide judgment dated 25.8.2017 in terms of settlement arrived at between the parties, with the condition that in case the petitioner did not comply with the undertaking so given by him, then the parties will be at liberty to revive their respective cases.

4. It appears that as the petitioner did not comply with the terms of compromise, an application was filed by the respondents before the learned Court below for revival of the case filed under the Domestic Violence Act.

5. After the application stood filed by the wife for revival of the case, petitioner-husband also filed an application under Section 151 of the Code of Civil Procedure before the learned Court below praying that wife be directed to join his company.

6. Learned Court below dismissed this application vide impugned order holding that the same was not maintainable in view of directions already issued by this Court (High Court) in its judgment supra. As the petitioner had failed to pay maintenance to the respondents, learned Court also sent him for imprisonment for one month.

7. Record demonstrates that even after 23.04.2018, opportunities were granted to the petitioner to pay maintenance; however, he failed to do so. This is evident from orders dated 28.06.2018 and 26.7.2018 passed by learned Court below which are also appended with the petition.

8. Respondent No. 1 has submitted before the Court that she was willing to join the company of the petitioner in terms of the compromise having entered into between them but petitioner made no endeavour to take her back. She further submitted that in this background she filed the application for revival of her case in terms of the judgment passed by this Court. No maintenance has been paid by the petitioner to her or to the daughter (respondent No. 2) for the last 2-3 years. According to her, filing of application under Section 151 of CPC and praying for a direction that she be directed to join the company of the petitioner was nothing but an attempt to delay the proceedings and also to delay the payment of maintenance to her and her minor daughter.

9. Having heard learned Counsel for the petitioner as also respondent No. 1, who is present in person in the Court, this Court does not finds any infirmity with the order passed by the learned Court below.

10. During the course of arguments, no cogent explanation was given by learned Counsel for the petitioner as to why maintenance has not been paid by the petitioner to the

respondents till date. It is evident from the record that even after the passing of the impugned order, apparently on the request of the present petitioner, further opportunities were granted to him to pay maintenance to the respondents, yet he did not abide by undertaking given by him before the learned Court below.

11. That being so, learned Court below has rightly dismissed the application filed by the petitioner under Section 151 of the Civil Procedure Code allegedly moved for conciliation but apparently moved for delaying the case and has also rightly ordered the imprisonment of the petitioner as he has failed to pay the maintenance to the respondents.

In this factual matrix, this Court finds no merit in this petition and the same is accordingly dismissed, so also pending miscellaneous application(s), if any.

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

Chittru ….Petitioner.
Versus
Pal and another ….Respondents.

CMPMO No.: 253 of 2018.
Decided on: 10.04.2019.

Indian Evidence Act, 1872 - Section 73**-** Comparison of signatures, thumb impression etc by expert - Request of – Permissibility – Plaintiff filing application for comparison of thumb impression of deceased on "Will"- Defendant contesting application on ground of its having been filed at belated stage with intent to linger on case - Trial Court dismissing application - Petition against- Held, plaintiff in possession of document sought to be examined for more than ten years – Application for comparison of thumb impression with admitted or proved thumb impression not filed earlier – Plaintiff already granted sufficient opportunity to lead evidence – Suit at stage of final arguments and many adjournments sought for arguments also - His conduct demonstrates that application was filed with intent to delay matter-Petition dismissed –Order upheld (Paras 7 to 10)

For the petitioner : Mr. Lovneesh Kanwar, Advocate.
For the respondents : Mr. Ajay Chandel, Advocate for respondent No. 1.
: Nemo of respondent No. 2

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this petition, petitioner has challenged order dated 27.04.2018, passed in CMP No. 171 of 2018, in Civil Suit No. 716 of 2013, vide which, application filed under Section 73 of the Indian Evidence Act by the petitioner/ plaintiff for comparison of the finger/thumb impression of the deceased Sunder Singh over the disputed Will with purported admitted documents, stands dismissed by the learned Court below.

2. Brief facts necessary for adjudication of the petition are that petitioner/plaintiff (hereinafter referred to as 'plaintiff') has filed a suit for declaration as also

for joint possession and injunction against the respondents/ defendants to the effect that Will dated 28.06.1995 be declared as null and void and plaintiff and defendant No. 1 be declared owners of the suit land in equal shares on the basis of Will dated 04.01.1986.

3. The suit was filed in the year 2010. During the pendency of the suit, at a belated stage, when the case was at the stage of arguments and same stood adjourned six times on the request of plaintiff, an application was filed by the plaintiff under Section 73 of the Indian Evidence Act for comparing finger/thumb impression of deceased Sunder upon disputed Will and sale deed with his admitted finger/thumb impression upon Will dated 04.01.1986. The application is dated 15th September, 2017.

4. It was averred in the application that the applicant had filed a suit for declaration and cancellation of Will dated 28.06.1995 allegedly executed by deceased Sunder. There was great difference between finger/thumb impression on Will dated 04.01.1986 as compared to Will dated 28.06.1995 as also sale deed dated 26.03.1996. It was further averred in the application that deceased Sunder was seriously ill and was confined to bed and was not in a position to move and defendant took undue advantage of the aforesaid situation. As per applicant/ plaintiff, Sunder had never executed the disputed Will and it was necessary to compare finger/thumb impression for decision of the case.

5. The application was opposed by the respondent/contesting defendant *inter alia* on the ground that the documents referred to in para two of the application were in possession of the plaintiff since last 10 years and the statements of the attesting witnesses to the Will under challenge stood recorded and the application had been filed just to delay the case and harass the defendants.

6. Learned Court below vide impugned order dismissed the application by holding that there was merit in the contention of the contesting defendant that application was filed at a belated stage with the intent just to linger on the case. Learned Court held that plaintiff could have filed the application earlier at the time of leading evidence but he did not do so. Application was filed at a stage when the matter was listed for final arguments and that too after six adjournments had already been sought and granted by by the Court for arguments. It held that the Will in question was a registered Will and the testator stood duly identified by one Shri R.N. Sharma, Advocate, who had appeared as DW-2 in the Court and who had specifically stated that he personally knew Sunder as he was native of the same village and said factor required to be considered while deciding the application. On these bases, learned trial Court dismissed the application.

7. I have heard learned Counsel for the parties and also gone through the impugned order as also the records of the case.

8. It is not in dispute that the suit in question was filed in the year 2010. The petitioner is plaintiff before the learned Court below. It is his allegation that the purported Will in favour of defendants is a forged Will. Therefore, the onus to prove the said fact is obviously on the petitioner/ plaintiff. Nothing stopped the petitioner from moving the application under Section 73 of the India Evidence Act at the stage when the plaintiff was leading his evidence before the learned trial Court. It has not been disputed, as it stands recorded in the impugned order too, that application under Section 73 of the Evidence Act was filed by the petitioner/plaintiff after six adjournments had already been sought and granted to the plaintiff to address learned trial Court on merit in the main suit itself. This palpably demonstrates that said application was filed just with the intent to delay the matter.

9. A perusal of the application demonstrates that there is not even a whisper in the application as to what prevented the petitioner for almost seven years from filing the application under Section 73 of the Evidence Act before the learned trial Court. The contention of the learned Counsel for the petitioner that procedural law is for furtherance of justice has no force in the facts of the case because procedure cannot be allowed to be used as a tool by a party to delay or prolong a litigation.

10. In this view of the matter, as this Court does not finds any illegality in the impugned order nor is there any infirmity in the same, this petition being devoid of merit is dismissed. On the request of learned Counsel for the petitioner, it is clarified that the suit shall be decided by learned Court below on merit uninfluenced by any observation made in this order or the order impugned passed by learned trial Court.

The petition stands disposed of in above terms, so also pending miscellaneous application(s), if any.

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

Mohinder Singh ….Petitioner.
Versus
Shri Ashok Kumar and others …Respondents.

CMPMO No.: 508 of 2018.
Decided on: 11.04.2019.

Code of Civil procedure, 1908- Order VI Rule 17**-** Amendment of pleadings after commencement of trial – Permissibility – Held, after commencement of trial, amendment in pleadings can not be allowed unless Court comes to conclusion that inspite of due diligence, party could not have sought such amendment before commencement of trial- Plaintiff not adducing evidence even after availing nine opportunities – Nothing mentioned in application as why amendment was not sought before commencement of trial – Amendment would change nature of suit – Plaintiff intending to withdraw admissions initially made in plaint by way of said amendment - Application not bonafide – Trial court justified in dismissing application - Petition dismissed.(Paras 9 to 11)

For the petitioner : Mr. Goldy Kumar, Advocate.
For the respondents : Mr. Bhupender Gupta, Sr. Advocate with Mr. Ajit Jaswal, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (Oral)

By way of this petition filed under Article 227 of the Constitution of India, challenge is laid to the order passed by the Court of learned Civil Judge (II), Kangra, District Kangra, HP, in CMA No. 14 of 2013, filed in Civil Suit No. 13 of 2013, vide which, an application filed under Order 6, Rule 17 of the Code of Civil Procedure by the petitioner/plaintiff praying for amendment in the plaint stands dismissed.

2. Brief facts necessary for adjudication of the petition are as under:-

Petitioner/plaintiff (hereinafter referred to as the 'plaintiff') has filed a suit for grant of decree of declaration alongwith permanent prohibitory injunction against the defendants qua the suit land on the ground that he is permanently residing over the suit land and the same belongs to the plaintiff from the time of ancestors. As per the plaintiff, defendants, who are outsiders and had become co-owners by way of subsequent purchase from Sh. Sahib Singh, were interfering in the suit land. On these pleadings, the suit is filed.

3. The suit was filed in the year 2013. As is evident from the record appended with the petition, Issues were framed by learned trial Court on 14.09.2013 and after having availed about nine opportunities by the plaintiff to lead his evidence, in the year 2016, plaintiff filed an application under Order 6, Rule 17 of the Code of Civil Procedure (hereinafter referred to as the 'Code') praying for permission to amend the plaint.

4. It was mentioned in the application that the plaintiff intended to incorporate certain amendments which were stated in paras 3 to 6 of the same and that earlier same could not be incorporated inadvertently and due to clerical mistake.

5. The application was opposed by the defendants on the ground that the application was not maintainable as it was not mentioned therein that despite due diligence, the proposed amendments could not be incorporated in the original plaint. It was also stated in the reply that filing of the application was delay tactic as the same was filed after plaintiff had failed to lead evidence even after availing nine opportunities for the same.

6. Vide impugned order, learned Court below has dismissed the application by holding that the applicant had made prayer simplicitor for grant of necessary permission to incorporate necessary amendments in the plaint and there was no pleading that despite due diligence on the part of the plaintiff, the proposed amendments could not be incorporated in the original plaint. It further held that the proposed amendments, if permitted, would change the nature of the suit, as in the original plaint, plaintiff had averred that a small share in the suit land was purchased by the father of the defendants Shri Sahib Singh and thereafter defendants have built up their *pakka* house on their share but by way of proposed amendments, plaintiff wanted to omit the fact of purchase of the suit land by father of the defendants and rather a plea was being set up that defendants were coming in possession of the suit land prior to the sale deed as tenants. Learned trial Court thus held that if proposed amendments were allowed, it would substitute the original case with new case and lead to a situation wherein contrary pleas would be permitted to be raised on behalf of the plaintiff. On account of said reasoning, learned trial Court dismissed the application.

7. Feeling aggrieved, the plaintiff has filed this petition.

8. I have heard learned Counsel for the parties and also perused the impugned order as also the record appended with the petition.

9. It is not in dispute that the suit was filed in the year 2013. It is also not in dispute that the issues were framed in the year 2013 itself. It is also not in dispute that after the framing of the issues, nine opportunities were granted to the plaintiff by the learned Court below to lead his evidence, but plaintiff failed to lead the same. It is thereafter that application under Order 6, Rule 17 of the Code was filed with the prayer to amend the plaint. A perusal of the averments made in the application filed under Order 6, Rule 17 of the Code demonstrates that there is not even a single word mentioned therein as to why the proposed amendments could not be incorporated in the original plaint despite due diligence.

In fact, there is no explanation given in the application as to why the proposed amendments were not earlier incorporated.

10. Order 6, Rule 17 of the Code provides that Court can allow amendment of pleadings by either party at any stage provided that no application for amendment can be allowed by the Court 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 commencement of the trial. Meaning thereby that even if the Court is satisfied that the amendment may be necessary to determine the real controversy between the parties, yet before allowing such application, the Court has to arrive at a conclusion that despite due diligence, the party could not raise the matter before the commencement of the trial.

11. Coming to the facts of the present case. As already mentioned above, there is no averment made in the application that despite due diligence, the proposed amendment could not be incorporated in the original plaint. Meaning thereby that neither the learned Court below nor this Court has the benefit to go into the reasons for not incorporating those pleadings in original plaint despite due diligence because the same do not find mention in the application itself. Besides this, the findings given by the learned trial Court that in case the proposed amendment is allowed, the same would introduce a whole new case and would lead to a situation that contrary pleas would be permitted to be raised by the plaintiff, is correct finding. It is evident from the record that plaintiff intends to withdraw by way of amendment earlier pleadings to the effect that father of defendants had purchased small share in the suit land from one Sahib Singh, upon which *pakka* house stood constructed, with amended pleadings that the defendants were coming in possession of the suit land before the said sale deed as tenants. This, if permitted, would obviously change the very nature of the suit and therefore, also the plea of the petitioner that the proposed amendment if allowed would not cause any prejudice to the defendants and that the proposed amendment is necessary for adjudication of the dispute, holds no merit as by way of the proposed amendment, the plaintiff in fact wants to introduce a completely new case and that too without justifying in the application as to why despite due diligence, said pleadings were not incorporated in the original plaint.

In view of observations made hereinabove, as this Court is satisfied that there is no infirmity in the order impugned, nor the same suffers from any jurisdictional error, this petition being devoid of merit, is dismissed. Pending miscellaneous application(s), if any, also stand disposed of accordingly.

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

Dilpreet Singh alias Laddi and another ….Petitioners.
Versus
State of HP ….Respondent.

Cr.MMO No. 485 of 2018
Decided on: 17.4.2019

Code of Criminal Procedure, 1973 – Section 482 - Inherent powers – Exercise of – Quashing of FIR - Whether maintainable in heinous offences? – Held, though in exercise of its inherent powers, High court may quash FIR but this jurisdiction not available in heinous

offences – Robbery being heinous offence, FIR can not be ordered to be quashed notwithstanding amicable settlement of dispute between parties – Petition dismissed - ***Parbatbhai Aahir alias Parbatbhai Bhimsinhbhai Kumar and others Vs. State of Gujarat and another, (2017) 9 Supreme Court Cases 641*** *relied upon.* (Paras 3 & 4)

Cases referred:
Parbatbhai Aahir alias Parbatbhai Bhimsinhbhai Kumar and others Vs. State of Gujarat and another, (2017) 9 SCC 641

For petitioners. Mr. O.P. Sharma, Sr. Advocate withMr. Gurmeet Bhardwaj, Advocate.
For the respondent Mr. Dinesh Thakur, Additional Advocate General with Mr. R.P. Singh Dy. Advocate General.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J (Oral)

By way of this petition filed under Section 482 of the Cr.P.C., a prayer has been made for quashing of FIR No. 264 of 2011 dated 31.10.2011 registered at Police Station Jawali under Section 392 read with Section 34 of IPC and also proceedings in case No. 17/11 of 2012 pending in the Court of learned Judicial Magistrate 1st Class, Jawali arising out of lodging of the said FIR.

2. Learned Senior Counsel for the petitioner has argued that the dispute which led to the registration of FIR has been amicably settled between the parties and a compromise to this effect was also entered into between complainant and the accused, copy whereof is appended with the petition as Annexure P-3. On the strength of the said compromise, learned Senior Counsel has argued that as the complainant before her death had already compromised the matter with accused, no fruitful purpose would be solved by keeping the trial alive and it will be in the interest of justice in case this petition is allowed and the FIR in issue as also subsequent criminal proceedings pending pursuant to lodging of said FIR are order to be set aside.

3. On the other hand, learned Deputy Advocate General has argued that as the offence alleged against the petitioners is a serious and heinous offence, therefore, this Court in exercise of its inherent powers under Section 482 of Cr.P.C. may not quash the FIR as also the subsequent criminal proceedings pending before the appropriate Court because Hon'ble Supreme Court has also laid down certain guidelines with regard to the exercise of inherent powers by High Courts under Section 482 of Cr.P.C. and as per the said guidelines in cases of heinous crime, no quashing of FIR is permissible even if the matter stands amicably settled by the parties. Learned Deputy Advocate General has placed reliance on Three Judges' Bench judgment of the Hon'ble Supreme Court in Parbatbhai Aahir alias Parbatbhai Bhimsinhbhai Kumar and others Vs. State of Gujarat and another **(2017) 9 Supreme Court Cases 641.**

4. Having heard learned counsel for the parties and having perused the judgment of Hon'ble Supreme Court, this Court is of the view that taking into consideration the nature of offence alleged against the petitioners, this is not a fit case wherein this Court should quash the FIR and subsequent criminal proceedings pending under Section 392 read with Section 34 of IPC in exercise of its inherent powers under Section 482 of Cr.P.C. This Court is not even remotely making any observation on merit of the case because whether or

not the petitioners are guilty of the offence alleged against them is for the learned trial court to decide. However, taking into consideration the gravity of the offence alleged against the petitioners, this Court is not willing to accept the prayer of the petitioners.

Accordingly, the petition is dismissed, so also pending miscellaneous applications, if any. It is clarified that this Court has not made any observations on merit of the case.

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

Janak Raj and another …Petitioners/Defendants.
Versus
Sukhdev and others …Respondents/plaintiffs.

C.R. No.11 of 2019.
Reserved on: 08.04.2019.
Date of decision: 17.04.2019.

Code of Civil Procedure, 1908 – Order -I Rule 10 - Order XXIII Rule 1(2)- Withdrawal of suit with leave to file fresh one – Formal defect- Duty of court - Held, provisions of order XXIII Rule 1 (2) not to be applied mechanically – It is duty of court to see whether suit suffers from formal defect - Non-joinder of necessary party is material defect and not formal defect in suit – Suit can not be permitted to be withdrawn with liberty to file fresh one on same cause of action on this ground - Order of trial court permitting plaintiff to withdraw suit with liberty to file fresh one on same cause of action on ground of some co-sharers having not been joined in suit, set aside – Petition allowed (Para 7)

Cases referred:

Abdul Ghafoor versus Abdul Rahman, A.I.R. 1951 Allahabad 845
Daulat Ram versus Smt. Janki Devi and others, 1995(1) SLC 132
Mangat Ram versus Chura Dutt, AIR 2003 (HP) 143
Nand Kumar versus Gajinder Singh & Ors., Latest HLJ 2014 (HP) 559
Savitri Devi versus Hira Lal, AIR 1977 HP 91
Union of India and another versus Monoranjan Banik, AIR 1976 Gauhati 1

For the Petitioners: Mr. Ramakant Sharma, Senior Advocate with Ms. Devyani Sharma, Advocate.
For the Respondents: Mr. Sanjeev Kuthiala, Senior Advocate with Ms. Kamlesh Kumari, Advocate, for respondents No.1 to 3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The moot question to be answered in this petition is whether non-joinder of party can be said to be a formal defect within the meaning of Rule 1(3) of Order 23 of the Code of Civil Procedure (for short 'Code'), entitling the plaintiffs for withdrawal of the suit

with permission of the Court to file a fresh suit on the same and similar cause of action or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

2. The plaintiffs- respondents (hereinafter to be referred to as the 'plaintiffs') filed a suit for declaration with consequential relief of permanent prohibitory injunction on 01.07.2013. It is not in dispute that the defendants/petitioners (hereinafter to be referred to as the 'defendants') contested the suit by filing written statement, thereafter issues were framed on 19.11.2014 and it was after the parties had led their respective evidence that the plaintiffs then filed an application for withdrawal of the suit with permission to file a fresh suit on the same cause of action.

3. The necessity for filing such application was spelt out in para-2 of the application which reads thus:-

> *"2. That during the pendency of the suit, it has come to the notice of the applicants/plaintiffs that some of the co-owners of suit land have been left out inadvertently, as the Patwari has not supplied the complete copies of revenue record, with respect to the suit land, which was divided into 7min Khasra numbers, on the basis of partition, which partition was set aside in revenue appeal. The predecessor-in-title of the present applicants/plaintiffs was co-owner in Khasra No. 14, which is subject-matter of the the present suit. The other co-owners, who could not be arrayed, as defendants inadvertently, are namely Sh. Geeta Ram S/o Sh. Jiwanu, Smt. Neelam W/o Sh. Chetan, Sh. Kishori Lal S/o Sh. Sulekh Chand, Sh. Ram Sawroop S/o Sh. Datta Ram, Sh. Raj Kumar S/o Sh. Prem Chand, Smt. Amarjeet Kaur W/o Sh. Prem Chand, Smt. Neelam W/o Sh. Kunj Bihari, Smt. Gurmeet Kaur D/o Sh. Nirmal Singh and Smt. Neenu W/o Sh. Shiv Charan. The aforesaid co-owners are necessary party to be impleaded and in their absence, there cannot be proper and complete adjudication of this case. This is the formal defect, in this civil suit, which goes to the root of controversy involved."*

4. Evidently, the only ground taken by the plaintiffs for filing the application is that they were unaware of the other co-owners, who are the necessary parties, because the Patwari had not supplied the complete copies of the revenue record with respect to the suit land. Evidently, this statement is false to the knowledge of the plaintiffs themselves because in the written statement, the defendants had put the plaintiffs to caveat that they were co-owners of the land, as is evident from para-5 of the preliminary objections as well as para-5 of reply on merits to the plaint which read thus:-

> *"5. That the replying defendant is bonafide purchaser for consideration and absolute owner in possession of land measuring 0-3 biswas, out of the land presently bearing khasra No. 614/14 and 615/14, situated in the area of village Rakh Ram Singh, Tehsil Nalagarh (HP), which has been purchased by the replying defendant vide sale deed No. 1428/2011 dt. 31.12.2011 from its previous owner Sh. Gita Ram son of Sh. Jiwanu Ram, after proper verification of title of the previous owner Sh. Gita Ram and on the basis of said sale deed mutation No. 1572 dt. 28.1.2012 has been sanctioned in his favour in the revenue record and since then the replying defendant is owner in possession of the said land and is having every right to use and enjoy with its possession, as per his wish and the plaintiffs have got no legal right to seek injunction qua user of said land by the replying defendant by filing*

this false and frivolous suit and also by concealing the true facts from this Hon'ble Court."

ON MERITS:-

5. This para of the plaint is wrong and denied. It is incorrect that replying defendant has started threatening to raise construction over the specific portion of the suit land, as alleged. It is incorrect that the revenue record showing the suit land as separate is not legal and correct, as alleged. It is incorrect that the replying defendant has claimed title over the specific portion of suit land on the basis of mutation No.560 dt. 30.5.2002, as alleged. In fact, replying defendant is bonafide purchaser for consideration and absolute owner in possession of land measuring 0-3 biswas, out of the land presently bearing Khasra No. 614/14 and 615/14, situated in the area of village Rakh Ram Singh, Tehsil Nalagarh (HP), which has been purchased by the replying defendant vide sale deed No. 1428/2011 dt. 31.12.2011 from its previous owner Sh. Gita Ram son of Sh. Jiwanu Ram, after proper verification of title of the previous owner Sh. Gita Ram and on the basis of said sale deed mutation No. 1572 dt. 28.1.2012 has been sanctioned in his favour in the revenue record and since then the replying defendant is owner in possession of the said land and is having every right to use and enjoy with its possession, as per his wish and the plaintiffs have got no legal right to seek injunction qua user of said land by the replying defendant by filing this false and frivolous suit and also by concealing the true facts from this Hon'ble Court. Rest of averments of this para of plaint are wrong and denied."

5. Notably, this written statement was filed on 15.11.2013, whereas, the present application for withdrawal of the suit came to be filed after a lapse of nearly 4 ½ years on 15.05.2018.

6. According to the plaintiffs, the co-owners are the necessary parties to be impleaded and in their absence, there cannot be complete and proper adjudication of this case. It is further averred that "*this is the formal defect in this suit which goes to the root of controversy involved".*

7. This Court in ***Smt. Savitri Devi*** *versus* ***Hira Lal, AIR 1977 HP 91*** has held that the omission to implead a necessary party is not a formal defect, it is a material defect, as is evident from para-3 of the judgment which reads thus:-

> *"3. In this revision petition, learned counsel for the defendant-petitioner urges that the conditions of O. 23 R. 1(2) of the Code are not satisfied. It is urged that having regard to the pleadings in the case the State Government was a necessary party, and therefore it cannot be said that it was by reason of a formal defect that the suit was liable to fail. The omission to implead a necessary party, it is urged, is not a formal defect, and support is taken from Tarachand Bapuchand v. Gaibihaji Ahmed Bagwan, AIR 1956 Bom 632 and Ram Padarath v. Data Din, AIR 1941 Oudh 417. There is force in the contention. The omission to implead a necessary party cannot be described a formal defect. It is a material defect. Consequently, the learned Subordinate Judge erred in applying the provisions of O.23 R.1(2) of the Code of Civil Procedure and making the order which he has."*

8. In ***Pankaj Soni*** *versus* ***Inder Singh Chandel, CMPMO No.52 of 2012, decided on 25.10.2013,*** this Court while dealing with the scope of Order 23 Rule 1(3) CPC

and also relying upon the judgment of this Court in ***Savitri Devi's case*** *(supra) and another judgment of this Court in* ***Mangat Ram*** *versus* ***Chura Dutt, AIR 2003 (HP) 143*** observed as under:-

> *"6......The provisions of Order 23 Rule 1 CPC cannot be applied mechanically. The parties cannot be vexed twice for the same cause of action. The ratio laid down by their Lordships of Hon'ble Supreme Court in Bani Ram and ors. vs. Gain and ors, 1982 AIR(SC) 789 was wrongly applied by the learned District Judge while allowing the application. The facts of the judgment cited hereinabove were entirely different. In that case, a contention was advanced by Mr. Phadke on a particular point. He had conceded that it was not the case pleaded in the plaint. In view of this Mr. Phadke wished to withdraw the suit with liberty to file a fresh suit on the same cause of action or on a different cause of action. Their Lordships further held that non-pleading could prove a technical impediment and could result in the dismissal of the appeal which could impede a fresh adjudication if a point was to be made though belated, therefore, in the interest of justice the plaintiff was permitted to withdraw the suit with liberty to file a fresh suit. However, in the present case, there is neither any formal defect nor sufficient grounds/reasons have been assigned for permitting withdrawal of the suit. The learned District Judge has also come to the wrong conclusion that ratio laid down in Bani Ram and ors. vs. Gain and ors, 1982 AIR(SC) 789 was applicable in the present case. In the present case, Civil Suit No.158/2006 has been dismissed by the learned Civil Judge (Senior Division) on merits. The plaintiff could move an application under Order 6 Rule 17 CPC seeking amendment of the plaint instead of moving an application for withdrawal of the suit without making sufficient grounds/reasons, as contemplated under the law. It is true that the suit can be permitted to be withdrawn at the appellate stage, but a case is required to be made out. The suit has been dismissed by the learned Civil Judge (Senior Division) on merits and not on account of any formal defect.*
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> *7. Division Bench of Bombay High Court in Asian Assurance Co. Ltd. vs. Madholala Sindhu, 1950 AIR(Bom) 378 held that a defect of non-joinder of some of the parties to the suit is not a formal defect contemplated by Order 23 Rule 1 (2) CPC. Learned Division Bench held as under:-*
>
> > *"4. Turning to the merits of the matter, although in this case the other side was not furnished with any affidavit which was made by the plaintiffs to satisfy the Judge that there was a formal defect and there is no judgment of the learned Judge from which we can ascertain what led the learned Judge to make this order, it is clear from the affidavit which was prepared that the only formal defect on which the plaintiffs relied was that two parties who should have been made parties to the suit were not so made and therefore the suit suffered from the defect of non-joinder. Surely, in our opinion, that is not a formal defect contemplated by Order 23, Rule 1 (2). The defect contemplated by it is one by reason of which the suit must fail. In this case the suit could not have failed by reason of non-joinder. The easiest and the simplest thing for She plaintiffs to have done was to have made those parties to the suit. There is a further difficulty to which Mr. Amin has drawn our attention. The suit filed is a representative suit and, thereof ore, besides the plaintiffs all those whom the plaintiffs represent were interested in the fate of the suit*

and the plaintiffs have obtained this order without in any way consulting that class whom they represent. It is perfectly true that the Court can give its consent to the compromise or withdrawal of a representative suit. But normally the Court does not do so without directing that the plaintiff should advertise in the papers that he proposed to take a particular course of action, and if no objection is forthcoming, then the Court ordinarily passes the order. But it does not appear from the order made by the learned Judge that it was present to his mind that he was permitting a representative suit to be withdrawn without the persons represented by the plaintiffs being consulted at all."

8. Division Bench of Allahabad High Court in Vidhydhar Dube vs. Har Charan, 1971 AIR(All) 41, has held that right of plaintiff to withdraw suit at appellate stage is not an absolute right but is subject to rights acquired by defendant under decree. Learned Division Bench further held that the Court may permit withdrawal if no vested or substantive right of defendant is to be adversely affected. Learned Division Bench held as under:-

"4. The learned counsel for the applicant has contended that the court below was in error in holding that the plaintiffs had no absolute right to withdraw the suit at the appellate stage under Order 23, Rule 1(1), Civil P. C. His submission is that appeal is a continuation of the suit and hence even in appeal the plaintiffs can withdraw the suit. We do not find any merit in this contention. A plaintiff has a right to continue or withdraw a suit till a decree comes into existence. Once the court makes a final adjudication and passes a decree, certain rights become vested in the party in whose favour the decree is made. Where the suit is dismissed, certain rights become vested in the defendants inasmuch as the findings given in the judgment become binding on the parties and operate as res judicata in subsequent litigation between the parties. The right of a plaintiff to withdraw the suit at the appellate stage thus becomes subject to the rights acquired by the defendants under the decree and ceases to be an absolute right.

5. Even when a suit is at the stage of trial and no decree therein has been passed, there may be cases where conceding an absolute right of withdrawal of suit to the plaintiff might result in serious injury to or jeopardize some valuable and substantive right of the defendant. A suit for accounts for instance may be filed by one of the partners of a dissolved firm. The defendants in such a suit may plead that the plaintiff himself is the accounting party and that on proper accounting they would be entitled to receive from him large sums of money, during the pendency of the suit it may become apparent that the suit is likely to culminate in a decree against him and he may seek to withdraw the suit. To hold that even under such circumstances that plaintiff has an absolute right to withdraw the suit, would be to acknowledge that the plaintiff's has an unfettered right to perpetrate fraud and dishonesty by defeating the legitimate rights of the defendants whose rights to file a fresh suit may have become barred by limitation. If under such or similar circumstances, it becomes difficult to concede an absolute right to the plaintiff of withdrawal of

suit, much less can any such right be recognized when a decree has been passed and an appeal against the same has been preferred, Sub-rule (1) of Rule 1 of Order 23 of the Code does not in terms apply to appeals and, whatever may be the legal position in the trial court, in the appellate court the plaintiff, be he an appellant or a respondent, cannot be held to possess any absolute right to withdraw the suit.

6. The appellate court may permit the plaintiff to withdraw the suit when by such withdrawal no vested or substantive right of the defendant is to be adversely affected but the plaintiff may not be permitted to withdraw the suit at the appellate stage if it results in depriving the defendant of some vested or substantive right. In the appellate court, the appellant may be held to have an absolute right to withdraw the appeal by equating the words "suit", "plaintiff" and "defendants" occurring in Order 23, Rule 1(1) of the Code with the words "appeal", "appellant" and "respondents" but he has no absolute right to withdraw the suit. The withdrawal of the appeal will not adversely affect the respondents if they have filed any separate appeal or a cross-objection as the same will remain unaffected.

10. In our opinion at the stage of appeal, the plaintiff, if be had filed the appeal, has the right to withdraw the appeal but not the suit except with the leave of the Court. The order of the court below thus suffers from no error of law or jurisdiction."

9. Learned Single Judge of Gujarat High Court in Kurji Jinabhai Kotecha vs. Ambalal Kanjibhai Patel, 1972 AIR(Guj) 63 held that if it is a defect of form and not a defect which affects the merits of the case then only the case would fall under the provisions of Order 23 Rule 1 (2)(a). Learned Single Judge held as under:-

"........Bhagwati. J. (as he then was) in Bai Maru V. Latifalli.,1962 3 GLR 800 has pointed out that the formal defect referred to in Order 23. Rule 1 (2) can only mean a defect of form and not a defect in the merits of the case. If it is a defect of form and not a defect which affects the merits of the case then only the case would fall under the provisions of Order 23, Rule 1 (2) (a). Gajendragadkar. J. (as he then was) has pointed out in Tarachand V. Gaibibhaji, 1956 AIR(Bom) 632 that Cls. (a) and (b) of Order 23, Rule 1(2) have to be read by applying the rule of 'ejusdem generis' and a cause which is sufficient within the meaning of Order 23, Rule 1 (2) must be similar or alike to the cause mentioned in Order 23, Rule 1 (2) (a). Under these circumstances, even on the allegations of the plaintiff himself, it cannot be said that there was a defect of form or a similar other defect from which first suit of the plaintiff was likely to fail. It was a defect on merits, namely, about the factum of Collector's sanction having been granted or not granted which would have come in the way of the plaintiff in getting the reliefs that he had claimed. In any event, if the cause of action and the reliefs claimed in the first suit are not going to be the same as the cause of action and the reliefs claimed in the second suit, there was nothing which he had to fear and even by way of abundant caution it was not necessary for him to obtained permission which he applied for in the instant case."

10. Learned Single Judge of Orissa High Court in Trinath Parida vs. Sobha Bholaini, 1973 AIR(Ori) 37 held that non-joinder of a necessary party is not a mere formal defect so as to attract the applicability of Order 23 Rule 1 CPC. Learned Single Judge held as under:-

> *"7. Opinion appears to be unanimous in all the High Courts that non-joinder of a necessary party is not a formal defect within the meaning of this rule. It is a defect which affects the root of the plaintiff's case and cannot be said to be a mere formal defect, (see Asian Assurance Co. Ltd. v. Madholal Sindhu, 1950 AIR(Bom) 378 and (Tarachand Bapuchand v. G.A. Bagwan, 1956 AIR(Bom) 632). In the circumstances, the application filed under Order 23, Rule 1, Civil P. C. has to be dismissed."*

11. In Smt. Savitri Devi Vs. Hira Lal, 1977 AIR(HP) 91, it was laid down that when the plaintiff after filing suit discovers that the suit land has been acquired and the Government has not been impleaded as party and plaintiff applied for permission to withdraw the suit with liberty to file fresh one. It was held that the defect was not formal as per Order 23 Rule 1 (2) of the Code of Civil Procedure. It was held as under:-

> *"3 In this revision petition, learned counsel for the defendant-petitioner urges that the conditions of O. 23 R. 1 (2) of the Code are not satisfied. It is urged that having regard to the pleadings in the case the State Government was a necessary party, and therefore it cannot be said that it was by reason of a formal defect that the suit was liable to fail. The omission to implead a necessary party, it is urged, is not a formal defect, and support is taken from Tarachand Bapuchand V. Gaibihaji Ahmed Bagwan, 1956 AIR(Bom) 632and Ram Padarath V. Data Din,1941 AIR(Oudh) 417. There is force in the contention. The omission to implead a necessary party cannot be described as a formal defect. It is material defect. Consequently, the learned Subordinate Judge erred in applying the provisions of O. 23 R. 1 (2) of the Code of Civil Procedure and making the order which he has."*

12. Learned Single Judge of Punjab and Haryana High Court in Jubedan Begum vs.Sekhawat Ali Khan, 1984 AIR(P&H) 221held that the words "atany time" under Order 23 Rule 1 would apply to the suit pending in the trial Court. Once the decree is passed by the trial court, then certain rights are vested in the party in whose favour the suit is decided. Thus, the plaintiff is not entitled to withdraw the suit, as a matter of course, at any time after the decree is passed by the trial Court. Learned Single Judge held as under:

> *"4. After hearing the learned counsel for the parties, I am of the considered view that the tower appellate Court has acted illegally in allowing the plaintiff in withdraw the suit after setting aside the judgment and decree of the trial Court dismissing the suit. The words "at any time" in Rule 1 of Order 23 of the Code would apply to the suit pending in the trial Court. Once the decree is passed by the trial Court, then certain rights are vested in the party in whose favour the suit is decided. Thus, the plaintiff is not entitled to withdraw the suit, as a matter of course at any time after the decree is passed by the trial Court. The judgment relied upon by the learned counsel for the*

respondent, Kamta v. Gaya Prasad, 1972 AIR(All) 143) was dissented subsequently by that Court in Kanhaiya's .

In paragraph 6 thereof, it was observed as under:-

"A learned single Judge of this Court in Kedar Nath v. Chandra Kiran, 1961 AIR(All) 263 also took the view that Order XXIII. Rule 1 (1) does not give an absolute right to the plaintiff to withdraw the suit at the stage of second appeal and that the matter of withdrawal of the suit under the aforesaid provision of the Code lay within the discretion of the Court. This case was cited with approval in the case of Vidyadhar Dubey , 1970 All LJ 732 (AIR 1971 All 41) (supra). The observation of the learned single Judge in Kamta's case, 1971 All WR (HC) 667 : (AIR 1972 All 143 (supra) that the view taken in Kedarnath's case (supra) has been rendered nugatory due to the law laid down by the Supreme Court in the case of M/s. Hulas Rai, 1968 AIR(SC) 111 does not appear to be justified. The case of M/s. Hulas Rai had nothing to do with the right of an appellant to withdraw the suit at the appellate stage."

Thus, keeping in view the facts and circumstances of the present case, the plaintiff could not be allowed to withdraw the suit at appellate stage. Consequently, the appeal succeeds. The order of the learned lower Appellate .Court allowing the plaintiff to withdraw his suit, is set aside and the case is sent back to the District Judge for deciding the appeal on merits in accordance with law."

13. Learned Single Judge of Hon'ble Punjab and Haryana High Court in Gurnek Singh vs. Gurbachan Singh, 1986 AIR(P&H) 228 held as under:-

"4. After hearing the learned counsel for the parties and going through the case law cited at the Bar I do not find any merit in this petition . In Jubedan Begum's case what was held by this court was that the plaintiff was not entitled to withdraw the suit, as a matter of course, at any time after the decree is passed by the trial Court. In other words, it means that a very strong case has to be made out for allowing the suit to be withdrawn at the appellate stage. As a proposition of law it could not be disputed that in a given case the suit may be allowed to be withdrawn even at the appellate stage. No such case has been made out as regards the facts of the present case. The suit was dismissed on merits and not on account of any formal defect in it in the present case. One of the issues in the suit was whether the suit was bad for a mere declaration. The trial Court found this issue against the plaintiff. During the trial the plaintiff never sought amendment of his plant so as to claim the relief of possession as well. In any case, the suit was ultimately dismissed on merits as it was held that the suit property was not the ancestral property of the plaintiff and defendants No. 1 as claimed in the plaint. In these circumstances no case has been made out by the plaintiff to withdraw the suit at the appellate stage. Consequently, the petition fails and is dismissed with costs."

14. Their Lordships of the Hon'ble Supreme Court in K.S. Bhoopathy and others Vs. Kokila and others, 2000 AIR(SC) 2132 held that it is the duty of the Court to feel satisfied about existence of proper grounds/reasons for granting

permission to withdraw the suit with leave to file fresh suit. Their Lordships held as under:-

> *"12. The provision in Order XXIII, Rule 1, C.P.C. is an exception to the common law principle of non-suit. Therefore on principle an application by a plaintiff under sub-rule (3) cannot be treated on par with an application by him in exercise of the absolute liberty given to him under sub-rule (1). In the former it is actually a prayer for concession from the Court after satisfying the Court regarding existence of the circumstances justifying the grant of such concession. No doubt, the grant of leave envisaged in sub-rule (3) of Rule 1 is at the discretion of the Court but such discretion is to be exercised by the Court with caution and circumspection. The legislative policy in the matter of exercise of discretion is clear from the provisions of sub-rule (3) in which two alternatives are provided, (1) where the Court is satisfied that a suit must fail by reason of some formal defect, and the other where the Court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim. Clause (b) of sub-rule (3) contains the mandate to the Court that it must be satisfied about the sufficiency of the grounds for allowing the plaintiff to institute a fresh suit for the same claim or part of the claim on the same cause of action. The Court is to discharge the duty mandated under the provision of the Code on taking into consideration all relevant aspects of the matter including the desirability of permitting the party to start a fresh round of litigation on the same cause of action. This becomes all the more important in a case where the application under Order XXIII Rule (1) is filed by the plaintiff at the stage of appeal. Grant of leave in such a case would result in the unsuccessful plaintiff to avoid the decree or decrees against him and seek a fresh adjudication of the controversy on a clean slate. It may also result in the contesting defendant losing the advantage of adjudication of the dispute by the Court or Courts below. Grant of permission for withdrawal of a suit with leave to file a fresh suit may also result in annulment of a right vested in the defendant or even a third party. The appellate/second appellate Court should apply its mind to the case with a view to ensure strict compliance with the conditions prescribed in Order XXIII, Rule 1(3), C.P.C. for exercise of the discretionary power in permitting the suit with leave to file a fresh suit on the same cause of action. Yet another reason in support of this view is that withdrawal of a suit at the appellate/second appellate stage results in wastage of public time of Courts which is of considerable importance in the present time in view of large accumulation of cases in lower Courts and inordinate delay in disposal of the cases."*

15. Learned Single Judge of this Court in Mangat Ram vs. Chura Dutt, 2003 AIR(HP) 143, held that by permitting the plaintiffs to withdraw the suit, first appellate court has not only permitted the plaintiffs to avoid the decree passed against him by the trial court, has also made the defendant to lose the advantage of adjudication of the dispute in his favour. Learned Single Judge of this Court held as under:-

"14. In the present case, the suit of the plaintiffs was dismissed on merits by the learned trial court by holding that no part of the land belonging to the plaintiffs had been encroached upon by the defendant. Therefore, the defendant had derived an advantage of the adjudication of the dispute by the learned trial Court. By permitting the plaintiffs to withdraw the suit, the learned first appellate Court has not only permitted the plaintiffs to avoid the decree passed against him by the learned trial Court, has also made the defendant to lose the advantage of adjudication of the dispute in his favour.

15. As pointed out above, the plaintiffs earlier had approached the learned first appellate Court under Order 26 Rule 9, Code of Civil Procedure, for appointment of a Local Commissioner to demarcate the land and to ascertain the extent of encroachment, if any, by the defendant. Such application was dismissed on 6.6.1998. By permitting the plaintiffs to withdraw the suit with liberty to bring a fresh suit on the same cause of action "after obtaining proper demarcation of the land in dispute" the learned first appellate Court has proceeded to set aside its own order, which it was not competent to do.

16. It was for the plaintiffs to frame their suit in any form as advised taking into consideration the nature of cause of action accruing to them. From the facts and circumstances of the case as emanating from the pleadings of the parties and the judgment of the learned trial Court as well as the impugned order of the learned first appellate Court, it is evident that the plaintiffs realised the weakness of their suit and in order to get over the findings against them recorded by the learned trial Court, they took recourse to Order 23 Rule 1(3), Code of Civil Procedure, for withdrawal of the suit with leave to file a fresh suit. Therefore, no leave could have been granted to the plaintiffs to withdraw the suit. The impugned order of the learned first appellate court is bad and cannot be sustained.

17. As a result the present petition is allowed. The impugned order dated 13.6.2000 of the learned first appellate court passed in Civil Appeal No. 2 of 1998 is set aside and the application made by the plaintiffs under Order 23 Rule 1(3), Code of Civil Procedure, is dismissed with costs, quantified at Rs.2,200."

16. The learned Single Judge in Somalraju Vs. Samanthu Sivaji Ganesh & Anr., 2009 AIR(AP) 12 held that expression 'formal defect' connotes defects of various kinds. The learned Single Judge held as under:-

"8. The expression 'Formal Defect' in the normal parlance connotes defects of various kinds not affecting the merits of the case. Thus, a formal defect is 'a defect of form' unrelated to the claim of the plaintiff on merits."

9. The scope of Order 23 Rule 1(3) CPC was considered by me in ***Nand Kumar*** *versus* ***Gajinder Singh & Ors., Latest HLJ 2014 (HP) 559*** and it was observed as under:-

"12. Sh. K.D.Sood, learned Senior Counsel in support of his contention that defect was not formal has relied upon the judgement of this Court in Smt. Savitri Devi vs. Hira Lal, 1977 AIR(HP) 91, wherein, it has been held as follows:

"2. The plaintiff filed a suit for declaration that he was the owner in possession of the disputed land. During the pendency of the suit he discovered that the land had been acquired by the State Government. Accordingly, he applied under Order 53, Rule 1 (2) of the Code of Civil Procedure for permission to withdraw the suit with liberty to file a fresh suit. The basis of the application was that as the land had been acquired by the State Government the suit must fail by reason of a formal defect inasmuch as the State was not a party to the suit. The learned Subordinate Judge allowed the application and by his order dated October 3, 1974 dismissed the plaintiff's suit granting permission to file a fresh suit.

3. In this revision petition, learned counsel for the defendant petitioner urges that the conditions of Order 23 Rule 1 (2) of the Code are not satisfied. It is urged that having regard to the pleadings in the case the State Government was a necessary party, and therefore it cannot be said that it was by reason of a formal defect that the suit was liable to fail. The omission to implead a necessary party, it is urged, is not a formal defect, and support is taken from Tarachand Bapuchand v. Gaibihaji Ahmed Bagwan, 1956 AIR(Bom) 632 and Ram Padarath v. Data Din,1941 AIR(Oudh) 417. There is force in the contention. The omission to implead a necessary party cannot be described as a formal defect. It is a material defect. Consequently, the learned Subordinate Judge erred in applying the provisions of Order 23 Rule 1 (2) of the Code of Civil Procedure and making the order which he has."

13. He further contended that plaintiff cannot be allowed to withdraw the suit when he failed to produce and prove the Tatima on record and was fully aware of the fact that suit would ultimately be dismissed. Even otherwise according to the learned counsel for the petitioner there was no question of granting liberty to the plaintiff to file a fresh suit on the same cause of action since Tatima could conveniently be placed on the record by amending the plaint under the provisions of Order 6 Rule 17 CPC. For this purpose he relied upon Sadhu Ram vs. Anto Devi, 2000 2 CivCC 545 , wherein, it has been held as under:-

"5. Learned counsel for the petitioner submitted that the non submission of the site plan with the plaint was not a formal defect and therefore, plaintiffs could not have been permitted to withdraw the suit with permission to file fresh suit on the same cause of action. Learned counsel for the petitioner submitted that the Courts have jurisdiction to grant permission to withdraw the suit with liberty to institute another suit on the same cause of action only for reasons falling within the ambit of Order 23 Rule 1(2)(a) CPC or for any grounds which, though they may not be exactly "ejusdem generis" to the same but still are somewhat analogous to them. A plaintiff cannot be allowed to withdraw the suit when he has failed to adduce proper evidence in the suit and when he knows that his suit is bound to be dismissed for want of proof. The court, in granting such a permission on grounds not warranted by law, acts beyond its jurisdiction or at any rate illegally or with material irregularity in the exercise of its jurisdiction. In support of this submission, he has drawn my attention

> *to Bhag Mal v. Master Khem Chand, 1961 AIR(P&H) 421. It was submitted that if the plaintiffs had not attached site plan with the plaint showing the portion alleged to have been encroached upon by the defendant, that was not a formal defect. Learned counsel for the petitioner submitted that non-production of the site plan is not a formal defect. It is case of non-production of evidence in support of their case by the plaintiffs. It is not a sufficient cause to allow them to withdraw suit with permission to file another suit on the same cause of action. In support of this submission, he cited Chander and Ors. v. Gulzari Lal and Ors., 1979 81 PunLR 637. He submitted that plaintiffs' evidence was closed by the Court. Thereafter, they moved application for additional evidence which was also dismissed. They moved application for framing additional issues which was also dismissed. Defendant had also concluded his evidence; At that later state, plaintiffs could not have been permitted to withdraw the suit with permission to file another suit on the same cause of action because if they are permitted to file another suit on the same cause of action at this stage of the case, they would fill up the lacuna which had crept in the suit.*
>
> *6. In my opinion, the learned counsel for the petitioner rightly submitted that the grant of permission to the plaintiff to withdraw the suit with liberty to file another suit on the same cause of action was not warranted. So, this revision is allowed. With the allowing of the revision, suit gets revived. Respondents-plaintiffs may apply for amendment of the plaint under Order 6 Rule 17 read with Section 151 CPC. Learned District Judge, Ambala will entrust this suit to some Civil Judge posted at Jagadhri for its disposal according to law. Civil Judge, to whom this suit is entrusted for its disposal will summon both the parties and then commence upon the trial of the suit."*

14. It was next contended that since the fault squarely lies on the plaintiff, wherein he had failed to place on record the Tatima despite specific objection having been taken in the written statement, therefore, he cannot be permitted to take advantage of his own wrong and consequently cannot be permitted to withdraw the suit with liberty to file a fresh one on the same cause of action. For this purpose, the petitioner has relied upon Rev. Y. Jagan Nath vs. Amritsar Diocesan Trust Association Amritsar, 2001 3 Civ CC 676 (P&H), wherein, it has been held as follows:-

> *"10. The defects as pointed was due to the plaintiffs own fault and these defects were pointed out by the defendants in the written statement. Thus, the plaintiffs was aware of the same, yet they tried to avoid it. Thus, in such circumstances, if the defect is due to the plaintiffs own fault, the Court would be acting illegally and with material irregularity in the exercise of its jurisdiction in permitting the plaintiff to withdraw the suit and to file a fresh one on the same cause of action. The plaintiff cannot take the benefit of Order 23 Rules I and 2 CPC at the stage of appeal, in this regard, reliance is also placed on Baru Ram and another v. Bal-deva and others, 1994 (1) RCR (Civil) 702 (P &H)"*

15. The learned counsel for the petitioner further contended that plaintiff himself had preferred an application for appointment of Local Commissioner to demarcate the land, which application was dismissed. The application, therefore, in such circumstances, was not bonafide as by now the plaintiff had realised the weakness of his case, which was bound to be dismissed, and, therefore, had malafidely filed the present application. He has placed reliance on the judgement of this court in Mangat Ram vs. Chura Dutt and another, 2003 (2) ShimLC 122, wherein it has been held as follows:-

> *"14. In the present case, the suit of the plaintiffs was dismissed on merits by the learned trial court by holding that no part of the land belonging to the plaintiffs had been encroached upon by the defendant. Therefore, the defendant had derived an advantage of the adjudication of the dispute by the learned trial Court. By permitting the plaintiffs to withdraw the suit, the learned first appellate Court has not only permitted the plaintiffs to avoid the decree passed against him by the learned trial Court, has also made the defendant to lose the advantage of adjudication of the dispute in his favour.*
>
> *15. As pointed out above, the plaintiffs earlier had approached the learned first appellate Court under Order 26 Rule 9, Code of Civil Procedure, for appointment of a Local Commissioner to demarcate the land and to ascertain the extent of encroachment, if any, by the defendant. Such application was dismissed on 6.6.1998. By permitting the plaintiffs to withdraw the suit with liberty to bring a fresh suit on the same cause of action "after obtaining proper demarcation of the land in dispute" the learned first appellate Court has proceeded to set aside its own order, which it was not competent to do.*
>
> *16. It was for the plaintiffs to frame their suit in any form as advised taking into consideration the nature of cause of action accruing to them. From the facts and circumstances of the case as emanating from the pleadings of the parties and the judgment of the learned trial Court as well as the impugned order of the learned first appellate Court, it is evident that the plaintiffs realised the weakness of their suit and in order to get over the findings against them recorded by the learned trial Court, they took recourse to Order 23 Rule 1(3), Code of Civil Procedure, for withdrawal of the suit with leave to file a fresh suit. Therefore, no leave could have been granted to the plaintiffs to withdraw the suit. The impugned order of the learned first appellate court is bad and cannot be sustained.*
>
> *17. As a result the present petition is allowed. The impugned order dated 13.6.2000 of the learned first appellate court passed in Civil Appeal No. 2 of 1998 is set aside and the application made by the plaintiffs under Order 23 Rule 1(3), Code of Civil Procedure, is dismissed with costs, quantified at Rs. 2,200."*

16. It was next contended by the learned counsel for the petitioner that non-giving of complete description of the property, the plaintiff cannot be allowed to withdraw the suit, because complete description of the property can be given by amending the plaint, which otherwise would not change the nature of the suit. For this purpose, he has placed reliance on a judgement passed by this

court in Dharampal vs. Nodhar Ram,2012 (2) Civ CC 698 (H.P.), wherein, it has been held as under:

> *"4. The other ground given was that complete description of the suit property, i.e. the path has not been given and the suit may be dismissed on this ground. The learned Trial Court has clearly observed that the plaintiff can move an application for amendment of the suit giving complete details of the property because this will not, in any manner, change the nature of the suit. The learned Trial Court has taken a correct view of the matter."*

17. In support of his aforesaid contention, he further placed reliance on Pardhan & Ors. vs. Mohar Singh & Ors.,2013 (1) CivCC 44 (P&H), wherein, it has been held as follows:

> *"6. Counsel for the appellants contended that application moved by plaintiffs in the lower appellate court for withdrawal of the suit, with liberty to file fresh suit, has been erroneously dismissed by the lower appellate court. The contention cannot be accepted. The plaintiffs pursued the suit in the trial court on the basis of the boundaries mentioned in the plaint and annexed site plan. The suit was dismissed by the trial court vide judgment and decree dated 16.03.2006. First appeal was preferred on 15.04.2006. Aforesaid application was moved on 15.03.2010 i.e. after delay of four years after decision by the trial court. The suit also remained pending in the trial court for more than ten years. Thus, the plaintiffs moved the aforesaid application fourteen years after the filing of the suit, for which no justification is made out. Entire evidence was led by the plaintiffs and also by the defendants, on the basis of description of the suit property given in the plaint and site plan. After fourteen years, the plaintiffs (after having already lost in the trial court) could not be permitted to turn around and to plead that the suit property was not correctly described. The alleged defect also does not fall within the purview of Order 23 Rule 1 (3) of the Code of Civil Procedure (in short CPC) as a formal defect or as other sufficient ground for permitting the plaintiffs to withdraw the suit at appellate stage, with liberty to file fresh suit. The application moved by the plaintiffs in the lower appellate court has been rightly dismissed by the said Court."*

10. Based on the aforesaid judgments, this Court concluded as under:-

"21. The only kind of defect which attracts the applicability of Order 23, Rule 1(3) CPC is formal defect. The formal defect is a defect of form described by a rule or procedure or in other words a defect which cannot be cured by an amendment. The formal defect connotes defects of various kinds not affecting the merits of the case. In Debashis Singha Roy & Ors. vs. Tarapada Roy & Ors., 2001 (2) CivCC 30(Cal.) the Calcutta High Court has held that non-joinder of parties and non-description of suit land is not a formal defect.

22. A suit cannot be allowed to be withdrawn for a defect of substance. (See: Ramrao Bhagwantrao Inamdar and another vs. Babu Appanna Samage and others,1940 AIR(Bom) 121(FB). The court cannot be oblivious to the fact that no litigant can be allowed to file suit one after another on the same cause of action only for the purpose of keeping alive the dispute between the parties to

be reopened at the discretion of the plaintiff. This would not only causes harassment to the parties against whom it is filed, but it is unnecessary impart on the public exchequer and unnecessary load on the court time. The grant of leave envisaged in sub-rule (3) of rule -1 of Order 23 CPC is at the discretion of the Court but such discretion is to be exercised by the Court with caution and circumspection because this provision is founded on public policy.

23. It is settled law that permission to withdraw the suit with liberty to file a fresh suit cannot be granted mechanically and the court is duty bound to satisfy itself that there exist proper grounds for granting such permission. Such permission cannot be resorted to when the claim set out in the original suit is weak. The Hon'ble Supreme in K.S. Bhoopathy and others vs. Kokila and others, (2000) 5 SCC 458 has held as follows:-

> *"13. The provision in Order XXIII, Rule 1, C.P.C. is an exception to the common law principle of non-suit. Therefore on principle an application by a plaintiff under sub-rule (3) cannot be treated on par with an application by him in exercise of the absolute liberty given to him under sub-rule (1). In the former it is actually a prayer for concession from the Court after satisfying the Court regarding existence of the circumstances justifying the grant of such concession. No doubt, the grant of leave envisaged in sub rule (3) of Rule 1 is at the discretion of the Court but such discretion is to be exercised by the Court with caution and circumspection. The legislative policy in the matter of exercise of discretion is clear from the provisions of sub-rule (3) in which two alternatives are provided, (1) where the Court is satisfied that a suit must fail by reason of some formal defect, and the other where the Court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim. Clause (b) of sub-rule (3) contains the mandate to the Court that it must be satisfied about the sufficiency of the grounds for allowing the plaintiff to institute afresh suit for the same claim or part of the claim on the same cause of action. The Court is to discharge the duty mandated under the provision of the Code on taking into consideration all relevant aspects of the matter including the desirability of permitting the party to start a fresh round of litigation on the same cause of action. This becomes all the more important in a case where the application under Order XXIII Rule (1) is filed by the plaintiff at the stage of appeal. Grant of leave in such a case would result in the unsuccessful plaintiff to avoid the decree or decrees against him and seek a fresh adjudication of the controversy on a clean slate. It may also result in the contesting defendant losing the advantage of adjudication of the dispute by the Court or Courts below. Grant of permission for withdrawal of a suit with leave to file a fresh suit may also result in annulment of a right vested in the defendant or even a third party. The appellate/second appellate Court should apply its mind to the case with a view to ensure strict compliance with the conditions prescribed in Order XXIII, Rule 1(3), C.P.C. for exercise of the discretionary power in permitting the suit with leave to file a fresh suit on the same cause of action. Yet another reason in support of this view is that withdrawal of a suit at the appellate/second appellate stage results in wastage of public time of Courts which is of considerable importance in the present time in*

> *view of large accumulation of cases in lower Courts and inordinate delay in disposal of the cases.*
>
> *17. From the above it appears that the approach of the High Court was that the plaintiff should have prayed for declaration of title which they had omitted to include in the plaint. It was for the plaintiffs to frame their suit in any form as advised. If they felt that there was a cause of action for declaration of their title to the suit property they could have made a prayer in that regard. If they felt that a declaration of their right to exclusive user of the pathway was necessary they should have framed the suit accordingly. On the other hand the plaintiffs merely sought a decree of injunction permanently restraining the defendants from disturbing their right of user of the property. From the facts and circumstances of the case as emanating from the judgments of the trial Court and the first appellate Court it is clear that the plaintiffs realised the weakness in the claim of exclusive right of user over the property and in order to get over the findings against them by the first appellate Court they took recourse of Order XXIII, Rule 1(3), C.P.C. and filed the application for withdrawal of the suit with leave to file fresh suit. The High Court does not appear to have considered the relevant aspects of the matter. Its approach appears to have been that since the interest of the defendants can be safeguarded by giving them permission for user of the pathway till adjudication of the controversy in the fresh suit to be filed, permission for withdrawal of the suit as prayed for can be granted. Such an approach is clearly erroneous. It is the duty of the Court to feel satisfied that there exist proper grounds/reasons for granting permission for withdrawal of the suit with leave to file fresh suit by the plaintiffs and in such a matter the statutory mandate is not complied by merely stating that grant of permission will not prejudice the defendants. In case such permission is granted at appellate or second appellate stage prejudice to defendant is writ large as he loses the benefit of the decision in his favour in the lower Court."*

11. Taking into account the aforesaid conspectus of law, it can conveniently be held that the mere statement by the plaintiffs that there is a formal defect in the plaint and form of the suit is not sufficient.

12. To be fair to the learned counsel for the plaintiffs, he has relied upon the following judgments:-

(i) Abdul Ghafoor *vs* ***Abdul Rahman, A.I.R. 1951 Allahabad 845;***

(ii) Duryodhan Jena *vs* ***Satyabadi Samal and others, AIR 1986 Orissa 58;***

iii) Daulat Ram *vs* ***Smt. Janki Devi and others, 1995 (1) SLC 132***

(iv) K.S. Bhoopathy and others *vs* ***Kokila and others, AIR 2000 SC 2132.***

13. In ***Abdul Ghafoor*** *versus* ***Abdul Rahman, A.I.R. 1951 Allahabad 845,*** it was held that under Order 23 Rule 1 (2) (b), the Court can for other sufficient grounds permit the withdrawal of the suit as these grounds are not analogous to those mentioned in Rule 1(2)(a) and it was further laid down that if the Court purports to exercise discretion

under Clause (b), but the grounds are not analogous to the defects referred to in Clause (a), the decision even though judicial can be interfered with under Section 115 of the Code.

14. In ***Daulat Ram*** *versus* ***Smt. Janki Devi and others, 1995(1) SLC 132,*** learned Single Judge of this Court after placing reliance upon the judgment of the Gauhati High Court in ***Union of India and another*** *versus* ***Monoranjan Banik, AIR 1976 Gauhati 1*** held that other sufficient grounds can be independent of formal defects and defects analogous to them. Further, it was held that moreover the grounds in sub-rule (3) (a) require that the suit must fail by reason of some formal defect, whereas, sufficient grounds contemplated in sub-rule (3) (b) need not necessarily be fatal to the suit.

15. As regards ***K.S. Bhoopathy's case*** (supra)**,** the same has already been considered by me in ***Nand Kumar's case*** *(supra).*

16. There can be no quarrel with the propositions as laid down in the judgments (supra). However, it would be noticed that the plaintiffs themselves had not invoked the provisions of Order 23 Rule 1 (3) (b), but their case has specifically been set out under Order 23 Rule 1(3) (a), as would be evident from para-2 of the application, the relevant portion whereof has been extracted and underlined as above.

17. It is nowhere the pleaded case of the plaintiffs that there are sufficient grounds for allowing the plaintiffs to institute a fresh suit for the subject-matter of the suit or a part of the claim so as to invoke the provisions of Order 23 Rule 1(3) (b). Even otherwise, the learned counsel for the plaintiffs has not been able to show any sufficient ground whereby the plaintiffs can be allowed to institute a fresh suit for the subject matter of the suit or a part of the claim, as is evident from para-2 of the application (supra).

18. In view of the aforesaid discussion, this Court has no hesitation in concluding that the impugned order dated 30.07.2018 passed by the learned trial Court is not only perverse, but even the factual and legal aspects, more particularly, the provisions of Order 23 Rule 1(3) (a) and (b) have been totally misconstrued and misinterpreted.

19. Consequently, I find merit in this petition and the same is accordingly allowed and the impugned order passed by the learned trial Court on 30.07.2018 is set aside, 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 AJAY MOHAN GOEL, J.

Smt. Jassi Devi ....Petitioner.
Versus
State of Himachal Pradesh & Ors. ....Respondents.

Review Petition No.49 of 2019
Decided on: 17.04.2019.

Code of Civil Procedure, 1908- Section 114 - Review – Maintainability –Held, review jurisdiction can be availed when there is error apparent on record in judgment or order sought to be reviewed – Failure on part of counsel then representing party to bring relevant

facts to notice of court at time of arguments, no ground to seek review of judgment – Petition dismissed.

For the petitioner.	Dr. Lalit K. Sharma, Advocate.
For respondents.	Mr. Dinesh Thakur, Additional Advocate General with Mr. R.P. Singh and Mr. Amit Kumar Dhumal, Deputy Advocates General for respondents No.1 to 4. Mr. Bimal Gupta, Sr. Advocate with Ms. Rubina Bhatt, Advocate for respondent No.5.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J *(Oral)*

Heard learned counsel for the parties. During the course of argument, Dr. Sharma learned counsel for the review petitioner could not point out any error apparent in the judgment, on the face of the record, review of which is being sought. His contention is that at the time when the writ petition was argued before this Court, learned counsel then representing the petitioner could not bring to the notice of this Court certain relevant facts, and on this ground there is a need to review the judgment. In my considered view, this is no ground to seek review of a judgment. The contention of Dr. Sharma that when the writ was heard, certain points could not be brought into the notice of the Court, does not satisfies the condition of there being an error apparent on the face of the record.

In this view of the matter, in my considered view, there is no ground to review the judgment passed by this Court and this petition is accordingly dismissed.

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

Smt. Kanchana Devi …Petitioner.
Versus
Devinder Anand & others …Respondents.

CRMMO No. 508 of 2018
Date of Decision: April 22, 2019

Code of Civil Procedure, 1908 - Section 24 - Transfer of case – Denial of relief - Ground of – Held, denial of relief by court is no ground to seek transfer of case from that court to some other court- Petition dismissed. (Paras 4 & 5)

For the Petitioner:	Mr.Sanjay Jaswal, Advocate.
For the Respondents:	Mr. Bodh Raj, Advocate, for respondents No.1 and 2. M/s Dinesh Thakur & Sanjeev Sood, Additional Advocate General, with M/s R.P. Singh and Amit Dhumal, Deputy Advocate Generals, for respondent No.3-State.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J (Oral)

Parties are present in person in Court. Learned counsel for respondents No.1 and 2 submits that respondent No.1 is willing to sit across the table and discuss the matter with the petitioner. However, petitioner, who is present in person submits that she is not interested in having the matter amicably resolved.

2. Accordingly matter has been heard on merit itself. Prayer made in this petition is for transfer of Criminal Proceedings initiated at the instance of the petitioner against respondents No.1 and 2 under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as the Act) DV Case No.22 of 2018, titled as *Kanchana Devi vs. Devinder Anand etc.,* pending in the Court of learned Chief Judicial Magistrate, Chamba, District Chamba, H.P. to the Court of learned Chief Judicial Magistrate, Kangra at Dharamshala, H.P. The ground taken in the present petition is that as no interim relief was granted in favour of the petitioner by the Court at Chamba, therefore, case be transferred to Dharamshala.

3. Having heard learned counsel for the parties and having perused the record, in my considered view this petition cannot be allowed.

4. The petition under Section 12 of the Act admittedly has been filed by the present petitioner at Chamba. In other words, it is not as if respondents filed a case against the present petitioner at Chamba and petitioner has approached this Court that as it is possible for her to defend herself at Chamba, therefore, the case be transferred to Dharamshala. Here the facts are that petitioner herself instituted a case at Chamba and now her contention is that because no interim relief has been granted to her by the learned Court at Chamba, therefore, matter be transferred to Dharamshala as it is not possible for her to pursue the case at Chamba. Simply because no interim relief has been granted to petitioner by the Court at Chamba, this is no ground for transferring the matter from Chamba to Dharamshala. It was the decision of the petitioner to file the case at Chamba. She was not forced by anyone to file the same at Chamba.

5. The purported hardship mentioned in the complaint, is not the primary reason for filing the present petition and as was borne out during the course of arguments also, the primary reason as to why this petition has been filed is that thepetitioner was not able to obtain any interim direction in her favour from the Court at Chamba. I reiterate that on this ground, case filed by the petitioner at Chamba cannot be ordered to be transferred to the Court at Dharamshala. Accordingly, present petition, being devoid of any merit, is dismissed. Pending application(s), if any, also stand disposed of.

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

Smt. Pronoti Singh ….Petitioner.

Vs.

Mrs. P. Southby Tailyour and others …..Respondents.

CMPMO No.: 396 of 2015
Reserved on: 10.04.2019

Decided on: 22.04.2019

Code of Civil Procedure, 1908 - Order I Rule 10 - Necessary party- Impleadment of – Requirements – Held, application seeking impleadment of party as co-defendant cannot be allowed mechanically – Plaintiff must show what interest proposed party has in suit and secondly, adjudication of *lis* is not possible in its absence – Unless these conditions are satisfied, party cannot ordered to be impleaded as co-defendant in suit - Petition allowed – Order of trial court set aside (Paras 16 to 19)

Cases referred:
Jogendrasinghji Vijaysinghji Vs. State of Gujarat and others, (2015) 9 SCC 1
Kasturi Vs. Iyyamperumal and others, (2005) 6 SCC 733
Sameer Suresh Gupta through PA Holder Vs. Rahul Kumar Agarawal, (2013) 9 SCC 374

For the petitioner:	Mr. R.L. Sood, Senior Advocate, with M/s Arjun Lall & Sanjeev Kumar, Advocates.
For the respondents:	None for respondents No. 1 to 3. Mr. Deepak Bhasin, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

***Ajay Mohan Goel, Judge**:*

By way of this petition filed under Article 227 of the Constitution of India, petitioner/plaintiff assails order dated 13.03.2015, passed by the Court of learned Civil Judge (Junior Division), Court No. V, Shimla, H.P. in RBT No. 19-1 of 14/95 V, titled as *Smt. Pronoti Singh and another Vs. Mrs. P. Southby Tailyour and others,*vide which, an application filed under Order 1 Rule 10 read with Section 151 of the Code of Civil Procedure by respondent No. 4 for being impleaded as defendant` in the suit, stood allowed.

2. Brief facts necessary for the adjudication of the present petition are that present petitioner Smt. Pronoti Singh and Ratanjit Singh (since dead, whose name has been deleted vide order dated 22.11.2018 from the array of petitioners) instituted a suit, i.e., Civil Suit No. 250 of 1995, RBT No. 19-1 of 14/95, titled as *Smt. Pronoti Singh and another Vs. Mrs. P. Southby Tailyour,* which is pending adjudication before the learned Trial Court praying for the following reliefs:

> *"(a) Pass a decree of declaration in favour of the plaintiff No. 1 against the defendants to the effect that plaintiff No. 1 is the sole beneficiary, as owner of the whole of the corpus and income of the Estate of Lady Constance Ker Trust, in view of the wills and codicils of Lady Constance Ker and late Mrs. Montagu; and also pass a decree to the effect that the appointment of defendant No. 1, as a trustee is void ab initio and illegal, and that she is not entitled to act as a trustee, or to deal with the trust properties in any manner what so ever.*
>
> *(b) Issue a mandatory injunction in favour of plaintiff No. 1 and against the defendants directing them to hand over the complete estate including corpus and income of Lady Constance Ker Trust and her residual estate to the plaintiffs and to act in respect thereof strictly in consultation with plaintiff No. 1. The defendants 4 and 5 further need to be directed to place before this Hon'ble Court the complete list of assets as well as the corpus and income of the Lady Constance Ker Trust and any estate held by them on behalf of the*

trust; the other defendants also need to be directed to give details and particulars of any such corpus or income that they may have in their possession or which is known to them.

(c) To allow such other relief as may be deemed just and proper in favour of the plaintiffs and against the defendants in the peculiar facts and circumstances of the present case.

(d) Allow costs of the suit in favour of the plaintiffs and against the defendants."

3. Respondents No. 1 to 3 before this Court are original defendants in the said suit. The suit was filed in the year 1995.

4. In the year 2014, respondent No. 4 herein, filed an application under Order 1 Rule 10 read with Section 151 of the Code of Civil Procedure before the learned Court below with the prayer that the applicant be impleaded as a party in the suit and be heard. This application was filed before the learned Trial Court on 24.03.2014.

5. It was averred in the same that the applicant Dalhousie Holdings Limited was Administrator to the estate of Lieutenant Colonel William Hall Nixon Kerr and Letters of Administration of the entire estate of Lieutenant Colonel William Hall Nixon Kerr were obtained by the applicant in 217 of 1957 from the High Court at Calcutta. It was further averred in the application that without specifically dealing with other assets of Lady Constance Kerr and Smt. P. Southby Tailyour, the applicant understands that shares, securities and lodgements with ANZ Grindlays vest upon the estate of Lieutenant Colonel William Hall Nixon Kerr. Recently, in the course of administration of the estate of Lieutenant Colonel William Hall Nixon Kerr, applicant vide letter dated 8th July, 2013 wrote to Standard Chartered Bank seeking details and release of the accounts and securities held in the name of Lady Constance Kerr Trust Account and the Bank vide letter dated 4th October, 2013 informed the applicant about the pendency of a suit at Shimla under the title Parnoti Singh Vs. P. Southby Tailyour. According to the applicant, Bank due to pendency of the suit and to maintain customer confidentiality, declined to part with the information. It was further mentioned in the application that inquiries made from the Court of learned Additional District Judge (Fast Track) revealed that the matter was pending and after collecting relevant record, the applicant was filing the application to implead it as a defendant in the Court as it was a necessary party, whose presence was must for proper adjudication of the case. It was further mentioned in the application that one Sir Arthur Milford Ker was owner of several properties in India. He made a Will dated 12.12.1914 appointing his wife Lady Constance Kerr, George Darling Kerr and Williams James Litster as executors of his estate and to be trustees thereby. After making various bequests and bequeathing certain pecuniary legacies, he bequeathed the residue of his estate to his trustees upon trust to pay ¾ of the income of his residuary trust fund to his wife Lady Constance Kerr during her life and remainder of his residuary fund to his brother George Darling Kerr and thereafter to Mr. Kerr (then infant). Lady Constance Kerr died on 23.01.1928 and Mr. George Darling Kerr pre-deceased her, as he passed away on 11.02.1920. After their deaths, the properties of estate of Arthur Milford Ker, which were held in the name of trustees, were wrongfully included in the estate of Lady Constance Kerr and the same were wrongfully dealt with in terms of the Will and Codicils of Lady Constance Kerr. As per the applicant, said properties could not form part of the estate of Lady Constance Kerr as she had only life interest in the same and upon her death, these properties rightfully accrued to Lieutenant Colonel William Hall Nixon Kerr. As per the applicant, after attaining the age of majority of Lieutenant Colonel William Hall Nixon Kerr, said discrepancies were brought to the notice of trustees to the estate Lady Constance Kerr, who not only acknowledged him to be sole beneficiary of the

estate of Sir Arthur Milford Ker, but also acknowledged him as a claimant and creditor to the estate of Lady Constance Kerr. This, as per the applicant, was reduced in the terms of settlement vide decree dated 26.02.1930 filed in the High Court Calcutta as also Deed of Compromise of claims executed in United Kingdom on 12th May, 1947. The properties, subject matter of the suit, after the death of lady Constance Kerr, stood passed on to Lieutenant Colonel William Hall Nixon Kerr. Application for impleadment as party was thus being moved by applicant Dalhousie Holdings Limited, being the Administrator to the estate of Lieutenant Colonel William Hall Nixon Kerr, who was entitled to the properties belonging to and owned by Arthur Milford Ker, which had been wrongfully dealt with by Lady Constance Kerr herself and after her death by her trustees. Further, as per the applicant, the proceedings in the Court to the extent relating to shares and securities lying with Standard Chartered Bank, Kolkata to Lieutenant Colonel William Hall Nixon Kerr could not proceed in view of the order in 217 of 1957 appointing Dalhousie Holdings Limited as Administrator to the estate of Lieutenant Colonel William Hall Nixon Kerr. In this background, prayer was made that the applicant be impleaded as a party in the suit and be heard in accordance with law.

6. The application was opposed by the non-applicant/plaintiff inter alia on the ground that it was not demonstrated as to how Lieutenant Colonel William Hall Nixon Kerr had any relation with Lady Constance Kerr and how Lieutenant Colonel William Hall Nixon Kerr had succeeded to the property of Lady Constance Kerr. It was mentioned in the reply that it was not shown by the applicant that on what basis Lieutenant Colonel William Hall Nixon Kerr claimed title to the shares etc. of Lady Constance Kerr. According to the non-applicant, a false story stood concocted and in fact applicant had no right to be impleaded as a party in the suit. It was denied in the reply that properties belonging and owned by Arthur Milford Ker amongst others were wrongfully dealt with by Lady Constance Kerr herself or by her trustees. It was denied that applicant was a necessary party in any manner. It was denied for want of knowledge that Sir Arthur Milford Ker was owner of several properties in India. It was also denied that Arthur Milford Ker had made a Will dated 12.12.1914 appointing his wife Lady Constance Kerr, George Darling Kerr and Williams James Lister as executors of his Estate and to be trustees thereby. It was denied that the properties of Estate of Arthur Milford Ker were held in the name of trustees and were wrongfully included in the Estate of Lady Constance Kerr. Non-applicant also denied that said properties were dealt with in terms of the Will and Codicils of Lady Constance Kerr. It was specifically denied that Lady Constance Kerr had only life interest in the said properties and upon her death, titled and interest accrued to Lieutenant Colonel William Hall Nixon Kerr. It was stated in the reply that no succession table was given to substantiate as to how and in what manner Lieutenant Colonel William Hall Nixon Kerr succeeded to the properties of Lady Constance Kerr. Non-applicant also denied that shares in various companies stood established as part of the Estate of Sir Arthur Milford Ker and they had actually accrued to Lieutenant Colonel William Hall Nixon Kerr.

7. Vide impugned order, the application filed by respondent No. 4 for impleadment as defendant in the suit stood allowed. Learned Court below after taking into consideration the respective contentions of the parties, allowed the application by returning the following findings:

> *"….The applicant is claiming to be the beneficiary of the estate of Lady Constance Ker and further received the information from the Standard Chartered Bank on 4th October, 2013. It is stated that Lady Constance Ker had only life interest in the property and upon her death authorities rightly accrued to Lieutenant Colonel William Hall Nixon Kerr. However, wrongly*

after the death of Lady Constance Ker, George Darling Ker and Williams James Litster, the properties were wrongly included in the estate of Lady Constance. However, upon attaining the majority of Lieutenant Colonel William brought the above discrepancies and the disputes to the notices of the trustees to the estate of Lady Constance Kerr, however, they acknowledged him to the sole beneficiary to the estate. In the present case, the applicant appears to be a necessary party in the present case since the case has been filed on behalf of the plaintiff for administrator of the estate of Lady Constance Ker and all the claims to the estate are necessary party in order to decide the dispute between the parties finally and put it at rest. Moreover, it will also reduce the multiplicity of litigation between the parties. Accordingly, the applicant in order to make his claim has also filed the terms of settlement vide decree dated 26.02.1930 and deed of compromise of claims executed in United Kingdom on 12th May, 1947. Accordingly, all these documents shows that the applicant appears to be necessary party in the present case and no order can be passed by this Court in absence of such, application is allowed….”

8. I have heard learned counsel for the parties and have also gone through the impugned order as well as the record of the case.

9. At this stage, it is relevant to deal with a preliminary objection taken by learned counsel for respondent No. 4 with regard to the maintainability of the present petition on the ground that this petition filed under Article 227 of the Constitution of India against the impugned order is not maintainable. According to him, petitioner should have had assailed the impugned order under the provisions of Section 115 of the Code of Civil Procedure. He has relied upon the judgment of Hon'ble Supreme Court in ***Sameer Suresh Gupta through PA Holder*** Vs. ***Rahul Kumar Agarawal,*** (2013) 9 Supreme Court Cases 374.

10. In my considered view, the preliminary objection raised by learned counsel for respondent No. 4 is not maintainable. Unlike the case before the Hon'ble Supreme Court in ***Sameer Suresh Gupta*** *(supra)*, the petitioner herein has not assailed the order passed by the learned Trial Court under Article 226 read with Article 227 of the Constitution of India. He has assailed the same solely under Article 227 of the Constitution of India, thus, invoking supervisory jurisdiction of this Court. The petition cannot be thrown out on the ground that it ought to have been filed under Section 115 of the Code, for the reason that as per law laid down by the Hon'ble Supreme Court, which stands reiterated in ***Jogendrasinghji Vijaysinghji*** Vs. ***State of Gujarat and others,*** (2015) 9 Supreme Court Cases 1, High Court can interfere in exercise of its power of superintendence when there has been a patent perversity in the orders of the Courts subordinae to it or where there has been a gross and manifest failure of justice or the basic principles of natural justice have been flouted, provided that in exercise of its power of superintendence, High Court cannot interfere to correct mere errors of law or fact or just because another view than the one taken by the Courts subordinate to it, is a possible view. Thus, in my considered view, this petition is very much maintainable. However, whether or not the impugned order can be interfered with in exercise of its power of superintendence under Article 227 of the Constitution of India, of course, will be dictated by the parameters laid down by the Hon'ble Supreme Court *supra*.

11. It is settled law that general rule qua impleadment of parties is that plaintiff being dominus litis, may choose persons against whom he wishes to litigate and plaintiff cannot be compelled to sue a person against whom he does not seek any relief. This general

rule, mentioned hereinabove, is of course subject to the provisions of Order 1 Rule 10(2) of the Code.

12. Sub-rule (2) of Order 1 Rule 10 of the Code of Civil Procedure (hereinafter referred to as 'the Code') provides that the Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

13. In ***Kasturi*** Vs. ***Iyyamperumal and others***, (2005) 6 Supreme Court Cases 733, a three Judge Bench of Hon'ble Supreme Court has held that two tests which are to be satisfied for determining the question as to who is necessary party are (i) there must be a right to some relief against such party in respect of the controversies involved in the proceedings; (ii) no effective decree can be passed in the absence of such party. Hon'ble Supreme Court has also held that jurisdiction of the Court to add an applicant arises only when the Court finds that such applicant is either a necessary party or a proper party. It has also held that an application so filed, cannot be allowed for adjudication of collateral matters.

14. Coming to the facts of the present case, it is a matter of record that no relief has been sought by the plaintiff against respondent No. 4 in respect of the issues raised in the suit nor it can be said that no effective decree can be passed in the same, in the absence of respondent No. 4. The suit is primarily filed for a decree of declaration in favour of plaintiff No. 1 therein and against the original defendants impleaded in the suit to the effect that plaintiff No. 1 was the sole beneficiary as owner of whole of the corpus and income of the estate of Lady Constance Kerr trust in view of the Will and Codicils of Lady Constance Kerr and late Mrs. Montagu. Respondent No. 4 wanted its impleadment in the said suit on the ground that Lieutenant Colonel William Hall Nixon Kerr had succeeded to the estate of Sir Arthur Milford Ker, which stood wrongly included in the estate of Lady Constance Kerr and, therefore, applicant being the administrator of the estate of Lieutenant Colonel William Hall Nixon Kerr, was a necessary party to the suit. However, a perusal of the averments made in the application filed under Order 1 Rule 10 of the Code as also documents appended therewith, demonstrate that applicant has not been able to spell out as to how Lieutenant Colonel William Hall Nixon Kerr was related to Sir Arthur Milford Ker. Incidentally, in para 9 of the application, it is averred that the right of Lieutenant Colonel William Hall Nixon Kerr to succeed to the estate of Sir Arthur Milford Ker upon being brought to the notice of trustees to the estate of Lady Constance Ker, stood acknowledged to the effect that Lieutenant Colonel William Hall Nixon Kerr was the sole beneficiary to the estate of Sir Arthur Milford Ker. This, as per the applicant stood acknowledged in terms of settlement vide decree dated 26.02.1930 filed with the High Court of Calcutta, as also Deed of Compromise of Claim executed at United Kingdom on 12th May, 1947. A perusal of the record demonstrates that alongwith the application filed under Order 1 Rule 10 of the Code, applicant filed certain documents, which includes Letter of Administration No. 217 of 1957, which reads as under:

> *"Hereby maketh known that on the twenty first day of August in the year one thousand nine hundred and fifty seven Letters of Administration of the property and credits of Lieutenant Colonel William Hall Nixon Kerr late of the Bengal Club Ltd., 33, Chowringhee Calcutta deceased who as appears from the petition filed herein died at Elgin Nursing Home Calcutta on the sixth day*

of February in the year one thousand nine hundred and fifty seven were granted to Dalhousie Holdings Limited of 4D, Gasstin Place Calcutta the duly constituted attorneys in India of Sylvia Jackson and Shelagh Dorolley Foster who are at present residing beyond jurisdiction of this Court the daughters and two of the kin of the deceased with effect throughout the whole of the Union of India for the use and benefit of the said Sylvia Jackson and Shelagh Dorolley Foster shall obtain from this Court Letters of Administration they the said Dalhousie Holdings Limited having undertaken to administer the said property and credits and to make a ful and true inventory thereof and exhibit the same in this Court within six months from the date of this grant or within such further time as the Court may from time to time appoint and also to render to this Court a true account of the said property and credits within one year from the same date or within such further time as the Court may from time to time appoint.

15. Incidentally, during the course of arguments, learned counsel for respondent No. 4 could not spell out the present status of Sylvia Jackson and Shelagh Dorolley Foster, who stand mentioned in the Letter of Administration. This Letter of Administration was issued on 19th September, 1957 and as already mentioned above, the present status of Sylvia Jackson and Shelagh Dorolley Foster is not known. Be that as it may, as per the applicant, the factum of Lieutenant Colonel William Hall Nixon Kerr, being the sole beneficiary of the estate of Sir Arthur Milford Ker is borne out from settlement decree dated 26.02.1930 and Deed of Compromise dated 12th May, 1947. There is no Deed of Compromise of Claims dated 12th May, 1947, but there is a Deed of Compromise of Claim dated 12th May, 1942, which was filed by the applicant alongwith the application and incidentally, in this document, there is no mention of Lieutenant Colonel William Hall Nixon Kerr. A perusal of the said document demonstrates that 'Mr. Ker' referred to in this deed is Major Johnne George Skipton Ker and not Lieutenant Colonel William Hall Nixon Kerr, as learned counsel for the respondent wants this Court to believe. During the course of arguments, learned counsel for respondent No. 4 could not point out any reference of Lieutenant Colonel William Hall Nixon Kerr in this particular document. As far as the second document referred to in para 9 of the application, i.e., Settlement decree dated 26.02.1030 is concerned, there is no such document filed alongwith the application.

16. During the course of arguments, on a query of the Court as to how as per the applicant, Lieutenant Colonel William Hall Nixon Kerr was related to Sir Arthur Milford Ker, answer of learned counsel for respondent No. 4 was that respondent No. 4 was not to answer the said query at the stage of filing of the application for being impleaded as defendant and once the applicant stood impleaded as defendant, then the same shall be spelt out in the written statement. In my considered view, said contention of respondent No. 4 is not sustainable in the eyes of law. When a party files an application for being impleaded as a defendant in the suit, it is incumbent upon the party to demonstrate as to what interest it has in the suit and unless the Court is satisfied that said party has an interest in the suit and no adjudication is possible in the absence of said party, no such party can be ordered to be impleaded as defendant. This extremely important aspect of the matter has not been appreciated by the learned Court below while allowing the application filed by the applicant for being impleaded as a party defendant.

17. I have already quoted the reasons given by the learned Court below in extensio while allowing the application. In my considered view, the application stood allowed by the Court below in a mechanical manner without appreciating either the contents of the application filed under Order 1 Rule 10 of the Code as also documents appended therewith

or the averments made in the reply to the application or for that matter, the contents of the suit filed by the petitioner.

18. As proposed defendant was claiming that Lieutenant Colonel William Hall Nixon Kerr was successor to the estate of Lady Constance Kerr, it was incumbent upon the proposed defendant to have had established through the application and documents appended therewith the factum of Lieutenant Colonel William Hall Nixon Kerr being related to Sir Arthur Milford Ker and his having succeeded to the estate of Lady Constance Ker. This, the proposed defendant miserably failed to do. In such circumstances, when the proposed defendant had failed to prove that Lieutenant Colonel William Hall Nixon Kerr had any interest in the suit property, Administrator of whose estate the proposed defendant claimed itself to be, prayer of applicant could not have been allowed for being impleaded as party defendant. This extremely important aspect of the matter has been ignored by the learned Court below and, therefore, there is a patent perversity in the order impugned, which has resulted in a gross and manifest failure of justice. Present case is not a case of mere errors of law or fact, but as I have already mentioned above, it is a case of patent perversity in the order passed by the learned Court below, which has erred in not appreciating the scope of Order 1 Rule 10(2) of the Code in its true mandate.

19. In view of the reasons given hereinabove, this petition is allowed. Order dated 13.03.2015, vide which, an application filed under Order 1 Rule 10 read with Section 151 of the Code of Civil Procedure by respondent No. 4 for being impleaded as defendant in the suit stood allowed, is quashed and set aside. Parties through counsel are directed to appear before the learned Court below on ***6th May, 2019.*** Miscellaneous applications, if any, also stand disposed of.

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

Harish Chand ....Petitioner.
Versus
Sarita Devi & another ...Respondents.

Cr. MMO No. 69 of 2019
Reserved on: 05.04.2019
Decided on: 24.04.2019

Code of Criminal Procedure, 1973 – Section 127 - Maintenance – Interpretation of – Held, word *'maintenance' should* not be narrowly interpreted - Maintenance to child does not mean providing raiment and food only - It should include expenses of education and his overall development - Order of Sessions Judge directing petitioner to pay arrears of maintenance at enhanced rate with in one month during pendency of revision petition upheld - Petition dismissed. (Paras 6 to 8)

For the petitioner: Mr. Neel Kamal Sharma, Advocate.
For the respondents: Mr. Ramakant Sharma, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present petition is maintained by the petitioner under Section 482 Cr.P.C. against order, dated 12.12.2018, passed by learned Additional Sessions Judge, Hamirpur, District Hamirpur, H.P., in application under Section 389 Cr.P.C., whereby the petitioner was ordered to pay an amount of Rs. 20,000/- each to the respondents.

2. As per the petitioner, he moved an application under Section 389 Cr.P.C. before the learned Additional Sessions Judge, Hamirpur, District Hamirpur, H.P. (hereinafter referred to as "the Revisional Court") for suspension of execution of order dated 01.08.2018, passed by learned Chief Judicial Magistrate, Hamirpur, H.P., in petition under Section 127 Cr.P.C., till disposal of the revision. Avowedly, the petitioner is husband of respondent No. 1 and father of respondent No. 2. Respondents No. 1 and 2 moved application for the learned Trial Court under Section 127 Cr.P.C. for enhancement of maintenance allowance @ Rs. 20,000/- per month. The learned Trial Court vide its decision dated 01.08.2018, enhanced the maintenance amount from Rs. 2,000/- to Rs. 10,000/- to respondent No. 1 and from Rs. 2,000/- to Rs. 20,000/- to respondent No. 2. Thus, cumulatively, the maintenance amount was enhanced from Rs. 4,000/- to Rs. 30,000/-. Subsequently, the present petitioner assailed the order of enhancement before the learned Revisional Court by filing a revision petition. The learned Revisional Court partly allowed the application and the petitioner was directed to pay the entire arrear @ Rs. 10,000/- per month within a month from 12.12.2018 (the date of the order) and he was also directed to pay maintenance @ Rs. 10,000/- per month till disposal of the revision petition. Feeling aggrieved and dissatisfied, the petitioner maintained the present petition tersely on the ground that the order passed by the learned Revisional Court is illegal, wrong, perverse and contrary to the facts, thus the same is liable to be quashed and set aside. The petitioner further contends that his net cash in hand monthly salary is Rs. 37,500/- and he pays Rs. 34,000/- per month towards the loan installment of loan amounting to Rs.22,57,533/-. The petitioner averred that if an amount of Rs. 20,000/- is deducted per month from out of Rs. 37,500/-, then the petitioner will be left with Rs. 17,500/- only and it will become difficult for him to meet out his day to day expenses and other social obligations. As per the petitioner, the amount of Rs. 20,000/- is so high, so the impugned order may be quashed and set aside and the petition be allowed.

3. Heard. The learned Counsel for the petitioner has argued that the impugned order has been passed by the learned Revisional Court without appreciating the facts and the maintenance amount is on very higher side. He has further argued that the amount is required to be reduced. On the other hand, learned counsel for the respondents has argued that in view of the income of the petitioner, the amount of maintenance is just and reasoned. He has argued that the petition has no merits and the same deserves dismissal and may be accordingly dismissed.

4. In rebuttal, the learned Counsel for the petitioner has argued that keeping in view the loan liability on the shoulders of the petitioner and also the fact that the maintenance amount awarded is on very higher side, the petition be allowed and the impugned order passed by the learned Revision Court be quashed and set aside.

5. Respondents earlier maintained a petition under Section 125 Cr.P.C. against the petitioner and they were awarded monthly maintenance @ Rs. 2,000/- each. The petitioner herein has stated that his father had undergone bypass surgery and he has loan liability of Rs. 24,00,000/- (rupees twenty four lac). The petitioner could not produce any medical record of his father and he has admitted in his cross-examination that his father is an Ex-Army personnel and he availed medical facility under ECH. The petitioner further

admitted that since 2012, he is working as Bank Manager and his monthly salary is more than Rs. 70,000/-. He further deposed that he owns vehicle Swift. Admittedly, the petitioner's monthly income is Rs. 80,000/- per month and he is deputed as Senior Manager in Punjab National Bank.

6. The petitioner had tried to convince this Court that he has to look after his old father and the maintenance allowance, so awarded, is on very higher side. Generally, speaking expression *'maintenance'* means appropriate food, clothing and shelter. The word *'maintenance'* is not to be narrowly interpreted. Indeed, maintenance encapsulates constant expenses towards the wife and children. In the instant case, maintenance to respondent No. 1 has been awarded keeping in mind her regular day to day expenses and for respondent No. 2 maintenance has included minimum amount for her education. Indeed, maintenance to a child does not mean providing raiment and food only. Maintenance to only human body is not sufficient, especially in case of children, as the children need to be educated and their overall development has to be kept in mind. In the instant case also, respondent No. 2, who is daughter of the petitioner, has been awarded maintenance by the learned Trial Court keeping in mind her educational expenses. PW-1 Smt. Sarita Devi (respondent No. 1 herein) deposed that educational and other expenses of the daughter (respondent No. 2 herein) are more than Rs. 10,000/- per month. She has further deposed that she has to pay monthly rent of Rs. 6500/-.

7. It has come on record that the petitioner has sufficient source of income, whereas the respondents have no source of income. In the above set of circumstances, this Court finds that respondent No. 2 is totally dependent for her education and other expenses on the petitioner and respondent No. 1 is also dependent upon the maintenance allowance awarded to her. Keeping in view the growing inflation rate as also the overall aspects of the case, this Court finds that the respondents have no source of income to meet their day to day expenses and respondent No. 2 needs money for her education, so it cannot be said that order granting the respondents monthly maintenance allowance of Rs. 10,000/- each is at all unreasonable. However, as the revision petition is pending adjudication before the learned Revisional Court below, the petitioner herein can argue and defend his cause there.

8. In view of what has been discussed hereinabove, this Court does not find any perversity in the impugned order passed by the learned Revisional Court. The petition, being devoid of merits, deserves dismissal and is accordingly dismissed. Pending application(s), if any, shall also stand(s) disposed of.

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

Cr.MPs(M) No. 537 & 538 of 2019
Decided on: 24th April, 2019

1. Cr.MP(M) No. 537 of 2019:

Parminder Singh …Petitioner

Versus

The State of Himachal Pradesh …Respondent

1. Cr.MP(M) No. 538 of 2019:

Balvir Singh …Petitioner

Versus
The State of Himachal Pradesh ...Respondent

Code of Criminal Procedure, 1973 - Section 438 - Pre-arrest bail - Grant of – Principle of parity – Applicability - Accused seeking anticipatory bail in case registered for gang rape – On facts, co-accused already enlarged on bail - No likelihood of accused fleeing away from justice or his tampering with prosecution evidence – Accused having joined investigation as such ordered to be enlarged on bail on principle of parity - Petition allowed with conditions. (Paras 6 & 7)

For the petitioner: Mr. Prem Pal Chauhan, Advocate.
For the respondent/State: Mr. S.C. Sharma, Mr. Shiv Pal Manhans and Mr. P.K. Bhatti, Additional Advocates General, with Mr. Raju Ram Rahi, Deputy Advocate Genera.
Sub Inspector Arjun Dev, Police Station Amb, District Una, H.P.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge. *(oral).*

The present bail applications have been moved by the petitioners under Section 438 of the Code of Criminal Procedure for releasing them on bail, in the event of their arrest, in case FIR No. 04 of 2018, dated 04.01.2018, under Sections 376-D, 313 and 506 read with Section 34 IPC, registered in Police Station Amb, District Una, H.P.

2. As per the averments made in the petitions, the petitioners are innocent and have been falsely implicated in the present case. They are neither in a position to tamper with the prosecution evidence nor in a position to flee from justice and they are joining and co-operating in the investigation, so they may be released on bail.

3. Police report stands filed. As per the prosecution story, on 04.01.2018 police received a complaint of the prosecutrix (name withheld), wherein she averred that in the month of September, 2017, the petitioners alongwith co-accused committed rape on her in a hotel. The prosecutrix further averred that she used to live separately from her husband and has a son, who is one year and seven months' old. Petitioner Parminder Singh, *Sarpanch*, promised her that he will adopt the son, as he is having no children. However, petitioner Parminder Singh did not introduce her to his wife. As petitioner Parminder Singh promised her to adopt her son, prosecutrix developed physical relations with him. Thereafter, petitioner Parminder Singh compelled her to live separately from her mother and he used to visit her place, but despite perennial requests he did not adopt her son. The prosecutrix further contended that in September, 2017, petitioner Parminder Singh asked her to come to Baba Barbhag Singh and he was accompanied by one Balwinder Singh and some another person, whose name she does not know. There they stayed in a hotel and she was made to drink liquor and all of them sexually molested her. When the prosecutrix told them that she would complain the matter, all of them threatened her. In November she came to know that she is pregnant and petitioner Parminder Singh told her to terminate the pregnancy and administered some pills to her. However, the pregnancy could not be completely terminated, so her surgical abortion was done on 30.11.2017. On the basis of the complaint, so made by the prosecutrix, a case was registered and the investigation ensued. The prosecutrix was medically examined and as per the medical opinion possibility

of sexual assault was not ruled out. Police prepared the spot map and records of hotel was also procured, which show that on 13.10.2017 rooms No. 104 and 105 were booked in the name of Balwinder Singh (co-accused). It was unearthed during the course of investigation that on that day co-accused (Balvir) mixed something in the drink of the prosecutrix and thereafter the petitioners and co-accused Balwinder Singh committed rape on her. Police recorded the statements of the witnesses and statement of the prosecutrix was also recorded under Section 164 Cr.P.C. It has come in the investigation that petitioner Parminder Singh got abortion of the prosecutrix done in a private hospital. Accused Balwinder Singh was arrested and his medical examination was conducted. The petitioners initially, in order to evade their arrest, fled away and on 09.04.2019 and 10.04.2019 petitioners Paraminder Singh and Balwinder Singh, respectively, joined the investigation. *Challan* against the petitioners stands presented in the learned Trial Court. Lastly, the prosecution has prayed that the petitioners have committed a heinous crime and in case they are enlarged on bail, at this stage, they may tamper with the evidence and may also flee from justice, so their applications may be dismissed.

4. I have heard the learned Counsel for the petitioner, learned Additional Advocate General for the State and gone through the record, including the report of the police, carefully.

5. The learned Counsel for the petitioner has argued that the petitioners are innocent and they are neither in a position to tamper with the prosecution evidence nor in a position to flee from justice. He has further argued that the petitioners are joining and co-operating in the investigation. Conversely, learned Additional Advocate General, has argued that the petitioners have committed a heinous crime and in case at this stage they are enlarged on bail, they may tamper with the prosecution evidence and may also flee from justice. He has further argued that at this stage the petitioners may not be released on bail and their applications be dismissed.

6. At this stage, considering the fact that the petitioners are joining and co-operating in the investigation, keeping in view the fact that co-accused Balwinder Singh has been enlarged on bail by a Co-ordinate Bench of this Hon'ble High Court and also considering the fact that the petitioners are neither in a position to tamper with the prosecution evidence nor in a position to flee from justice and also considering all the material, which has come on record, and without discussing the same at this stage, this Court finds that the present is a fit case where the judicial discretion to admit the petitioners on bail, in the event of their arrest, is required to be exercised in their favour. Under these circumstances, it is ordered that the petitioners be released on bail, in the event of their arrest, in case FIR No. 04 of 2018, dated 04.01.2018, under Sections 376-D, 313 and 506 read with Section 34 IPC, registered in Police Station Amb, District Una, H.P., on their furnishing personal bond to the tune of `50,000/- (rupees fifty thousand only) each with one surety each in the like amount to the satisfaction of the Investigating Officer. The bail is granted subject to the following conditions:

(i) That the petitioners will join investigation of the case as and when called for by the Investigating Officer in accordance with law.

(ii) That the petitioners will not leave India without prior permission of the Court.

(iii) That the petitioners will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Investigating Officer or Court.

7. In view of the above, the petitions are disposed of.

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

Prithi Singh ....Petitioner.
Versus
Jagdish Chand & others ....Respondents.

Cr. MMO No. 46 of 2015
Reserved on: 05.04.2019
Decided on: 24.04.2019

Code of Criminal Procedure, 1973 – Section 482 – Inherent power – Exercise of - Cancellation report – Acceptance thereof – Trial court accepting cancellation report and setting aside FIR – Sessions court upholding order in revision – Revision against – On facts, dispute between parties purely civil in nature – Demolition of boundary wall, if any, will have civil consequences – Remedy for petitioner lies in filing suit for damages or any other appropriate relief- petition dismissed. (Paras 6 to 10)
Code of Criminal Procedure, 1973 (Code) - Sections 397 & 482 – Whether inherent powers can be invoked when second revision is not maintainable ? – Held, when second revision is expressly barred under Code, inherent powers cannot be invoked to defeat statutory limitations- Petition dismissed. (Para 7)

Cases referred:
Amar Nath & others vs. State of Haryana & others, AIR 1977 SC 2185
Deepti alias Arati Rai vs. Akhil Rai & others, 1995 SCC (Cri) 1020

For the petitioner: Mr. Rajesh Kumar, Advocate.
For the respondents: Mr. Ajay Sharma, Sr. Advocate, with Mr. Rakesh Chaudhary, Advocate, for respondents No. 1 to 3.
M/s. S.C. Sharma, Shiv Pal Manhans and P.K. Bhatti, Additional Advocates General, with Mr. Raju Ram Rahi, Deputy Advocate General, for respondent No. 4/State.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present petition is maintained by the petitioner under Section 482 Cr.P.C. against order, dated 25.04.2011, passed by learned Judicial Magistrate 1st Class, Barsar, District Hamirpur, H.P., and also against order dated 16.04.2014, passed by learned Sessions Judge, Hamirpur, H.P.

2. As per the petitioner, he made a complaint to police of Police Station Barsar, District Hamirpur and contended that respondents No. 1 to 3 herein demolished a brick wall forcibly and illegally. Pursuant to his complaint, FIR No. 152 of 2007, dated 11.08.2007,

was registered against respondents No. 1 to 3. Precisely, the petitioner contends that the police did not carry the investigation properly and ultimately prepared a cancellation report. The petitioner filed objections against the said report before the learned Trial Court and alleged that the revenue staff wrongly and illegally converted the *karu kans* and thereby caused deficiency of land. The learned Trial Court, vide its order dated 25.04.2011, accepted the cancellation report and the objections filed by the petitioner were dismissed. Feeling aggrieved and dissatisfied, the petitioner filed a revision petition before the learned Revision Court, assailing the order passed by the learned Trial Court dismissing his objections and accepting the cancellation report, but the same was also dismissed on the premise that during the course of investigation, police got the land demarcated from revenue experts and the wall was found over the land of the accused (respondents No. 1 to 3 herein), hence the present petition preferred by the petitioner.

3. Heard. The learned Counsel for the petitioner has argued that the cancellation report was prepared by the police without properly investigating the matter and the learned Trial Court has wrongly, in a cursory way, accepted the cancellation report. He has further argued that even the learned Revisional Court, without application of mind, dismissed his revision petition. He has argued that the police did not take into consideration the fact that by whom the wall was forcibly demolished. This facet has not been considered by the learned Trial Court and by the learned Revisional Court. He has argued that the present petition be allowed and the impugned orders passed by the learned Courts below be quashed and set aside. The matter be investigated afresh and respondents No. 1 to 3 (accused persons) be punished for the commission of the offences punishable under Sections 447, 427 read with Section 34 IPC. On the other hand, learned Senior Counsel for respondents No. 1 to 3 has argued that the demarcation was got conducted by the police and the demarcation report has not attained finality. He has further argued that the demarcation report has been accepted by both the parties and the wall qua which the petitioner is raising objection fell in the land of respondents No. 1 to 3. He has argued that the present is a dispute of civil nature and no illegality has been committed by the learned Courts below. He has argued that the learned Courts below have taken the correct view after appreciating the facts and law correctly. He has prayed that in the above backdrop, the petition be dismissed. The learned Senior Counsel for respondents No. 1 to 3 has argued that the instant petition is not maintainable. In order to draw lateral support to what has been argued by the learned Senior Counsel, he has placed reliance on the following judicial pronouncements:

1. ***Amar Nath & others vs. State of Haryana & others, AIR 1977 Supreme Court 2185;***
2. ***Deepti alias Arati Rai vs. Akhil Rai & others, 1995 SCC (Cri) 1020;***

4. In rebuttal, the learned Counsel for the petitioner has argued that it is not the case of respondents No. 1 to 3 that they were owners of the wall and this fact is clear from the record of the present petition. In these circumstances, the police were duty bound to investigate that the wall of the petitioner was demolished by force and in that eventuality the result would have been different. He has prayed that in view of the above, the petition be allowed and the matter be investigated afresh and the orders of the learned Courts below be quashed and set aside.

5. I have heard the learned counsel for the petitioner, learned Senior counsel for respondents No. 1 to 3, learned Additional Advocate General for respondent No. 4/State and gone through the record.

6. Noticeably, demarcation had been carried out on the spot in presence of the parties and the wall, which was allegedly demolished, came on the land of Shri Jagdish Chand (respondent No. 1 herein). In fact, petitioner, Shri Prithi Singh, is owner of land having khasra No. 199 and respondent No. 1, Shri Jagdish Chand, is owner of adjoining land, having khasra No. 198. It is on record that the petitioner got registered FIR No. 152 of 2007, dated 11.08.2007 against respondents No. 1 to 3 and he alleged that the said respondents demolished the wall, which was on his land (on khasra No. 199). After the registration of the FIR, police got the spot demarcated from revenue expert and the wall in question was found on the land of respondents No. 1 to 3. Thus, the police prepared a cancellation report and the petitioner preferred objections, which were mainly based on order of correction, dated 24.08.2009, passed by Settlement Collector, Kangra Division, and demarcation report dated 23.01.2012 given by Shri Lakshmi Dutt Thakur, Tehsildar. The documents, whereupon the petitioner based his objections against the cancellation report have no effect on the cancellation report, as vide correction order dated 24.08.2009, correction qua *karu kans* of northern and southern boundary were made and neither the total length of *karu kans* changed, nor there was any change in the area. The learned Courts below have rightly observed that there seems to be a boundary dispute of civil nature *inter se* the parties, efficacious remedy whereof is damages or any other relief. This Court is also of the opinion that there exists a boundary dispute between the parties and nothing emanates from the record that demarcation dated 23.01.2012 has attainted finality or not.

7. The learned Counsel for respondents No. 1 to 3 has placed reliance upon a decision of Hon'ble Supreme Court rendered in ***Amar Nath & others vs. State of Haryana & others, AIR 1977 Supreme Court 2185,*** wherein vide para 3 the Hon'ble Supreme Court has observed as under:

> ***"3. While we fully agree with the view taken by the learned Judge that where a revision to the High Court against the order of the Subordinate Judge is expressly barred under sub-s. (2) of S 397 of the 1973 Code the inherent powers contained in S. 482 would not be available to defeat the bar contained in S. 397(2). Section 482 of the 1973 Code contains the inherent powers of the Court and does not confer any new powers but preserves the powers which the High Curt already possessed. A harmonious construction of Ss. 397 and 482 would lead to the irresistible conclusion that where a particular order is expressly barred under S. 397(2) and cannot be the subject of revision by the High Court, then to such a case the provisions of S. 482 would not apply. It is well settled that the inherent powers of the Court can ordinarily be exercised when there is no express provision on the subject matter. Where there is an express provision, barring a particular remedy, the Court cannot resort to the exercise of inherent powers."***

8. In ***Deepti alias Arati Rai vs. Akhil Rai & others, 1995 SCC (Cri) 1020,*** the Hon'ble Supreme Court has held that second revision after dismissal of the first one by the Sessions Court not maintainable and inherent power cannot be utilized for exercising powers expressly barred by the Code.

9. In view of the above cited judgments, the learned Senior Counsel for respondents No. 1 to 3 tried to question the maintainability of the petition. Certainly, it is settled law that second revision after dismissal of the first one is not permissible under the

law. However, the High Court can exercise power under Section 482 to set right the perversity in the orders passed by the learned Courts below.

10. In view of what has been discussed hereinabove, this Courts finds that the dispute is of civil nature *inter se* the parties and the learned Courts below have rightly dealt with the matter. It would be apt for the petitioner to avail efficacious remedy, if available under the law. This Court does not deem it fit and proper to interfere with the impugned order. Accordingly, the petition, which is devoid of merits, deserves dismissal and is dismissed. Pending application(s), if any, shall also stand(s) disposed of.

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

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

Versus

Bishamber Singh .....Respondent.

Cr. Appeal No. 188 of 2009
Reserved on:10.04.2019
Decided on: 24.04.2019

Indian Evidence Act, 1872 - Section 3 – Appreciation of evidence - Held, when two reasonable views emerge out from evidence on record, then view favouring accused should be taken – On facts, evidence regarding transport of Khair wood more than permitted under transport permit, conflicting – Official witnesses admitting that Khair wood was being transported under valid permit - Acquittal recorded by trial court not to be interfered with - Appeal dismissed.(Paras 13 to 17)

***Cases referred*:**

Arun vs. State, (2008) 15 SCC 501
Chandrappa vs. State of Karnataka, (2007) 4 SCC 415
T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401

For the appellant:	M/s. S.C. Sharma and Shiv Pal Manhans, Additional Advocates General, with Mr. Raju Ram Rahi, Deputy Advocate General.
For the respondent:	Mr. Ashok Chaudhary, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal is maintained by the appellant/State laying challenge to judgment dated 03.09.2008, passed by learned Judicial Magistrate 1st Class, Jawali, District Kangra, H.P., in Criminal Case No. 49-III/02, whereby the respondent/accused (hereinafter referred to as "the accused") was acquitted for the offences under Sections 41 and 42 of the Indian Forest Act read with Section 20 of the H.P. Forest Produce Transit Rules.

2. As per the prosecution, the background facts giving rise to culmination of the case against the accused can tersely be summarized as under:

On 15.06.2001, a police team was on patrol duty at Bhanai and a *nakka* was laid at Bhanai. The police team intercepted a truck coming from Jassur side, having registration No. HPK-4733, which was being driven by the accused. The accused disclosed his name as Bishamber Singh and on checking the said truck was found loaded with logs and fuel wood. The accused further divulged that he was taking the load from Fatehpur to Gagret vide Chit No. 131/NFD RFO, Jawali, dated 14.06.2001, vide permit No. 1492, dated 02.06.2001 and produce export permit, bearing number 4492 and *challan* number 3556 valid upto 26.06.2001. GR No. 3716, dated 14.06.2001 was produced by the accused and RC and Driving Licence were also shown to the police. The police got the truck unloaded and the material was measured. On measurement the material was found to be 104 quintals and 40 kgs and the permit, bearing number 4492 was only for 80 quintals wood scants and 10 quintals of fuel wood. Police sent the *rukka* to the police station, whereupon FIR was registered and the truck was impounded. The wood was taken into possession and given on *superdari* to Shri Kuldeep Singh, Forest Guard. Police prepared the spot map and recorded the statements of the witnesses. Lastly, the police prepared the *challan* and presented the same in the learned Trial 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.

4. The learned Trial Court, vide impugned judgment dated 03.09.2008, acquitted the accused for the offences punishable under Sections 41 and 42 of the Indian Forest Act read with Section 20 of H.P. Forest Produce Transit Rules, hence the present appeal is preferred by the appellant/State.

5. The learned Additional Advocate General for the appellant/State has argued that the learned Trial Court did not appreciate the evidence correctly and the accused has been acquitted on the basis of surmises and conjectures. He has further argued that after reappraisal of the evidence, which has come on record, the appeal be allowed and the accused be convicted. Conversely, the learned counsel for the accused has argued that the learned Trial Court has correctly appreciated the evidence and the judgment of acquittal is well reasoned. He has further argued that there is nothing on record which could remotely establish the guilt of the accused. He has argued that the judgment of acquittal needs no interference, so the appeal be dismissed.

6. In rebuttal, the learned Additional Advocate General has argued that the accused be convicted after re-appreciating the evidence, as the learned Trial Court has failed to appreciate the evidence correctly.

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

8. Succinctly, as per the prosecution, the accused was found transporting the wood exceeding the limit, as the permit number 4492, dated 02.06.2001, was given to Shri Jagdish Kumar from Nurpur Forest Division was for transporting 2271 quintals of Khair wood and 381 quintals of Khair fuel wood between 02.06.2001 and 20.06.2001. The prosecution has further alleged that the truck in question was hired by Truck Union and vide export permit number 4492, the said truck was only allowed to load 80 quintals of Khair wood and 10 quintals of fuel wood. On the contrary, the defence of the accused is

that labourers loaded excess wood in the truck, so he is not at all responsible for excess of load for which he had been booked.

9. Indisputably, prosecution witnesses admitted, while deposing in the Court that 426 scants of Khair wood, which were found loaded in the truck, were having hammer marks. PW-1, Constable Mohinder Singh, went a steps further by deposing that 426 scants of Khair wood, which were loaded in the truck, having registration No. HPK-4733, had hammer marks and these scants were being transported under a valid permit. Likewise, PW-2, Shri Kuldeep Singh, Forest Guard, deposed that 426 scants of Khair wood had hammer marks. Thus, it is clear that the wood loaded in the truck in question was having hammer marks.

10. PW-3, Constable Subhash Chand and PW-4, ASI Mohammad Arshad (Investigating Officer) deposed in their testimonies that the truck in question was parked outside the house of Shri Ranjeet @ Jito, who is owner of the truck. PW-10, Inspector Gurbaksh Singh, also fortified this fact by deposing that the truck was parked adjoining to the house of owner of the truck. From the testimonies of PWs 3, 4 and 10 it is proved that the truck was parked outside the house of its owner. Thus, if any illegal activity was underway, the owner and driver of the truck could not have parked the truck unworriedly. PW-5, Shri Punjab Singh, Forest Guard, deposed that on 14.06.2001, at about 04:30 p.m., permit, Ex. PW-5/A, was given to the driver of the truck and on 15.06.2001, at about 05:00 p.m., the truck left from Fatehpur to Gagret. From the version of PW-5, it also stands established that the wood, which was found loaded in the truck, was being transported under proper and valid permit.

11. PW-6, Shri Yog Raj, deposed that he loaded the truck, having registration No. HPK-4733. PW-7, Shri Jagdish Chand (owner of the truck) deposed that the driver of the truck told him that en route Gagret, he will park the truck outside the house of PW-7. PW-8, ASI Surinder Kumar, PW-9, Shri Om Prakash and PW-11, Shri Prem Singh, are formal witnesses, so their testimonies are not worth discussing.

12. After threadbare scrutiny of the material, which has come on record, it stands established that at Fatehpur, where the khair wood was loaded by the labour in the truck, there was no weighing scale. Thus, there is strong possibility that the truck might have been loaded with load exceeding the limit provided vide export permit No. 4492, which was issued in favour of Shri Jagdish Kumar (PW-7), owner of the truck. The available material establishes the fact that the truck was found parked adjacent to the house of PW-7 and it was loaded with wood. The wood was loaded by the labour and under valid permit it was being transported, so it cannot be presumed by any stretch of imagination that the accused knowingly got the truck loaded with wood excessively and under the guise of permit he intended to transport extra wood. Further the act and conduct of the accused is also very important in the instant case. The accused informed the owner of the truck, Shri Jagdish Kumar (PW-7) that he will park the truck outside his house and accordingly parked the truck, where it was checked by the police. Therefore, the act and conduct of the accused seems natural and in case he was knowingfully transporting excessive wood, he could have transported it on the same day. The way the accused parked the truck adjacent to the house of the owner of the truck without any worry, further proves that the accused had no intention to commit the crime by illegally transporting the excessive wood.

13. After exhaustively discussing the testimonies of key prosecution witnesses, it is safe to hold that the learned Trial Court has rightly appreciated the evidence and the conclusion of acquittal of the accused is firmly based upon what has come on record. In the instant case, after evaluating the diluted evidence, it is more than safe to hold that the

learned Trial Court rightly acquitted the accused. However, if any other view is qua the guilt of the accused, then also the law pronounced by the Hon'ble Supreme Court comes to the rescue of the accused, as the Hon'ble Supreme Court in ***Arun vs. State, (2008) 15 SCC 501,*** has held that if there are two reasonable views, then the view favouring the accused be adhered to. In the present case also there are two views and the available material on record compels us to tilt towards the view favouring the accused.

14. 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.

15. 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.***
>
> i) ***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."***

16. In view of the settled legal position, as aforesaid, and on the basis of material, which has come on record, it is more than safe to hold that the prosecution has

failed to prove the guilt of the accused beyond reasonable doubts and the findings of acquittal, as recorded by the learned Trial Court, need no interference, as the same are the result of appreciating the facts and law correctly and to their true perspective. Accordingly, the appeal, which sans merits, deserve dismissal and is dismissed.

17. In view of the above, the appeal, so also pending application(s), if any, stand(s) disposed of.

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

Tek Chand ....Petitioner
Versus
The State of Himachal Pradesh ....Respondent

Cr.MP(M) No. 401 of 2019
Decided on: 24th April, 2019

Code of Criminal Procedure, 1973- Section 438 - Pre-arrest bail - Grant of – Principle of parity – Applicability - Accused seeking anticipatory bail in case registered for cheating, forgery etc – On facts, principal accused already enlarged on bail - No likelihood of accused fleeing away from justice or his tampering with prosecution evidence – Accused having joined investigation as such ordered to be enlarged on bail on principle of parity - Petition allowed with conditions. (Paras 4 to 7)

For the petitioner:	Mr. Praveen Chauhan and Mr. Rakesh Chauhan, Advocates.
For the respondent/State:	Mr. S.C. Sharma, Mr. Shiv Pal Manhans and Mr. P.K. Bhatti, Additional Advocates General, with Mr. Raju Ram Rahi, Deputy Advocate Genera. SI Baldev Singh, Police Station Sadar Hamirpur, District Hamirpur, H.P.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge. *(oral).*

The present bail application has been moved by the petitioner under Section 438 of the Code of Criminal Procedure for releasing him on bail, in the event of his arrest, in case FIR No. 237 of 2018, dated 28.09.2018, under Sections 420, 465, 467, 468, 471 and 120B IPC, registered in Police Station Sadar Hamirpur, District Hamirpur, H.P.

2. As per the averments made in the petition, the petitioner is innocent and has been falsely implicated in the present case. He is neither in a position to tamper with the prosecution evidence nor in a position to flee from justice, so he may be released on bail.

3. Police report stands filed. As per the prosecution story, on 28.09.2019 police received a complaint from Himachal Pradesh Beverages Limited (HPBL). It is contended in the complaint that during the year 2016-17 HPBL sold liquor amounting to Rs. 543.59 crore and when chartered accounts checked the accounts it was found that payment of Rs.11,47,50,291/- (rupees eleven crore forty seven lac fifty thousand two hundred ninety

one) has not been received by HPBL. Inquiry further revealed that different licensees did not deposit the amount. Thereafter, HPBL constituted an internal committee to probe the matter. The said committee found that the licensees have either reused one UTR (Unique Transaction Reference) issued by the Bank for procuring stock of liquor from more than one Depot or have tempered with the UTRs/HPBL account and while doing so they have committed forgery and cheating knowingly that spent UTRs would induce the HPBL Depot Manager to release stock in their favour again to which they were not entitled for. Upon the complaint, police registered a case and investigation ensued. During the course of investigation police found the involvement of the petitioner, who was posted in Depot Bajuri, District Hamirpur, H.P. The petitioner was instrumental in making liquor available to licencee Ankush Rana without any payment and verification. The action of the petitioner resulted into financial loss to HPBL. During the course of investigation, police recorded the statements of the witnesses and relevant record was taken into possession. *Challan* stands presented in the learned Trial Court. Lastly, the prosecution has prayed that the petitioner was found involved in a serious offence and in case he is enlarged on bail, at this stage, he may tamper with the prosecution evidence and may also flee from justice, so the application may be dismissed.

4. I have heard the learned Counsel for the petitioner, learned Additional Advocate General for the State and gone through the record, including the report of the police, carefully.

5. The learned Counsel for the petitioner has argued that the petitioner is innocent and he is neither in a position to tamper with the prosecution evidence nor in a position to flee from justice. He has further argued that the main accused have been enlarged on bail, so the application be allowed may also be enlarged on bail. Conversely, learned Additional Advocate General, has argued that the petitioner was found involved in a serious offence and in case at this stage he is enlarged on bail, he may tamper with the prosecution evidence and may also flee from justice. He has further argued that at this stage the petitioner may not be released on bail and his application be dismissed.

6. At this stage, considering the role of the petitioner in the alleged offence and the fact that main accused have already been enlarged on bail and also the overall aspects of the case and without discussing the same at this stage, this Court finds that the present is a fit case where the judicial discretion to admit the petitioner on bail, in the event of his arrest, is required to be exercised in his favour, as he is neither in a position to tamper with the prosecution evidence nor in a position to flee from justice. Under these circumstances, it is ordered that the petitioner be released on bail, in the event of his arrest, in case FIR No. 237 of 2018, dated 28.09.2018, under Sections 420, 465, 467, 468, 471 and 120B IPC, registered in Police Station Sadar Hamirpur, District Hamirpur, H.P., on his furnishing personal bond to the tune of Rs.50,000/- (rupees fifty thousand only) with one surety in the like amount to the satisfaction of the Investigating Officer. The bail is granted subject to the following conditions:

(i) That the petitioner will join investigation of the case as and when called for by the Investigating Officer in accordance with law.

(ii) That the petitioner will not leave India without prior permission of the Court.

(iii) That the petitioner will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Investigating Officer or Court.

7. In view of the above, the petition is disposed of.

Copy *dasti*.

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

M/s Dev Resins Pvt. Ltd. ...Plaintiff/Applicant

Versus

M/s Sudhir & Company & others ...Defendants/Respondents

OMP No. 433 of 2017 in Civil Suit No.10 of 2013
Order reserved on 8th March, 2019
Date of Decision 25th April, 2019

Code of Civil Procedure, 1908 - Section 151 CPC & Order VII Rule 14 (3) – Additional evidence - Production of documents - Plaintiff filing application for placing documents on record by way of additional evidence on ground that these could not be traced earlier – Documents pertained to old transaction and lying in its record room - And could not be produced before Court despite due diligence - Defendant resisting application on ground of documents being beyond pleadings and new case being spelt out by it - Facts showing that documents were already in possession of plaintiff – Plaintiff filed applications for producing documents twice earlier and those were allowed - No plea regarding present documents raised in those applications - Held, Plaintiff failed to exercise due diligence or withheld documents deliberately - Evidence beyond pleadings can't be allowed – Application dismissed. (Paras 18 to 22)

Cases referred:

K.K. Velusamy vs. N. Palanisamy (2011)11 SCC 275
Kapil Kumar Sharma vs. Lalit Kumar Sharma and another (2013)14 SCC 612
M.Chinnasamy vs. K.C. Palanisamy and others (2004)6 SCC 341
Ramesh Kumar and another vs. Furu Ram and another (2011)8 SCC 613

For the Plaintiff/Applicant: Mr. N.K.Bhalla and Mr.Dalip K. Sharma, Advocates.
For the Defendants/ Non-applicants Mr. B.C. Negi, Sr. Advocate with Mr.Pranay Pratap Singh, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

This application has been filed on behalf of the plaintiff/applicant, invoking Section 151 CPC, for permission to place certain documents on record and to prove the same by way of additional evidence on the ground that the company is maintaining huge record rooms for keeping records, which are subject to audit and sometime due to some human error, it takes time to search the old record and since the transaction was old, the documents could not be traced earlier and therefore could not be produced before the Court despite due diligence and plaintiff/applicant has never acted wrongfully and negligent

manner and now after proper and careful search of records, the plaintiff/applicant has found the documents, proposed to be placed and proved on record in evidence, after the closure of plaintiff evidence, leading to filing of this application without delay.

2 In the main suit, recording of evidence of defendant is yet to start. The evidence of plaintiff was closed on 15.6.2017 whereafter on 25.8.2017 and 8.12.2017 evidence of defendants could not be recorded for want of steps to be taken by the defendants. In the meanwhile, on 17.11.2017 present application stands filed along with photocopies of documents with further averments that original documents are in the custody of defendant No.1 and also in the office of Chief Conservator of Forests, Jammu, Government of Jammu and Kashmir.

3 Main suit has been filed on 16th February, 2013 for recovery of sum of Rs. 36,20,430/- along with pendente lite and future interest at the rate of 18% per annum with averments in the plaint that defendant No.1 was manufacturing 'Gum Rosin' which was used by plaintiff as a raw material for manufacturing resin and plaintiff was also selling Patra to defendant No.1. It is further case of the plaintiff that plaintiff and defendant had been raising independent invoices and bills to each other with regard to respective sales of goods made to each other and there existed a reciprocity of demands and there was independent dealing between the parties and the account maintained for this purpose was mutual, open and current and in alternative, it is pleaded that in case it is considered that account was not mutual, open and current, in that event also, plaintiff is entitled for recovery of said amount as the payments have been made by the plaintiff to the defendants on account of business transaction for making purchase of Gum Rosin on various dates from time to time.

4 By filing written statement on 19.6.2013, it is categorically denied that plaintiff was engaged in manufacturing of resin and was selling Patra to defendant No.1 and plaintiff and defendant No.1 were raising independent invoices/bills to each other with respect to sales of goods made to each other and existence of mutual, open current account on account of alleged transaction and also non-settlement of final balance.

5 After filing replication to the written statement on 10.12.2013, issues were framed on 11.12.2013 and the case was ordered to be listed for recording plaintiff's evidence on 19.5.2014, however, on that day, instead of leading the evidence an application under Order 7 Rule 14(3) CPC bearing OMP No. 198 of 2014 was filed on behalf of plaintiff/applicant for placing on record the documents on behalf of plaintiff on the ground that those documents were necessary for proper adjudication of the suit and plaintiff/applicant could not produce those documents on record due to reason that those aforesaid documents got mixed up with another case file of litigation pending between the parties at District Court, Solan. The said application was allowed on 2.6.2014, whereafter case was again fixed on 19.9.2014 for recording the evidence of plaintiff's witnesses.

6 On 19.9.2014 three plaintiff witnesses were present, however, documents sought to be proved through these witnesses were neither filed with plaint nor relied upon on the memo of reliance and therefore, for filing appropriate application, matter was adjourned on the request made on behalf of the plaintiff/applicant. On 28.10.2014 another application under Order 7 Rule 14(3) CPC bearing OMP No. 446 of 2014 was filed for placing on record the documents on behalf of plaintiff on the same ground that those documents were necessary for proper adjudication of present case and plaintiff was under bonafide impression that those documents had been filed along with plaint and this mistake came in the notice on 19.9.2014 when plaintiff was summoned to prove those documents and further that plaintiff/applicant could not produce those documents on record as those

documents were got mixed up with another case file of litigation between the parties at District Court, Solan with respect to specific performance of agreement, which was initially filed before this Court.

7 The said application was opposed by non-applicants/defendants by filing reply, however vide order dated 5.3.2015 the said application was allowed subject to all just exceptions. Thereafter, case was listed for recording evidence of plaintiff on 15.6.2015, 17.11.2015, 2.5.2016, 10.8.2016, 21.12.2016, 4.5.2017 and 15.6.2017 and adjournments for recording the evidence, except at one instance on 4.5.2017, were at the request of plaintiff and ultimately, the evidence of plaintiff, after recording the evidence of witnesses, was closed on 15.6.2017.Thereafter, case was listed for recording of evidence of defendants. However, as noticed supra, present application stands filed during interregnum.

8 This application has been opposed by defendants on the ground that documents sought to be placed and proved on record are beyond the pleadings of parties and a new case has been spelt out in the application, which is not permissible under law and permission to place and prove the documents filed with application would amount to changing the basic nature of case and permitting the plaintiff to lead evidence beyond the pleadings. It is further pleaded in reply that alleged transaction indicated in the documents, proposed to be produced, is with respect to purchase of resin from the office of Chief Conservator of Forests, Jammu and in fact the said purchase was for and on behalf of the plaintiff, but in the name of defendant No.1 as the plaintiff was not having licence to purchase the same, whereas defendant No.1 was having the requisite licence for the said purchase. It is contended on behalf of defendants that documents were very much with the plaintiff as material was purchased for the plaintiff but in the name of defendant No.1 for technical reasons as defendant No.1 was having licence to purchase and plaintiff was not having the same and the material, if any, alleged to so purchased was not used by the defendants but by the plaintiff itself and the plaintiff had not produced these documents with plaint as it was never the case of plaintiff that it had made payment on behalf of defendant No.1 for purchase of resin from Forest Department of Jammu and Kashmir. Suit has been filed only with respect to the purchase of Gum Rosin and Patra and in any case, the plea, which has been taken in application for production of those documents, is not part of the pleadings in plaint and now allowing these documents to be placed and proved in evidence would cause serious prejudice to defendants as the defendants, for want of pleadings in plaint, had no occasion to explain their position in written statement.

9 The defendants/non-applicants have relied upon the decision of Apex Court passed in ***M.Chinnasamy vs. K.C. Palanisamy and others*** reported in ***(2004)6 SCC 341*** (para 42) wherein it is held that it is now well settled principle of law that evidence adduced beyond the pleadings would not be admissible nor can any evidence be permitted to be adduced which is at variance with such pleadings.

10 Further reliance has been placed on decision rendered in ***Ramesh Kumar and another vs. Furu Ram and another*** reported in ***(2011)8 SCC 613*** wherein the Apex Court has reiterated the same principle by holding that no amount of evidence, contrary to pleadings, can be relied on or exhibited.

11 Reliance on behalf of the plaintiff/applicant has been placed on the pronouncement of the Apex Court rendered in ***Kapil Kumar Sharma vs. Lalit Kumar Sharma and another*** reported in ***(2013)14 SCC 612*** wherein application under Order 7 Rule 14 CPC, seeking leave to file additional evidence in probate case and civil suit, was allowed by the Apex Court at the stage of cross examination.

12 Referring to the pronouncement of the Apex Court in ***K.K. Velusamy vs. N. Palanisamy*** reported in ***(2011)11 SCC 275*** (See paras 13 and 19) it is contended on behalf of the defendants that no doubt deletion of provision of Order 18 Rule 17-A CPC does not mean that no evidence can be received at all, after a party closes his evidence, however, for making out a case to lead additional evidence at such a stage, it must be established on record that such evidence could not be produced despite due diligence and also the evidence must be relevant, admissible and within the scope of pleadings and power, under Section 151 of CPC vested in the Court, is not intended to be used routinely merely for the asking as its such user will defeat the very purpose of various amendments to the Code to expedite the trial and therefore, unless the application is found to be bonafide and where the additional evidence, oral or documentary, will assist the Court to clarify the evidence on the issues and will assist in rendering the justice and the Court is satisfied that if earlier non-production was for valid and sufficient reason, the Court may exercise its discretion to allow to lead additional evidence and in case application is found to be mischievous or frivolous or to cover up negligence or lacunae, it should be rejected with heavy costs.

13 It is contended on behalf of plaintiff/applicant that forest produce does not automatically stand transferred unless owner of goods (purchaser) has paid price and sale tax and at the time of purchase of resin, defendant No. 1 was not having sufficient amount for said purchase and on request of deceased Sunil Sood, plaintiff/applicant had made the payment on behalf of defendant No.1 and in the accounts maintained by plaintiff/applicant, there is transaction of Rs.28,86,400/- with regard to making the payment to the Chief Conservator of Forests, Jammu for defendant No.1, and the said accounts have been produced in evidence as Ext.PW4/D-1 to Ext.PW4/D-13 and the said transaction has been denied by defendants and therefore, the documents, Annexure A, filed with application i.e. order passed by the Chief Conservator of Forest, Jammu having the details of payment made by plaintiff on 9.3.2011 and 10.3.2011 are necessary for adjudicating the claim of plaintiff/applicant. It is further submitted on behalf of plaintiff/applicant that reason for late production of documents is that original is in possession of department and defendants and plaintiff or its officers/officials being non-resident of Jammu and Kashmir are not entitled to get information under Right to Information Act in that State and there was human error at the time of keeping the photocopies of documents, now placed with application, in the record room and they were misplaced by the concerned person. It is further contended that being documents proposed to be placed and proved on record are public documents, and cannot be tampered with by plaintiff/applicant and therefore, these documents cannot be said to be fabricated or prepared by plaintiff/applicant. It is submitted that plaintiff/applicant has not travelled beyond the pleadings as plaintiff/applicant has paid the amount sought to be proved through proposed additional evidence and therefore, in view of the nature of suit, the defendants should either return the goods or the money and these documents are being filed only to support the entries in account maintained by plaintiff/applicant Ext.PW4/D-1 to Ext.PW4/D-13 which contains the entry of concerned payment.

14 I have considered the arguments advanced by learned counsel for the parties and have also gone through record.

15 From the pleadings in plaint, it is evidently clear that suit has been filed for recovery of amount against the payments made by plaintiff to defendants on account of business transaction for making purchase of 'Gum Rosin' on various dates from time to time. There is no reference in plaint with respect to payment of amount by plaintiff/applicant to third party on behalf of defendant No.1 on asking of its proprietor late Shri Sunil Sood. The case set up in application for production of additional evidence is missing from plaint. Therefore, there was no occasion for the defendants to respond thereto

in written statement. Though, in reply to application, the defendants, without admitting the transaction, have given explanation about the transaction. However, the fact remains that averments made in application or in reply thereto, are not part of pleadings in plaint or written statement. Therefore, in view of settled law, the evidence beyond the pleadings is not permissible.

16 It is true that ledger account statement Ext.PW4/D-1 to Ext.PW4/D-13 was filed by plaintiff/applicant along with plaint which contains the entry regarding the payment of Rs.28,86,400/- to Chief Conservator of Forest, Jammu with endorsement that the said amount was paid on behalf of M/s Sudhir and Company Ltd. However, it is also the fact that no such claim has been put forth in the plaint for recovery of amount paid to third party.

17 Even otherwise, for other reasons also, the plaintiff/applicant is not entitled for discretionary relief for the reasons assigned hereinafter.

18 It is the case of plaintiff/applicant that purchase of resin, referred in documents proposed to be placed on record, was by defendant No.1 and role of plaintiff was only to make payment on the request of proprietor of defendant No.1 and further that plaintiff/applicant had made the payment of Rs.28,86,400/- only to the Chief Conservator of Forests, Jammu which was the price of Oleo Resin, whereas sale tax was paid by defendant No.1 M/s Sudhir and Company by deposit of Rs.5,00,945/- through Government Challan and the entire material was purchased by defendant No.1 for use of plaintiff and it was transported by defendant No.1. On perusal of Annexure A, filed with application, reveals that Rs.28,86,400/- is inclusive of sale tax of Rs.5,00,945/- and in case the amount of Rs.5,00,945/- was paid by defendant No.1 the remaining amount would be Rs.22,03,857/- only. Further the entry in Ext.PW4/D-1 to Ext.PW4/D-13, is indicating that on 9.3.2011 an amount of Rs.28,86,400/- was paid by plaintiff/applicant to Chief Conservator of Forest, Jammu on account of defendant No.1, whereas in document Annexure A, Rs. 2 lacs is reflected to be paid through two different CDRs of Rs. 1 lac each on 23.2.2011 payable at SBI Jammu and Rs. 24,56,400/- is stated to have been deposited by plaintiff on 9.3.2011 through TEGS and Rs. 2,30,000/- is reflected to be paid by plaintiff on 10.3.2011 through TEGS. Therefore, Annexure A proposed to be placed and proved on record is not in consonance with entries made in ledger and probably for this reason only, plaintiff/applicant has not produced the said documents earlier with plaint and even thereafter at the time of filing two applications, OMP No. 198 of 2014 and OMP No. 446 of 2014 filed under Order 7 Rule 14(3) CPC for placing certain documents on record and it has now been proposed to be placed on record without any reference of claim for that in plaint. Defendants have taken a position in the written statement as well as in cross examination to witnesses. Therefore, allowing this application at this stage would certainly cause irreparable loss and prejudice to the defendants.

19 Further PW4 Dinesh Kumar who has appeared as a witness being authorised person of plaintiff No.1, on behalf of plaintiff company, has been confronted by defendnats in his cross examination with respect to entry of payment of Rs.28,86,400/- in Ext.PW4/D wherein this witness has tried to explain that such payment was made to third party at the instance of defendant No.1. As discussed above, no such case has been set up in plaint. Therefore, this application is found to be filed either mischievous or to cover up negligence or lacunae and therefore, deserves to be disallowed.

20 The documents proposed to be placed and proved on record are (i) order dated 14.3.2011 passed by the Chief Conservator of Forest in favour of defendant No.1, (ii) Toll-Post Ticket dated 25.3.2011 regarding transportation of forest produce by defendant No.1, (iii) GR of Jetking Roadways (Regd) and (iv) Form ST-16 along with Form 25 regarding

the payment of sale tax i.e. Rs. 5,00,945/- by defendant No.1. It is the stand of applicant/plaintiff that this purchase was made by defendant No.1 and plaintiff/applicant has only made the payment to facilitate the same as defendant No. 1 was not having sufficient funds for the said purchase and it is also claim of plaintiff/applicant that originals are lying with the department and defendants. If it was the purchase made by defendant No.1 having no link with plaintiff/applicant except facilitating the purchase by providing funds, there was no occasion for plaintiff/applicant to have these documents in its record. Even if it is considered that photocopy of order dated 14.3.2011 passed by the Chief Conservator of Forest Jammu was kept in the record of plaintiff as a supported document with respect to payment of Rs.28,86,400/- even then there was no occasion for plaintiff/applicant to have the possession of photocopy of Toll Post Ticket, GR and sale tax receipt and Form ST-16 along with Form 25. But it is the case of plaintiff/applicant that those documents were misplaced or could not be traced in its record room. It is not the case of plaintiff that he has procured the photocopies of these documents from the concerned agency, rather it has been categorically contended on behalf of the plaintiff/applicant that he was not having any right to procure these documents under RTI Act and also it is not the case of plaintiff/applicant that these documents have been procured by it from the offices concerned but it is specific plea of plaintiff/applicant that these documents have been traced in his huge record room maintained by it. Therefore, now production of these documents at this stage, which were in possession of plaintiff, definitely creates doubt about its bonafide.

21 Plea of plaintiff/applicant that these documents could not be produced earlier on account of human error is also not tenable as after filing of suit, the plaintiff has preferred application under Order 7 Rule 14(3) CPC twice by taking identical plea in those applications that documents were intermingled in the record of another case pending in District Court, Solan. Plea in the present case is also almost similar as now it has been canvassed that these photocopies were misplaced in the record room.

22 Therefore in view of above discussion, I am of the considered view that production of additional evidence proposed to be placed and proved on record with this application would not facilitate the fair adjudication of case and I also find that these documents were in possession of plaintiff/applicant and its earlier non-production was not for bonafide, valid and sufficient reason. Plaintiff has either failed to exercise due diligence or has withheld these documents deliberately. Accordingly, the present application is dismissed.

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

M/s Indo Farm Tractors and Motors Ltd. ……Decree Holder.
Vs.
The Rajpura Cooperative Agriculture Service Society and others …..Judgment Debtors.

OMP No. 105 of 2018 in
Execution Petition No. 25 of 2014
Date of Decision 25th April, 2019

Code of Civil Procedure, 1908 – Order XXI Rule 58 - Execution of decree – Attachment of property – Objections thereto – Sustainability – Under compromise decree, Judgment debtor

no.1 (Society) bound to pay 1/3rd share of decretal amount – Decree holder getting Society's property attached – Judgment debtor filing objections that property has been raised out of deposits of members, who are poor farmers and it cannot be sold in execution – Held, Society has its separate legal entity - Attached property is owned by it - It is not property of any individual – JD has suffered decree and under legal duty to satisfy it – No third party has first charge over attached property - No ground to hold that such property is not liable to attachment – Objections dismissed. (Paras 25 to 29)

Himachal Pradesh Cooperative Societies Act, 1968 (Act) - Section 2(11) – 'Officer' - Meaning of – Held, expression 'Officer' as defined in Section 2(11) of Act is inclusive one – It includes any officer of Society empowered under Rules and bye-laws to give directions in regard to its business etc - Assistant Manager of Society specifically authorized vide resolution of Administrative Board to engage counsel and defend suit, is an officer of Society. (Paras 20 to 22)

Cases referred:

Kancherla Lakshminarayana vs. Mattaparthi Syamala and others, (2008)14 SCC 258
Land Acquisition Collector, Mohali and another vs. Surinder Kaur (2013)10 SCC 623
Maya Devi vs. Lalta Prasad (2015)5 SCC 588
State of Punjab and others vs. Krishan Dayal Sharma AIR 1990 SC 2177
Vedic Girls Senior Secondary School, Arya Samaj Mandir, Jhajjar vs. Rajwanti (Smt.) and others (2007)5 SCC 97

For the Decree Holder/Non- applicant: Mr.C.N.Singh, Advocate and Mr. Devinder Sharma, Advocate.

For the Judgment Debtors/ applicant Mr. T.S. Chauhan Advocate for Judgment Debtor No.1, Ms. Ritika Kashav Advocate, vice Mr.H.S.Rana,Advocate,for Judgment Debtor No.2 and Mr.J.L.Bhardwaj, Advocate, for Judgment Debtor No.3.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

These objections have been preferred on behalf of Judgment Debtor No.1 Cooperative Society under Order 21 Rule 58 CPC against the attachment of property of said Judgment Debtor on the ground that the said Society is a Society of poor and marginal farmers, who have invested their entire earnings with the Society, and property of the Society has been raised out of the deposits of members and in case this property is attached and sold, the Society would be unable to repay the fixed deposits of its poor members and first right on the property is of its members, who are poor and marginal farmers and further that Judgment Debtor Nos. 2 and 3 were having vested interest as they had misappropriated the amounts of the Society and thus entered into compromise having adverse impact on its members.

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

3 Perusal of record reveals that originally Decree Holder had filed a civil suit for recovery of Rs. 1,19,50,000/- against the Rajpura Cooperative Agriculture Service Society Ltd. (Judgment Debtor No.1/defendant No.1), Mr. R.K. Saini Manager of defendant

No.1 Society as defendant No.2 and Mr. Manmohan Singh President of defendant No.1 Cooperative Society as defendant No.3. Initially, defendant No.1 Cooperative Society was being represented through its President Manmohan Singh (defendant No.3). However, it appears from record that at that time, Society was being managed through Administrative Board headed by Administrator appointed by the concerned authority. The said Administrative Board, by passing a resolution on 28.5.2010, had authorized its Assistant Manager Nasib Singh to take appropriate action for the benefit of the Society including consulting the Advocate and contesting the case in the High Court. Thereafter, Nasib Singh, the Assistant Manager of the Cooperative Society, had signed power of attorney on behalf of defendant No.1 (Judgment Debtor No.1) on 17.6.2010 which was filed in the Court on 18.6.2010. At that time, Nasib Singh was not party to the suit in individual capacity. However, later on 29.5.2013 after conciliation before the Mediator on 14.12.2012, on an application OMP No. 227 of 2013, preferred by the plaintiff/Decree Holder, the said Nasib Singh was impleaded as defendant No.4 as an authorized officer of defendant No.1 Cooperative Society vide order 30.5.2013.

4 During pendency of suit, matter was referred for mediation in November, 2012 vide order dated 9.11.2012 and Decree Holder/plaintiff and Judgment Debtors No. 1 and 2 had appeared before learned Mediator and parties have agreed to pass a decree for Rs. 80 lacs as a full and final claim in favour of plaintiff and the said amount was agreed to be payable within a period of one year from the date of grant of permission from the High Court to sell the immovable properties, on an application to be preferred by defendants and it was further agreed that in case of default in making payments, the defendants shall be liable to pay interest at the rate of 9% per annum on Rs. 80 lacs till final payment and further that recovery of entire amount will be affected in equal shares from defendants No. 1 to 3.

5 Later on, defendant No. 3 Manmohan Singh who was earlier proceeded ex-parte, and was not present before learned Mediator, had appeared in the Court on 18.12.2012 and had deposed on oath that he had seen the report of learned Mediator available on record and being aware of the contents of report had admitted the same to be correct with assurance to abide by the settlement so arrived at.

6 Ultimately a joint application, OMP No. 228 of 2013 dated 29.5.2013, was preferred by the plaintiff/Decree Holder and original defendants No. 1 to 3 for passing a compromise decree in terms of agreement entered between the parties placed on record with this application wherein the settlement arrived at before learned Mediator was reiterated and endorsed. The case was listed for presence of parties on 11.6.2013 on which date after recording the statements of parties on oath, the suit was decreed in terms of agreement/compromise.

7 It is contended on behalf of Judgment Debtor No.1 Society that previous management of the Society had committed serious irregularities in the functioning of the Society and they had started their own business in the name of the Society causing huge losses to it and failure of previous management, to pay the amount payable to the Decree Holder, had resulted filing of suit, decree wherein has been sought to have been executed in the present execution petition wherein Judgment Debtors No. 2 and 3, who were at the helm of affairs of the Society at that time, had entered into compromise with the Decree Holder having adverse effect on interest of the Society and its members and thereafter, had filed an application under Order 23 Rule 3 CPC on the basis of agreement so arrived between the parties. According to Judgment Debtor No.1, Nasib Singh through whom Judgment Debtor No. 1 was being represented in the suit, was also party to the suit as defendant No.4 and there is every chance of collusive suit and sufficient for doubting that Nasib Singh to protect himself from the liability had entered into the compromise.

8 Aforesaid compromise has also been questioned on the ground that Judgment Debtors No. 2 and 3 having the vested interest, had misappropriated the amount of Society and had entered into the compromise without having any authorization to do so on behalf of the Society. It is further contended that they had committed a fraud upon the Society and had also issued cheques to repay their liabilities, whereafter, defendant No. 2 is stated to be undergoing sentence at Chandigarh and Judgment Debtor No. 3 is stated to have been convicted by the Court in the contempt proceedings and besides it, proceedings have also been initiated against defendants No. 2 and 3 against the Cooperative Society for recovery of amount and the property, sought to be attached, belongs to the poor and marginal farmers and as it has been raised through their investment of entire earnings, it is not liable to be attached and sold.

9 During the arguments it is contended on behalf of Judgment Debtor No. 1 Cooperative Society that Judgment Debtor/Cooperative Society, being represented in the suit through Nasib Singh who was also later on added as defendant No.4 in the civil suit, was not represented through authorized officer as provided under Section 2(11) of the H.P. Cooperative Society Act 1968. He has contended that Nasib Singh was Assistant Manager of Judgment Debtor Cooperative Society and the Assistant Manager does not find mention in the list of officers mentioned in this Section 2(11) competent to represent the Society and thus it is an inherent defect in the civil suit which renders the decree unexecutable.

10 Learned counsel for Judgment Debtor No. 1 has also submitted that in fact defendants No. 2 and 3 were liable to pay the misappropriated amount of the society and therefore, for their own benefit they have collusively agreed to the compromise entered upon between the parties which was adverse to the interest of Judgment Debtor/Cooperative Society and its members. Therefore, attachment of the property of Judgment Debtor Society has been opposed.

11 Learned counsel for the Judgment Debtor No.1 has submitted that property of Judgment Debtor No.1 has only been attached but has not been sold yet and therefore he is entitled for filing present application under Order 21 Rule 58 CPC.

12 Learned counsel for Judgment Debtor No.1 has also placed reliance upon ***Kancherla Lakshminarayana vs. Mattaparthi Syamala and others*** reported in ***(2008)14 SCC 258 and Maya Devi vs. Lalta Prasad*** reported in ***(2015)5 SCC 588*** for substantiating his arguments that his application under Order 21 Rule 58 CPC is maintainable on behalf of Judgment Debtor Society and objections so raised in this application are to be adjudicated on merits before proceeding further in the execution petition as all questions raised by the objector/Judgment Debtor No.1 are to be comprehensively considered on their merits.

13 Learned counsel for the Decree Holder/plaintiff has opposed the contention, advanced on behalf of Judgment Debtor No.1 Cooperative Society, on the ground that Judgment Debtor No.1, after passing of compromise decree, has no legal right to file the application under Order 21 Rule 58 CPC to stale the proceedings initiated for recovery of amount agreed by the Judgment Debtors payable by them to the Decree Holder particularly when the said compromise decree has not been assailed further. It is further argued that allegations of collusive suit by the Decree Holder/plaintiff raised by Judgment Debtor No.1 is also not tenable for the reasons that Judgment Debtor No.1 was being represented by Nasib Singh, Assistant Manager of Judgment Debtor No.1 Society, who was duly authorized by the Administrative Board of the said Society and not only this, but also during the pendency of contempt proceedings against the said Nasib Singh, he had placed on record the communication addressed by him to the Chairman/President of Judgment Debtor No.1

for making the payment to the plaintiff in compliance of compromise decree. Along with this letter Decree Holder has also placed on record the notice dated 18.12.2015 issued by the Assistant Manager Nasib Singh for calling the meeting of Management Committee of Judgment Debtor No.1 and copy of resolution passed by Judgment Debtor No. 1 Society on 22.12.2015 in a meeting held in pursuance to notice dated 18.12.2015 wherein it was decided on behalf of Judgment Debtor No.1 to pray for one year further time from the High Court for making the payment of amount in compliance of compromise decree. It is further contended that this application has been filed on behalf of Judgment Debtor No.1 with only purpose to delay the recovery of amount by Decree Holder/plaintiff and avoid its liability on flimsy grounds. Lastly it is contended that by invoking the provisions of Order 21 Rule 58 CPC Judgment Debtor No.1 has no right to reopen the case and the Executing Court is bound to execute the decree as it is without any modification therein. To substantiate this plea of Decree Holder, reliance has been placed on ***Vedic Girls Senior Secondary School, Arya Samaj Mandir, Jhajjar vs. Rajwanti (Smt.) and others*** reported in ***(2007)5 SCC 97, State of Punjab and others vs. Krishan Dayal Sharma*** reported in ***AIR 1990 SC 2177 and Land Acquisition Collector, Mohali and another vs. Surinder Kaur*** reported in ***(2013)10 SCC 623.***

14 Learned counsel representing Nasib Singh has also strongly opposed the contention put forth by Judgment Debtor No.1 that the said respondent was conniving with the plaintiff and had agreed to passing of compromise decree in order to avoid his liability and that the said Nasib Singh, being an Assistant Manager, was not competent to represent Judgment Debtor No.1 Society. It is contended that he was duly authorised by Judgment Debtor No.1 Society by passing a resolution on 14.6.2010 by Administrative Board of the Society and was directed to contest the suit on behalf of the Society, whereafter he had contested the suit with due diligence to the best of his ability through Advocate engaged by the Society as resolved in resolution dated 14.6.2010. Further it is contended that at the time of conciliation proceedings before learned Mediator the said Nasib Singh was not a party in his individual capacity but was representing Judgment Debtor No.1 and he has been arrayed as defendant No.4 on application of plaintiff but no relief was ever claimed in the plaint against him and during the compromise also, Judgment Debtor/defendant No.1, defendant No.2 R.K. Saini and defendant No.3 Manmohan Singh had agreed for payment of decreetal amount by defendants No. 1 to 3 in equal shares on failure of payment of decreetal amount as per compromise decree and Nasib Singh was arrayed as a party as defendant No.4, only being Assistant Manager of Judgment Debtor No.1 Cooperative Society, but not in the individual capacity.

15 As already noticed supra, initially suit was filed suing Judgment Debtor No.1 Cooperative Society as defendant No.1 through its Chairman Manmohan Singh, who, besides defendant No.2 R.K. Saini, was also arrayed as defendant No.3 in individual capacity. After receiving notice in the suit, defendant No. 3 Manmohan Singh had chosen not to contest the suit and for not appearing after due service, he was proceeded ex-parte. As the suit was filed as a summary suit under Order 37 Rules 1 and 2 CPC, defendants No. 1 and 2 had contested the same and had resisted the claim of plaintiff that they are having no defence to contest the suit and ultimately, had succeeded to make out a case for leave to defend the suit and accordingly, leave to defend the suit was granted to defendant No.1/Judgment Debtor No.1 Cooperative Society and defendant No. 2 R.K. Saini by the Court vide order dated 21.3.2011.

16 Defendant No.3 Manmohan had appeared in Court only after conciliation before learned Mediator with plaintiff and defendants No. 1 and 2 and vide order dated 28.12.2012 he was permitted to join the proceedings at that stage and on that day by

making a statement on oath he had accepted the compromise entered before learned Mediator. Not only this, as has been stated in the main execution petition, after passing of compromise decree he has also deposited 1/3rd of the decreetal amount i.e. Rs.26,66,667/- against his liability under the compromise decree.

17 After service, Judgment Debtor No.1 Cooperative Society vide resolution dated 14.6.2010, through its Administrative Board had decided to defend the suit through Mr. Nasib Singh Assistant Manager, who in turn had signed his power of attorney on 17.6.2010 and had contested the suit.

18 As per compromise, on failure to make payment of agreed amount by the defendants to the plaintiff, defendants No. 1 to 3, i.e. Judgment Debtor No. 1 Cooperative Society, Judgment Debtor No. 2 R.K.Saini and Manmohan Singh (defendant No.3 in the original suit) had undertaken to pay the said amount in equal shares. Nasib Singh Assistant Manager was added as defendant No.4 at the later stage but after the settlement of dispute before learned Mediator at the time of filing of joint application by Decree Holder/plaintiff and defendants No. 1 to 3, for passing a compromise decree. Nasib Singh had signed the same being an authorized person to defend the case on behalf of defendant No.1 Cooperative Society and at that time he was also not arrayed as defendant No.4. He had not signed compromise as well as application in his individual capacity. The compromise decree was passed, as prayed by plaintiff and defendants No. 1 to 3 and defendant No.3 Manmohan Singh has also deposited his share whereas defendants No. 1 and 2 have failed to pay the same.

19 For the non-compliance of undertaking given by defendants, plaintiff has preferred present execution petition for compliance of compromise decree and after filing present petition, plaintiff had also initiated contempt proceedings in COPC No. 1 of 2015 wherein Nashib Singh, who was also arrayed as a contemnor, had filed an application therein for placing on record certain documents along with affidavit. This application, filed by Nasib Singh, has also been placed on record by the Decree Holder/plaintiff, along with its reply to the present objections preferred by Judgment Debtor No.1. It is evident from these documents that passing of compromise decree on 11.4.2013 was well within the knowledge of defendant No.1 Cooperative Society through its Management Committee. From perusal of letter dated 18.12.2015 addressed by Nasib Singh to the President of Judgment Debtor No.1 Society, it is evident that not only passing of compromise decree, was well within the knowledge of the Management Committee of Judgment Debtor No.1, but filing of present execution petition as well as contempt petition was also in the knowledge of the Management Committee of Judgment Debtor No.1 as it had been communicated by Nasib Singh to it. Nasib Singh being the Assistant Manager of Judgment Debtor No.1 had also notified the meeting of Management Committee on 22.12.2015 by issuing notice dated 18.12.2015 and thereafter a meeting of the Management Committee was conducted on 22.12.2015 wherein President Jaswant Singh Vice President Parkash Chand, Jaswant Singh Cashier and six other members of Managing Committee were present. From resolution No.2, passed in the said meeting placed on record with reply of plaintiff, it is evident that entire episode was in the knowledge of the Managing Committee of Judgment Debtor No.1 and after considering all facts and circumstances, it was resolved by the Managing Committee to seek one year time from the High Court for making the payment in compliance of compromise decree. After 2015 till filing of present objections under Order 21 Rule 58 CPC in April, 2018 there is not even a whisper on the part of Judgment Debtor No.1 about the competency of Nasib Singh to represent Judgment Debtor No.1 Cooperative Society in the civil suit. This is for the first time this objection has been raised during the course of arguments and filing a collusive suit for obtaining the decree has been alleged.

20 Definition of Officer under Section 2(11) of H.P. Cooperative Societies Act is inclusive which does not find specific mention of Assistant Manager therein but includes any Officer empowered under the Rules or by-laws to give directions in regard to business of Cooperative Society. Nasib Singh had entered into arena only in compliance of resolution of Administrative Board of the Society.

21 Application of Nasib Singh filed in contempt petitioner and his letter dated 18.12.2015 addressed to the President of Judgment Debtor No.1, notice dated 18.12.2015 and resolution No.2 dated 22.12.2015 filed with the said application, placed on record by Decree Holder, have not been rebutted either in pleadings or by placing any document on record. Rather there is positive action on the part of the Society endorsing the validity of act and conduct of Nasib Singh.

22 In the aforesaid facts and circumstances, it is evidently clear that Nasib Singh was duly authorized by the Administrative Board of Judgment Debtor No.1 to represent it and was competent to defend and enter into the compromise on its behalf. There is no illegality committed by Nasib Singh on this ground.

23 So far as connivance of Nasib Singh with plaintiff or allegations of filing of collusive suit is concerned, nothing substantial has been brought to the notice of Court. Otherwise also, this Court is now acting as an Executing Court which is bound to execute the decree as it is, without any modification. Judgment Debtor No.1, despite having knowledge of passing of compromise decree and representation of Judgment Debtor No.1 through Nasib Singh, has not chosen to assail the same by filing appropriate proceedings in the competent Court of law. Present objections have been preferred on the affidavit of Yashwant Singh Chairman of Judgment Debtor No.1. It is worth to notice that at the time of passing resolution No.2 on 22.12.2015 also Jaswant Singh was President of Judgment Debtor No.1 Cooperative Society. Even, if it is considered, for want of substantial evidence on record, that present Chairman/President of Judgment Debtor No.1 Society and the Chairman/President of Judgment Debtor No.1 Society at the time of passing of resolution No.2 on 22.12.2015 are not the same person, then also it does not make any difference as everything was in the knowledge of the Management of Judgment Debtor No.1. Therefore, plea of incompetency of Nasib Singh to represent Judgment Debtor No.1 or obtaining compromise decree by him in collusion with plaintiff is not sustainable.

24 Ratio of law as reiterated in ***State of Punjab vs. Kishan Dayal Sharma, Maya Devi and Vedic Girls Sr. Secondary School (supra)*** is undisputed wherein it is reiterated that Executing Court cannot act beyond the scope of decree and the Executing Court is required to act within the bounds of decree and it cannot add or alter the decree on its notion of fairness or justice and also principle of law reiterated in ***Surinder Kaur's case (supra)*** that at the time of deciding objections, Executing Court does not have jurisdiction to go into legality or correctness of judgment sought to be adjudicated.

25 In present case, there is compromise decree in favour of Decree Holder and against Judgment Debtors/defendants No. 1 to 3 wherein defendants No. 1 to 3 have agreed to pay Rs. 80 lacs as full and final settlement and to indemnify the Decree Holder and undertaken to pay the said amount in equal shares and as per compromise of parties it is also agreed that aforesaid amount shall be repaid by selling the property of Judgment Debtor No.1 after seeking permission from the Court, but Judgment Debtors have failed to comply with directions contained in compromise decree which led to filing of execution petition. Therefore, at this stage, it cannot be said that property of Judgment Debtor No.1 cannot be sold for satisfying the decree under execution for recovering the decreetal amount

falling in the share of Judgment Debtor No.1, which was agreed to be paid in compromise on the basis of which decree has been passed.

26 Order 21 Rule 58 CPC provides adjudication of claims or objections by the Court to attachment of property on the ground that such property is not liable to such attachment. In the present case, the Decree Holder/plaintiff has placed on record the details/documents of property owned and possessed by Judgment Debtor No.1 Cooperative Society which has been ordered to be attached, whereafter present application objecting the said attachment has been filed. The property belongs to Judgment Debtor No.1, who has suffered the compromise decree wherein he is liable to pay at least 1/3rd of the decreetal amount. The attached property belongs to Judgment Debtor No.1 and Decree Holder has right to recover the decreetal amount by selling the property belonging to Judgment Debtor(s). It is not the property of individual member of the Society. Judgment Debtor No.1 Society is a separate legal entity capable of owning property independent of its members. Property of society is not property of individual. Rather, it is the property of Cooperative Society, no doubt to be utilized for the welfare of members of society, but to satisfy the decree passed against the Society is also legal duty of the Society. Therefore, there is no illegality or irregularity in recovering the amount from Judgment Debtor No.1 by selling its property. The ground that said property has been purchased by utilizing the earnings of poor and marginal farmers who are members of society is not legally sustainable in the given facts and circumstances of the case.

27 It is not a case of Judgment Debtor No.1 that this property belongs to someone else than the Judgment Debtor No.1. No valid and just reason has been made out for not attaching and selling the property in question owned by Judgment Debtor No.1. There is no material on record so as to establish that property of Judgment Debtor No.1, so attached, is having first charge over it in favour of some third party other than the Decree Holder in preference to the right of Decree Holder flowing from the compromise decree. The pre-condition in application under Order 21 Rule 58 CPC is that there must have been attachment of property for execution of decree and claim should have been preferred or the objection should have been made to the attachment on the ground that such property is not liable to such attachment.

28 As noticed supra, though the fact that property has been attached, is existing, however, no ground is made out so as to hold that property in question is not liable to the attachment.

29 In view of above discussion, I find no merits in objections and accordingly, application is dismissed.

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

Prem Laxmi and Co. …Objector.

Versus

Himachal Pradesh State Electricity Board Ltd. ..Respondent.

Arbitration Case No.4017 of 2013
Reserved on: 07.03.2019
Date of Decision: 25.4.2019

Arbitration and Conciliation Act, 1996 (Act) - Sections 31(3) and 34 - Award – Objection thereto, on ground of its being unreasoned award – Maintainability - Held, passing a non speaking award in contravention of Section 31(3) of Act will invite interference by court (Para 13)

Arbitration and Conciliation Act, 1996 (Act) - Sections 31(3) and 34 – Award - Objection thereto, on ground of its being unreasoned award - Maintainability – Arbitrator considering contentions of parties - Forming opinion and also assigning some reasons against each claim while deciding respective claims put forth by parties - Held, it's not a case of unreasoned award – There is sufficient expression of reasons as required under law - Arbitrator is not expected to write judgment like judicial officer - Objection dismissed. (Paras 16-23)

Arbitration and Conciliation Act, 1996 (Act) - Section 34 – Award - Objection – Receipt of amount under award by objectors – Effect - Held, receipt of amount under award unequivocally and without any reservation will debar objector from filing objections to it or that part of award under which amount was accepted - It's not proved that acceptance of award by objector was prior to or after filing of objections by it - Objector not debarred from filing objections to award (Paras 14-16)

Cases referred:

Centro Trade Minerals and Metal Inc vs. Hindustan Copper Ltd., 2006(2) R.A.J. 531 (SC)
Janki Ram vs. State of H.P. & others, reported in, 2008(1) Latest HLJ 319
Markfed Vanaspati& Allied Industries vs. Union of India, [(2007) 7 SCC 679
Oil & Natural Gas Corporation Ltd. vs. Saw Pipes Ltd., [(2003) 5SCC 705
Pooran Chand Nangia vs. National Fertilizers Ltd., [(2003) 8 SCC 245
Saroj Bala vs. Rajive Stock Brokers Ltd. and Another, 2005(1) R.A.J. 637
Som Datt Builders Limited vs. State of Kerala, [(2009) 10 SCC 259
State of Rajasthan vs. Nav Bharat Construction Co., (2006) 1 SCC 86
T.N. Electricity Board vs. Bridge Tunnel Constructions and others, [(1997) 4 SCC 121

For the Petitioner: Mr.R.K. Gautam, Senior Advocate with Ms.Megha Kapoor Gautam, Advocate.
For the Respondent: Mr. J.S. Bhogal, Senior Advocate with Ms.Shrishti Verma, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

By means of present petition, preferred under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act), petitioner-objector has assailed the Arbitral Award dated 16.05.2013, passed by the Arbitrator, in a dispute, between the parties, related to execution of work of construction of 775 meter long traffic tunnel, on the ground that the award so passed, is devoid of any reasoning and is a result of complete non application of mind by the Arbitrator.

2. Arising out of the dispute between the parties, petitioner-objector had submitted 5 claims before the Arbitrator, out of which 4 claims of the petitioner-objector have been rejected by the Arbitrator and Claim No.1 for refund of Rs.20,00,000/- has been allowed alongwith interest @ 7% per annum w.e.f. July, 2002 till the date of passing of the Award. It is the claim of the petitioner-objector that the Arbitrator has violated the

mandatory provisions of Section 31(3) of the Act, which provides that unless parties have agreed to contrary the Arbitral Award shall state reasons upon which it is based.

3. Learned counsel for the petitioner-objector has placed reliance on the judgment of this High Court, passed in *Janki Ram vs. State of H.P. & others, reported in,* 2008(1) Latest HLJ 319, wherein after relying upon the judgments in *Centro Trade Minerals and Metal Inc vs. Hindustan Copper Ltd.,* 2006(2) R.A.J. 531 (SC) passed by the Apex Court and judgment in *Smt.Saroj Bala vs. Rajive Stock Brokers Ltd. and Another,* 2005(1) R.A.J. 637 passed by the Delhi High Court, award passed by the Arbitrator was set aside for not assigning the reasons for findings arrived at by the Arbitrator.

4. Further reliance has been placed on the judgments passed by the Apex Court in *State of Rajasthan vs. Nav Bharat Construction Co.,* (2006) 1 SCC 86; *Oil & Natural Gas Corporation Ltd. vs. Saw Pipes Ltd., [*(2003) 5SCC 705]; and *T.N. Electricity Board vs. Bridge Tunnel Constructions and others, [*(1997) 4 SCC 121], wherein the Apex Court, after considering the plethora of judgments, has held that Section 31 of the Act mandates that the Award of the Arbitrator, should state reasons upon which it is based and in case the Award is contrary to the substantive provisions of law or the provisions of the Act, it would be patently illegal and liable to be interfered with under Section 34 of the Act.

5. The objection petition is resisted by the respondent-Board, on the ground that the learned Arbitrator was not a qualified or trained Judge, so as to expect from him to pass an award akin to the judgments passed by the Judicial Officers or Judges of the Court. It is canvassed by him that the purpose of mandatory provisions of Section 31(3) of the Act is to reflect the reasons in the award by the learned Arbitrator, which led for arriving at a particular conclusion by him and in present case, the Arbitrator has appliedhis mind by considering the claims of the petitioner-objector and objections raised by the respondent-Board and thereafter has returned the findings by expressing his opinion about the rival claims of the parties.

6. Reliance has also been placed on the judgment passed by the Apex Court in *Nav Bharat's* case (supra), wherein it has been canvassed that the purpose of Section 31(3) of the Act, is to enable the Court to see from the reasoning expressed by the Arbitrator that what impelled the Arbitrator to arrive at his conclusion and in case the Arbitrator has indicated the reasons for accepting or rejecting the claims at the time of passing the award, like the present case, it cannot be said that, for not giving elaborate judgment like a Judge, the Arbitrator has misconducted himself by not following mandatory provisions of Section 31(3) of the Act.

7. By referring a decision rendered by the Apex Court in *Som Datt Builders Limited vs. State of Kerala, [*(2009) 10 SCC 259], it is submitted that where the Arbitrator has referred the facts of the case and has noticed some reasoning which in view of the Arbitrator was sufficient to arrive at a conclusion for granting relief, the award cannot be stated to be unreasoned as the Arbitrator is not expected to write an elaborate judgment and where the Arbitrator has noticed contentions of the counsel, it cannot be said that the Arbitrator has failed in stating reasons for the award as the reasons indicated inthe award, howsoever brief these may be, but reflecting the thought process of learned Arbitrator leading to a particular conclusion, are sufficient to satisfy the requirement of Section 31(3) of the Act.

8. Reliance has also placed on the judgment rendered by the Apex Court in *Markfed Vanaspati& Allied Industries vs. Union of India, [*(2007) 7 SCC 679], wherein it has

observed that endeavor of the Court should be to honour and support the award as far as possible.

9. It is also contended on behalf of the respondent-Board that the petitioner-objector is estopped from challenging the impugned award as it has already received and accepted the amount awarded vide impugned award through cheque dated 07.08.2013 amounting to Rs.35,22,356/-.

10. By referring to judgment passed by the Apex Court in *Pooran Chand Nangia vs. National Fertilizers Ltd., [*(2003) 8 SCC 245], wherein it is held that once the objector had submitted to the award unequivocally and without reservation by receiving the money, which was due to him under the Award, it was not open to the objector to challenge the Award, dismissal of the present petition has been prayed.

11. Learned counsel for the petitioner-objector has contended that vide communication dated 19.08.2013, it was duly conveyed to the respondent-Board that the petitioner-objector had received and encashed the cheque dated 07.08.2013 not in settlement of the impugned award, but was accepted and appropriated against the outstanding dues payable by HPSEB and it was informed to the respondent-Board that the impugned award being contrary to the provisions of the arbitration agreement as well as law, is liable to be set aside under Section 34 of the Act and appropriate steps, in accordance with law, had been taken in that regard.

12. Learned counsel for the petitioner-objector has also placed reliance on the judgment dated 04.09.2008, passed by the Delhi High Court in OMP No.152 of 2002, titled as *Jai Singh vs. DDA & others,* wherein it is held that a claimant ought not to be prevented from receiving the amounts awarded for the fear of losing the right to challenge the award insofar as with respect to the claims disallowed and when the statute confers right of a party to an arbitration to challenge the same, the said right cannot be taken away merely for the reason of the parties accepting payments under that part of the award which is neither challenged by him nor by the opposite party.

13. It is true that in *Markfed Vanaspati's* case (supra) the Apex Court has observed that endeavour of the Court should be to honour and support the award of the Arbitrator as far as possible, but it does not mean that objections preferred by the either party are definitely to be rejected, as the Apex Court in plethora of cases has also held that where award is not in consonance with the provisions of the Act or in terms of the agreement, and where learned Arbitrator has misconducted by acting beyond the jurisdiction or not complying with the provisions of the Act, award is to be interfered with by the Courts. Passing a non-speaking award, in confrontation with the provisions of Section 31(3) of the Act, will definitely invite interference by the Court and for that reason only verdict of the Apex Court is to protect the award as far as possible.

14. It is undisputed fact, as is evident from the record, that Court fee, for the purpose of filing the present petition was purchased on 14.08.2013 and the present petition was filed on the very same date, after supplying copy of the same to the representative of the standing counsel for the respondent-Board. The respondent-Board has claimed payment of the awarded amount vide cheque dated 07.08.2013, but no document substantiating the plea of the respondent-Board that the cheque was issued on 07.08.2013 and was also delivered or dispatched to the petitioner-objector on the very same date or any other date subsequent thereto, but before filing of the present petition, has been placed on record. Further there is nothing on record to reflect the date of encashment of the cheque by the petitioner-objector. Similarly, in the rejoinder, petitioner-objector has taken a plea that

amount paid through cheque dated 07.08.2013 was received by it as a part payment and the said fact was communicated to the respondent-Board vide letter dated 19.08.2013. Neither letter dated 19.08.2013 has been placed on record nor any date of receiving the cheque and the date of encashing the same has been brought on record. Though, it emerges from the stand of the petitioner-objector that cheque dated 07.08.2013 was received and encashed by it, however there is no cogent, reliable and convincing evidence on record to oust the petitioner-objector on this count.

15. So far as pronouncement of the Apex Court in *Pooran Chand Nangia's* case (supra) is concerned, ratio of law is that once the objector has submitted to the award unequivocally and without reservation, it is not open for him to challenge the award. In such a situation, as per the verdict of the Apex Court, objections against the impugned award are liable to be dismissed. In *Jai Singh's* case (supra), Delhi High Court has held that the objector after accepting the payment under that part of the award, which is not challenged by the either party, cannot take away right of the objector to assail the rest award, meaning thereby that after accepting the amount paid in pursuance to claim, disentitles the objector from assailing the said portion of the award.

16. In the present case, Claim No.1 has been allowed by awarding interest @ 7% per annum on the amount of Rs.20,00,000/-, liable to be refunded to the petitioner-objector and other claims of the petitioner-objector have been rejected. The respondent-Board has also made payment by calculating the amount on the basis of Claim No.1, which was allowed by the learned Arbitrator in favour of the objector. However, it is not clear on record that acceptance of the said award by petitioner-objector was after or before filing of the objections, though cheque vide which it was paid by the respondent-Board was dated before filing the objections, but response thereto is dated 19.8.2013, i.e. after filing of the petition under Section 34 of the Act, therefore, there is no conclusive evidence on record to dis-entitle the petitioner-objector from assailing the said portion of the impugned award on this ground. However, even if it is considered that the petitioner-objector has not lost right to assail the finding on claim No.1, the plea that the Arbitrator has not assigned reasons for deciding the claims, is not tenable for the discussion hereinafter.

17. Claim No.1 is regarding release of Rs.20,00,000/- which was deducted/retained by the respondent-Board for not achieving the milestones No.1 and 2 at the time of execution of work by the petitioner-objector awarded to it, and also for awarding interest on the aforesaid amount as detailed in Claim No.4. During the pendency of arbitration proceedings, respondent-Board vide order dated 19.12.2012 had decided to ratify the extension of time w.e.f. 23.07.1999 to 30.07.2004 in favour of the petitioner-objector and to refund the amount of Rs.20,00,000/- without interest. Learned Arbitrator under the head 'award' against Claim No.1, has observed that extension of time was ratified after a period of 12 ½ years and thereafter, he had given the relief by awarding interest @ 7% for delayed refund of amount after ratification of extension of time. So far as interest on Rs.20,00,000/-, deducted for not achieving milestones 1 and 2, is concerned, the same has been rejected by the Arbitrator by giving reason under the head of 'award' mentioned in Claim No.4, stating therein that said amount was deducted according to Clause 9B of the contract agreement for not achieving milestones No.1 and 2, and thus the interest is not payable thereon.

18. Under the head 'award' against Claim No.2, petitioner-objector's claim has been rejected by the learned Arbitrator by saying that according to his opinion respondent-Board had already paid for extra item beyond 20% limit as per contract and rate approved by EIC, which was accepted by the petitioner-objector and while assigning this reason, he

has held that nothing is to be paid extra against Claim No.2, which was claimed for substitution/extra items.

19. Under the head of award, against Claim No.3, the Arbitrator has given his opinion that a few payments disbursed/made by the respondent-Board through PFC/Bank in New Delhi, were accepted by the petitioner-objector and therefore, claim of the petitioner-objector was rejected, which was claimed on account of commission charges for making payment of various bills by PFC/Banks in New Delhi.

20. Petitioner-objector, in Claim No.4, had also claimed for payment of interest, on the amounts claimed by them. As noticed supra, the petitioner-objector was not held entitled for any amount claimed by it and deductions/retention made by respondent-Board was found to be in order as per the contract agreement, claim of interest has been rejected by the Arbitrator by stating so under head of 'award' in Claim No.4.

21. Claim No.5 has also been rejected in the head of 'award' under the said claim by stating that work was not completed in the stipulated period as per contract agreement and it was completed on 30.07.2000 and for not achieving milestones No.1 and 2, Rs.20,00,000/- were also retained by the respondent-Board and further that the extension of time has been ratified by respondent-Board on 19.12.2012 after a gap of period 12 ½ years with further rider that this extension of time shall not form basis of any claim whatsoever against the Department. On the basis of this rider, the learned Arbitrator has rejected Claim No.5.

22. It is evident from the aforesaid discussion that after reproducing the rival contentions of the parties, the Arbitrator has formed his opinion and for forming said opinion, he has assigned some reasons while deciding respective claim and perusal thereof does not lead to the conclusion that the reasoning given by the learned Arbitrator was not sufficient to arrive at the said conclusion. It is not a case where the claim has been rejected without assigning any reason.

23. In view of aforesaid discussion, it is not a case where it can be said that award does not contain any reason upon which it is based. Arbitrator, who is neither a judge nor professional expert in passing the judgment and thus may not be able to pass an award like a Judge. However, despite such limitation, his award must reflect the reasons for which he has rejected or accepted the claim. The Apex Court, as noticed supra, in the cases referred to by the parties, has also observed that Arbitrator is not expected to write an elaborate judgment and in the present case also after noticing the rival contentions of the parties, he has given his opinion based on the reasoning given by him under the head of award against each claim. The Arbitrator, may be with smallest expression but has given reason for rejecting the claims of the petitioner-objector. It is not a case where there is no reason assigned, but it can be said that precise reason has been mentioned against rejection of each claim, which, in my view, is sufficient expression as required under law.

24. All objections raised in present petition and also during arguments revolve around the plea that the Arbitrator has failed to assign reason and has passed a non-speaking award. It is not a case where no reason has been assigned by the Arbitrator for his findings. Reasons may be small or in one line, but definitely having bearing on the issues involved for deciding the claims of the petitioner-objector and in the objection petition, it is not the case of the petitioner-objector that any of the reasons assigned by the Arbitrator are contrary to law or not in consonance with the terms of the agreement. Therefore, I find no grounds for interference on the objections preferred and argued before me.

25. In view of the above, present petition is dismissed, so also pending application(s), if any.

****

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

CWPs No. 1147, 1439 and 3134 of 2016 and CWP No. 2007 of 2017

1. CWP No. 1147 of 2016
Rajesh Kumar Thakur and others …Petitioners
Versus
State of H.P. and others ...Respondents
2. CWP No. 1439 of 2016
Devender Kumar Tandon and others ...Petitioners
Versus
Himachal Pradesh Urban Development Authority and others ...Respondents
3. CWP No. 3134 of 2016
H.P.Housing and Urban Development Authority (HIMUDA) ….Petitioner
Versus
L.I.C. of India and another ...Respondents
4. CWP No. 2007 of 2017
Ashwani Kumar Kalta and others ...Petitioners
Versus
Himachal Pradesh Housing & Urban Development Authority and others ...Respondents

Reserved on: 09.04.2019.
Date of decision: 25th April, 2019.

Life Insurance Corporation Act, 1956 - Section 37 - **Income Tax Rules, 1962** - Rule 89 - Purchase of annuity - Purpose – Held, Rule 89 requiring trustees to purchase annuity from Life Insurance Corporation of India (LIC) to exclusion of anyone else must be judged in context that contract of life insurance entered with it, is backed by Government guarantee – Payment of annuity is, thus, secured.(Para 23)

Interpretation of Commercial Contract – Principles - Held, insurance contract is *specie* of commercial transactions and must be construed like any other contract on its own terms and by itself *albeit* subject to additional requirements of *uberrime fides*, i.e., good faith on part of insured - In other respects there is no difference between contract of insurance and other contracts - Terms of insurance contract have to be strictly construed without venturing into extra-liberalism that might result in re-writing of contract. (Para 25)

Constitution of India, 1950 - Article 14 & 16 - **Life Insurance Group Superannuation Cash Cumulative (Defined Beneficiaries) Scheme** - Denial of pensionary benefits - Writ jurisdiction – HIMUDA (trustee) entering into contract with LIC regarding payment of pensionary benefits to its employees - LIC working out modalities and trustee making contribution – Parties creating corpus out of which payments of benefits to be disbursed – On accounts of revision of pay, LIC declining pensionary benefits for want of necessary corpus - Petition against - Held, it is legitimate to assume that Scheme was signed by LIC

after working out all financial implications - It cannot claim that on account of manifold increase in salary and deficit corpus, Scheme has become unviable - Deficiency in corpus, if any, is attributable to lapses of LIC and it cannot take any advantage of its own lapses - Petition allowed - LIC directed to pay pension with upto date DA to retirees. (Paras 29, 30, 39 to 41)

Cases referred:

Air India Employees Self-contributory Superannuation Pension Scheme vs. Kuriakose V. Cherian and othera (2005) 8 SCC 404

Manuelsons Hotels Private Limited vs. State of Kerala and others (2016) 6 SCC 766

Motilal Padampat Sugar Mills Co. Ltd. Vs. State of U.P. (1979) 2 SCC 409

Sasadhar Chakravarty and another vs. Union of India and others (1996) 11 SCC 1

State of Punjab vs. Nestle India Ltd. (2004) 6 SCC 465

Suraj Mal Ram Niwas Oil Mills Private Limited vs. United India Insurance Company Limited and another (2010) 10 SCC 567

Vikram Greentech India Limited and another vs. New India Assurance Company Limited (2009) 5 SCC 599

For the Petitioner(s) : Mr. Shrawan Dogra, Senior Advocate, with Mr. Harsh Kalta, Advocate, for petitioners in CWP No. 1147 of 2016.
Mr. Sunil Mohan Goel, Advocate, for petitioners in CWPs No. 1439 of 2016 and CWP No. 2007 of 2017.
Mr. Bhupender Gupta, Senior Advocate with Mr. Janesh Gupta, Advocate, for petitioner in CWP No. 3134 of 2016.

For the Respondents : Mr. Vinod Thakur and Mr. Sudhir Bhatnagar, Addl. A.Gs., with Mr. Bhupinder Thakur, Ms. Svaneel Jaswal, Dy.A.Gs., and Mr. Ram Lal Thakur, Asstt. A.G., for respondents-State.
Mr. C.N. Singh, Advocate, for respondents -HIMUDA.
Mr. Narender Sharma, Advocate, for the LIC, in all the petitions.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Since common question of law and facts are involved in all these petitions, therefore, they are taken up together for consideration and are being disposed of by a common judgment.

2. For the sake of convenience, pleadings and documents filed and the material available in the record of CWP No.3134 of 2016, is being made the basis of decision. However, in order to maintain clarity, it needs to be observed that CWPs No.1147 , 1439 and CWP No. 2007 of 2017 have been filed by the serving or retired employees of the Himachal Pradesh Housing and Urban Development Authority pertaining to the grant of pensionary benefits and assailing the action of the LIC in refusal to pay pension/family pension to the petitioners or to the family(s) of the deceased member(s), who have retired or died w.e.f. April, 2014 onwards and have further assailed the consideration order passed by the LIC on 23.11.2015 pursuant to the orders passed by this Court in earlier writ petition filed by some of the petitioners being CWP No.8821 of 2014 alongwith connected writ petitions.

3. Whereas, CWP No. 3134 of 2016 has been filed by the employer i.e. H.P. Housing and Urban Development Authority (for short 'HIMUDA') against the Life Insurance Corporation of India (for short 'LIC') with the following reliefs:

> *"1. Directing the respondents to pay the pension and uptodate DA to the retirees of the petitioner as per the scheme without any delay.*
>
> *2. Directing the respondents not to withhold any amount of pension and DA in future which is payable to the present and prospective retirees as well.*
>
> *3. Directing the respondents to pay amount of pension and upto date DA, wrongly and illegally withhold by the respondents from the date of stoppage till the entire amount is paid with interest @ 18% per annum.*
>
> *4. Restraining the respondents from raising illegal demand for paying the additional amount which is not payable under the scheme with further directions not to insist the application of the terms and conditions of the master policy and to strictly follow pension scheme as has been mutually agreed in accordance with the scheme annexed at Annexure P-8."*

4. The State of Himachal Pradesh had earlier framed the "H.P. Corporate Sector Employees Pension, Family Pension and Commutation of Pension, Gratuity Scheme, 1999" and the same was applicable to the Corporate Employees of the State of Himachal Pradesh including HIMUDA. This scheme was applicable w.e.f. 1.4.1999. However, vide notification dated 2.12.2004, the State of Himachal Pradesh repealed the Pension Scheme with immediate effect. Nonetheless, the operation of the said scheme was saved qua those corporate sector employees, who had retired till the date of issuance of the said notification.

5. Since the State of Himachal Pradesh showed its inability to arrange for funds of pension liabilities and after repeal of the scheme, the HIMUDA considered the matter for creating a Pension Fund of its own by constituted a six Members Committee vide letters dated 31.10.2005 and 16.11.2005. The Committee so constituted, considered the question of Pension Scheme and it was found that there were two sets of employees of the petitioner, some of them were covered under CPF Scheme and some of the employees were contributing to EPF. However, it was found that on account of length of service, CPF employees could not qualify for EPF Pension Scheme, therefore, the matter was sent to the Government for approval vide letter dated 5.10.2006. However, this proposal was returned back by the Finance Department expressing its inability to concur to the proposal. The Pension Scheme was thereafter examined by the HIMUDA with EPF Organization. However, it was found that the EPF Pension Scheme which came into existence w.e.f. 15.11.1995 could not be made applicable to the employees of the HIMUDA (erstwhile H.P. Housing Board) as most of the employees were having less than 10 years of service left. The issue of daily waged employees covered under CPF Scheme was also referred to EPF Organization, but the same was declined on the ground that such case cannot be considered favourably. This led the HIMUDA to take up the matter with the LIC for exploring possibilities of implementing any Pension Scheme.

6. The LIC represented to the HIMUDA that it has a Scheme known as "LIC Group Superannuation Cash Cumulative (Defined Beneficiary) Scheme". The HIMUDA considered the Scheme and calculated the liability with respect to 485 members + daily wagers and sent a communication dated 28.6.2005 to the LIC. Thereafter deliberations took place between the HIMUDA and the LIC and ultimately the LIC submitted revised Scheme vide letter dated 13.3.2008 and in terms thereof, the value of the past service benefits of the employees covered under this Scheme was calculated at Rs.29.10 crores. Another communication dated 28.7.2008 regarding 12 retired employees having service benefit of DA

linked pension was also calculated by the LIC which was worked out at Rs.2,27,15,000/-. The LIC vide its communication dated 25.3.2009 informed the HIMUDA that the valuation of the Scheme at the rate of 12% annual wage bill was calculated and the deficit in initial contribution was asked to be made good by the HIMUDA within a specified period.

7. The HIMUDA after approval of the Scheme from its Board of Directors requested the State of Himachal Pradesh to approve the implementation of the Group Superannuation Scheme for its 477 existing employees as on 1.4.2008 + 12 retirees and 58 daily waged employees and the same was approved by the Government vide communication dated 10.11.2008. This brought about an agreement duly agreed and signed by the LIC with HIMUDA, this led to letter dated 10.11.2008 (Annexure P-8). For the management of the aforesaid Scheme, the HIMUDA constituted a Trust with the LIC for administration and implementation of the Scheme vide Trust Deed dated 31.3.2008 (Annexure P-9). The LIC thereafter, on its own sent a sample of Master Policy to the HIMUDA, which however was never accepted, much less approved by the HIMUDA and rather the HIMUDA requested the LIC to reframe the Master Policy as per agreed terms and conditions, but the fact of the matter is that the LIC neither replied to those communications nor revised the policy as per the agreed terms and conditions. It is the specific case of the HIMUDA that for all intents and purposes, the parties had accepted the proposal as given by the LIC vide letter dated 13.3.2008 (Annexure P-5) which thereafter culminated into a Scheme dated 10.11.2008 (Annexure P-8) and, therefore, the LIC of its own could not alter or change the terms and conditions agreed upon by the parties and, as such, the HIMUDA was not bound by the proposed Master Policy which was issued by the LIC during February, 2010 i.e. after lapse of nearly two years. It is further the case of the HIMUDA that the LIC had been disbursing the pension to the members of the Pension Scheme, who retired w.e.f. 2004 onwards. However, the LIC did not disburse any amount to the members of the Pension Scheme, who retired after March, 2014 onwards and the D.A. was not paid w.e.f. 7/2013 on the ground of insufficient funds.

8. The HIMUDA repeatedly requested the LIC to supply the details of the accounts, but the same were not supplied. Thereafter, a meeting of Pension Trust was held on 22.8.2012 wherein the issue of insufficient fund, as raised by the LIC was taken up. The HIMUDA found that the LIC as per the terms and conditions of the Scheme and the agreement was not maintaining running account and had in fact segregated the initial contribution on highly unjustifiable grounds. The HIMUDA thereafter sent various communications to the LIC to rectify its record and calculations as the funds were not properly managed by the LIC as according to it, withdrawal of lumpsum amount segregated for payment of pension without maintaining the running account was wholly unjustified. However, the LIC instead of rectifying its illegal action in not maintaining the running account as agreed continued to maintain the accounts arbitrarily, compelling the HIMUDA to address a communication dated 13.8.2014 to Grievance Redressal Officer of the LIC. This was followed by another communication dated 20.8.2014. It is further the case of the HIMUDA that despite various communications and meetings held between the parties from time to time, the LIC only insisted on the additional amount of money which was not at all justified as per the proposal made by it to the HIMUDA prior to the implementation of the Scheme and ultimately, the LIC stopped the payment of Pension to the retirees of the HIMUDA, which led to the filing of the various writ petitions before this Court. All these writ petitions were clubbed together and vide order dated 6.10.2015 passed in bunch of writ petitions, the lead being CWP No. 8821 of 2014, titled Devender Kumar Tandon vs. H.P. Housing and Urban Development Authority and others, this Court directed the LIC to examine the recommendations made by HIMUDA and take a decision after hearing the parties.

9. It was pursuant to the aforesaid order that the LIC has now rejected the claim of the HIMUDA in its meeting held on 23.11.2015 (Annexure P-18) as communicated to the HIMUDA. It is the specific case of the HIMUDA as also the other petitioners that the action of the LIC in rejecting the claim of the HIMUDA and its employees is highly arbitrary, unconstitutional and violative of Articles 14 and 16 of the Constitution on the ground that the LIC of its own could not have altered the terms and conditions agreed between the parties wherein total amount of past service was calculated at a particular sum and, therefore, no additional contribution was required to be paid either by the HIMUDA or its employees to the LIC except as contained in revised Scheme dated 13.3.2008 (Annexure P-5) and Pension Scheme duly agreed and signed by the parties on 10.11.2008 (Annexure P-8). The LIC could not have varied the terms and conditions initially agreed on the basis of the alleged Master Policy which had never come into existence with the concurrence of the parties. The LIC is otherwise bound by the principles of promissory estoppel. Moreover, the purchase of annuities was never accepted by the HIMUDA and the LIC at no point of time had revealed to the HIMUDA that the payment of the pension was subject to the purchase of annuities. The action of the LIC is further assailed on the ground that the LIC of its own had not been maintaining the running account as per the scheme and terms and conditions agreed upon between the parties and had withdrawn larger sum from the contributions thereby drastically reducing the balance without paying any interest upon the amount so withdrawn, which amounted to high-handed action on the part of the LIC without there being any lawful justification for the same. The LIC was bound to maintain the running account and pay the requisite interest as agreed upon. Had the LIC adhered strictly to the maintenance of true and faithful accounts, which the LIC miserably failed to do. There could not have been a question of any deficit of the amount in the pension fund. Thus, there was gross negligence and mis-management of the pension fund by the LIC to the detriment and dis-advantage of the HIMUDA and its employees.

10. The LIC has contested the petition by filing reply wherein preliminary submissions have been made to the effect that the contract of insurance is regulated strictly as per the terms of the contract. HIMUDA Employees Group Pension Trust (for short 'Trust') opted to purchase an Employees Superannuation (DA Linked) Scheme from the LIC, covering its members/employees for pension (personal as well as family pension). The pension is payable as per the Rules applicable to other State Government Employees (as per CCS Pension Rules). Hence, the liability of the LIC to pay pension (personal or family) would increase with the increase in the salary of the member i.e. last pay drawn on the date of superannuation. Therefore, in order to keep the policy effective, it was incumbent upon the Trust (Master Policy Holder) to pay premium so calculated by the LIC on the basis of wage data made available every year (w.r.t. the pay drawn by the members in respective year) of members covered under Master Policy. It was specifically made clear to the representatives of the Trust that the premium would be calculated on the basis of wage data for the respective year/salary drawn by the members in the year. The rate of premium chargeable is roughly @ 12% of the annual salary received by the members in a year (as per wage data to be provided by the Trust). However, there can be a variation maximum upto 25% on either side of 12% depending on various factors. Therefore, due to enhancement of salary on account of release of increments, DA and pay revisions and other factors as well as induction of new members and purchase of annuities for creating provisions for releasing pension to the members superannuated, the wage data would be changed and as such the premium would definitely change. As such, the premium is to be calculated as per actuarial basis valuation. The policy was sold in the year 2008 and it was specifically made clear to the policy holder that the premium cannot be calculated in advance and the representatives of the Trust were informed and advised specifically that due to change of various factors, it is not possible to calculate the premium in advance and as such, the policy holder/trustees

were advised that the premiums shall be calculated on actuarial valuation basis, inasmuch as due to pay revision and other enhancements the salaries of the members escalated manifold about 3-5 times as a result pension liabilities would increase automatically. It is further averred that the LIC merely acts as Fund Manager and as such, manages the pension fund which is formulated strictly and adhering to the respective legal provisions of the Income Tax Act and Rules. As such, on receipt of claim for pension, the Fund Manager has to purchase annuity out of pension fund and to create provision for pension and to clear other liabilities. The LIC adhered to the provisions and had purchased annuities for clearing pension etc. However, since the Trust was not paying premium on actuarial basis (as per escalation in salary) and, therefore was not justified in seeking pension on the basis of enhanced pay drawn by the member. The method of calculation of annual premium and other queries were made clear to the Trust (HIMUDA) vide communication dated 19.3.2008. On the basis of data provided for 477 employees, initially valuation was done as per past service and it was assessed for Rs.29.10 crore against in-service members and Rs.2.27 crore in respect of retired employees and hence total Rs.31.37 crores was assessed as initial valuation. Besides this, the Trustees are bound to pay annual premium as per calculations so done by the LIC on the basis of wage bill data provided every year. It is further averred that the LIC had provided the calculations/ statements every year clarifying each and everything, but due to non-payment of due premiums, there are inadequate funds to purchase annuity so as to clear the pension liability and, as such, the same could not be released. In reply to the merits of the petition, the averments made in the preliminary submissions have been reiterated and re-affirmed and in addition thereto, in para-7 of the reply, it has been mentioned that it was after many interactive sessions that the contract agreement was entered into between the parties and therefter Master Policy was sold to the Trust i.e. HIMUDA.

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

11. At the outset, it needs to be noticed and is otherwise fairly conceded by learned counsel for the LIC that the Master Policy in fact was never executed between the parties and the same was in fact submitted to the HIMUDA for the first time on 16.12.2009 as is evident from page-329 of CWP No. 1147 of 2016. Once that be so, obviously then the LIC cannot fall back to any terms and conditions of the Master Policy and the instant lis shall now essentially have to be decided on the basis of the revised scheme submitted by the LIC to HIMUDA vide its letter dated 13.3.2008 (Annexure P-5), agreement duly signed by the parties on 10.11.2008 (Annexure P-8) and the provisions of the Trust Deed dated 31.3.2008 (Annexure P-9).

12. Here it shall be apposite to reproduce in verbatim the proposal sent by the LIC vide its letter dated 13.3.2008 (Annexure P-5) and the same reads as under:

"Life Insurance Corporation of India,
Branch Office, P&GS Old SBI Building, Nr. Hotel
Auckland, Lakkar Bazar, Shimla-171001

Ref: SML/P&GS *Dated: 13/03/2008*

The Chief Executive-cum-Secretary,
HIMUDA, Shimla.

Respected Sir,

RE: Proposal for implementation of Group Superannuation Scheme for your Present & Retired Employees.

This has the reference of our earlier meeting with your good self on 12/03/2008, in this connection we are proposing revised Scheme. The Scheme is as under:

1. Name of Fund : HP Housing Board Shimla GSCA NEW
2. Benefits Value : As per email dated 23.02.08.
3. Membership data:
Number of members : 477
Average age : 47 years.
Average Monthly salary : Rs.10400/-
Average past service : 18 years.
NRA : 58 yrs (cat.1) & 60 yrs (cat.2).
4. Valuation method :Attained age method.
5. Actuarial assumption
Mortality :LIC 1994-96 (Ultimate)
Withdrawal rate :1% to 3% depending on age
6. Results of valuation :
Value of past service benefits: Rs.29.10 crores
7. Recommended Contribution :
Annual Contribution : Rs.12% of Annual wage Bill.

The other conditions are:

1. Minimum age for eligibility of pension is 50 years
2. Pension for spouse 50% of Pension till life.
3. In case of death minimum 10 years service required.
4. Pension Formulae:

$$\frac{\text{Last Drawn Salary (Basic + DP) (years of service}}{66}$$

5. Maximum credit for service is 33 years.
6. The pension is DA linked.
7. The pension for two children up to the age of 25 years.
8. Commutation is 33% of Pension (Basic)

PENSION FOR RETIRED EMPLOYEES:

Only one lump sum amount of Rs.2.11 crores is required and is payable in one installment. No further contribution is required. It will be NON DA linked pension.

We are enclosing list of our few clients where pension scheme is running and also enclosing commutation chart for calculation of 1/3rd of pension.

Thanking you,

With regards,

Sd/-
Sr. Branch Manager,
Shimla(P&GS)"

13. As a matter of fact, the LIC itself vide letter dated 19.3.2008 (Annexure R/1) wrote to the HIMUDA in continuation of the proposal dated 13.3.2008 (Annexure P-5) and held out as under:

"Ref. NZ/P&GS 19.03.2008

The CEO-cum-Secretary,

HIMUDA,

Shimla-2.

Dear Sir,

Re: Proposal for implementation of Group Superannuation Pension Scheme for HIMUDA Employees.

We acknowledge the receipt of your letter regarding above. We thank you for reposing confidence in us. We understand that HIMUDA is considering a superannuation scheme for their employees with the following features:

1. *It is a defined benefit scheme on the pattern of other autonomous bodies of the State like yours and rules applicable to the employees of Himachal State Government Employees.*
2. *It is to be an index linked pension.*
3. *All types of pension like normal, family, invalid etc. are on the pattern of rules applicable to Himachal State Government Employees.*

In this context, we would like to inform you that the valuation provided by us was done on the above parameters and our clarifications on the points raised in your letter on the above lines are as under:

I) & II) Emoluments will mean basic pay (including stagnation increment) drawn immediately before retirement or on the date of his death. An average emolument is the average of emoluments drawn by the employer during the last 10 months of his service.

III) The dearness relief for pensioner is same as dearness allowance for serving employees and it is revised every six month i.e. 1st Jan. & 1st July.

IV) Family Pension: - as per rule 54(2), Family pension shall not be less than 30% of the minimum pay.

As per rule 54(3), the enhanced pension is payable:-

a) When an employee dies while in service after having rendered at least 7 years continuous service – 50% of last pay drawn or twice the normal family pensions, whichever is less.

b) When the employee dies after retirement – 50% of the last pay drawn or twice the normal family pension or retirement pension, whichever is less.

V) Same as (IV) and (IV) a.

VI) An amount not exceeding 40% of monthly pension can be computed. The commuted pension will be restored after 15 years.

VII) The pension may be remitted by way of six post dated cheques, through Ecs whever this facility is available or by availing direct credit facility.

VIII) The valuation will be done by us at the end of every year and annual contribution will be demanded accordingly. The pooled fund will be maintained by us and interest at the prevailing rate will be credited at the end of every financial year. The purchase price will be debited to it at the time of vesting of annuity on retirement or at the start of family pension. Further the purchase price will depend upon the prevailing security rates on the date of vesting of annuity.

IX) HIMUDA will have to be in close liaison with us for finalizing the trust deed and rules. Further, we would advise you to frame the rules as per the existing pension scheme applicable to Himachal State Government. At the time of vesting of annuity, the prescribed claim forms signed by trustees will be required to be submitted to us.

HIMUDA will be at liberty to manage the funding as per the financial planning. However, it is advised that valuation of liabilities should be investigated every ear and any shortfall is to be determined and provided for. We will be informing you from time to time about the position of fund.

Illustration:

a) Basic pension = (16350+8175+1226)/2(33/33)=25751/2=12875.5=12876/-*

DA = (12876.41) = 5279*

Total pension = 18155.

b) Value of commutation - (Assuming 40%)

*Ref. Age 58 – 10.46*12*12876*.4 = 646478*

*Ref. Age 60-9.81*12*12876*4 = 606305*

c) Pension after commutation = 12876.6+5279 = 7726+5279 = 13005*

d) Family pension – 50% of (a)

We hope above queries will suffice your purpose. Kindly also make study of the pension rules applicable to the employees of Himachal State Government employees.

Yours faithfully,

Secretary (P&GS).

14. It was only thereafter that the parties entered into Agreement (Annexure P-8), some of its salient features are as under:

'EFFECTIVE DATE' is defined in Clause-xi of the Scheme and reads as under:

> *"xi) "EFFECTIVE DATE" in relation to the Scheme shall mean the 31st of March, 2008 the date as from which the Scheme takes effect."*

'CONTRIBUTIONS AND SCHEME OF INSURANCE' is dealt with in SECTION -II of the Scheme and the provisions of Clause 6-A and 6-B are relevant for the adjudication of this writ petition and are reproduced as under:

*"**6. CONTRIBUTION:***

A) These shall be paid by the HIMUDA to the Trustees in respect of each Member, the contributions hereinafter mentioned in sub-paragraph (i) annually in advance on the date of entry into the Scheme and on the relevant Annual Renewal Dates and the contributions in sub-paragraph (ii) in lump sum as stipulated hereinbelow and the Trustees shall pay the same to the Corporation for the purpose of the Scheme of Insurance.

i) Annual Contribution:

The Annual Contribution in respect of each Member would be such as is determined by LIC of India every year on the basis of valuation, which will be 12% of Annual Wage Bill (emoluments) subject to 25% variation on either side of 12% annual contribution. (It includes pay revision etc., to manage pension for HIMUDA employees).

ii) Initial Contribution for Past Service:

In respect of the Member who at the time of his entry into the Scheme has past service to his credit, lump sum contribution relating to past service may be payable as is determined by LIC on the basis of valuation on the date of entry into the Scheme. It shall be 29.10 Crores in respect of existing 477 employees of the authority as on 31.03.2008 (Letter No.SML/P&GS dated 13.03.2008 annexed A & B).

B) Scheme not contributory:

The HIMUDA shall be liable to pay contribution as per Sub-para (i) & (ii) of Para-6 above and the same shall be paid to the Trustees and trustees in turn shall transfer the funds to LIC under the Scheme."

15. Clause-7 provides for 'Group pension scheme' and reads as under:

"**7. Group Pension Scheme.**

For the purpose of providing pensions to the Members, the Trustees shall enter into a Scheme of pension with the Corporation where under the Corporation will issue a Master Policy. In terms of the Master Policy, the Corporation will maintain a running account in favour of the Trustees to which will be credited the contributions paid by the Trustees in respect of all the members. Every year, the Corporation will allow interest on the balances standing to the credit of the running account at the rate to be determined by the Corporation as at the close of each financial year. When a pension becomes payable to the member on his retirement or cessation of service or to his beneficiary in the event of his death, the Corporation shall on the advice of the Trustees, appropriate the accumulations of the member's concerned to provide for payment of the pension as under:

I) For the pension payable to the employees pensioners on retirement, voluntary retirement, disablement etc.

ii) For the family pension payable to the widows/widowers and/or children of the employees on their death while in service.

Iii) For the family pension payable to the widows/widowers and/or children of the employee pensioners on their death.

iv) For increase in pension amount as a result of rise in DA.

v) For the reversion of the commuted pension after 15 years, if any, as per Rules of the Scheme.

vi) For the reversion of share of one of the widows/ twin children to other widow/ child.

However, in the following circumstances the trustees will be entitled for the special commuted value:

i) For the decrease in pension amount due to fall in DA.

ii) On remarriage of widow/ widower.

Iii) On getting married (in case of female child), death of the child before the terminal age (say 25 years).

16. Section – III of the Scheme deals with the 'Benefits' and specific provides for amount of pension and reads as under:

"**BENEFITS.**

1) Amount of Pension.

All pensionary benefits will be determined in accordance with CCS (Pension) Rules, 1972 as adopted by the State Government of H.P. for its employees and as amended from time to time, except commutation which shall be 33% of basic pension."

17. Section – V deals with 'Pension to retirees of HIMUDA' and reads as under:

"**Pension to retirees of HIMUDA.**

The Government of H.P. Department of Finance vides notification No. Fin.IF(c) 1-9/97 dated 29th October, 1999 formulated a pension scheme for HP Corporate Sector Employees namely HP Corporate Sector Employees (Pension, Family Pension, Commutation of Pension & Gratuity) Scheme, 1999, which stands repealed on 02.12.2004. The Authority has considered the case into two parts viz., retirees between period 01.04.1999 – 02.12.2004 will be considered separately after decision of the court and those who have been retired between 03.12.2004 – 31.03.2008 shall be provided pension under Group Superannuation Pension Scheme of LIC as under:

i) Pension shall be payable w.e.f. 01.04.2008 & no past arrears of pension components shall be payable.

ii) No commutation shall be paid.

Iii) Pension shall be DA-Linked with family pension w.e.f. 1.4.2008.

As far as the retirees between the period 1.4.99 to 2.12.2004 are concerned the decision will be taken after the verdict of the Hon'ble Court as matter is subjudiced and negotiation with such retirees of the Authority."

18. It is thereafter clearly provided that in case there is anything contained in these Rules or in any alteration or amendment thereof, which is inconsistent with the objects or provisions of the Trust Deed, the provisions of the Trust Deed shall prevail. The Trust Deed between the HIMUDA and the LIC was signed on 31.3.2008 and 'Trust Fund' as mentioned in Clause-5 reads as under:

*"**5. Trust Fund:** The sum in cash and other assets retained by the Trustees in the Surplus Account as provided for in the Rules and the Master Policy to be issued by the Corporation shall constitute the funds of the Scheme and the Trustees shall hold and employ the said funds in accordance with these presents and the Rules. The funds shall be vested in the Trustees. The Trustees shall have the entire custody, management and control of the Trust*

Fund. The Trustees shall decide all difference and disputes which may arise under these presents or under the Rules either as to the interpretation thereof or as to the rights and objections of the Employer or of the Members or their Beneficiaries and the decision of the Trustees, shall in all cases be final and binding on all parties concerned. PROVIDED THAT if the decision has any bearing on the provision of the Income Tax Act, 1961 or the Income Tax Rules, 1962, it shall be forthwith reported to the Commissioner of Income Tax and if so required by him the Trustees shall review the decision."

19. Clause – 13 deals with 'Surplus Account' and reads as under:

"13. Surplus Account*. Any sums forfeited by the Trustees under the Rules shall be credited to a separate account called the 'Surplus Account' and may be utilised for the purpose of investment in accordance with Rule 85 of Income Tax Rules, 1962."*

20. Clause – 25 deals with 'Investments of Fund Moneys' and reads as under:

*"**25. Investments of Fund Moneys.** All moneys contributed to the Fund or received or accruing by way of interest or otherwise to the Fund may be deposited in a Post Office Savings Bank Account in India or in Current Account in a Saving Account with any Scheduled bank of utilised in accordance with Rule 89 of the Income Tax Rules, 1962 for making payments under a Scheme of Insurance or for purchase of Annuities referred to in the rule and to the extent such moneys as are not deposited or utilised shall be invested in the manner prescribed from time to time in Rule 85 read with Rule 67(2) of the Income Tax Rules, 1962."*

21. It would be noticed that in terms of Clause 25 of the Trust Deed dated 31.3.2008 (Annexure P-9), all moneys contributed to the fund or received or accruing by way of interest or otherwise to the fund could be deposited: (i) In a Post Office Savings Bank Account in India or; (ii) In Current Account in a Saving Account with any Scheduled Bank or: (iii) Rule 89 of the Income Tax Rules, 1962 for making payments under a Scheme of Insurance or for purchase of Annuities referred to in the rule and to the extent such moneys as are not deposited or utilised were to be invested in the manner prescribed from time to time in Rule 85 read with Rule 67(2) of the Income Tax Rules, 1962.

22. Then why it (LIC) had chosen to invest the same in annuities is not difficult to guess as the purchasing of an annuity from the Life Insurance Corporation of India is not comparable to any kinds of investments because all contracts of insurance entered into by the LIC are backed by a government guarantee which is provided by Section 37 of the Life Insurance Corporation Act, 1956. Therefore, from the point of view of safety and security of the moneys of the superannuation fund, an investment in an annuity through the LIC, provides valuable security to a beneficiary. By ensuring that the investment is made in a manner which ensures the safety of the fund and the payment of an annuity. (Refer: **Sasadhar Chakravarty and another vs. Union of India and others (1996) 11 SCC 1).**

23. Even otherwise, Rules 85 and 89 of the Income Tax Rules, 1962, are meant to safeguard the moneys deposited in the superannuation fund and to secure to the annuitant the annuity amount. Undoubtedly, Rule 89 requires the trustees to purchase an annuity from the Life Insurance Corporation of India to the exclusion of anyone else. But this provision must be judged in the context of the fact that the contracts of life insurance which are entered into by the Life Insurance Corporation of India are backed by a Government guarantee which is provided by Section 37 of the Life Insurance Corporation

Act, 1956. The payment of annuity is thus properly secured. (**Para-8 of Sasadhar Chakravarty's case** (supra).

24. All pensionary benefits were to be determined in accordance with CCS (Pension) Rules, 1972 as adopted by the State Government of Himachal Pradesh for its employees. The pension was payable w.e.f. 1.4.2008 and no past arrears of pension components were payable. No commutation was required to be paid and pension was to be DA-linked with family pension w.e.f. 1.4.2008. The Scheme was non-contributory and the annual contribution in respect of each member would be such as is determined by the LIC every year on the basis of valuation, which would be 12% of the Annual Wage Bill (emoluments) subject to 25% variation on either side of 12% of annual contribution. This would include pay revision etc., to manage pension for HIMUDA employees. The Scheme allowing non-contributory,the employees of the HIMUDA or for that matter the HIMUDA was not required to contribute any amount save and except the one mentioned above , as the right to get pension was came to be crystallized at the time of entering into the Scheme.

25. It is more than settled that an insurance contract is a species of commercial transactions and must be construed like any other contract on its own terms and by itself albeit subject to the additional requirement of uberrima fides i.e. good faith on the part of the insured except that the other respects, there is no difference between the contract of insurance and any other contract. In order to determine the extent of liability of insurer, terms of insurance contract have to be strictly construed without venturing into extra liberalism that might result in rewriting of the contract or substituting the terms which were not intended by the parties. (Refer: **Vikram Greentech India Limited and another vs. New India Assurance Company Limited (2009) 5 SCC 599).**

26. Equally it is settled law that the terms of the contract have to be strictly read and natural meaning be given to it. No outside aid should be sought unless the meaning is ambiguous. (Refer: **United India Insurance Co. Ltd. vs. Harchand Rai Chandan Lal (2004) 8 SCC 644).**

27. Words in an insurance contract must be given paramount importance and interpreted as expressed without any addition, deletion or substitution. (Refer: **Suraj Mal Ram Niwas Oil Mills Private Limited vs. United India Insurance Company Limited and another (2010) 10 SCC 567.**

28. It would be noticed that as per the Scheme entered into between the parties, the amount to be calculated on superannuation of employee and the annuity to be purchased from LIC so as to ensure the payment by the LIC a fixed monthly sum to the retired employee or payment of annuity amount to LRs on his demise had already been worked out and it was on this basis that the LIC initially demanded a sum of Rs.29.10 crores for 477 existing employees as on 1.4.2008 and a sum of Rs.2.11 crores for retired employees as lumpsum payment (corpus fund) and were required to contribute and the Scheme being a non-contributory Scheme, the members thereof are only required to make an annual contribution which was to be 12% of the Annual Wage Bill (emoluments) subject to 25% variation on either side of 12% of annual contribution. This was to include pay revision etc. to manage pension for HIMUDA employees.

29. The LIC has claimed itself to be a Fund Manager on behalf of the HIMUDA and, hence it would be absolutely necessary or rather legitimate to assume and presume that the Scheme was signed by the LIC after working out all financial implications. Therefore, it does not lie in the mouth of the LIC to claim that since there was a manifold

increase in the salary, therefore, there was a deficit in the corpus making the Scheme un-viable.

30. It has specifically been acknowledged by learned counsel for the LIC that the Scheme so formulated was designed by the employees of the LIC, who very well knew that there could be a rise in the salary as they themselves being public sector employees are presumed would be knowing or legitimately expected to know about the periodic increase in the pay scales especially after the recommendation that are made in the public sector after the receipt of the report of the Pay Commission. Therefore, the employees of the LIC could not be so naive so as to feign ignorance regarding the periodic rise in pay scale of public sector employees.

31. In such circumstances, the deficiency in the 'corpus' if any, is only and solely attributable to the lapses of the LIC and therefore, it cannot obtain any dis-advantage for their own lapse. The rights in favour of the employees of the HIMUDA and HIMUDA itself crystallized on the date of entering into the Scheme and the terms of the Scheme because it is clearly stipulated in the Scheme that terms thereof would not be subject to any alteration/amendment especially unilaterally by the LIC.

32. In taking this view this Court is fortified by the decision of the Hon'ble Supreme Court in **Air India Employees Self-contributory Superannuation Pension Scheme vs. Kuriakose V. Cherian and othera (2005) 8 SCC 404**. In that case, the Hon'ble Supreme Court took note of the factual aspects of the matter in paragraph 13 that the crucial question requiring consideration is whether the benefit, which the retired employees are getting, can be curtailed because of reduction of the fund amount. Thereafter, in para-25, various provisions of the Trust Deed were taken note of and are so dealt with in paragraphs 26 and 27.

33. Like in the case before the Hon'ble Supreme Court, the Scheme in the present case envisages a defined benefit plan and are not defined contribution plan. It also envisages allocating funds at the time of retirement of employees i.e. the amount for which the annuity is purchased. No doubt, it can be true that corpus deficiency has taken place as a result of gap between contribution and amount of annuity purchased. All the same, the basic question is whether by stopping the pension or providing the D.A. the gap can be abridged by demanding more amount from the HIMUDA or its retired employees.

34. As observed above, similar issue has been squarely answered by the Hon'ble Supreme Court in paragraphs 34 to 52 of its judgment in **Air India Employees Self-contributory Superannuation Pension Scheme's** case (supra) which read thus:

> *"34. It is not necessary to go into detail calculations. It does appear that there is shortfall in the Fund though a lot can be said in respect of calculation submitted by both sides. No doubt, the amount which went out of the fund for purchase of annuity for retiring employee was considerably more than what was contributed by the outgoing employee but it is also true, at the same time, that the huge amounts did not come to the fund from Air India and some of assumptions on which Scheme was formulated did not hold good on commencement of the Scheme. The reason for the position of the fund which necessitated the amendment cannot be attributed entirely on account of the gap between the amount contributed by the retiring employee and the amount used for purchase of annuity. It may also be noted that the appellant's own case is that there was basic fallacy in the Scheme from its inception. The Scheme, as originally conceived was flawed, is the stand of the appellants in*

CA No.4267 of 2003. It is further their own stand that concept of granting annuities on a defined benefit basis in a self-contributory fund is inherently fallacious as in the self-contributory scheme the only consideration is the contributions made by the members and hence the benefit has to necessarily flow from their contributions and the interest accrued thereon. As against this, the present is a case of defined benefit Scheme. This basic fallacy in the Scheme was never rectified from inception. It is the own case of the appellants that in addition to this inherent fallacy in the formation of the Scheme, the situation was aggravated by various factors noticed above.

35. We would assume that there were several contributory factors as a result of which the fund position became quite bad. The factors included the non-receipt of huge funds in time from Air India, lack of proper investment by the trust resulting in loss of interest in addition to the fallacy in the scheme being gap between the contribution and the amount required for purchase of annuity to ensure return of specified amount to the retirees.

36. It may be that the last of the aforesaid factor contributed most in the depleted financial position of the fund requiring the trustees to make the amendments in the scheme on 3rd April, 2002, but it has to be borne in mind that the original scheme was a 'Benefit Defined Scheme' as opposed to a 'Contribution Defined Scheme'. It has now been conceded on behalf of the appellants that there was no fraud in formulation or implementation of the scheme. Besides aforesaid factor, there were other factors, such as, considerable delay in Air India remitting arrears of pension contribution amounting to Rs.23 crores to the trust, non-payment of interest by Air India on late payments etc.

37. The retirees received what was receivable by them according to the existing scheme on the date of retirement. The pension scheme, as originally conceived and formulated, was a rolling scheme postulating outgoing employees on retirement and their place being taken by induction of new employees whose contributions would add to the fund.

38. According to the figures given above, the shortfall in the fund was in the sum of Rs.41.83 crores which was sought to be made up from 1852 retirees. According to the retirees, if they are asked to make good that amount, on average each pensioner will have to repay a sum of Rs.2,25,863/-. At the same time, if the amount is contributed by the existing over 16,500 employees to make good the aforesaid differential amount of Rs.41.83 crore, they would be required to pay about Rs.25,000/- each which can be split into convenient installments.

39. On distinction between 'Defined Benefit Plan and 'Defined Contribution Plan' Mr. Arun S. Murlidhar in 'Innovations in Pension Fund Management' states :

> *"Defined Benefit Plans. - In the DB pension plan, participants and/or sponsors make contributions, and these contributions could change over time. The scheme then provides a defined benefita prescribed annuity in either absolute currency or as a faction of a measure of salary (e.g., 50 per cent of final salary or the average the last five years of salary. The guaranteed pension benefit could be in either real or nominal terms. The ratio of annuity or benefit to a measure of salary is known as the replacement rate.*

Defined Contribution Plans. - Under the DC scheme, participants and/or sponsors make prespecified contributions. These contributions could be specified in either absolute currency or as a fraction of a measure of salary (e.g. 5 per cent of annual pretax salary). The participants invest the contributions in assets. However, the pension depends entirely on the asset performance of accumulated contributions. As a result, two individuals with identical contributions could receive very different pensions. Bader (1995), Bodie, Marcus, and Merton (1988), and Blake (2000) provide more detailed descriptions of DB and DC plans."

(Emphasis supplied by us)

According to learned author, there are several ways in which the aforesaid plans can be funded. In general, country's social security systems are pay-as-you-go (PAYG), defined benefit schemes which tax current participants to pay retiree benefits. However, corporate or occupational defined benefit or defined contribution schemes tend to be funded both partially and fully. Funding requires allocating funds prior to retirement in order to service future liabilities.

40. The scheme envisages a Defined Benefit Plans and not a Defined Contribution Plans. It also envisages allocating funds at the time of retirement of employees, i.e. the amount for which the annuity is purchased. None has questioned the power of the trustees to amend the scheme prospectively from the date of amendment. We would also assume that there is a corpus deficiency which, to a considerable extent, has taken place as a result of gap between contribution and amount of annuity purchased. All the same, the basic question is whether by the amendment of the scheme, this gap can be bridged by making recoveries from those who have already retired and are getting benefit from LIC as a result of purchase of annuity and/or from their heirs who would otherwise receive annuity amount after the demise of the retiree. This necessarily takes us to the second question as to the power to amend the scheme retrospectively.

41. At the outset, it may be noted that there is no merit in the contention, half-heartedly canvassed, that the amendment is not retrospective on the ground that the rights of the retirees only after the amendment of the scheme are being effected as the amount already paid to them under the unamended scheme is not being asked to be returned. There is fallacy in the argument. It is evident that the retirees, as a result of amendment, are being asked to pay to make good the gap between the amount of annuity and the contributions made by them and, if not, either their monthly pension would be reduced or their heirs would not get the annuity amount at the relevant stage. The amounts already taken by the retirees have also been taken into consideration while working out the figures. Therefore, it cannot be said that the amendment is not retrospective. Various clauses on the basis whereof learned counsel for the appellants contend that it is permissible to amend the scheme with retrospective effect have already been noted hereinbefore. To consider the effect thereof and to appreciate contentions urged by learned

counsel for the appellants, first let us examine the true meaning of expression 'Annuity'.

42. The expression 'annuity' has no statutory definition. However, according to Black's Law Dictionary, it means an obligation to pay a stated sum usually monthly or annually to a stated recipient.

43. An annuity is a right to receive de anno in annum a certain sum; that may be given for life, or for a series of years; it may be given during any particular period, or in perpetuity; and there is also this singularity about annuities, that, although payable out of the personal assets, they are capable of being, even, for the purpose of devolution, as real estate; they may be given to a man and his heirs, and may go to the heir as real estate (see : Advanced Law Lexicon by P Ramanatha Aiyar, 3rd Edition 2005).

44. In Commissioner of Wealth Tax v. P.K.Benerjee [(1981) 1 SCC 63], the Hon'ble Supreme Court held that in order to constitute an annuity, the payment to be made periodically should be a fixed or pre-determined one, and it should not be liable to any variation depending upon or on any ground relating to the general income of the fund or estate which is charged for such payment. The court cited with approval the observations of observations of Jenkins L. J in In-re Duke of Norfolk Re, Public Trustee v. Inland Revenue Commr. [(1950) Ch 467] which reads thus:

> *"An annuity charged on property is not, nor is it in any way equivalent to an interest in a proportion of the capital of the property charged sufficient to produce its yearly amount. It is nothing more or less than a right to receive the stipulated yearly sum out of the income of the whole of the property charged (and in many cases out of the capital in the event of a deficiency of income). It confers no interest in any particular part of the property charged, but simply a security extending over the whole. The annuitant is entitled to receive no less and no more than the stipulated sum. He neither gains by a rise nor loses by a fall in the amount of income produced by the property, except in so far as there may be a deficiency of income in a case in which recourse to capital is excluded."*

45. Learned counsel for the appellants have, however, placed strong reliance on the Trust Deed and the Rules to contend that the Trustees have full right to amend the Scheme with retrospective effect and that the members or beneficiaries have no right, title or interest in the fund or even in the annuities purchased from the fund on the retirement of beneficiary. In this respect, reliance is placed upon Clause 5 of the Trust Deed above reproduced stating that the Trustee may at any time with previous concurrence or approval in writing of the employer alter, vary or amend any of the provisions of the Trust Deed and the Rules. The first proviso to the aforesaid clause, however stipulates that no such alteration or variation shall be inconsistent with the main objects of the Trust thereby created. Reliance has also been placed to Clause 8 of the Trust Deed stipulating that except as provided for in this Deed or Rules, no

member, beneficiary or other person claiming right from such member shall have any legal claim, right or interest in the Fund. But, the proviso to the said clause enjoins upon the Trust Deed to administer the Fund for the benefit of the members and/or their beneficiaries in accordance with the provisions of the Deed and the Rules. Reliance on Clause 24 has been strongly placed submitting, inter alia, that the members' Fund shall consist of contributions as specified in the Trust Deed and the Rules governing the Fund and contributions received by the Trustees from the Air India and of the accumulations thereof and of the securities and annuities purchased therewith and interest thereon and that the said Fund shall be established for the benefit of the members and/or their beneficiaries and shall be vested in the Trustees. Further, Clause 26 is relied upon which stipulates that the trustees may enter into any scheme of insurance or contracts with the LIC to provide for all or any part of the benefits which shall be or may become payable under this deed and may pay out of the Fund all payments to be made by it under such scheme or contracts.

46. Besides the aforesaid clauses, learned counsel for the appellant have placed strong reliance on Clause 32 and Clause 33 of the Trust Deed. Clause 32 provides the power of the Trustee to review the availability of Funds of the Scheme annually or at such intervals as may be deemed fit by the Trustees and to decide any revision as to the rate of the member's contribution under the Scheme. Clause 33 i.e. power of review of benefits stipulates the Trustees right to review any limit the benefits payable to the beneficiaries including the right to reduce the benefits payable in accordance with the rules in the event of any or all the members ceasing or reducing to make contribution to the Fund.

47. None of the aforesaid clauses render any assistance to the appellants. The relied upon clauses deal with the members who continue to contribute to the Fund. The liability of the retiring member to make any such contribution ceases on retirement. It is nobody's case that after the retirement any contribution is made or required to be made by retired employees. The aforesaid clauses only show the right and power to review the Fund and the benefits payable to the continuing members/employees. Likewise, reliance on Rule 14 which stipulates that the member or his beneficiary shall not have any interest in the master policy taken out in respect of the members in accordance with the Rules of the Scheme but shall be entitled to superannuation benefits in accordance with the Rules, has no applicability. The retired employees are not claiming any interest in the master policy but are claiming right flowing from the annuity purchased on their retirement.

48. The rights of the employees to receive the annuity and quantum of the annuity get crystallized at the time of purchase of the annuity.

49. In Sasadhar Chakravarty & Anr. v. Union of India & Ors. [(1996) 11 SCC 1], the question arose as to when the right of an employee to receive annuity and the quantum thereof gets crystallized. In that case, the employer had set up a non-contributory

superannuation fund under the provisions of Income Tax Act, 1961. On retirement, under the rules of the fund, the retired employee was receiving an annuity under the policy purchased by the members of the fund from LIC. A writ petition was filed by retired employee contending that certain improvements have been effected in the executive staff fund to which the pensioners who had already retired were entitled and denial thereof was arbitrary and violative of Article 14 of the Constitution. The retired employee claimed right to the larger benefits which though not available at the time of his retirement but were being given to the employees who retired after the improvements to the fund have been made. This Court held that the right of the employee to receive an annuity and the quantum thereof get crystallized at the time of purchase of the annuity under the then existing scheme of the LIC and any subsequent improvements in a given pension fund scheme would not be available to those persons whose rights are already crystallized under the scheme by which they are governed because the amounts contributed by the employer in respect of such persons are already withdrawn from pension fund to purchase the annuity. With reference to Rules 85 and 89 of Income Tax Rules, this Court held that the same are meant to safeguard the monies deposited in the superannuation and to secure the annuitant annuity amount. Undoubtedly, Rule 89 requires the Trustee to purchase an annuity from the LIC to the exclusion of any one else but this provision must be judged in the context of the fact that the contracts of life insurance which are entered into by the LIC are backed by a government guarantee which is provided by Section 37 of the Life Insurance Act, 1956. The Court observed right of an employee to receive the annuity and the quantum gets determined at the time when the annuity is purchased. Any subsequent improvement in a given pension fund will benefit only those whose moneys form part of the pension fund. As soon as an employee retires, an annuity is purchased for his benefit under Rule 89, there remains no scope for any fresh contribution on his account so as to entitle him to an increased pension prospectively on the basis of the improvements made subsequently in the pension scheme of a fund since the existing pensioners form a distinct class.

50. The decision was sought to be distinguished on the ground that in the said case, this Court was concerned with the scheme financed by the employer unlike the present scheme where employer's contribution was almost nil and that it was self-contributing scheme. We are, however, unable to accept this contention. The ratio decidendi of the case is that the moment annuity is purchased, the fund leaves the corpus and the relations between the two are snapped. The corpus to the extent required for purchase of annuity leaves the trust fund and all connections between trust fund and retirees are severed. Thus, once the annuity is purchased, there remained no connection with the quantum of the fund. Therefore, annuitants are in no way concerned with the financial position of the fund for which annuity was purchased. They cannot be asked to further contribute. That is the basic question in the present case. It matters little that the present case is of reverse

position inasmuch as in the case of Sasadhar Chakravarty this Court was considering the case of a retired employee who was seeking right in the improvement whereas in the present case the question is about reducing the benefits or rights of the retired employees. The question is about applicability of the principle. Applying the principle in Sasadhar Chakravarty's case to the present case, we have no doubt that after retirement retirees are not liable for any deficit in the fund which is sought to be made good by recovery from them which is the effect of retrospective amendment. Further, as already noted it was a benefit and rolling scheme as opposed to a contributory scheme. Neither clauses 32 and 33 or the Trust Deed nor Rule 14 has any applicability on question of retrospective operation of amendment to the retired employees. It has been admitted that the form of insurance annuity policy with LIC was adopted as a result of mandate of the statute. Having done that, the appellants are bound by the consequences flowing from purchase of annuity. In view of what we have said above there is neither any substance in the contention that contract was between LIC and the trustees nor is it of any consequence in view of our conclusion that the amount, on retirement of employees, leaves the fund for purchase of annuity and the rights of the retirees are crystallized on their retirement by purchase of annuity and thus no amount can be claimed from them by making applicable amendment dated 3rd April, 2002 with retrospective effect. Therefore, we find no substance in the second contention.

51. The contention that there is no privity of contract between LIC and the retired employees as contract for purchase of annuities is between trust and LIC, has also no substance. In Chandulal Harjivandas v. Commissioner of Income-tax, Gujarat [AIR 1967 SC 816] insurance policy was purchased by the father of the assessee and the life assured was that of the assessee. The claim of assessee for rebate of insurance premium under Section 15(1) of the Income Tax Act, 1922 was rejected. On reference, the High Court upheld this view of the Revenue holding that contract of insurance with LIC was entered into by the father of the assessee and that the contracting parties were the father of the assessee and the LIC. This court reversing decision of the High Court held that the contract of insurance must be read as a whole; in substance it is a contract of life insurance with regard to the life of the assessee and that the main intention of the contract was the insurance on the life of the assessee and other clauses are merely ancillary or subordinate to the main purpose, under Section 2 (11) of the Insurance Act, the purchase of annuity amounts to purchase of an insurance policy. It would make no difference, in the present case, as to who made the payment.

52. The LIC having accepted the annuity and having effected monthly payments can neither reduce the annuity amount nor refund it to the trust to the detriment of the retirees since the annuity has already crystallized and no change can be made in such annuity as stipulated by the impugned amendments. LIC has obligation to fulfill the promise given by it to the retirees, who are assured under the annuity scheme."

35. Apart from the above, this Court is of the considered view that the doctrine of promissory estoppel is clearly applicable to the facts of the instant case as there has been non-considerable departure of the subject matter by one party (LIC) which has been adopted by the other party (HIMUDA) and its employees which is the basis of relationship and it is more than settled that such departure cannot be allowed.

36. Reliance in this regard can conveniently be made to a celebrated decision of the Hon'ble Supreme Court in **Motilal Padampat Sugar Mills Co. Ltd. Vs. State of U.P. (1979) 2 SCC 409** and as followed in the **State of Punjab vs. Nestle India Ltd. (2004) 6 SCC 465** and **Manuelsons Hotels Private Limited vs. State of Kerala and others (2016) 6 SCC 766.** The appellant therein (Motilal Padampat's case (supra) before the Hon'ble Supreme court was primarily engaged in the business of manufacture and sale of sugar. An insurance was given by the State Government in that case that new vanaspati units in the State which go into commercial production by 30.9.1970 would be given partial concession in sales tax for a period of three years. The appellant having set up such vanaspati unit thereafter went into the production of vanaspati on 2.7.1970 and sought exemption. The Government apparently turned around and rescinded its earlier decision of January, 1970 in August 1970, by which time the factory of the appellant had gone into commercial production. The writ petition was filed in the High Court of Allahabad seeking exemption of sales of vanaspati manufacturer from sales tax for a period of three years commencing 2.7.1970 as per the promise held out. The High Court turned down the plea which led to filing of an appeal before the Hon'ble Supreme Court after discussing the authorities in detail, the Hon'ble Supreme Court held: (SCC pp. 442-44, para 24)

> "24. .....*The law may, therefore, now be taken to be settled as a result of this decision, that where the Government makes a promise knowing or intending that it would be acted on by the promisee and, in fact, the promisee, acting in reliance on it, alters his position, the Government would be held bound by the promise and the promise would be enforceable against the Government at the instance of the promisee, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Article 299 of the Constitution. It is elementary that in a republic governed by the rule of law, no one, howsoever high or low, is above the law. Everyone is subject to the law as fully and completely as any other and the Government is no exception. It is indeed the pride of constitutional democracy and rule of law that the Government stands on the same footing as a private individual so far as the obligation of the law is concerned: the former is equally bound as the latter. It is indeed difficult to see on what principle can a Government, committed to the rule of law, claim immunity from the doctrine of promissory estoppel. Can the Government say that it is under no obligation to act in a manner that is fair and just or that it is not bound by considerations of "honesty and good faith"? Why should the Government not be held to a high "standard of rectangular rectitude while dealing with its citizens"? There was a time when the doctrine of executive necessity was regarded as sufficient justification for the Government to repudiate even its contractual obligations; but, let it be said to the eternal glory of this Court, this doctrine was emphatically negatived in Indo-Afghan Agencies, AIR 1968 SC 718 and the supremacy of the rule of law was established. It was laid down by this Court that the Government cannot claim to be immune from the applicability of the rule of promissory estoppel and repudiate a promise made by it on the ground that such promise may fetter its future executive action. If the Government does not want its freedom of executive action to be hampered or restricted, the*

Government need not make a promise knowing or intending that it would be acted on by the promisee and the promisee would alter his position relying upon it. But if the Government makes such a promise and the promisee acts in reliance upon it and alters his position, there is no reason why the Government should not be compelled to make good such promise like any other private individual. The law cannot acquire legitimacy and gain social acceptance unless it accords with the moral values of the society and the constant endeavour of the Courts and the legislature, must, therefore, be to close the gap between law and morality and bring about as near an approximation between the two as possible. The doctrine of promissory estoppel is a significant judicial contribution in that direction. But it is necessary to point out that since the doctrine of promissory estoppel is an equitable doctrine, it must yield when the equity so requires. If it can be shown by the Government that having regard to the facts as they have transpired, it would be inequitable to hold the Government to the promise made by it, the Court would not raise an equity in favour of the promisee and enforce the promise against the Government. The doctrine of promissory estoppel would be displaced in such a case because, on the facts, equity would not require that the Government should be held bound by the promise made by it. When the Government is able to show that in view of the facts as have transpired since the making of the promise, public interest would be prejudiced if the Government were required to carry out the promise, the Court would have to balance the public interest in the Government carrying out a promise made to a citizen which has induced the citizen to act upon it and alter his position and the public interest likely to suffer if the promise were required to be carried out by the Government and determine which way the equity lies. It would not be enough for the Government just to say that public interest requires that the Government should not be compelled to carry out the promise or that the public interest would suffer if the Government were required to honour it. The Government cannot, as Shah, J., pointed out in the Indo-Afghan Agencies case, claim to be exempt from the liability to carry out the promise "on some indefinite and undisclosed ground of necessity or expediency", nor can the Government claim to be the sole Judge of its liability and repudiate it "on an ex parte appraisement of the circumstances". If the Government wants to resist the liability, it will have to disclose to the Court what are the facts and circumstances on account of which the Government claims to be exempt from the liability and it would be for the Court to decide whether those facts and circumstances are such as to render it inequitable to enforce the liability against the Government. Mere claim of change of policy would not be sufficient to exonerate the Government from the liability: the Government would have to show what precisely is the changed policy and also its reason and justification so that the Court can judge for itself which way the public interest lies and what the equity of the case demands. It is only if the Court is satisfied, on proper and adequate material placed by the Government, that overriding public interest requires that the Government should not be held bound by the promise but should be free to act unfettered by it, that the Court would refuse to enforce the promise against the Government. The Court would not act on the mere ipse dixit of the Government, for it is the Court which has to decide and not the Government whether the Government should be held exempt from liability. This is the essence of the rule of law. The burden would be upon the Government to show

that the public interest in the Government acting otherwise than in accordance with the promise is so overwhelming that it would be inequitable to hold the Government bound by the promise and the Court would insist on a highly rigorous standard of proof in the discharge of this burden. But even where there is no such overriding public interest, it may still be competent to the Government to resile from the promise "on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position" provided of course it is possible for the promisee to restore status quo ante. If, however, the promisee cannot resume his position, the promise would become final and irrevocable. Vide Ajayi v. R.T. Briscoe (Nigeria) Ltd. (1964) 1 WLR 1326."

37. The Hon'ble Supreme Court further went on to hold that it was not necessary for the petitioner to show that it had suffered any detriment, and it was enough that the petitioner had relied upon the promise or representation held out, and altered its position relying upon such assurance. Importantly, the Hon'ble Supreme Court held in paragraph 33 as under:

"33. ….."Of course, it may be pointed out that if the U.P. Sales Tax Act, 1948 did not contain a provision enabling the Government to grant exemption, it would not be possible to enforce the representation against the Government, because the Government cannot be compelled to act contrary to the statute, but since Section 4 of the U.P. Sales Tax Act, 1948 confers power on the Government to grant exemption from sales tax, the Government can legitimately be held bound by its promise to exempt the appellant from payment of sales tax. It is true that taxation is a sovereign or governmental function, but, for reasons which we have already discussed, no distinction can be made between the exercise of a sovereign or governmental function and a trading or business activity of the Government, so far as the doctrine of promissory estoppel is concerned. Whatever be the nature of the function which the Government is discharging, the Government is subject to the rule of promissory estoppel and if the essential ingredients of this rule are satisfied, the Government can be compelled to carry out the promise made by it. We are, therefore, of the view that in the present case the Government was bound to exempt the appellant from payment of sales tax in respect of sales of vanaspati effected by it in the State of Uttar Pradesh for a period of three years from the date of commencement of the production and was not entitled to recover such sales tax from the appellant."

38. After having so held, the Hon'ble Supreme Court then went on to hold that since the Government is bound to exempt the appellant from payment of sales tax for a period of three years w.e.f. 2.7.1970, being the date of commencement of the production of vanaspati, the appellant would not be liable to pay any sales tax, subject only to the State's claim to retain any part of such amount under any provision of law. In the absence of such claim, the State would have to refund the amount of sales tax collected by it from the appellant with interest thereon.

39. In the present case too, after having entered into a Scheme and thereafter created a Trust with an eyes wide open, the LIC cannot back out from its promise and it is clearly doing so especially when the Master Policy has not been executed between the parties.

40. In view of the aforesaid discussion, I find merit in these petitions and the same are accordingly allowed and consequently the proceedings of the LIC held on 23.11.2015 (Annexure P-13) are quashed and set-aside and the LIC is directed to pay pension and uptodate D.A. to the retirees of the HIMUDA as per the Scheme without any delay and are further directed not to withhold any amount of pension and DA in future, which is payable to the present and prospective retirees. Lastly, the LIC is restrained from raising any illegal demand for paying any additional amount since the amount other than which was mutually agreed in accordance with Scheme (Annexure P-8) as admittedly the said amount already stands paid to the LIC.

41. These petitions are disposed of in the aforesaid terms, leaving the parties to bear their own costs. Pending applications, if any, also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Ramakant Sharma & Ors. .....Petitioners
Versus
Bar Council of India & Ors. .....Respondents.

CWP No. 2496 of 2018
Reserved on: 08.04.2019
Date of decision: 26.04.2019.

Constitution of India, 1950 – Article 226 – **Advocates Act, 1961 -** Section 8(A) – **Bar Council of India Rules, 1975** - Rule 10 - Election of office bearers of Bar Council of Himachal Pradesh – Dispute of – Writ jurisdiction – Maintainability – Bar Council of India (BCI) constituting committee to supervise elections to State Bar Councils pursuant to directions of Hon'ble Supreme Court - Office bearers of Bar Council of Himachal Pradesh unanimously elected by its constituent members - Complaint to BCI by some advocates regarding improper conduct of elections – BCI directing parties to maintain *status quo ante,* resulting in nullifying such elections - Petition against – Complainant (R8) contending that since matter regarding elections to Bar Councils pending before Supreme Court, Writ not maintainable - Held, Hon'ble Supreme Court not adjudicating matter regarding elections to State Bar Councils – No restraint or order against entertaining petitions by High Courts pertaining to election disputes of State Bar Councils - Petition cannot said to be not maintainable. (Paras 5,24, 26 to 28)

Constitution of India, 1950 – Article 226 – Election of officer bearers of State Bar Council – Dispute of – Writ jurisdiction – Estoppel - State Bar Council unanimously electing its office bearers – Complainant (R8) and others filing complaint to BCI (R1) and alleging improper conduct of elections - BCI directing parties to maintain *status quo ante* - Petition against by elected members – Held, complainant found having attended and participated in meeting which unanimously elected office bearers – He even seconded one of office bearers - Newly elected office bearers conducted business for about one month – Complainant never raised dispute regarding election before Tribunal within stipulated period – Complainant estopped from challenging election - Petition allowed - Election of office bearers upheld.(Paras 28 to 30,38 to 42 & 45)

Cases referred:
Bejgam Veeranna Venkata Narasimloo and others vs. State of A.P. and others, (1998) 1 SCC 563
Chhabil Dass vs. Inder Singh and others, AIR 1976 HP 6

For the Petitioners: Mr. B. C. Negi, Sr. Advocate with Mr. Basant Thakur, Advocate.

For the Respondents: Mr. N. K. Sood, Sr. Advocate with Mr. Aman Sood, Advocate, for respondent No. 1.
Mr. K. S. Banyal, Sr. Advocate with Mr. Inder Rana, Advocate, for respondents No. 2 & 3.
Mr. Shrawan Dogra, Sr. Advocate with Ms. Megha Kapur Gautam, Advocate, for respondent No. 8.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

This writ petition is directed against the resolution passed by the Bar Council of India in its meeting held on 15.09.2018, whereby it has ordered the maintenance of status quo as existed prior to 07.08.2018, while entertaining a petition filed by seven Members of the Bar Council of Himachal Pradesh and has been filed for the following substantive relief(s):-

> *"(I) Issue a writ in the nature of certiorari to quash and set aside annexure P-45 dated 15.09.2018 consequently upholding elections of the petitioners No. 1 to 3 as Chairman, Vice Chairman and Member-Representative to Bar Council of India and that of petitioners No. 4 to 8 as members of various committees.*
>
> *(II) Issue a writ in the nature of mandamus directing respondents not to give effect to the annexure P-45, dated 15.09.2018."*

2.1. It is the pleaded case of the petitioners that previously elections to the Bar Council of Himachal Pradesh were held in the year, 2011 and the same were published in the Gazette on 27.06.2011. The term of the State Bar Council expired on 26.06.2016 and was extended till 26th December, 2016 and thereafter a Special Committee was constituted by Bar Council of India as per its resolution dated 27.12.2016. This Committee was constituted under Section 8(A) of Advocates Act, 1961 and comprised of the then Advocate General, as its Chairman and Shri Amit Vaid and Shri Sandeepan Sharma, Advocates, as its Members.

Since, the six months period of Special Committee was to expire, therefore, the Secretary of Bar Council of Himachal Pradesh i.e. respondent No. 2, wrote to the respondent No.1 for extension of the period of Special Committee vide communication dated 23.06.2017. The terms of the Special Committee was extended vide communication dated 24.06.2017. Respondent No. 1 vide communication dated 05.02.2018, intimated respondent No. 2 with respect to the constitution of three (3) Election Tribunals/Committees for looking into and deciding election disputes arising before or after elections of various State Bar Councils. In so far as the Bar Council of Himachal Pradesh is concerned, the Election Tribunal/Committee No. 2 headed by Hon'ble Mr. Justice L. Narasimha Reddy, former Chief Justice, Patna High Court as Chairman, Hon'ble Mr. Justice Akhilesh Chandra, former Judge, Patna High Court and Hon'ble Mr. Justice P. R. Shivakumar, former Judge,

Patna High Court and Madras High Court as Members. The resolution of the Bar Council of India, in turn, was approved by Hon'ble Supreme Court vide its order dated 23.03.2018.

2.2. The elections of the State Bar Council were held on 28.03.2018 and the counting was done on 08.04.2018 and 15 Members were declared elected. In terms of the order passed by the Hon'ble Supreme Court on 23.03.2018, the complaints were required to be considered by Election Tribunal, which were duly considered and vide communication dated 26.09.2018, respondents No. 2 and 3 were duly communicated, after disposal of the complaints, that 15 members were elected to the State Bar Council of Himachal Pradesh.

2.3. That the elections of the 15 Members who were duly elected to the State Bar Council of Himachal Pradesh had been approved and authorities were accordingly directed by the Tribunal to publish their names in the official gazette vide Notification dated 9th July, 2018. Thereafter, respondent No. 1 vide communication dated 30.07.2018 directed respondent No. 2 to hold elections to the various posts of Chairman, Vice-Chairman, Executive Chairman, four Co-Chairmen and Member-Representative to Bar Council of India and other office bearers of Bar Council including members of various Committees, if any, on 07.08.2018 and the State Bar Council was directed to issue Schedule of election.

Since Rule 4 of the Bar Council of Himachal Pradesh (Constitution and Conduct of Business) Rules, 1999, only provided for election of three posts i.e. Chairman, Vice-Chairman and Member Representative, Bar Council of India, therefore, respondent No. 2 sought clarification from respondent No. 1. Thereafter, respondent No. 1 vide communication dated 01.08.2018 directed respondent No. 2 to hold election for aforesaid three posts only.

2.4. It is a further case of the petitioners that respondent No.2 directed the Members of Special Committee on the directions of its Chairman to hold a meeting on 01.08.2018 at 3:00 pm in the office of Bar Council of Himachal Pradesh, which was accordingly held and the Schedule of election therein was fixed as 07.08.2018, at 2:00 pm and the venue for the nomination and election was fixed in the office of Bar Council of Himachal Pradesh. Accordingly, intimation was sent by respondent No.2 to all the 15 newly elected members of the Bar Council of Himachal Pradesh, Returning Officer as well as the learned Advocate General vide communicated dated 02.08.2018.

2.5. As regards the election for the posts of Chairman and Vice-Chairman, Bar Council of Himachal Pradesh, that was required to be conducted by the Returning Officer and for the purpose of election of Member Representative, Bar Council of India, Secretary, Bar Council, Himachal Pradesh was Returning Officer. According to the petitioners, the election to the aforesaid three posts was unanimous.

2.6. Petitioners No. 1 to 3 were unanimously elected as Chairman, Vice-Chairman and Member-Representative of the Bar Council of Himachal Pradesh on 07.08.2018 at 2:00 p.m. and proceedings to this effect were drawn vide Annexure P-26. The copies of signatures of all the members present including the Secretary as well as Returning Officer have been appended as Annexure P-27. Intimation with regard to the unanimous election was duly sent to respondent No. 1 vide communication dated 07.08.2018 through e-mail at 4:30 pm alongwith all the relevant documents.

All the Members of the Bar Council including the Chairman and Vice-Chairman were intimated vide communication dated 08.08.2018, regarding the next meeting of Bar Council to be held on 19.08.2018 at 11:00 am in the office of the Bar Council. The Agenda of the meeting was also sent by e-mail on 16.08.2018.

Accordingly, on 19.08.2018, out of 15 Members of the Bar Council, 14 Members were present and have appended their signatures on the attendance register (Annexure P-34) and the Minutes of the Meeting have been annexed as Annexure P-33. As many as 41 items were discussed and deliberated upon and even decision was taken on those items.

2.7. On 28.08.2018, respondent No. 1 addressed a communication to the Secretaries of Bar Councils for sending two representatives, preferably the Chairman and Vice-Chairman for the purpose of attending a meeting on 01.09.2018 at 11:00 am in the auditorium of Bar Council of India, which was attended by petitioners No. 1 and 2 being the Chairman and Vice-Chairman of the Bar Council of Himachal Pradesh. Thereafter, petitioners No. 1 to 3 in the capacity of the Chairman, Vice-Chairman and Member of the Bar Council of Himachal Pradesh attended the joint meeting of the Bar Council held on 01.09.2018, wherein all the arrangements of boarding, lodging etc. were made by the Bar Council of India.

Not only this, in the joint meeting held on 01.09.2018, the Chairman, Bar Council of India, honoured the Chairman, Vice-Chairman as well as Member Representative, Bar Council by presenting a bouquet and petitioner No. 1 in the capacity of Chairman of Bar Council of Himachal Pradesh called upon to address the august house.

Thereafter vide communication dated 05.09.2018, respondent No. 1 made reference of the joint meeting and directed the State Bar Councils to hold a press conference and every Bar Associations of the Country was directed to hold a meeting on 17.09.2018 at the respective headquarters and to have an awareness drive amongst the legal fraternity and thereafter pass resolutions which were required to be handed over to the authorities specified therein.

After receipt of the aforesaid communication, respondent No. 2 wrote to all the Presidents of all the Bar Associations vide communication dated 06.09.2018. Accordingly, the petitioners held a press conference on 11.09.2018, at 1:30 pm in the Hotel Holiday Home (Dragon Hall), which was chaired by petitioner No. 1 and was attended by Shri Amit Vaid and Shri Lovneesh Kanwar, Members.

The Bar Council of Himachal Pradesh vide communication dated 27.09.2018 sent the specimen signatures of petitioner No. 1 as Chairman, Bar Council of Himachal Pradesh to respondent No. 1.

2.8. The petitioners thereafter received a notice from the Secretary of respondent No. 2 dated 12.10.2018, which was accompanied vide communication dated 11.10.2018 from respondent No. 1 wherein the extract of minutes of meeting of respondent No. 1 dated 15.09.2018 was enclosed whereby respondent No. 1 has ordered the status quo as it exists prior to 07.08.2018 and the same has been assailed on various grounds like estoppel, impugned order being issued without any authority, violation of statutory provisions and principles of natural justice, equity and fair play and malafides etc. etc.

3. This Court vide order dated 23.10.2018 stayed the operation of the impugned Annexure P-45 to the extent it directed the parties to maintain status quo as existed prior to 07.08.2018.

4. It is only respondents No.1 and 8, who have contested this petition.

5.1. In reply filed by respondent No. 8 (Shri Amit Vaid, Member), preliminary submissions have been raised, questioning the very maintainability of this petition and the jurisdiction of this Court to entertain the same. It is averred that the Bar Council of India

Certificate and Place of Practice (Verification)Rules, 2015 were challenged before various High Courts in the country and in some of the cases even stay has been granted, therefore, Hon'ble Supreme Court of India has called all the matters from various High Court to adjudicate all these matters. During the pendency of the transferred matter, the issue with regard to conducting all elections to various Bar Councils in the country also came up before the Hon'ble Supreme Court and various orders from time to time have been passed. Reference in particular is made to the order dated 13.03.2018 whereby the Hon'ble Supreme court while quashing the order passed by the High Court of Madras observed as under:

> *"We are of the considered opinion that since the elections to the State Bar Council are being conducted under the directions of this Court, the High Court of Madras is not justified in giving directions to the Bar Council of India, Returning Officer and the Director General of Police as mentioned in paragraphs 31(A) (B) and (C) of the impugned order."*

5.2. In this order, the Hon'ble Supreme Court also directed the respective Committees appointed by the Bar Council of India to follow the directions given by the Bar Council of India while conducting the elections and ensure its strict compliance. It is further averred that since the Hon'ble Supreme court is supervising the elections being held to the various State Bar Councils, therefore, the impugned order having been passed by the Bar Council of India cannot be challenged before this Court as in the facts and circumstances it would not be proper to this Court to entertain the present writ petition virtually challenging the election process.

5.3. Another preliminary submission has been raised to the effect that the petitioners have not approached the Court with clean hands and have concealed material facts while filing the present writ petition as such the petition deserves to be dismissed. It is averred that petitioners No. 1 to 3 have not been elected to the post of Chairman, Vice-Chairman and Member Bar Council, respectively as the so-called election to these three posts have not been approved by the Bar Council of India as required vide order dated 23.03.2018, relevant portion whereof reads as under:-

> *"That though the counting process will go on after elections and the result of the members will also be declared; But the result will not be sent for publication in the official Gazette and will not attain finality, unless the concerned tribunal finally approves the said result after holding enquiry, if any, into the complaints made. The result will be sent for publication in the official Gazette only after getting approval from the Tribunal's and the Bar Council of India. The office is directed to place the resolution before the Hon'ble Tribunal's for the needful. The same principle will apply for the election of Chairman, Vice-Chairman, representative-Member and other posts of State Bar Councils/bar Council of India."*

5.4. According to this respondent, there is no such approval granted by the Bar Council of India to the so-called elections of petitioners No. 1 to 3 and, therefore, the functions being discharged by these three petitioners on the above-mentioned posts are not only illegal but are without any authority. It is also averred that the seven elected members of the Bar Council of Himachal Pradesh had submitted a representation to the Chairman, Bar Council of India requesting him to conduct the elections for the post of Chairman, Vice-Chairman and Member-Representative Bar Council of India. In this representation, it was submitted that as directed by the Bar Council of India vide letter dated 30.07.2018, a detailed schedule for holding election to above-mentioned three posts was required to be published by the Special Committee and nominations in this regard were to be submitted

before the Secretary, Bar Council of Himachal Pradesh, but, no schedule was published whereby the nominations could be filed by the interested candidates, nominations were not filed by any candidate but the petitioners constituted a body without adhering to the various resolutions passed by the Bar Council of India and directions issued by the Hon'ble Supreme Court. It was also pointed out in the representation that a meeting was called on 19.08.2018 in which it was discussed that since no election in the eyes of law has taken place, therefore, the Bar Council of India be requested to hold the elections as per the mandate of the Hon'ble Supreme Court.

5.5. The Bar Council of India after taking into consideration the aforesaid representation passed a resolution dated 15.09.2018 whereby a Committee comprising of Justice M. Y. Eqbal, former Judge Supreme Court of India, Justice Ahsanuddin Amanullah, Judge Patna High Court, Justice Shashi Kant Gupta, Judge Allahabad High Court, Shri Satish Deshmukh, Vice-Chairman, Shri Vijay Bhatt and Shri Prashant Singh was constituted to look into the allegations made in the representation. While passing the resolution dated 15.09.2018, the status quo as existed prior to 07.08.2018 was ordered to be maintained.

5.6. In the third preliminary objections raised, respondent No. 8 has pointed out that petitioner No. 7 who is stated to have seconded the candidature of petitioner No. 1 as per record annexed with the writ petition, while appearing before the Special Committee had submitted a reply affidavit endorsing the contents of the representation made by seven members of the Bar Council of Himachal Pradesh. Similarly, petitioner No. 8, who is stated to have proposed the name of petitioner No. 2 for the post of Vice-Chairman, while filing reply before the Special Committee has endorsed the contents of the representation filed by the seven members. As regards the replying respondent, it has been averred that he has never seconded the name of petitioner No. 3 for the post of Member-Representative of the Bar Council of India. It is also averred that respondents No. 5 and 6 i.e. S/Shri Sandeepan Sharma and Rajiv Rai, Advocates and Members Bar Council of Himachal Pradesh have filed common reply before the Special Committee submitting therein that no schedule was finalised by the Special Committee with regard to holding of elections to the above-mentioned three posts.

5.7. The fourth and last preliminary submission is to the effect that the Bar Council of India has constituted a Special Committee to look into the representation made by the seven members, as was required in terms of the directions passed by the Hon'ble Supreme Court in its order dated 23.03.2018. Since, the Bar Council of India has passed a resolution dated 15.09.2018, which virtually tries to bring back the position as it existed before the so-called elections and to bring all actions strictly in conformity with the orders passed by Apex Court from time to time in the matter. Therefore, the writ petition in the facts and circumstances of the case ought to be dismissed.

5.8. On merits, the preliminary objections as raised above, have been reiterated and even while replying to para-wise grounds has relied upon the preliminary objections.

6.1. Respondent No. 1 i.e. Bar Council of India, has not chosen to file separate reply, however, it has filed an affidavit for submitting original record of six men Committee appointed by the Bar Council of India on the issue of the elections to the post of Chairman, Vice-Chairman and Member-Representative to the Bar Council of India from the State Bar Council of Himachal Pradesh. In the affidavit, reference is made to the resolution passed by Bar Council of India dated 15.09.2018, wherein six men Committee (supra) was constituted and reference has further been made to the order of the status quo. It is averred that six men Committee appointed by the Bar Council of India prepared its report dated 05.01.2019

and the same is enclosed in a sealed cover as Annexure-A. This report was placed before the General Council at its meeting held on 12.01.2019 and the same was duly accepted and it was resolved as follows:-

> *"The report is accepted. The Bar Council of Himachal Pradesh has to conduct a fresh election of the Office Bearers and the Member-Representative to the Bar Council of India. However, the date is to be fixed by the Hon'ble Chairman in consultation with the Ex-Officio Members of the State Bar Council after the final disposal of CWP No. 2496 of 2018 (Ramakant Sharma & Ors. vs. Bar Council of India & Ors.), pending before the Hon'ble High Court. The office is to bring this report and this resolution on record before the Hon'ble High Court of Himachal Pradesh. The resolution of this Council is subject to final order of Hon'ble High Court."*

6.2. The resolution of the Council has been attached with the affidavit in a sealed cover as Annexure-B. The justification for such course is sought to be justified in para 6 of the affidavit, wherein it is averred that the Hon'ble Supreme Court vide its order dated 23.03.2018 passed in ***IA No. 39883 of 2018 in Transferred Case (Civil) No(s). 126 of 2015 in the matter of Ajayinder Sangwan versus Bar Council of Delhi and Ors.*** had directed that the resolution of both the General State Bar Council Elections and the Elections of the office bearers of the State Bar Council should be sent for publication only after approval from the Election Tribunal and the Bar Council of India after having satisfied themselves with the fairness of such elections. This six men Committee was constituted by the Bar Council of InNo. 7 who is stated to have seconded the candidature of petitioner No. 1 as per record annexed with the writ petition, while appearing before the Special Committee had submitted a reply affidavit endorsing the contents of the representation made by seven members of the Bar Council of Himachal Pradesh. Similarly, petitioner No. 8, who is stated to have proposed the name of petitioner No. 2 for the post of Vice-Chairman, while filing reply before the Special Committee has endorsed the contents of the representation filed by the seven members. As regards the replyindia in pursuance to the aforesaid order to submit its report to the General council of the Bar Council of India and further as per Rule-10, Part-II, Chapter-I of the Bar Council of India Rule. Thereafter the Rule 10, Part-II, Chapter-I of the Rules have been quoted.

6.3. At this stage, it may be noted that petitioners No. 7 and 8 filed applications for withdrawal of the writ petition on their behalf on the ground that they do not want to pursue the aforesaid writ petition and the same was duly allowed by this Court vide its order dated 09.01.2019. However, it appears that there is typographical error in the said order and instead of the writ petition on behalf of petitioners No. 7 and 8 being dismissed as withdrawn, it has erroneously been reflected that writ petition qua respondents No. 7 and 8 has been ordered to be withdrawn. This position is not disputed by any of the parties to the *lis*.

7.1. Reference now is required to be made to the reply filed by respondents No.2 and 3, who in their preliminary submissions have averred that respondent No. 2 had received a communication dated 30.07.2018 from the Bar Council of India with regard to the schedule of election for the post of Chairman, Vice-Chairman and Member-Representative. A detailed reference to the communication dated 30.07.2018 from the Bar Council of Himachal Pradesh with regard to the schedule of elections of various posts have been referred to and then the clarification sought by respondent No. 2 from respondent No. 1 in terms of Rule 4 of Bar Council of Himachal Pradesh (Constitution and Conduct of Business), Rules 1999, wherein the only election to three posts provided i.e. Chairman, Vice-Chairman and Member-Representative. Preliminary submission has been raised explaining why and how

permission for conducting elections for the post of Chairman, Vice-Chairman and Member-Representative, Bar Council of India, in terms of Rule of of the Bar Council was necessitated. It is further averred that a communication was addressed to the Members of the Special Committee i.e. S/Shri Sandeepan Sharma and Rajiv Rai, for the meeting to be held on 01.08.2018 at 3:00 pm in the office of Bar Council Himachal Pradesh to discuss the detailed schedule of election for the aforesaid three posts. However, the replying respondents got e-mail on 01.08.2018 whereby the Bar Council of India gave permission for holding election to three posts only. On the basis of such communication, the following resolution came to be passed:-

> *"That keeping in view the response received from Bar Council of India on 01.08.2018 w of Business) Rules, 1999, as per the schedule as under:-*
>
> *Date and Time for Election i.e. 07.08.2018 at 2:00 pm. The venue for the nomination and election will be in the office of Bar Council of Himachal Pradesh, Ravens Wood, High Court Complex, Shimla, 17.r.t. the clarification to be sought by the State Council for the number of posts for which elections are to be conducted on 7th of August, 2018 the office is directed to inform all the 15 members of Bar Council of Himachal Pradesh that there will be election for three posts only i.e. for the post of Chairman, Vice-Chairman & Member-Representative of Bar Council of India, for which the election will be held on 7th of August, 2018 as per Bar Council of Himachal Pradesh (Constitution and Conduct 1001. The relevant portion of minutes of the meeting dated 01.08.2018 is being placed on record as marked as Annexure R-2/E."*

7.2. It is further averred that as per the unanimous decision of the Special Committee meeting held on 01.08.2018, all the 15 newly elected members of the State Bar Council were informed vide communication dated 02.08.2018 regarding the date, time and venue for holding elections for three posts and the copies of the same were also endorsed to the Advocate General and Shri Ravinder Bhandhari, Returning Officer for information. It is further averred that on the same date i.e. 02.08.2018, a separate communication was also addressed to Shri Ravinder Bhandhari, Returning Officer, for holding elections for the posts of Chairman, Vice-Chairman on 07.08.2018 at 2:00 pm in the office of Bar Council Himachal Pradesh. It is further averred that copy of communication dated 02.08.2018 alongwith information of the election schedule was also given to all the newly elected members of the Bar Council by two modes, first by Speed Post and second by e-mail. That apart, letters were also served upon local members based in Shimla through Bar Council Peon. As per the schedule, all the 15 members of the Bar Council remained present for the election in the office of Bar Council of Himachal Pradesh as per the time given in the communication addressed to them and they also marked their presence in the attendance register, extract whereof has been placed as Annexure R-2/H.

7.3. It is averred that as per the directions issued by the Bar Council through Shri Ravinder Bhandhari, Returning Officer, conducted the proceedings of the election for the post of Chairman and Vice-Chairman in presence of the learned Advocate General Shri Ashok Sharma, who was performing twin responsibility (i) as Chairman of Special Committee under whose supervision the election was conducted (ii) as ex-officio member of the Bar Council of Himachal Pradesh. Shri Ajay Kumar Sharma, Member, Bar Council Himachal Pradesh proposed the name of Sh. Ramakant Sharma for the post of Chairman and the proposal was seconded by Shri Rohit Sharma, Member of Bar Council of Himachal Pradesh. Since no other name was proposed for the post of Chairman for 10 minutes in spite of Returning Officer making inquiry w.r.t. the candidature of any other candidate for the said post and ultimately the Returning Officer declared Shri Ramakant Sharma elected

as Chairman. The election was unanimous. Thereafter, the Returning Officer asked the members to put forth their proposal for election to the post of Vice-Chairman of Bar Council of Himachal Pradesh, Shri Rakesh Kumar Acharya, Member, Bar Council of Himachal Pradesh proposed the name of Shri Narender Singh for the post of Vice-Chairman, the proposal was seconded by Shri Arvind Dhiman, Member, Bar Council of Himachal Pradesh since there was no other name proposed for the said post and Shri Narender Singh was declared elected by the Returning Officer as Vice-Chairman. Thereafter, the member Bar Council of Himachal Pradesh dispersed with the understanding to re-assemble after thirty minutes. After thirty minutes all the members of the Bar Council including ex-officio member re-assembled and the Secretary/Returning Officer for conducting the proceedings for electing member representative Bar Council of India started.

7.4. Thereafter, the election for the post of Member representative Bar Council of India was conducted wherein Shri I. N. Mehta, Member, Bar Council of Himachal Pradesh proposed the name of Shri Desh Raj Sharma which was seconded by Shri Amit Vaid, Member, Bar Council of Himachal Pradesh. Since no other candidate was in the fray, Shri Desh Raj Sharma was declared unanimously elected. Copy of election proceedings conducted by Bar Council of Himachal Pradesh by two Returning Officer has been annexed as Annexure R-2/I. It is further averred that the conduct and declaration of result was immediately communicated to the Bar Council of India vide e-mail on 07.08.2018 at 4:30 pm with five attachments, the screen shot whereof is being annexed as Annexure R-2/J. It is also averred that the hard copy of the same was sent by registered post to the Chairman, Bar Council of India and this practice is continuing since long.

7.5. Thereafter, on 19.08.2018, the General House meeting of the Bar Council of Himachal Pradesh was convened in which all the elected members except Shri Naresh Thakur were present and the learned Advocate General was also present. The extract of the attendance register has been placed as Annexure R-2/K. The agenda of the said meeting contained 41 items, which was also sent by e-mail to all the Members including the ex-Officio Member, Bar Council of Himachal Pradesh and in the meeting so held on 19.08.2018 in the office of Bar Council of Himachal Pradesh at 11:00 am was attended by 14 elected members and the learned Advocate General wherein all the 41 items in the agenda were discussed by office bearers and the Members of the Bar Council of Himachal Pradesh. During this meeting, agenda item No. 17 was also discussed and it was unanimously resolved to constitute 25 Committees which were accordingly constituted. Copy of them have been annexed as Annexure R-2/L.

7.6. It is also averred that vide communication dated 28.08.2018 had sent an invitation for a joint meeting with Bar Councils of States of the country and two representatives/office bearers of the Bar Council of the State were requested to attend the joint meeting to be held on 01.09.2018 at 11:00 am in the auditorium of Bar Council of India, which was duly attended by petitioner No. 1 as Chairman and petitioner No. 2 as Vice-Chairman of the Bar Council of Himachal Pradesh.

7.7. While filing reply on the merits, respondents No. 2 and 3 have not denied any of the submissions as made in the writ petition.

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

8. The Court, at this stage, is required to consider the jurisdiction of this Court to entertain this petition on the objections raised by respondent No. 8 to the effect that the Hon'ble Supreme Court is in seisin of the matter and, therefore, it is only the Hon'ble

Supreme Court which has jurisdiction to give directions. What appears from the orders passed by the Hon'ble Supreme Court from time to time in ***Ajayinder Sangwan's case*** *(supra) is* that initially the issue before it was only pertaining to identification of fake lawyers and the steps taken by respondent No. 1 Bar Council of India to cause an enquiry and to find out fake lawyers. So as to identify such action of the Bar Council of India would affect the lawyers who are not members of the Bar Association. Another grievance, which was placed before the Hon'ble Supreme Court in the hearing held on 02.11.2015 was with regard to persons who were carrying out as elected members of the State Bar Council or their tenure had expired. It was then the Hon'ble Supreme Court requested respondent No. 1 to take necessary steps in accordance with the provisions of the Advocates Act, 1961 to remove such discrepancies in the matter.

9. On 10.05.2016, it was pointed out to the Court that Bar Council of India had taken steps to cause enquiry to find out fake lawyers and had sought reply from the concerned State Bar Council. Therefore, all the Bar Councils were directed to take necessary steps to conclude the proceedings by 30.06.2016. Vide order dated 10.06.2016, the Hon'ble Supreme Court directed that Rule 5(a) of Certificate and Place of Practice (Verification) Rules, 2015 would not be given effect to till the next date of hearing. On 30.06.2016, all the State Bar Councils were impleaded as party-respondents.

10. In the interregnum, vide order dated 30.06.2016, time to complete the verification was extended by three months i.e. up to 30.09.2016. When the matter subsequently came up before the Hon'ble Supreme Court on 29.07.2016, the Court reiterated that the date i.e. 30.09.2016 should be taken as final date for taking steps by the Bar Councils of all States to complete process and it was further made clear that if this is not done by that time, the pendency of this matter before the Hon'ble Supreme Court would not stand in the way to hold elections, where it is due or where the office bearers, though, their term is over, are continuing in office. Rather, it was specifically stated that in such cases the Bar Council will proceed to hold elections.

11. On 27.09.2016, respondent No. 1 was directed to take all steps and prepare a chart giving its suggestions to facilitate early election. When the matter subsequently came up before the Hon'ble Supreme Court on 04.10.2016, respondent No. 1 informed the Hon'ble Supreme Court that the process of verification of fake lawyers was not complete and a request was made to extend time to complete its exercise upto 30.11.2016 and on such representation time to complete the verification was extended upto 30.11.2016. Lastly, it was directed that respondent No. 1 - Bar Council of India and State Bar Councils shall complete the process and submit its status report in the first week of February, 2017, thereafter the Hon'ble Supreme Court would consider the fixation of dates for elections to be conducted. On 02.05.2017, the Hon'ble Supreme Court directed all the Bar Councils to furnish necessary data within four weeks' with regard to the verification.

12. On 23.08.2017, the Hon'ble Supreme Court passed a detailed order. Even on the said date, the Hon'ble Supreme Court was informed that the Bar Council of India as well as the respective Bar Councils had not completed the verification which necessitated the Court to pass the following orders:-

> *"7. We have been informed by learned senior counsel for the Bar Council of India as well as the respective State Bar Councils that the process of verification is not completed yet. In view of that, to do complete justice to the parties, it would be proper for us to provide a last opportunity for the same as mentioned below:-*

(1) 15 (fifteen) days' time be given to cure the defective applications by the concerned Advocates and to all such advocates to submit their complete application forms for necessary verification of their degrees if they have not submitted the same earlier, from the date of publication of advertisement in two leading newspapers, one in English language and the other in regional language having wide circulation in the respective State/Union Territories, for which advertisement shall be published within 7 days from the passing of this order.

(2) 1 (one) month time for verification of applications, without any charge, by the State Bar Councils, after the expiry of the above 15 (fifteen) days.

(3) The University Authorities shall ensure the verification of degrees awarded by them, without any charge, within 1 (one) month on its presentation.

(4) The respective State Bar Councils shall publish a Final Electoral Roll by including the names and particulars of such advocates, whose degrees attached with the application forms have been verified by the concerned University authorities. The name of all such advocates who have not removed the defects in the application forms already submitted within the specified time and also such persons whose degrees on verification have been found false or fake by the Universities authorities shall not be included in the Electoral Rolls.

(5) Bar Council of India to declare the schedule of elections in respective State Bar Councils to be held after the expiry of 75 (seventy five) days, as mentioned above, within one week mentioning therein:-

(i) 15 days for nomination.

(ii) 1 week for withdrawal of nomination.

(iii) to upload final candidates' list in 1 (one) week.

(iv) to decide the date of election.

8. We further make it clear that all the steps be taken by all the parties concerned in the matter for the purpose of elections in respect of all the Bar Councils where the term of the existing members have already expired or to be expired. We further make it clear that although this order has been passed in favour of the verification only for the purpose of the election but it would also include for the purpose of the verification of all other learned lawyers who have already applied within the time stipulated by this Court.

9. We direct all the State Bar Councils to take necessary steps and to conclude all proceedings by 31.12.2017 and send a reply to the Bar Council of India. Thereafter, the Bar Council of India, after receiving all the replies from the State Bar Councils, would file a status report.

10. We, hereby, authorize the Bar Council of India to notify all the State Bar Councils, by way of publication in two leading newspapers, that they must take all steps to complete the process before 31.12.2017.

11. The Bar Council of India is directed to request a retired Judge of the Supreme Court in order to control and supervise the verification process and preparation of electoral Rolls. We direct the Bar Council of India to take all steps in this regard immediately in order to do the needful. All concerned are directed to render full assistance and cooperation to the Verification

Committee. List the matter in the second week of January, 2018 on a Non-Miscellaneous Day."

13. On 11.09.2017, the Hon'ble Supreme Court clarified its earlier order dated 23.08.2017 to the effect that the petitioners therein would be at liberty to approach the Committee for pre-poning and change of the date of election. The matter thereafter came up before the Hon'ble Supreme Court on 24.11.2017 and again a detailed order was passed and the advocates, who had submitted their forms with Law Degrees but their cases were still pending for verification, were provisionally permitted to participate in the election by including their names in the electoral roll. However, it was made clear that if such advocates are found false or fake as per the report of the concerned University/authority, then appropriate orders in relation to their enrollment and also in relation to the elections in which they were allowed to participate would accordingly be passed by the Court on receipt of the report of the Committee. In para-9 of the order, it was made clear that the result of the election would be subject to the final result of this petition (*Ajayinder Sangwan versus Bar Council of Delhi and Ors*.).

14. On 14.12.2017, a request was made by the parties to extend time for publishing electoral list as also deciding the objections regarding the name of electoral roll but the request was declined. However, the date from 24.11.2017 was extended upto 15.01.2018 to publish Electoral List and it was directed that election would start from 15.02.2018 and should be completed within a period of six weeks.

15. On 05.02.2018, the Hon'ble Supreme Court dismissed the contempt petition that had been filed against the Bar Council of India for not finalising the schedule for election as the Hon'ble Supreme Court was satisfied that the Bar Council of India had finalised the said schedule in respect of the State Bar Councils, which was termed by the Hon'ble Supreme Court to be just and proper.

16. On 13.03.2018, the issue before the Hon'ble Supreme Court pertained to the order passed by the Madras High Court on 16.02.2018 and while staying the said order, the Hon'ble Supreme Court observed as under:-

> *"We are of the considered opinion that since the elections to the State Bar Council are being conducted under the directions of this Court, the High Court of Madras is not justified in giving directions to the Bar Council of India, Returning Officer and the Director General of Police as mentioned in paragraphs 32(A) (B) and (C) of the impugned order.*
>
> *Therefore, the directions given in the said order as contained in paragrpahs 32(A) (B) and (C) are hereby stayed, till the elections are held and result are announced.*
>
> *We, however, direct that the respective Committees appointed by the Bar Council of India to follow the directions given by the Bar Council of India while conducting the elections and ensure its strict compliance."*
>
> *In view of the above, the application stands disposed of."*

17. On 23.03.2018, the Hon'ble Supreme Court directed that the following resolutions passed by the Bar Council of India be given effect to:-

> *"a) The State Bar Councils/Returning Officers are further requested to provide CCTV cameras or video-coverage for the process of polling at sensitive polling booths. It is further resolved that any candidate, if found using any sort of unfair means, corrupt practice, bribing the voters, throwing lunch, dinner*

parties, breakfast etc. in and around the polling booths (for getting votes) should be debarred from contesting elections and their candidatures will be cancelled by the Tribunal.

b) That though the counting process will go on after elections and the result of the members will also be declared; But the result will not be sent for publication in the official gazette and will not attain finality, unless the concerned Tribunal finally approves the said result after holding enquiry, if any, into the complaints made. The result will be sent for publication in the official gazette only after getting approval from the Tribunals and the Bar Council of India. The office is directed to place the resolution before the Hon'ble Tribunals for the needful.

The same principle will apply for the elections of Chairman, vice-Chairman, representative-Member and other posts of State Bar Councils/Bar Council of India. The Bar Council of India shall fix the schedule for the elections of the aforementioned posts after getting the final approval from the concerned Tribunals and after getting satisfied with the fairness of the elections. All the disputes and complaints are to be disposed of before the publication of the result in the official gazette.

c) That to request the Hon'ble member in-charge of the Tribunal for the State Bar Council of Bihar to appoint 5 Co-observers in order to aid and assist the Hon'ble Observer for the State Bar Council of Bihar. This proposal is being made in view of serious complaints made by some Bar Associations and the Advocate Mr. Avinash Motihari. The five Co-observers will be authorized to look after the entire affairs of the elections of the State of Bihar and to report to the Hon'ble Observer and the Hon'ble Member in-charge for the State of Bihar of the Tribunal.

I.A. is disposed of accordingly."

18. The case came up before the Hon'ble Supreme Court on 16.07.2018 and it was observed as under:-

"I. A. D. No. 85817 of 2018

Taken on Board.

By our orders dated 14.05.2018 insofar as it pertains to Delhi and 06.06.2018 so far as it pertains to Kerala, we have passed orders in which we have made it clear that objections to the results of all elections held to the various Bar Councils in the States may be held as expeditiously as possible after which the result may be declared. We do the same in the present I.A. also.

I.A. No. 83546 of 2018 and I.A. No. D 85817 of 2018 are disposed of accordingly."

19. The aforesaid order was followed by another order passed by Hon'ble Supreme Court on 07.12.2018, which reads thus:-

*"**IA No. 170780/2018***

By an order dated 21.01.2018, the Bar Council of India had set up 3 Committees/Tribunals for looking into and ensuring free and fair elections and to ensure full compliance of our orders. These three Tribunals were to be headed by three former Chief Justices of the High Courts, who will not only supervise and have a full control on process of election of the State Bar

Councils, but were also empowered to decide any election dispute arising before or after the election in the State Bar Councils expeditiously.

On 05.02.2018, this Court, referred in paragraph 4 of this Order to the order of the Bar Council of India in the context of elections to the State Bar Councils of Tamil Nadu and Puducherry.

Insofar as the State of Karnataka is concerned, we had, by our order dated 24.10.2018, stated as under:-

> *"We are informed that the elections have since been held on 18.03.2018. The results, however, have not been declared despite a direct order of this Court stating that it should be declared immediately.*
>
> *Mr. S. N. Bhat inform us that the Tribunal has decided to sit on the 28th of this month in order to resolve all objections. The tribunal will complete hearing of the objections on that date itself and deliver its order within a week therefrom. The elections results be declared thereafter in accordance with law."*

On being informed that our order had not been complied with in that the Tribunal had not completed hearing of objections and delivered its order within a week, this Court then passed the following order:-

> *"We had issued several orders in this matter in the fond hope that the Tribunal would decide the objections within time. This hope has been belied. We understand from learned counsel appearing before us that the Bar Council election results have since been declared, subject to the Tribunal deciding objections.*
>
> *We are of the view that the available remedy in law is contained in Rule 32 of the Karnataka State Bar Council Election Rules, 1971. The results that have now been declared will stand declared finally i.e. they will no longer be subject to the Tribunal deciding objections.*
>
> *We may only indicate that all objections that have been filed before the Tribunal and any other further objections that may occur post declaration of results should follow the drill of Rule 32 as aforesaid.*
>
> *IA stands disposed of accordingly."*

We have since been informed that Rule 32 of the Karnatka State Bar Council Rules, in particular, sub-Clause 5 thereof, specifically states that an election Tribunal shall be appointed by the bar Council on or before the Committee of which the time of the election is fixed under Rule 4.

We have since been informed that this has been done. In this view of the matter, we dismiss this application.

IA No. 171568/2018

As has been stated by us in IA No. 170780/2018, Rule 32(5) of the Uttarakhand State Bar Council Rules, which is substantially the same as that of the Karnataka State Bar Council Rules, provides that the Election Tribunal shall be constituted before the election actually takes place. This, not having been done, we recall our order dated 20.11.2018. The Tribunal/Committee, set up by the Bar Council of India, will hear all objections within a period of four weeks from today and decide the said objections within the aforesaid period. Thereafter, Bar Council election results may finally be published.

IA No. 160653 and connected IAs.

In these cases, by our order dated 16.07.2018, we had ordered that objections to the result of all elections, that were held by the Bar Councils of the States, may be decided as expeditiously as possible, by the Tribunal/Committee, set up by the Bar Council of India, after which, the results may be declared. On 27.10.2018, the observor Committee, after setting out this order, stated that any further process of declaration of votes will be in contempt of this Court's order and further proceedings are stayed until after the Tribunal decides objections. Unfortunately, this has not been done. We, therefore, direct the aforesaid Committee to decide all objections raised within a period of four weeks from today after which the results may finally be declared.

It is made clear that any contempt petition filed shall not stand in the way of this order.

20. When the matter came up for consideration on 24.10.2018, the Hon'ble Supreme Court passed the following order:-

IA Nos. 150956/2018, 150958/2018 & 150959/2018

Application for impleadment is allowed.

Heard the learned counsel for the parties.

The Bar Council of India in a letter dated 08.10.2018 has resolved:

"The Council has considered the letter dated 29.09.2018 received from Mr. Amrendra Nath Tripathi. The enrolment of applicant Mr. Amrendra Nath Tripathi has already been transferred from Bar Council of Delhi had verified the genuineness of his certificates. The letter to this effect has also been issued to the Bar Council of U.P., even then the grievance is that the Certificate of Practice is not being issued by the Bar Council of U.P.; His name is not included in the list of voters of the concerned Bar Association. The election of concerned association is to be held in this month. Keeping in view the urgency of the matter, the council resolves to direct the Special Committee of Bar Council of U.P. to issue COP to the applicant Mr. Amrendra Nath Tripathi forthwith and allow the applicant to participate in the process of election, include his name in the list of voters of the Association where the applicant intends to be a member. The applicant shall be allowed to participate in the process of elections of Bar Association. Office to communicate this order to Special Committee of Bar Council of U.P. without any delay.

Resolved accordingly."

Given this letter, we take it that the Bar Council of U.P. will do the needful to include the name of the applicant in accordance with this letter as soon as possible, and positively before 29.10.2018.

I.As stands disposed of accordingly.

IA Nos. 153271/2018 & 153277/2018

Application for impleadment is allowed.

Heard the learned Counsel for the parties.

We are informed that the elections have since been held on 18.03.2018. The results, however, have not been declared despite a direct order of this Court stating that it should be declared immediately.

Mr. S. N. Bhat informs us that the Tribunal has decided to sit on the 26th of this month in order to resolve all objections. The Tribunal will complete hearing of the objections on that date itself and deliver its order within a week therefrom. The election results be declared thereafter in accordance with law.

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I.As stand disposed of accordingly."

21. This was followed by another order dated 13.11.2018, which reads as under:-

IA No. 158863/2018

We had issued several orders in this matter in the fond hope that the Tribunal would decide the objections within time. This hope has been belied. We understand from learned counsel appearing before us that the Bar Council election results have since been declared, subject to the Tribunal deciding objections.

We are of the view that the available remedy in law is contained in Rule 32 of the Karnataka State Bar Council Election Rules, 1971. The results that have now been declared will stand declared finally i.e. they will no longer be subject to the Tribunal deciding on objections.

We may only indicate that all objections that have been filed before the Tribunal and any other further objections that may occur post declaration of results should follow the drill of Rule 32 as aforesaid.

I.A. stands disposed of accordingly."

22. This order was followed by yet another order dated 20.11.2018, which reads thus:-

"IA Nos. 158696/2018 & IA No. 154205/2018

Application for Intervention / Impleadment is allowed.

We are informed that the Members of the Bar Council have since been elected.

This being the case, the available remedy in law is contained in Rule 32 of the Bar Council of Uttarakhand, Nainital Election Rules, 2014. The results that have now been declared will stand declared finally and objections that have been filed before the tribunal and any other further objections that may occur post declaration of results should follow the drill of Rule 32 as aforesaid.

I.A. stands disposed of accordingly.

IA No. 158015/2018 & IA No. 158028/2018

Application for Intervention/Impleadment is allowed.

I.A. stands disposed of in terms of the order passed by this court on 13.11.2018 in I.A. No. 158863/2018."

23. Lastly, the case was listed before the Hon'ble Supreme Court on 07.12.2018, when the following orders came to be passed:-

"IA No. 170780/2018

By an order dated 21.01.2018, the Bar Council of India had set up 3 Committees/Tribunals for looking into and ensuring free and fair elections, and

to ensure full compliance of our orders. These three Tribunals were to be headed by three former Chief Justices of the High Courts, who will not only supervise and have a full control on process of election of the State Bar Councils, but were also empowered to decide any election dispute arising before or after the election in the State Bar Councils expeditiously.

Insofar as the State of Karnataka is concerned, we had, by our order dated 24.10.2018, stated as under:-

> *"We are informed that the elections have since been held on 18.03.2018. The results, however, have not been declared despite a direct order of this Court stating that it should be declared immediately.*
>
> *Mr. S. N. Bhat inform us that the Tribunal has decided to sit on the 28th of this month in order to resolve all objections. The tribunal will complete hearing of the objections on that date itself and deliver its order within a week therefrom. The elections results be declared thereafter in accordance with law."*

On being informed that our order had not been complied with in that the Tribunal had not completed hearing of objections and delivered its order within a week, this Court then passed the following order:-

> *"We had issued several orders in this matter in the fond hope that the Tribunal would decide the objections within time. This hope has been belied. We understand from learned counsel appearing before us that the Bar Council election results have since been declared, subject to the Tribunal deciding objections.*
>
> *We are of the view that the available remedy in law is contained in Rule 32 of the Karnataka State Bar Council Election Rules, 1971. The results that have now been declared will stand declared finally i.e. they will no longer be subject to the Tribunal deciding objections.*
>
> *We may only indicate that all objections that have been filed before the Tribunal and any other further objections that may occur post declaration of results should follow the drill of Rule 32 as aforesaid.*
>
> *IA stands disposed of accordingly."*

We have since been informed that Rule 32 of the Karnatka State Bar Council Rules, in particular, sub-Clause 5 thereof, specifically states that an election Tribunal shall be appointed by the Bar Council on or before the Committee of which the time of the election is fixed under Rule 4.

We have since been informed that this has been done. In this view of the matter, we dismiss this application.

IA No. 171568/2018

As has been stated by us in IA No. 170780/2018, Rule 32(5) of the Uttarakhand State Bar Council Rules, which is substantially the same as that of the Karnataka State Bar Council Rules, provides that the Election Tribunal shall be constituted before the election actually takes place. This, not having been done, we recall our order dated 20.11.2018. The Tribunal/Committee, set up by the Bar Council of India, will hear all objections within a period of four weeks from today and decide the said objections within the aforesaid period. Thereafter, Bar Council election results may finally be published.

IA No. 160653 and connected IAs.

In these cases, by our order dated 16.07.2018, we had ordered that objections to the result of all elections, that were held by the Bar Councils of the States, may be decided as expeditiously as possible, by the Tribunal/ Committee, set up by the Bar Council of India, after which, the results may be declared. On 27.10.2018, the Observor Committee, after setting out this order, stated that any further process of declaration of votes will be in contempt of this Court's order and further proceedings are stayed until after the Tribunal decides objections. Unfortunately, this has not been done. We, therefore, direct the aforesaid Committee to decide all objections raised within a period of four weeks from today after which the results may finally be declared.

It is made clear that any contempt petition filed shall not stand in the way of this order."

24. A perusal of the orders passed by the Hon'ble Supreme Court from time to time, some of which have been extracted hereinabove, leaves no manner of doubt that the elections to the different Bar Councils of the Country are not to be determined or adjudicated by the Hon'ble Supreme Court. All that has been observed in these orders is that the Tribunals, Committees set up by the Bar Council of India vide order dated 21.01.2018 (whereby it set up three Committees/Tribunals for looking into and ensuring free and fair elections) will hear objections and decide the same and thereafter Bar Council would publish the result. Therefore, the objections raised by the respondents regarding maintainability or the jurisdiction of this Court to entertain the petition is over-ruled.

25. Adverting to the merits of the case, it would be noticed that it was by an order dated 21.01.2018, the Bar Council of India had set up three Committees/Tribunals for looking into and ensuring free and fair elections and these three Committees/ Tribunals were to be headed by three former Chief Justices of the High Courts, who were not only to supervise but also had full control on the process of the elections of the State Bar Councils and were also empowered to decide any election dispute arising before or after the election in the State Bar Councils expeditiously. This is clearly evident from the orders passed in ***Ajayinder Sangwan's case*** (supra) on 21.01.2018, the mention whereof is also made in the subsequent order dated 07.12.2018.

26. What, therefore, led to constitution of another six men committee by respondent No.1, is not at all forthcoming. Admittedly, respondent No.1 did not obtain permission of the Hon'ble Supreme Court before constituting such committee. As per respondent No.1, it had received some kind of undated complaint on 10.09.2018 i.e. more than 30 days after the declaration of the result. How and under what provisions of law the complaint was entertained by the Bar Council is also not at all forthcoming. Even though, in its reply, respondent No.1 has stated that such complaint was entertained in terms of Rule 10 of the Bar Council of India Rules, 1975. But, Shri Naresh Kumar Sood, learned Senior Advocate, appearing on behalf of respondent No.1 has fairly conceded and stated that the said rule is not at all attracted or applicable in the present case.

27. Thus, we have no hesitation to conclude that respondent No.1 had no authority or jurisdiction to entertain the objections preferred by respondent No.8 as these objections could only have been entertained by the Committee constituted by the Bar Council of India vide order dated 21.01.2018 and as had been approved by the Hon'ble Supreme Court that too in case the same were preferred within the prescribed period of limitation.

28. That apart, we are also of the considered view that the action of respondent No.1 in passing resolution dated 15.09.2018 whereby it constituted six members committee

to look into the dispute relating to the elections of therlier order dated 23.08.2017 to the effect that the petitioners therein would be at liberty to approach the Committee for pre-poning and change of the date of election. The matter thereafter came up before the Hon'ble Supreme Court on 24.11.2017 and again a detailed order was passed and the advocates, who had submitted their forms with Law Degrees but their cases were still pending for verification, were provisionally permitted to participate in the e members and officer bearers of the State Bar Council of Himachal Pradesh was illegal and without jurisdiction and, therefore, the said Committee had no jurisdiction whatsoever to even deal with the objections raised by respondent No.8 much less decide the same.

29. In addition to the above, we find it rather strange that after having unanimously elected Chairman, Vice Chairman and members representing Bar Council of India on 07.08.2018 and thereafter having participated in the meeting held on 19.08.2018 where 14 out of 15 elected members were present and had transacted business, how can respondent No.8 or for that matter any of the members of the Bar Council of India subsequently that too after more than a month could have filed the objection petition before respondent No.1 claiming that the elections have not been conducted in accordance with law.

30. Notably, respondent No.8 along with all other elected members, who submitted undated representation to respondent No.1, have not only actively participated in the elections held on 07.08.2018, but in fact, respondent No.8 himself had seconded the name of Shri Desh Raj Sharma for being elected as Member Representative of Bar Council of India.

31. It is not the case of respondent No.8 or of any other member, who petitioned respondent No.1, by filing representation that a hoax was played and fraud perpetrated on the elected members of the general body, who were caught unaware on account of lack of information of the election schedule. All the elected members were not only informed about the elections, but they had actively participated in the said process leading to the nominations and election of petitioners No.1 to 3 to the different posts. In case, the elections were not unanimous and the petitioners had not been nominated and elected unopposed, there was no reason why respondent No.8 along with other persons, who petitioned respondent No.1, would have kept mum and still participated in the General House meeting of the Bar Council of Himachal Pradesh convened on 19.08.2018 wherein as many as 41 items were deliberated and discussed. It was unanimously resolved to constitute 25 Committees which were accordingly constituted.

32. Further, in case respondent No.1 had not atoned and acknowledged and accepted the elections of petitioners No.1 and 2 as Chairman and Vice Chairman, respectively, then there was no occasion for it to have sent a communication dated 28.08.2018 for a joint meeting with the Bar Councils of the States of the Country and to further facilitate and honour both petitioners No.1 and 2 in the capacity as Chairman and Vice Chairman of the Bar Council of Himachal Pradesh.

33. That apart, in case petitioners No.1 and 2 were not elected as Chairman and Vice Chairman of the Bar Council of Himachal Pradesh, then there was no occasion for respondent No.1 to have addressed a communication dated 05.09.2018 to hold a press conference and further to hold a meeting on 17.09.2018 at their respective headquarters to have an awareness drive amongst the legal fraternity and thereafter pass resolutions which were to be handed over to the authorities specified therein.

34. Further, in case petitioners No.1 and 2 were not the Chairman and Vice Chairman of the Bar Council of Himachal Pradesh, where was the question of respondent No.8 along with some other elected member(s) attending the press conference held on 11.09.2018 at 1.30 pm in the Hotel Holiday Home (Dragon Hall), which was chaired by petitioner No.1 in the capacity of a Chairman.

35. What is further intriguing is that in case the petitioners had not been elected to the representative posts, then where was the occasion for sending the specimen signatures of petitioner No.1 as a Chairman, Bar Council of Himachal Pradesh to respondent No.1.

36. This Court cannot remain oblivious to the fact that it is dealing with a case wherein the facts clearly reveal that petitioners had been unanimously elected unopposed as Chairman, Vice Chairman and Member Representative of the Bar Council and since there was no contest whatsoever, therefore, the entire procedure of elections was not required to be gone through by return of candidates. It is only where the election is contested that the whole procedure which consists of several stages and includes all steps whereby an elected member is returned that these steps have to be followed in letter and spirit. The process of nomination, scrutiny and withdrawal would only apply in case where there are more than one candidates in the fray wherein the whole process of elections will be required to be gone through. However, where there is single nomination and there is no contestant in the field, the said candidate would be treated elected as unopposed automatically and the requirement of any such rule regarding nomination, scrutiny and withdrawal etc. shall be deemed to have been waived by the members electing such candidates.

37. In taking this view, we are fortified by a judgment of the learned Division Bench of this Court in ***Chhabil Dass*** *versus* ***Inder Singh and others, AIR 1976 HP 6***, wherein while dealing with a case relating to the election of the Bar Council like in the instant case, it was observed as under:-

> *"30. Notice of the first meeting was received on June 28, 1973 by at least one member, and the meeting was held on July 7, 1973. Now it appears that all the members of the Bar Council were present and they participated in the meeting, and no objection was raised as to the sufficiency of the period of notice. In such a case, the requirements as to notice may be considered as waived. In Re. Express Engineering Works (1920) 1 Ch 466. Younger, L.J. said:*
>
> > *"If you have all the shareholders present, then all the requirements in connection with a meeting…………..are observed."*
>
> *Reference may also be made to Re. Oxted Motor Co. (1921) 3 KB 32. In the circumstances, I am unable to hold that the meeting was invalid on the ground that all the members did not receive notice of 10 clear days…."*

38. This prolonged silence on behalf of respondent No.8 and other members for over 30 days assumes importance, after-all, the elections were being held to the most elite and apex body of the Advocates that too at the behest and on behalf of the elected Advocates themselves. Therefore, we have no hesitation to conclude that the undated representation made at the behest and on behalf of respondent No.8 along with certain other elected members to respondent No.1 was clearly an after-thought and above-all the same was not even maintainable.

39. It is significant to note that even the orders passed by the Hon'ble Supreme Court are being thoroughly misconstrued by the respondents and, therefore, we have no

hesitation to conclude that since the elections were to be notified after seeking approval and the results were to be published by the Bar Council of India (respondent No.1), it deliberately and willfully chose not to publish the same despite the fact that there was no objection(s) from any person(s) or authority to the elections from 07.08.2018 up to 10.09.2018.

40. It may not be too far-fetched to observe that during this period, respondent No.8 with the active assistance and connivance of other private respondents No.4 to 8 and the original petitioners No.7 and 8 managed to muster and gather some other members and filed undated petition that too to the Bar Council of India and not before the Committee/Tribunal specially constituted for this purpose.

41. This inference can clearly be gathered from the fact that one Rohit Sharma and Rakesh Kumar Acharya, who had been shown in this petition as petitioners No.7 and 8 and had filed their respective affidavits in support of the same, later withdrew and sought deletion of their names by moving applications to this effect. In the applications so filed, they have gone to the extent of stating that they are not aggrieved by the communication issued by respondent No.1 to respondent No.2 and have further averred that these applicants/petitioners have neither authorized the petitioners to file this petition on their behalf nor had the petitioners ever discussed with them regarding the filing of this petition. Not only this, these applicants/petitioners have further averred that even the affidavit dated 20.10.2018 attached with the writ petition was not executed by them. Surprisingly, none of these erstwhile petitioners No.7 and 8 appeared before this Court in support of the affidavit which only speaks volume against their conduct.

42. In such facts and circumstances, the objection petition on behalf of respondent No.8 and other members mentioned therein was not at all maintainable as these members were clearly estopped by their acts and conducts in doing so. Even, respondent No.1 after having accepted petitioners No.1 and 2 to have been duly elected as Chairman and Vice Chairman of the Bar Council of Himachal Pradesh was clearly estopped from accepting and thereafter dealing with the undated representation submitted by respondent No.8 by appointing a six members committee, the constitution of which was illegal itself.

43. In drawing such conclusion, we are fortified by the observations made by the Hon'ble Supreme Court of India in ***Bejgam Veeranna Venkata Narasimloo and others versus State of A.P. and others, (1998) 1 SCC 563***, more particularly, in paragraphs 14 and 15 which read as under:-

> *"14.We are of the view that the contentions made on behalf of the Andhra Pradesh Government are untenable in law. It has not been explained how and in what circumstances the order/memorandum dated 2.11.76 extending the life of the 1975-76 procurement order came to be issued. the issuance of the memorandum is not denied. It is also not denied that rice was procured in terms of this order. Rice millers had to deliver the rice according to the quantum or slab fixed by the 1975-76 order on the strength of the Memorandum dated 2.11.76. FCI also acted upon this Memorandum and paid the millers at the rates laid down in the order dated 24.9.75. It is not open to the Andhra Pradesh Government now to say that this Memorandum is of no legal effect because it was not notified in the Official Gazette and was not addressed to any of the rice millers but was merely an inter- departmental communication. the Memorandum categorically stated "pending issue of the amendment, the District Collectors are instructed to take action to collect levy*

from millers and dealers not exceeding the percentage mentioned above for the crop year 1976-77". District Collectors acted on the basis of this Memorandum. The millers were compelled to sell rice to FCI. in the background of all these facts, it is not open to the State Government to contend that the Memorandum was not notified and therefore, no right or obligation flowed from that Memorandum. If the Memorandum was required to be notified, the Government cannot take advantage of its failure to notify it. Having acted on the basis of the unnotified Memorandum and having collected rice compulsorily from the millers on the strength of this Memorandum and also having paid the millers at the rate fixed by the Memorandum, the Government cannot be heard to say that the Memorandum is of no legal effect and the payment was made under mistake of law.

15. In our view, it will be inequitable to permit the Government to take the plea of irregularity of its own Order after procuring rice on the basis of that order."

44. At this stage, it also needs to be clarified that the main issue before the Hon'ble Supreme Court of India is regarding the steps taken by the Bar Council of India to find out fake lawyers out of its members and/or persons who are not even members of the Bar Councils and/or members of any Bar Associations of the Country in accordance with the Advocates Act, 1961 and the rules framed thereunder. Therefore, also the present petition cannot be said to be not maintainable.

45. The net result of the aforesaid discussion is that there is merit in this writ petition and the same is accordingly allowed. Consequently, the election of petitioners No.1 to 3 as Chairman, Vice Chairman and Member Representative of the Bar Council of India and that of petitioners No. 4 to 8 as members of various Committees is upheld and the order dated 15.09.2018 passed by respondent No.1 is quashed and set aside. In addition thereto, the entire proceedings held by six members Committee appointed by respondent No.1 pursuant to the resolution dated 15.09.2018 and constitution of the Committee is held to be null and void and consequently all the recommendations andhe petitioners had not been elected to the representative posts, then where was the occasion for sending the specimen signatures of petitioner No.1 as a Chairman, Bar Council of Himachal Pradesh to respon findings recorded are also declared null and void and not binding on the petitioners.

46. The petition is allowed in the aforesaid terms, leaving the parties to bear their own costs. Pending application(s), if any, also stand disposed of.

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

M/s Jai Luxmi Labour and Construction Co-operative Society Ltd.
...Petitioner/Defendant

Versus

Dev Singh Negi ...Respondent/Plaintiff

C.R. No. 104 of 2018.
Reserved on: 24.4.2019.
Date of decision: 29.04.2019

Himachal Pradesh Co-operative Societies Act, 1968 (Act) - Section 76 – Statutory notice - Whether mandatory?- Held, issuance of statutory notice contemplated by Section 76 of Act before filing of suit against Society is mandatory- However, requirement is procedural in nature - Defendant must take objection regarding non maintainability of suit for want of notice at the earliest opportunity- When no objection is taken by defendant, it can be deemed to have waived notice - Order of trial court dismissing defendant's application for rejection of plaint for want of notice filed at evidence stage proper and valid- Petition dismissed.(Paras 10 to 14)

Cases referred:

Amar Nath Dogra vs. Union of India, AIR 1963 SC 424
Bhagchand vs. Secretary of State, AIR 1927 PC 176
Bishandayal and sons vs. State of Orissa and others, (2001) 1 SCC 555
Dhian Singh vs. Union of India, AIR 1958 SC 274
Dhirendra Nath vs. Sudhir Chandra, AIR 1964 SC 1300
Gaekwar Baroda State Railway vs. Hafiz Habib-ul-Haq, AIR 1938 PC 165
Ghanshyam Dass vs. Dominion of India, (1984) 3 SCC 46
Maya Rani Ghosh etc. vs. State of Tripura and others, AIR 2007 Gauhati 76
Sivaramakrishna vs. Executive Engineer, AIR 1978 AP 389
State of A.P. and others vs. Pioneer Builders, A.P. (2006) 12 SCC 119
State of Punjab vs. Geeta Iron & Brass Works Ltd., (1978) 1 SCC 68
The Jawali Harijan Co-operative Agriculture Society vs. Chet Ram, 1991 (2) Sim. L.C. 142
Vasant Ambadas Pandit vs. Bombay Municipal Corporation and others, AIR 1981 Bombay 394
Vellayan Chettiar vs. Province of Madras, AIR 1947 PC 197

For the Petitioner : Mr. J. L. Bhardwaj, Advocate.
For the Respondent : Mr. B.C. Negi, Senior Advocate with Mr. Nitin Thakur, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The moot question that arises for consideration in this petition under Section 115 of the Code of Civil Procedure is whether the notice under Section 76 of the Himachal Pradesh Co-operative Societies Act, 1968 (for short 'Act'), even if held to be mandatory in the given facts and circumstances of the case, can be waived of by a party.

2. It is not in dispute that the plaintiff/respondent filed a suit for recovery of Rs.19,36,189/- and the same is now pending adjudication before the learned Senior Civil Judge, Kinnaur at Reckong Peo.

3. The petitioner/defendant not only filed the written statement, but thereafter filed a counter-claim also. However, the further admitted position is that neither in the counter-claim nor in the written statement was the objection with regard to non-service of notice under Section 76 of the Act taken by the petitioner/defendant. It is only when the case was listed for recording of the statement of Dev Singh, plaintiff that the petitioner/defendant filed an application for rejection of the plaint under Order 7 Rule 11(d) read with Section 151 of CPC. It is averred that since the suit had been instituted without

serving the notice as required under Section 76 of the Act, therefore, the plaint deserves to be rejected.

4. The learned trial Court vide its order dated 4.5.2018 rejected the application by according the following reasons:

> *"So far as business of the society is concerned, the matter is already at the stage of leading Pws and constitution or bye-laws of society has not been placed with the application so that this could come to the conclusion as to whether the present suit pertains to the business of the society or not. Therefore, to my mind, the application under Order 7 Rule 11 (d) read with Section 151 of the C.P.C. at this stage is not maintainable. However, defendant, in his written statement has nowhere taken such a defence that suit is bad in law for non-submission of notice to the Registrar, Co-operative Societies as per the mandate of Section 76 of H.P. State Co-operative Societies Act.*
>
> *Therefore, to my mind, the present application seems to be without any merit and the same is dismissed without issuing any notice to the other party as the case is very old one and required to be disposed of on priority basis and such notice is also not called for."*

5. Assailing the said order, it is vehemently argued by learned counsel for the petitioner/defendant that the order passed by the learned trial Court is contrary to law and, therefore, deserves to be set-aside.

6. On the other hand, Mr. B.C.Negi, Senior Counsel assisted by Mr. Nitin Thakur, Advocate, learned counsel for the respondent/plaintiff would argue that even if it is assumed without conceding that the notice was mandatory, the petitioner has waived of such right and, therefore, the present petition ought to be dismissed.

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

7. Section 76 of the Act reads thus:

> *"**76. Notice necessary in suits** : No suit shall be instituted against a society or any of its officers in respect of any act touching the constitution, management or the business of the society until the expiration of two months after notice in writing has been delivered to the Registrar or left at his office, stating the cause of action, the same 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.*
>
> *Notwithstanding anything contained in Section 72, a suit cannot be instituted against a society or any of its officers (concerning the constitution, management or business of the society) unless two months period has expired after notice in writing has been delivered to the Registrar stating the cause of action. The object is to save the societies from unnecessary involvement in litigation and further to apprise the Registrar of the prospective disputes in which the society would be a party."*

8. Without going into the question and assuming that the dispute involved in the present lis pertaining to the suit which launches or related to the constitution, management and business of the society for which a notice was mandatory required to be

served under Section 76 of the Act. Admittedly, such notice has not been served, so therefore, can the plaint be rejected as prayed for by learned counsel for the petitioner.

9. The answer to the same is a big 'No'.

10. It is more than settled and rather there can be no quarrel with the proposition that the requirement of notice can always be waived. Equally settled is the proposition of law that the provision of Section 80 CPC, which is akin to Section 76 of the Act is mandatory, but right can be waived by a party.

11. As a matter of fact, as early as in the year 1945, the Judicial Committee of the Privy Council in ***Vellayan Chettiar vs. Province of Madras AIR 1947 PC 197,*** unequivocally held that there is no reason why the notice under Section 80 could not be waived if the authority thinks it fit to waive the said benefit. In that case, it was argued on the basis of the observations of Lord Sumner in an earlier decision in ***Bhagchand vs. Secretary of State AIR 1927 PC 176*** that the provisions of Section 80 were express, explicit and mandatory, a notice under Section 80 could not be waived. Distinguishing Bhagchand, Lord Simonds stated:

> *"The observations of Lord Sumner in delivering the opinion of the Board were directed solely to the construction of the section and cannot in their Lordship's opinion be regarded as deciding that it is not competent for the authority, for whose benefit the right to notice is provided, to waive that right. There is no inconsistency between the propositions that the provisions of the section are mandatory and must be enforced by the Court and that they may be waived by the authority for whose benefit they are provided."*

12. Reliance was also placed in ***Gaekwar Baroda State Railway vs. Hafiz Habib-ul-Haq AIR 1938 PC*** 165 in which the Privy Council considered the provisions of Sections 86 and 87 of the Code relating to suits against Rulers, etc., observing that the said decision was not governing authority, the Judicial Committee observed:

> *"The condition to which Sections 86 and 87 relate is created not, or not merely, for the benefit of the Sovereign Prince, but to serve an important public purpose. It is for that reason that the consent of the Governor-General in Council is required, and for that reason that there can be no waiver of his consent by a Sovereign Prince. On the other hand, there appears to their Lordships to be no reason why the notice required to be given under Section 80 should not be waived if the authority concerned thinks fit to waive it. It is for his protection that notice is required; if in the particular case he does not require that protection and says so, he can lawfully waive his right.*

13. In ***Dhian Singh vs. Union of India AIR 1958 SC 274,*** the Hon'ble Supreme Court held that when objection as to validity of notice was not taken in the written statement nor an issue framed by the trial Court, an inference could be drawn that the objection under Section 80 had been waived.

14. In a leading decision in ***Dhirendra Nath vs. Sudhir Chandra AIR 1964 SC 1300*** the Hon'ble Supreme Court after referring to various decisions, observed as under:

> *"Where the Court acts without inherent jurisdiction, a party affected cannot by waiver confer jurisdiction on it, which it has not. Where such jurisdiction is not wanting, a directory provision can always be waived. But a mandatory provision can only be waived if it is not conceived in the public interest, but in the interests of the party that waives it."*

15. An objection as to the validity of the notice can be taken at the earliest stage of the proceedings. If such objection is not taken at the initial stage, an inference can be drawn that the defendant had waived his objection against non-service or validity of the notice (See: **Sivaramakrishna vs. Executive Engineer, AIR 1978 AP 389**).

16. Learned Full Bench of Hon'ble Bombay High Court in ***Vasant Ambadas Pandit vs. Bombay Municipal Corporation and others AIR 1981 Bombay, 394*** held that no suit can be instituted without service of notice if such service of notice is required statutorily as a condition precedent. The giving of notice is a condition precedent to the exercise of jurisdiction. But, this being a mere procedural requirement, the same does not go to the root of jurisdiction in a true sense of the term. The same is capable of being waived by the defendants and on such waiver, the Court gets jurisdiction to entertain and try the suit. The plea of waiver can always be tried by the Civil Court. In fact it is not suggested who else can try. The question whether, in fact, there is waiver or not would necessarily depend on facts of each case and is liable to be tried by the same Court if raised.

17. In ***Bishandayal and sons vs. State of Orissa and others (2001) 1 SCC 555***, the Hon'ble Supreme Court was dealing with a question as to whether the amendment suit was not maintainable for want of notice under Section 80 CPC. Placing reliance upon the cases of ***Amar Nath Dogra*** vs. ***Union of India, AIR 1963 SC 424, State of Punjab*** vs. ***Geeta Iron & Brass Works Ltd., (1978) 1 SCC 68, Ghanshyam Dass*** *vs.* ***Dominion of India (1984) 3 SCC 46*** and ***Vasant Ambadas Pandit*** *vs.* ***Bombay Municipal Corporation, AIR 1981 Bom. 394,*** wherein it was held that a notice under Section 80 CPC or equivalent notices under Section 527 of the Bombay Municipal Corporation Act are for the benefit of the respondents and the same can be waived as they do not go to the root of jurisdiction in the true sense of the term.

18. In ***State of A.P. and others vs. Pioneer Builders, A.P. (2006) 12 SCC 119***, it was held by the Hon'ble Supreme Court that where the plea of want of notice under Section 80 CPC was not raised by the Government in the written statement or additional written statement, such defect will be deemed to have been waived and it was observed as under:

> *"19……Accordingly, we decline to interfere with the finding recorded by the High Court on this aspect of the matter. The High Court has held that having participated in the original proceedings, it was not now open to the State to raise a fresh issue as to the maintainability of the suit, in view of waiving the defect at the earliest point of time. The High Court has also observed that knowing fully well about non-issuance of notice under Section 80 CPC the State had not raised such a plea in the written statement or additional written statement filed in the suit and, therefore, deemed to have waived the objection. It goes without saying that the question whether in fact, there is waiver or not necessarily depends on the facts of each case and is liable to be tried by the Court, if raised, which, as noticed above, is not the case here."*

19. In a case relating to claim for compensation under the Fatal Accidents Act, 1855, it was held by the Gauhati High Court that where maintainability of the claim application was challenged by the opposite party, but no specific ground was taken as to why the application was not maintainable and at no stage, the State took the plea of non-service of notice under Section 80 CPC. The requirement of notice may be safely held to have been waived. (Refer: ***Smt. Maya Rani Ghosh etc. vs. State of Tripura and others AIR 2007 Gauhati 76)***.

20. To be fair to the learned counsel for the petitioner, he has placed strong reliance on the judgment of this Court in ***The Jawali Harijan Co-operative Agriculture Society vs. Chet Ram, 1991 (2) Sim. L.C. 142,*** more particularly, in para-8, which reads thus:

> *"8. The trial Court expected the appellant Society to prove by way of evidence a negative fact that such a notice was not issued and on that assumption, it proceeded to decide that issue against the Society for want of evidence. To the contrary, it was incumbent for the plaintiff to have made appropriate averments in the plaint and prove the fact that notice as required under Section 76 of the Act had been duly served upon the Registrar. The lower Appellate Court also failed to consider the objection which was raised before it. In vview of this, when no notice had been served as required under Section 76 of the Act above, upon the Registrar, therefore, the suit was barred and plaint ought to have been rejected under Section 7, Rule 11 (d) of the Code of Civil Procedure. The Courts ought not to have proceeded to determine issues on merits. The judgment and decrees of the courts below as such are vitiated."*

21. Obviously, there can be no quarrel with the proposition as laid down in the aforesaid case, but then the Court was not dealing with the plea of waiver as is canvassed in the present case. Therefore, the aforesaid case is clearly distinguishable and not applicable to the present case.

22. Learned counsel for the petitioner has also cited number of judgments of the various High Courts and also Hon'ble Supreme Court to canvass with support of application for rejection of plaint can be filed at any time. Here again there cannot be any quarrel with the proposition, but such proposition does not arise for consideration in this case.

23. In view of the aforesaid discussion, the present revision petition is bereft of any merit and consequently, 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 Ltd. .....Appellant.
Versus
Sh. Niranjan Singh and others ......Respondents.

FAO No. 245 of 2018 along with
Cross Objections No. 99 of 2018.
Reserved on : 8th March, 2019.
Decided on : 15th March, 2019.

Motor Vehicles Act, 1988 – Sections 149 & 166 - Motor accident- Claim application – Defences – Route permit – Additional evidence- Claims Tribunal allowing claim application and fastening liability on insurer - Appeal and cross objection – Insurer submitting offending vehicle not having route permit to ply vehicle in Himachal Pradesh at relevant time– There was violation of terms and conditions of insurance policy - Owner filing application for adducing additional evidence showing valid route permit with respect to vehicle at relevant time- Held, additional evidence can be received by Appellate Court also– Additional evidence

of cross objector relevant – Application allowed – Insurer had valid route permit at relevant time to ply vehicle – Plea of insurer is devoid of merit. (Para 4)

Motor Vehicles Act, 1988 – Section 166 – Motor accident – Claim application- Permanent total disability – Compensation under head 'pain & suffering' – Held, compensation under this head also encompasses monetary indemnification qua claim for future pain and suffering resulting from his disability. (Para 5)

Motor Vehicles Act, 1988 –Motor accident – Claim application – Future medical expenses – Entitlement - Held, compensation towards future medical expenses can be awarded only on proof that claimant requires medical treatment in future also. (Para 6)

Cases referred:

J.B. Pipes vs. Madan Lal and others, 2008 ACJ 574

Ketal Singh vs. Bhag Devi and others, 2015(5) ILR (HP) 1263

For the Appellant: Mr. Ashwani K. Sharma, Senior Advocate with Mr. Jeevan Kumar, Advocate.

For Respondents No. 1: Mr. Dheeraj K. Vashishta, Advocate.

For Respondent No. 2 & 3/Cross objectors: Mr. Anirudh Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The Insurer of the offending vehicle, has, instituted the instant appeal before this Court, wherethrough, it, casts, a, challenge, upon, the award pronounced by the learned Motor Accident Claims Tribunal-II, Una, upon, MAC Petition No. 134 of 2014, whereunder, compensation amount comprised, in, a sum of Rs.23,16,300/- alongwith interest accrued thereon, at the rate of 9% per annum, and, commencing from, the date of petition till realization thereof, stood, assessed, vis-a-vis, the disabled claimant, and, the apposite indemnificatory liability thereof, was, fastened upon the insurer/appellant herein. On the other hand, the respondent No.3/cross objector also reared cross-objections bearing CO No. 99 of 2018, against, the impugned award.

2. The learned tribunal, had, upon meteing reliance, upon a judgment of this Court rendered in a case titled as ***Ketal Singh v.s Bhag Devi and others***, reported in ***2015(5) ILR (HP) 1263***, (a) wherein it stands expostulated qua (i) where, the, insurer has not led any evidence, and, rather has failed to prove, that, the offending vehicle stood plied, in violation of the route permit, and, hence, infringed the terms, and, conditions, as, contained in the apposite insurance policy, (ii) thereupon, concluded qua hence the afore ground, being not, a befitting exculpatory espousal, available for the insurer of the offending vehicle, (iii) and, the learned tribunal hence concluded, that, since the insurer was enjoined to plead, and, also enjoined to prove, that, the cause of the accident, is, a sequel of the peculiar geographical condition, prevailing in the State of H.P., where, the ill-fated accident took place, and, for hence in the impermissible plying, of, the ill-fated vehicle, within, the territory of the Himachal Pradesh, hence, occurred willful breach of the terms, and, conditions of the insurance policy. Reiteratedly, hence, for want, of, adduction, of, cogent proof by the insurer, that, in the plying of the offending vehicle, in a territory, in respect whereof, it held no valid permit to ply, hence, there being willful breach of the terms, and, conditions of the insurance policy, (iv) thereupon, rather the learned tribunal hence concluded, that, the tests contemplated, in, the afore judgment rather standing not satiated,

and, hence fastened, the, apposite indemnificatory liability, upon, the insurer of the offending vehicle.

3. The afore reasons, as, formed by the learned tribunal, stood, contested by the learned counsel appearing, for the insurer herein, by his placing reliance, upon, a judgment of this Court, rendered in a case titled as ***J.B. Pipes versus Madan Lal and others,*** reported in ***2008 ACJ 574,*** (a) wherein this Court while placing reliance, upon, a judgment of the Hon'ble Apex Court, had, concluded that the mere plying of the offending vehicle concerned, in a territory or area, in respect whereof, no valid route permit stands issued, rather ipso facto hence constituting violation of the terms, and, conditions of the insurance policy, (b) and, hence, no pleadings being enjoined to be reared, in proof thereof, and, also not enjoining adduction, of, evidence in respect thereof.

4. Be that as it may, at this stage, it may be unnecessary, to delve into the legal force, of, the above submission, (a) especially when the owner of the offending vehicle instituted cross-objections, bearing CO No. 99 of 2018, to, the impugned award, and, when therewith rather stands appended, an, application bearing CMP No. 10451 of 2018, as, cast under the provisions of Order 41, Rule 27 of the CPC. Furthermore, with the afore application, being, accompanied, by, Annexure CO-1, wherein a disclosure occur qua a national permit standing issued, vis-a-vis, the offending vehicle, and, the validity of the afore national permit being alive upto 10th September, 2014, hence, covering the date of mishap, which occurred prior thereto, inasmuch as, on 25.07.2014. When the case was listed for arguments, before this Court, the learned counsel for the appellant, did not, make any endeavour to contest the validity, of, the afore annexure, hence, the validity of the afore annexure acquire tremendous force. Consequently, for lack of contest thereto by the learned counsel appearing for the insurer, this Court does not deem, it necessary to seek adduction hereat, of, the apposite original, for, hence the afore photo copy, being therethrough hence proven (i) more especially when the claim petitions cast under Section 166 of the Motor Vehicles Act are triable summarily, and, when no strict proof, vis-a-vis, the issuance or qua the veracity of the afore annexure, appended with the afore application, is enjoined to elicited, (ii) rather when there, is, failure of contest, in respect of tenacity thereof, thereupon, this Court proceeds to take it on record, and, the afore application is allowed, it being just and essential, for, adjudicating the relevant factum probandum. This Court for afore reasons, hence, assigns probative vigour, to the afore Annexure CO-1, appended with the application cast, under the provisions of Order 41, Rule 27 of the CPC, and, also hence drives strength, from, the provisions borne in Order 41, Rule 28 of the CPC, provisions whereof stand extracted hereinafter:-

> "**28**. **Mode of taking additional evidence.-** Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court."

(iii) wherein, it is permissible for the Appellate Court, to also, receive any oral or documentary evidence, in tandem therewith, (iv) and, conspicuously hence contra therewith afore decision relied, upon, by the counsel for the insurer, also stands denuded, vis-a-vis, its apt vigour, (v) thereupon, upon assigning credibility thereto, this Court, holds, that the offending vehicle concerned, at the relevant time, hence, holding the route permit, for its being plied, within, the territory of the Himachal Pradesh, hence, the fastening of the apposite indemnificatory liability, upon, the insurer of the offending vehicle, is, both apt and tenable.

5. The learned counsel appearing for the insurer, further contends that undisputedly the claimant, was a driver, and, in sequel to the disability pronounced in Ex.PW3/A, proven by PW-3, 100% functional disability, stood encumbered, upon, him. However, the learned counsel for the insurer, contends that when the learned tribunal, had assessed compensation, in a sum of Rs.1,00,000/-, under, the head "pain and suffering", vis-a-vis, the disabled claimant, (a), thereupon, it was impermissible, for, the learned tribunal, to also award, a, further sum of Rs.1,00,000/-, under, the head "future pain and sufferings". The afore submission has immense vigour, and, is accepted, for the reasons, that, awarding, of, a sum of Rs.1,00,000/-, under the head "pain and suffering", was, a, comprehensive quantification, of, compensation, and, also encompasses, the, monetary indemnification qua the claim, for, future pain and sufferings, sparked, by the disability encumbered upon him. Consequently, the awarding by the learned tribunal of a sum of Rs.1,00,000/-, under, the head "future pain and suffering, is set aside, and, the award is modified according.

6. Furthermore, the learned counsel, for the insurer, has, also contended with much vigour, that, with a sum of Rs.10,300/- being assessed, as compensation under the head "reimbursement towards medical expenses and transportation charges from hospital to back", (a) thereupon, it was impermissible, for the learned tribunal, to, further assess rather towards future medical expenses, also a sum of Rs.50,000/-, especially, when there is no evidence on record in support thereof. The afore submission has vigour, more especially, when no evidence, in support thereof, hence, occurs on record, rather disclosing, that, the claimant, was enjoined to incur any amount towards his future treatment, thereupon, the afore awarding of compensation under the head "future medical expenses" is also set aside, and, the award is modified accordingly.

7. For the foregoing reasons, the appeal filed by the insurer is partly allowed, whereas, the cross-objections instituted by cross-objector/respondent No.3 herein is allowed and, the impugned award, is, in the aforesaid manner, hence modified. Accordingly, the disabled claimant/petitioner, is, held entitled to a total compensation of Rs.21,66,300/--, alongwith interest accrued thereon, at the rate of 9% per annum, and, commencing from, the date of petition till realization thereof. The amount of interim compensation, if awarded, be adjusted in the aforesaid compensation amount, at the time of final payment. 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.

Satish Kumar and others ....Petitioners.
Versus
Mehta Raguvindera Singh and others ....Respondents.

CMPMO No.: 362 of 2018.
Decided on: 19.03.2019.

Code of Civil Procedure, 1908 - Order II Rule 2 – Splitting of claims – Leave of court – Requirement – Plaintiffs filing suit for injunction for restraining defendants from interfering in their land – Also filing application seeking leave to file separate suit for damages caused to their property by such interference – Trial court dismissing application on ground that both reliefs being distinct, leave of court was not required – Petition against - Plaint revealing

plaintiffs' having specifically pleaded of defendants interfering in their land and causing damage to it – Cause of action to claim both reliefs accrued to plaintiffs on same cause of action – Causes of action not distinct - Subsequent suit for damages can only be filed with leave of court - Petition allowed – Order of trial court set aside – Leave granted. (Paras 11 to 13)

For the petitioners : Mr. Anirudh Sharma, Advocate.
For the respondents : Mr. Kulwant Singh Katoch, Advocate

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

This petition is directed against order dated 28.05.2018, passed by the Court of learned Civil Judge, Court No. 1, Solan, District Solan, in Civil Suit No. 42-1 of 2015, titled as Satish Kumar and others vs. Mehta Raghuvindra Singh and others, vide which, an application filed by the petitioners/plaintiffs under Order II, Rule 2 of the Code of Civil Procedure (hereinafter referred to as the 'Code') praying for grant of permission to them to reserve their right to file a separate suit for claiming damages stands dismissed by the learned Court below by holding as under:-

> *"The present application has been filed under Order 2 Rule 2 CPC. Order 2 Rule 2 applies only when the different relieves arrives from same cause of action. But, in the present case, the relief of injunction and the relief of damages are different cause of action. Hence, the present application is mis-conceived and is not maintainable under Order 2 Rule 2 CPC. The application is accordingly disposed. Be tagged with the main case file after doing needful."*

2. Brief facts necessary for adjudication of the present petition are as under:-

The petitioners/plaintiffs (hereinafter referred to as 'plaintiffs') have filed a suit for permanent prohibitory injunction against the respondents/defendants (hereinafter referred to as 'defendants') for restraining them from causing any interference, changing the nature, raising any construction on the land, causing damage etc. as well as restraining them from throwing debris, removing valuable trees from the suit land, situated in Mauja Banat, Tehsil and District Solan. According to the plaintiffs, they are owners in possession of the suit land and defendants are strangers to the same.

3. In para 6 of the plaint, it has been averred that defendants have engaged labour and JCB machines for the purpose of constructing a road through the suit land with the intent of dispossessing the plaintiffs and have caused damage to suit land. It is further averred in the said para of the plaint that the plaintiffs were getting the loss assessed and a separate application under Order II, Rule 2 of the Code was being filed by them alongwith the plaint reserving their right to claim damages after the assessment of the same.

4. Said application filed under Order II, Rule 2 of the Code by the petitioners/plaintiffs stands dismissed by the learned Court below vide impugned order.

5. I have heard learned Counsel for the parties and also gone through the impugned order as well as the record of the case.

6. Order II, Rule 2 of the Code provides that 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.

7. The reliefs prayed for by the petitioners/plaintiffs in the suit have been broadly referred by me herein-above. There is a categorical assertion made in the plaint by the plaintiffs that defendants have caused damage to the suit land. This demonstrates that cause of action to claim damages from the defendants stood accrued as on the date when plaintiffs filed the suit. As said relief is not claimed in the suit, the plaintiffs could not have subsequently claimed the same in the teeth of the provisions of Order II, Rule 2 of the Code unless they sought permission of the Court in this regard.

8. To meet this eventuality, the plaintiffs not only clearly mentioned in the plaint itself that they were reserving their right to claim damages from the defendants, in addition as a prudent litigant, they mentioned in the plaint that a separate application for this purpose under Order II, Rule 2 of the Code was being filed with the plaint and which was actually filed by the plaintiffs. In the application, prayer was that plaintiffs be permitted to reserve their right to file separate suit for damages against the defendants as the quantum of damage was in the process of being assessed through expert.

9. Surprisingly, learned trial Court vide impugned order, on an erroneous interpretation of the provisions of Order II, Rule 2 of the Code has dismissed the application and thus refused the liberty being prayed for by the plaintiffs.

10. The reasoning assigned by the learned trial Court in rejecting the application is perverse. Learned Court below has erred in not appreciating that though relief of injunction and relief of damages are distinct reliefs but if the cause giving arise to both of them is common, then both these reliefs have to be claimed in the same suit unless permission is obtained under Order II, Rule 2 of the Code from the Court.

11. Learned Court below has erred in not appreciating that relief of injunction and relief of damages are different reliefs but the "cause" is both same and common in the present case. The alleged 'Cause' is interference and encroachment upon the suit land by the defendants which allegedly also damaged the suit land.

12 Learned Court has not appreciated that in the light of the pleadings, subsequent suit to claim damages could not have been filed by the plaintiffs in lieu of bar contemplated under Order II, Rule 2 of the Code. The prayer thus made in the application by the plaintiffs seeking liberty reserving their right to file a subsequent suit for damages deserved to be allowed.

13. In view of discussion held above, this petition is allowed. Impugned order dated 28.05.2018, passed by learned Civil Judge, Court No. 1, Solan, is quashed and set aside. The prayer made in the application under Order II, Rule 2 of the Code by the petitioners/plaintiffs is allowed and they are granted liberty to institute a separate suit for damages against the defendants if so advised. The petition stands disposed of in above terms, so also pending miscellaneous application(s), if any. No orders as to costs.

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