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suit was decreed by the Trial Court – an appeal was filed, which was dismissed- held in second appeal that the Courts had assessed Rs.85,400/- as pecuniary damages based upon the medical bills – the plaintiff had suffered loss of estate due to death of his father – the Courts had properly appreciated the evidence- appeal dismissed.(Para-8 to 14) Title: Om Prakash alias Parkash & others Vs. Devinder Page-495

Code of Civil Procedure, 1908- Section 100- Plaintiff filed a civil suit seeking recovery of Rs.1,00,000/- on the ground that plaintiff had sold apple crop in the year 2005 to the defendant – the defendant issued a cheque, which was dishonoured- the suit was decreed by the Trial Court- an appeal was filed, which was also dismissed- held in second appeal that plaintiff had admitted in a previous suit that the apple crop becomes ready by the end of July and that he had sold the crop to V – this fact was denied by the defendant in the present suit- the Courts had wrongly placed reliance upon the conviction of the defendant in a criminal case.(Para-7 to 12) Title: Paras Ram Vs. Inder Singh Page-80

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Code of Civil Procedure, 1908- Order 7 Rule 11- Plaintiff filed a civil suit for restraining the defendant from using the name Ms/ D.P. Jagan Hardware Private Limited or any similar name as the name M/s D.P. Jagan& Sons, which was being used by the plaintiff since 1985- an application for rejection of plaint was filed by the defendant, which was dismissed- however, the plaint was ordered to be returned – held that right of action of any person for passing off goods and services of another person and remedies thereof are not affected by Trade Marks Act, 1999- therefore, it cannot be said that the suit was not maintainable before the Civil Court- the suit was based upon unregistered trade mark and the application for registration is pending before Registrar Trade Mark – hence, the suit was to be instituted before the District Judge in accordance with Section 134(1)(c) of Trade Marks Act- Petition dismissed.(Para-6 to 11) Title: M/s D.P. Jagan Hardware Private Limited Vs. M/s D.P. Jagan& Sons and another Page-1

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Code of Civil Procedure, 1908- Order 9 Rule 7- A suit and counter-claim were pending before Trial Court- the defendant did not appear on the date of hearing- the suit was decreed ex-parte and the counterclaim was dismissed in default- applications for the restoration of the counterclaim and setting aside the ex-parte decree were filed, which were dismissed- appeals were filed against the order of the dismissal, which were also dismissed-aggrieved from the order, the present petitions have been filed-held that the applications for restoration and setting aside ex-parte order were filed within limitation and within reasonable time –applications were decided after five years – Trial Court held that applicant wanted to delay the matter, which was falsified by the fact that applications were filed within a reasonable time and within limitation- the applications, affidavits, and the evidence established sufficient cause on part of the applicant and it was wrongly held that there was no sufficient cause- applications allowed- directions issued to the judicial officers to dispose of the miscellaneous applications within a period of six months. (Para-9 to16)Title: Des Raj Vs. Satish Chand Page-480

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Code of Civil Procedure, 1908- Order 23 Rule 1- Petitioner had withdrawn the petition in view of the judgment of Hon'ble Supreme Court in **State of West Bengal &Ors. Associated Contractors 2015 (1) SCC 32-** permission granted to withdraw the petition with liberty to file the fresh petition in the competent court of law- time spent in prosecuting the present petition ordered to be excluded in accordance with the judgment of Hon'ble Supreme Court in**State of Goa Vs. Western Builders(2006) 6 SCC 239,Consolidated Engineering Enterprises Vs. Principal Secretary, Irrigation Department and others(2008) 7 SCC 169** and **Commissioner, M.P. Housing Board and Others Vs. M/S. Mohanlal and Company decided vide judgment dated 19.07.2016 passed in Civil Appeal No. 6573 of 2016 (Arising out of S.L.P.(C) No. 39511 of 2013**. Title: M/S. Farm Fresh Food Pvt. Ltd. Vs.Himachal Pradesh State Electricity Board Limited Page-248

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Code of Civil Procedure, 1908- Order 26 Rule 9- Plaintiff filed an application for appointment of local commissioner for determining the encroachment on the suit land – the application was dismissed by the Trial Court- held that it is permissible for the plaintiff to apply to the Court for determining the encroachment on his land – the appointment of local commissioner does not amount to creating evidence in favour of the plaintiff – the revision allowed- order passed by Trial Court set aside- a Local Commission ordered to be issued to ascertain whether any encroachment has been made on the suit land or not. (Para-3) Title: SomNath Vs. Gurdev Page-281

Code of Civil Procedure, 1908- Order 41 Rule 19- The appeal filed by the applicant was dismissed in default for non-appearance – an application for restoration of the appeal was filed on the ground that the counsel was engaged by the applicant who had assured to appear in the appeal but the counsel did not fulfill the assurance- the applicant came to know about the dismissal of the appeal when the son of the applicant visited Shimla – held that there is delay of more than 5 years and 5 months in filing the application–the defence taken by the applicants is not plausible – the application is not supported by the affidavit of the parties – son of the applicant did not state that assurances were made in his presence – the applicant was under constant legal advice – it was her duty to follow the counsel and not the duty of the counsel to follow her – the advocate cannot pursue the matter in absence of any instruction – the appeal was dismissed due to lack of instruction- the applicants did not have any reasonable cause for condonation of delay- application dismissed.(Para-8 to 18) Title: M/s Divyang Associates (P)

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Code of Criminal Procedure, 1973- Section 256- The complaint was dismissed by the Magistrate under Section 256 of Cr.P.C –held that the complaint can be dismissed under this Section only if the Magistrate is satisfied that it is not possible to adjourn the complaint to a future date – the complainant had engaged a counsel, who had a reasonable cause for non-appearance on the date of hearing – the Magistrate had wrongly dismissed the complaint in these circumstances – appeal allowed- order of the Magistrate set aside. (Para-3) Title: Sanjeev Gupta Vs. Karam Dass Page-218

Code of Criminal Procedure, 1973- Section 439- a FIR has been registered for the commission of offence punishable under Section 15 of the N.D.P.S. Act- the petitioner pleaded that he is innocent and has been falsely implicated and he be released on bail- held that there are sufficient reasons to believe that petitioner was involved in the commission of offence and is likely to repeat the same in future in case of release on bail- there is likelihood that petitioner will flee from justice and tamper with prosecution evidence – the petitioner cannot be enlarged on bail – petition dismissed. (Para- 6) Title: Gurdarshan Singh alias Darshan Singh Vs. State of Himachal Pradesh Page-528

Code of Criminal Procedure, 1973- Section 439- a FIR has been registered against the petitioner for the commission of offences punishable under Section 21 of N.D.P.S. Act, 1985 for carrying 12 bottles of Corex without a valid permit- the petitioner prayed for bail on the ground that challan has been filed against him and that the quantity of substance present in the bottle has to be taken into consideration for determining the liability of the petitioner – held that SFSL had found that quantity of codeine phosphate was 2.006 mg per/ml in 100ml bottle of Corex, which if taken into consideration in 12 bottles comes to be less than 10 grams specified as small quantity by the Central Government-the petitioner is in custody for more than five months-challan has been filed in the Court and he is not required for the purpose of investigation – hence, bail application allowed and the petitioner ordered to be released on bail in the sum of Rs.50,000/- with one surety in the like amount.(Para- 10 to 21) Title: Jai Bahadur alias Raju Vs. State of H.P. Page-462

Code of Criminal Procedure, 1973- Section 439- A FIR was registered against the petitioners for the commission of offences punishable under Sections 363, 366, 506, 120B of Indian Penal Code, 1860 and Section 18 of Prevention of Children from Sexual Offences, Act and Sections 9and 10 of the Prohibition of Child Marriage Act- petitioners pleaded that they were falsely impleaded in the case- they are not in a position to tamper with the prosecution witnesses- held that R to whom the prosecutrix was allegedly married has been released on bail- hence, the petitioners are entitled to bail as well- petition allowed and petitioners ordered to be released on furnishing personal and surety bonds of Rs.50,000/- subject to conditions.(Para-6 and 7) Title: Asha Vs. State of Himachal Pradesh Page-355

Code of Criminal Procedure, 1973- Section 482- A challan was filed against the petitioner –the petitioner filed the present petition seeking the cancellation of the same- held that specific allegations have been made against the petitioner, which have been supported by independent witnesses – police had found a case against the petitioner and filed the charge-sheet – the power to quash charge-sheet cannot be exercised in such circumstances- petition dismissed.(Para-8 to 14) Title: Lalit Singh Vs. State of H.P. & others Page-48

Code of Criminal Procedure, 1973- Section 482- A complaint was filed for the commission of offence punishable under Section 138 of N.I. Act- the accused did not appear – a proclamation was issued and a direction was also issued to register the FIR for the commission of offence punishable under Section 174-A of I.P.C. against the absentee accused – subsequently the

accused appeared and the matter was compromised- he filed a petition for quashing the FIR – held that it has to be proved that the accused had not appeared before the court despite knowledge– no such allegation was made in the complaint – there is no evidence that newspaper was read by the accused in absence of which the necessary ingredients for the commission of offences are not made out- petition allowed and FIR ordered to be quashed.(Para-4 to 5) Title: N.Balakrishnan Vs. State of H.P. and another Page-492

Code of Criminal Procedure, 1973- Section 482- Petition for quashing the FIR filed on the ground that the matter has been compromised between the parties, wherein they have agreed to settle the dispute amicably and to live life happily – held that in view of the compromise, no useful purpose would be served by keeping the proceedings alive- the petition allowed and the FIR/challan ordered to be cancelled.(Para-8 to 12) Title: Vineet Verma Vs. State of H.P. &others Page-175

Code of Criminal Procedure, 1973- Section 482-A complaint was filed against the petitioner that he had sold immovable property after assuring the purchaser that property was free from all encumbrances and litigation etc.- the purchaser came to know subsequently the property was not free from encumbrances and a compromise was effected regarding the same before the Court – the petitioner sought the quashing of the complaint – held that the petitioner had an intention to cheat the purchaser and the complaint cannot be quashed at this stage- petition dismissed.(Para-5 to 18) Title: Santosh Sharma Vs. Chaman Lal Jindal Page-329

Code of Criminal Procedure, 1973-Section 378- A case was registered against the accused for the commission of offences punishable under Sections 354, 323 and 504 IPC and Section 3(1)(x) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989- the Special Judge acquitted the accused after holding that case was not proved beyond reasonable doubt – aggrieved from the judgment, the State preferred an application to grant leave to file appeal – held that no evidence was led to prove that accused was not a member of scheduled caste community- there are variations in the statement of the complainant made before the Court and the statement made before the Police –material witnesses were not examined – Trial Court had taken a reasonable view while deciding the matter.(Para- 7 to 15) Title: State of Himachal Pradesh Vs. Dharmender Singh Page-265

Constitution of India, 1950- Article 226- A cafeteria in State War Memorial, Dharmshala was allowed to be managed by the petitioner for a period of 11 months commencing from 1.8.19991- the petitioner managed to retain possession despite the order of eviction– held that the authorities had jurisdiction to pass the order- no extraneous circumstances/factors were taken into consideration while passing the order- petitioner is not the owner of the premises nor has he become the owner by adverse possession- his possession is unauthorized and he was rightly ordered to be ejected- petition dismissed. (Para-2 to 17) Title: Ranjit Kumar Vs. State of H.P. & another (D.B.) Page-168

Constitution of India, 1950- Article 226- An advertisement was issued for filling 90 posts of Lecturers (College Cadre) in Commerce in which two posts were reserved for persons with disability in orthopaedical - only one candidate was selected and appointed – another advertisement was issued for filling up the vacant posts- the petitioner applied for the post- a call letter was issued for interview – two persons were declared successful and were recommended for appointment against the posts reserved for physically handicapped persons –the advertisement was issued for the regular post but she was appointed on contract basis – she made representation but no action was taken – a writ petition was filed, which was allowed – direction was issued to make appointment on regular basis – aggrieved from the judgment, present appeal has been filed – held that the Commission had recommended appointment in the pay scale of Rs.8000- 13500/- - education department had no authority to appoint the petitioner on contract basis on a consolidated salary of Rs.12,000/- per month – hence, the Writ Court had rightly set

aside the appointment on contract basis – appeal dismissed. (Para-10 to 24) Title: State of Himachal Pradesh Vs. Ruchy Sharma & another (D.B.) Page-318

Constitution of India, 1950- Article 226- An execution petition was filed for executing the award passed by the Arbitrator – objections regarding the territorial jurisdiction of the Arbitrator and non-accounting of the amount paid by the objector in the statements of the account were raised- the objections were dismissed by the Court- held that there is distinction between venue of arbitration and the seat of arbitration – it was provided in the agreement that venue of arbitration is at Chennai- it cannot be said that Arbitrator had exercised jurisdiction not vested in it- the matter regarding non-accounting of the amounts paid by the objector is a matter of merit and cannot be gone into while deciding the objections – petition dismissed.(Para-5 to 12) Title: Rajiv Bhatia Vs. Indusind Bank Ltd. and another Page-14

Constitution of India, 1950- Article 226- Complainant had applied for the power availability certificate, which was issued for 11 KV power from Barowtiwala Sub Station- the certificate was extended by the Board – the complainant stated that supply voltage was varied to 66 KV instead of 11 KV, as originally agreed- the complaint was allowed and it was held that as per tariff order issued by Himachal Pradesh State Electricity Regulatory Commission, 11 KV voltage would be applicable – a review petition was filed, which was dismissed as not maintainable – aggrieved from the order, present writ petition has been filed- held that right to file an appeal or review is not a common law right but a statutory right – the Forum had rightly held that in absence of any power of review, this power cannot be exercised – the connected load of respondent No.1 is between 101 KW to 2000 KW – the recommendation was for release of additional load of 1119 KW with 550 KVA demand of 11 KV-there was no perversity or illegality in the findings recorded by the Forum – writ petition dismissed.(Para-9 to 13) Title: Himachal Pradesh State Electricity Board & others Vs. M/s Hemkunth Iron Steel Pvt. Ltd. &anr. Page-118

Constitution of India, 1950- Article 226- Petitioner along with other persons appeared for the post of AnganwadiWorker- petitioner was selected- respondent No.4 filed an appeal against her appointment, which was allowed and selection of petitioner was set aside- petitioner filed an appeal before Divisional Commissioner, who dismissed the same- a writ petition was filed and the matter was remanded to Deputy Commissioner, who dismissed the appeal – an appeal was filed, which was also dismissed- another writ petition was filed, which was disposed of with a direction to Tehsildar to decide the income of petitioner- Tehsildar found that the income of the petitioner was more than the ceiling prescribed under the Rules – petitioner filed an appeal before SDO (Civil) who dismissed the same- appeals were filed before Deputy Commissioner and Divisional Commissioner, which were dismissed- a writ petition was filed, which was allowed and the order of Divisional Commissioner was set aside- aggrieved from the judgment- present appeal has been filed- held that the provisions of Limitation Act are not applicable to the proceedings before the Divisional Commissioner but if there is a delay in obtaining the copy, the appellant cannot be penalized for the same – the matter remanded to the Divisional Commissioner to count the period of limitation from the date of supply of copy and not from the date of order.(Para-9 to 15) Title: Jaiwanti Vs. Heera Mani and others (D.B.) Page-295

Constitution of India, 1950- Article 226- Petitioner and respondent No.3 submitted a tender – the work was awarded to respondent No.3- aggrieved from the award, the present writ petition has been filed- held that the committee had calculated the rates submitted by the bidders – rates quoted by respondent No.3 were found to be the lowest regarding the items to be supplied mandatorily –the committee had rightly considered the rates for the items to be supplied mandatorily- no mala-fide action was proved on record- petition dismissed.(Para- 8 to 13) Title: Lalchand Vs. State of Himachal Pradesh and others (D.B.) Page-304

Constitution of India, 1950- Article 226- Petitioner took admission in 5th standard in National Institute of Open Schooling (NIOS) –her date of birth was not recorded correctly- she made an

application for correction, which was rejected – held that the correct date of birth was mentioned in the school leaving certificate- the petitioner came to know about the incorrect date of birth on the receipt of the mark-sheet in the month of April, 2015 – she filed the application for correction in the month of June, 2015, which was within three years- writ petition allowed and date of birth ordered to be corrected.(Para-5 to 9) Title: Brahmi Devi Vs. National Institute of Open Schooling &anr. Page-

Constitution of India, 1950- Article 226- Petitioner was appointed as beldar on daily wage basis in animal husbandry department- his services were regularized in the year 2007 – he retired in the year 2009 on attaining the age of 58 years – the petitioner pleaded that he should have been regularized from the date of appointment as beldar with all consequential benefits – the decision to reduce the age of superannuation was taken in the year 2001 after the appointment of the petitioner and would not apply to him- he filed a writ petition, which was allowed by the writ Court- held in appeal that High Court had already decided in ***CWP No. 5749 of 2010*** titled ***Lachhi Ram Versus State*** that a person appointed as workman before 2001 was entitled to continue until the age of 58 years – however, the judgment was reviewed and it was held that those workmen who were regularized in service after 10.5.2001 are entitled to continue only until the age of 58 years – the writ court had placed reliance upon the judgment of ***Lachhi Ram***, which was subsequently reviewed- the judgment passed by writ court quashed and set aside.(Para- 8 to 13) Title: State of H.P. & Others Vs. Dharam Singh (D.B.) Page-418

Constitution of India, 1950- Article 226- Petitioner was engaged as Secretary with respondent No.4- a Criminal Case was registered against the petitioner and he was put under suspension- another FIR was registered against the petitioner and services of the petitioner were terminated – the petitioner filed an appeal before Registrar Co-operative Societies, which was allowed and the petitioner was ordered to be re-engaged – the Society did not comply with the order and a notice was issued as to why the management of the Society should not be superseded – a reply was filed which was not found satisfactory and the supersession of the Committee was ordered- an appeal was filed, which was dismissed – however, the petitioner was not permitted to join- the petitioner filed a writ petition, which was disposed of with a direction to the petitioner to resort to the remedies available under the provisions of H.P. Co-operative Societies Act – the petitioner approached respondent No.2, who directed the respondent No.3 to issue notice to the Managing Committee to comply with the order – a notice was issued but respondent No.4 refused to comply with the order- a show cause notice was issued but the order was not complied – the petitioner filed a writ petition- held that the scheme of the Constitution is based upon the rule of law and nobody is above law – the Society has been persistently flouting and disobeying the orders of the statutory authority – the Society should have assailed the orders, if it felt aggrieved by them – writ petition allowed- all the members of the Management Committee of respondent No.4 from the year 2008 till date are debarred not only from being the members of the governing body of respondent No. 4 Society but are also debarred from becoming members of the society and from forming any new Co-operative Society or other Society for a period of five years – direction issued to respondent No.2 to dissolve the Managing Committee and appoint an administrator to implement the order with all consequential benefits – State Government also directed to create Co-operative Appellate Tribunal.(Para-11 to 21) Title: Ashok Kumar Vs. State of H.P. and Ors. Page-457

Constitution of India, 1950- Article 226- Petitioner, a foreign national, applied for extension of visa, which was rejected – a notice was issued by Superintendent of Police to the petitioner to exit India – the petitioner filed a writ petition seeking the extension and quashing the quit notice- held that as per Foreigners Act, a foreigner cannot enter into India or remain in India unless authorized to do so by the Central Government- stay in India beyond the prescribed period is a penal offence –the petitioner had changed his residence thrice and no intimation was given to the Government which is a violation of Foreigners Act and the Rules framed thereunder- the Court

has no authority or jurisdiction to extend the period of limitation- petition dismissed. (Para-2 to 46) Title: M. Alexander Vs. Union of India and others (D.B.) Page-381

Constitution of India, 1950- Article 226- Petitioners filed a writ petition seeking mandamus to the respondent to count the period of services when they were prevented from discharging duties on account of cancellation of their appointment towards seniority- held that the petitioners were prevented from discharging the duties on the basis of an order, which was quashed and set aside by the Appellate Authority –petition allowed and direction issued to regularize the services for the purpose of seniority and to release the grant in aid. (Para-4 to 6) Title: Saroj Devi Vs. State of H.P. &anr. Page-243

Constitution of India, 1950- Article 226- Petitioners filed the present writ petition seeking the patient care allowance- it is pleaded that the employees of the hospital and other institution were granted such benefits – however, this benefit was not extended to the petitioners- the petitioners filed an application before Central Administrative Tribunal, which issued a direction to decide the claim of the petitioner in accordance with law – the competent authority rejected the claim of the petitioners- another application was filed before the Tribunal, which quashed the order and petitioners were held entitled to patient care allowance – aggrieved from the order, present writ petition has been filed – held that Tribunal had considered the nature of the duties performed by the employees as well as the recommendations made by the Director of the institution- the object of the grant of allowance was to compensate the person likely to come in contact with infected machinery and equipment – the petitioners are discharging their duties as laboratory Attendants, Supervisors, Assistants, Safai Karamcharis, Animal Attendants etc. and thus are exposed to infectious materials – the Tribunal had rightly granted the allowance to the petitioner – petition dismissed. (Para-7 to 15) Title: Union of India & others Vs. Jitender Singh & others (D.B.) Page-211

Constitution of India, 1950- Article 226- Respondent No.4 was registered under Societies Registration Act in the name and style of Pensioners Welfare Association – subsequently, another society was registered in the name and style of Himachal Pensioners Kalyan Sangh- respondent No.4 applied for cancellation on the ground that there cannot be resemblance in the name of two or more societies- the petition was rejected – an appeal was preferredand the order passed by the Registrar was set aside– held that there was no authority with the Additional District Magistrate to register the petitioner as Himachal Pensioners Kalyan Sangh in 1999 as the respondent No.4 was already registered in the year 1989- there cannot be any resemblance in the name of two societies registered under the Societies Registration Act –the order was correctly passed – writ petition dismissed.(Para-10 to16) Title: Himachal Pensioners KalyanSanghVs. Principal Secretary (Coop.) and othersPage-158

Constitution of India, 1950- Article 226- The Court had taken suomoto cognizance of the report made by Registrar Vigilance as well as the news report published in Tribune pertaining to the failure in the regulation of the traffic in and around the town of Manali–S.P., Kullu wrote a letter to D.C., Kullu outlining the long-term vision plan to regulate and manage the traffic – the government has also made a plan to ease the traffic congestion – various notification have been issued by the Government to regulate the traffic – directions issued to complete the work of construction of bridges, to formulate long-term vision plan and associate all the stakeholders in the implementation of the same. (Para-1 to 18) Title: Court on its own motion Vs. State of H.P. & others (D.B.)CWPIL No.15 of 2015 Page-102

Constitution of India, 1950- Article 226- The land was allotted in favour of respondent No.5 to run a school in the name of DAV Public School- however, the school is being run in the name of Sri Aurobindo Public School- the Court had taken cognizance of this fact in a public interest litigation and had issued the directions - the petitioner had filed an earlier writ petition, which was disposed of with a direction to decide the representation made by the petitioner with a

speaking order- the representation was rejected by a detailed order– the allotment was not in violation of the Rules – the sanction for the change of the name of the School was granted by Financial Secretary (Revenue) – petition dismissed. (Para-5 to 11) Title: Rajinder Singh Vs. State of Himachal Pradesh and others Page-216

Constitution of India, 1950- Article 226- The petitioner remained engaged as daily rated mazdoors with BSNL since November, 1995 till 23.8.1996- their services were dispensed with – Labour Court on references held that services of the petitioners were terminated in violation of Section 25-F of the Act and the termination was illegal and unjustified – reinstatement was denied but compensation of Rs.25,000/- was ordered to be paid to each of the petitioners- however, in case of K, another workman, reinstatement with all service benefits was allowed- BSNL filed a writ petition in case of K, which was dismissed- LPA and SLP were also dismissed – held that the case of the petitioner is similar to K – hence, the compensation enhanced to Rs.3 lac from Rs.25,000/-.(Para-12 to 18) Title: Geeta Nand Vs. Bharat Sanchar Nigam Limited Page-426

Constitution of India, 1950- Article 226- The previous elections to M.C. Shimla were held on May, 2012- M.C. was constituted on 4.6.2012 with a term of five years, which will expire on 4.6.2017 on which date a new elected body is required to be constituted as per the mandate of law- the respondents stated that electoral rolls are not correct and there are various discrepancies in the same – hence, an order was issued for correction of electoral rolls- held that the purpose of inserting part IX-A in the Constitution is to ensure timely elections of the local bodies – the delay in holding the elections can be due to exceptional circumstances – the exercise of revision of electoral rolls cannot stop the elections process – the order passed to postpone the elections set aside- direction issued to frame a programme for general elections and take all consequential actions to ensure that elections are held not later than 18.6.2017 and new body is constituted by 19.6.2017. (Para-17 to 58) Title: Raju Thakur Vs. State Election Commission and others (D.B.) Page-532

Constitution of India, 1950- Article 226- The State Government issued a P.G. policy for pursuing P.G. (MD/MS) Degree/Diploma Courses within the State of H.P. for the academic session 2017-2018, in which it was provided that incentive @ 10% would be given to the in service G.D.O.s of the marks obtained in National Eligibility Entrance Test – PG (NEET-PG) for each completed year of services in the area declared as difficult/remote/backwards as per the notification – Medical Council of India framed Post Graduate Medical Education Regulation, 2000 and Regulation 9 provided that in determining the merit of in-service candidates incentives @ 10% of the marks obtained for each year of service in remote and/or difficult areas upto the maximum of 30% of the marks obtained in National Eligibility -cum- Entrance Test would be given - held that Regulation 9 is a self-contained Code and the admissions have to be made strictly in accordance with the procedure prescribed therein- the term remote/difficult area is not to be literally construed – some overlapping in the areas will not make the notification bad – the Court cannot strike down a policy or decision taken by the Government merely because it feels that another decision would have been fairer or more scientific or logical or wiser – the petitioners have failed to show as to how the decision of the Government is arbitrary, irrational, capricious or whimsical – some of the petitions partly allowed with a direction to count the entire service rendered by the petitioners in remote/difficult areas on pro rata basis.(Para-9 to 34) Title: Dr. Aarti Dhatwalia and others Vs. State of H.P. and others (D.B.) Page-27

'E'

Employees Compensation Act, 1923- Section 2 (d)- It was contended that the mother of the deceased was not a dependent as she had independent income from the orchard – held that the deceased was unmarried and had no family to support, hence, it can be concluded that he would have given his earnings to his mother –thus, she would fall within the definition of the dependent and claim petition would be maintainable at her instance – the insurer is liable to pay the interest, however, the interest has to be paid after one month from the date of accident- appeal

partly allowed and order of Trial Court modified. (Para- 3 to 7) Title: National Insurance Company Ltd. Vs. Sarla and another Page-290

Employees Compensation Act, 1923- Section 4- A claim petition was allowed by the Employees Compensation Commissioner and the compensation of Rs.5,21,290/- was awarded along with interest- Commissioner had taken themonthly income of the deceased as Rs.5,500/- aggrieved from the award, present appeal was filed – held that the income of the deceased has to be taken as Rs.4,000/- only, even if it exceeds the same in view of explanation-II to Section 4 of Employees Compensation Act- the daily allowance is part of wages and has to be added to the same- it cannot be considered as an addition to the ceiling of monthly wages – 50% of the wages have to be considered for determining the compensation - applying the factor of 189.56, the total compensation would be Rs.3,79,120/- - Insurance Company is liable to indemnify the owner – appeal partly allowed and compensation of Rs.3,79,120/- awarded with interest @ 12% per annum.(Para-3 to7)Title: Reliance General Insurance Company Limited Vs. Shakuntla and others Page-205

Employees Compensation Act, 1923- Section 4- Deceased died in a motor vehicle accident – a claim petition was filed, which was dismissed by the Commissioner – held that it was not disputed that deceased was present in the vehicle at the time of accident- the owner had engaged C as driver who had engaged the deceased as a cleaner – hence, the engagement was by the owner- the appeal is allowed- the case remanded for fresh adjudication. (Para- 4 to 7) Title: Raja Ram and another Vs. Oriental Insurance Company & another Page-53

Employees Compensation Act, 1923- Section 4- The deceased died in an accident involving a motor vehicle – a claim petition was filed, which was allowed by the Commissioner – it was contended in appeal that the deceased is the brother of the owner and it cannot be believed that he was hired as a driver by the owner- held that the evidence led before the Commissioner proved that the deceased was employed as a driver on a payment of Rs.7,000/- per month – simply because no record was maintained regarding the payment of wages cannot lead to an inference that this statement is not true – appeal dismissed- the order passed by the Commissioner upheld.Title: National Insurance Company Ltd. Vs. Rukmani & others Page-363

Employees Compensation Act, 1923- Section 4- The owner was not examined to prove that he had employed the deceased as a driver of the vehicle – however, this cannot lead to an inference that the deceased was not employed as a driver by him especially when the claimant had stated this fact on oath- the deceased was driving the vehicle at the time of accident and it can be inferred that this was by virtue of the contract of employment between the parties – appeal dismissed. (Para-2 to 4) Title: Oriental Insurance Company Ltd. Vs. Shankri Devi and another Page-294

'H'

H.P. Co-operative Societies Act, 1968- Section 69- A complaint was filed against the Management Committee of the Society – an inquiry was made by District Audit Officer who observed that irregularities and violation had taken place – an inquiry was initiated, in which it was held that charges against the Society were proved – an order was passed holding that President and Members of the Management Committee had misutilised the funds and they were directed to pay a sum of Rs.9,05,363/- along with interest – an appeal was filed before the State Government and the case was remanded – notice was not issued to the petitioner, however, an order was passed- aggrieved from the order, the present writ petition has been filed- held that every quasi-judicial authority is supposed to act with fairness- it has to follow the principle of natural justice- the proceedings were initiated at the instance of the petitioner- he was arrayed as respondent No.4 in the writ petition before the High Court in which the order was passed to file an appeal before the Government- the petitioner was entitled to notice – hence, the order set aside

with a direction to impart training to the Officers vested with adjudication power and authority in H.P. Judicial Academy.(Para-9 to 37) Title: Balak Ram Sharma Vs. The Ex-Committee of Baghal Land Loosers Transport Co-operative Society Darlaghat and others Page-365

H.P. Public Premises and Land (Eviction and Rent Recovery) Act, 1971- Section 5- Petitioner was ordered to be evicted from the government land, which was acquired for the construction of Karsog –Parlogroad – an appeal was filed, which was allowed and the case was remanded with a direction to decide the same afresh after conducting demarcation- the petitioner was again ordered to be ejected- an appeal was filed, which was dismissed- held in writ petition that due opportunity of hearing was given to the parties- the encroachment was proved by demarcation- the acquisition was not challenged by any person and has attained finality – petition dismissed.(Para- 12 to 14) Title: Muni Lal Vs. State of H.P. &others Page-307

H.P. Urban Rent Control Act, 1987- Section 14- Landlord filed an eviction petition on the ground of arrears of rent and the tenant having ceased to occupy the premises without any reasonable cause – the petition was allowed on the ground of arrears of rent – an appeal was filed, which was allowed and the eviction was ordered on the ground that tenant had ceased to occupy the premises – held in revision that power of revision should be exercised sparingly in a case of gross miscarriage of justice where the findings recorded are in complete departure of the facts and circumstances of the case- the electricity consumption from May, 2003 till December, 2003 was nil, whereas, it was 40 units till February 2014 – the consumption was nil from April 2004 to February 2006 – occasional and casual visits of the tenant are not equivalent to occupation - the Appellate Court had taken correct view of the matter- Revision dismissed.(Para-4 to 13) Title: Sanjay Kumar Vs. Dinesh Chand since deceased through his LRs Page-239

Himachal Pradesh Holdings (Consolidation and Prevention of Fragmentation)Act, 1971- Section 54- The order passed by Divisional Commissioner, Mandi was challenged on the ground that the order was passed against the petitioner behind his back – the petitioner was not heard before passing the impugned order – no service was effected upon the petitioner – the petitioner remained admitted in CHC, Barsar from 16.11.2010 till 20.11.2010 and it was not possible to tender the summons to the petitioner on 18.11.2010 – the report regarding the refusal by the petitioner is incorrect- hence, it was prayed that the order passed by Divisional Commissioner be set aside- held that the plea of the petitioner is corroborated by the discharge slip - the report submitted by the Process Server regarding the service cannot be accepted in view of the discharge slip – the writ petition allowed- order passed by Divisional Commissioner set aside with a direction to the Divisional Commissioner to issue fresh notices to the petitioner and also to conduct an inquiry against the Process Server.(Para-8 to 10)Title: Kuldip Singh Vs. State of Himachal Pradesh and others Page-530

Himachal Pradesh Urban Rent Control Act, 1987- Section 14- An eviction petition was filed for eviction of the premises on the ground that the premises were handed over to the subtenant without the written consent of the landlords, tenants are in arrears of rent and the premises are required bonafide for the purpose of rebuilding and reconstruction, which cannot be carried out without vacating the premises- the petition was allowed by the Rent Controller on the ground of arrears of rent, subletting, rebuilding and reconstruction – an appeal was filed, which was allowed and the case was remanded to the Rent Controller after framing the issues– this order of remand was set aside in revision by the High Court- Appellate Authority dismissed the appeal and affirmed the order passed by the Rent Controller – held in revision that once the order of remand was set aside, it had the effect of setting aside the order of framing of issues as well- there was no requirement to record findings on the additional issues- the evidence established the subletting on the part of the tenant after the commencement of H.P. Urban Rent Control Act- it was also established that the reconstruction cannot be carried out without vacating the building- the Courts had correctly appreciated the evidence- appeal dismissed.(Para- 20 to 46) Title: Rajinder Kumar Vs. Kusum Goel and others Page-499

Himachal Pradesh Value Added Tax Act, 2005-Section 34- Petitioner had made the payments for the purchase of vehicles to the manufacturer- when the consignment was checked, it was found that one out of six vehicles was neither declared electronically nor crossed through any of multipurpose barriers of the State – a penalty of Rs.3,21,658/- was imposed- an appeal was filed, which was rejected- another appeal was filed before H.P. Tax Tribunal, which was partly allowed- aggrieved from the order, the present revision has been filed- held that the Court can interfere with the findings recorded by the authority in case it involves any question of law arising out of erroneous decision of law or failure to decide a question of law- the orders of authorities are based upon categorical admission of the representative of the petitioner- the admission was not withdrawn- the representative had not only admitted his mistake but had agreed to pay the penalty – the petitioner had not sought the recall of the order – no question of law arises- petition dismissed.(Para-9 to22) Title: M/s. Shimla Automobile Pvt. Ltd. Vs. State of H.P. and others (D.B.) Page-55

Hindu Adoption and Maintenance Act, 1956- Section 18- Applicants applied for interim maintenance- the Court allowed the application and awarded maintenance @ Rs. 3,000/- per month – held in revision that the Court has the power to grant interim maintenance –the applicants has a right to inherit the ancestral property and would get the income from the same- no evidence was led and it was not proper to rely upon the pleadings at this stage – the revision allowed- order passed by Trial Court set aside- Trial Court directed to conclude the trial of the suit within six months. (Para- 3 to 8) Title: Gulab Singh & another Vs. Manorama Devi and others Page-268

Hindu Marriage Act, 1955- Section 11 and 12- A petition for annulment of marriage was filed with the allegations that husband had performed marriage on the assurance of the wife that she had taken divorce, which was not true- the marriage was void ab initio and it be declared as such – the petition was dismissed by District Judge – held that the evidence led by the husband that a telephonic call was received by his father from the previous husband of the wife was false- the evidence of the wife was more probable – appeal dismissed. (Para-6 to8) Title: Arun Kapoor Vs. Anita Kumari Page-477

Hindu Marriage Act, 1955- Section 13- Husband filed a petition for dissolution of the marriage pleading that the wife had developed illicit relation with respondent No. 2 – wife and respondent No.2 were caught red handed in the room, which was locked by the villagers – respondent No.2 was found inside the bed box during the search – the petition was decreed by the Trial Court and dissolution of marriage was ordered- held in appeal that it was duly proved that wife was caught red handed in her bedroom with respondent No.2 – Trial Court had rightly allowed the petition- appeal dismissed.(Para-8 to 12) Title: Shashi BalaVs. Anil Kumar and Anr. Page-208

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Indian Evidence Act, 1872- Section 45- An application for comparison of the signatures of the accused on the cheque, vakalatnama and acknowledgment was filed, which was dismissed by the Trial Court – held that vague suggestions were put to the witnesses, which shows that the accused had not contested his signatures on the cheque – the Trial Court had rightly dismissed the application- petition dismissed.(Para-2 and 3) Title: SubhashChand Vs. Mukesh Chand Page-96

Indian Evidence Act, 1872- Section 73- The signatures of the plaintiff were sent for comparison to CFSL and a report was issued that comparison cannot be carried out with the help of supplied specimen and admitted signatures- plaintiff has died and it is not possible to get his specimen signatures- hence, the documents ordered to be sent to CFSL, Hyderabad for comparison – the order of Trial Court set aside. (Para-1 and 2) Title: Chand Rani & another Vs. Ram Lal (deceased) through Kamla Thakur Page-429

Indian Evidence Act, 1872- Section 137- An application for recalling PW-5 was filed, which was dismissed by the Trial Court- aggrieved from the order, present petition has been filed- held that witness had stated in examination-in-chief that the defendants never remained in possession but admitted in cross-examination that defendant G is cultivating the land- K is cutting the grass from the suit land and M is ploughing the suit land – if the witness is recalled, the basic principle of cross-examination of witness namely to bring out the truth will be frustrated- the Trial Court correctly exercised the jurisdiction by dismissing the application – petition dismissed.(Para-10 to 13) Title: Prabhi Devi & others Vs. Madan Lal & others Page-50

Indian Forest Act, 1927- Section 42- Accused were found transporting the timber without any permit – they were tried and convicted by the Trial Court- an appeal was preferred, which was dismissed- held in revision that merely because independent witnesses have turned hostile is no ground to acquit the accused – non-examination of a single person will not make the prosecution case suspect –the minor contradictions are also not sufficient to create doubt in the prosecution version- admittedly, the trees were cut from the land of accused B- there was long gap between the date of incident and date of deposition due to which the contradictions are bound to come – transportation of timber was duly proved – the accused failed to produce any permit – they were rightly convicted by the Trial Court- Revision dismissed. (Para-7 to 41) Title: Baldev Singh & others Vs. State of H.P. Page-133

Indian Penal Code, 1860- Section 279 and 304-A- Accused was driving a tipper – the deceased, complainant and other persons were loading the same – deceased was standing behind the tipper – the complainant requested the accused to reverse the tipper and also cautioned that deceased was standing behind it – the accused reversed the tipper and hit the deceased- when the complainant raised alarm, the accused stopped the tipper – the accused was tried and convicted by the Trial Court- an appeal was preferred, which was dismissed- held in revision that revisional power can be exercised to prevent failure of justice or misuse of judicial mechanism – prosecution witnesses stated that the accident took place due to the negligence of the accused but the detail of negligence was not given- the deceased had suffered injury on the neck while opening/closing the tail gate (dala) – it was not established as to how the act of the accused led to the death of the deceased – accident had taken place at the stone crusher and not on the highway, therefore, ingredients of Section 279 are not satisfied - medical evidence also does not prove that the injury was caused in a manner suggested by the prosecution – Courts had not correctly appreciated the evidence- appeal dismissed. (Para-8 to 23) Title: Kumar Lama Vs. State of H.P. Page-62

Indian Penal Code, 1860- Section 279 and 337- **Motor Vehicles Act, 1988-** Section 185- Accused was driving a Maruti car under the influence of liquor in a rash and negligent manner- he could not control the vehicle and hit a bus- he was tried and acquitted by the Trial Court- held in appeal that prosecution witnesses contradicted each other and made material improvements in their testimonies – Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-7 to 13) Title: State of Himachal Pradesh Vs. Satish Saraswati Page-172

Indian Penal Code, 1860- Section 279, 337 and 338- Accused was driving the truck and hit a Maruti van by taking it to the wrong side – occupants of the van sustained injuries – the accused was tried and acquitted by the Trial Court- held in appeal that the defence version that the accused was signaled to overtake the bus which was moving ahead of the truck was made probable by the prosecution witnesses – the negligence of the accused was not proved in these circumstances- accused was rightly acquitted- appeal dismissed. (Para-10 to 12) Title: State of Himachal Pradesh Vs.Dharam Singh Page-475

Indian Penal Code, 1860- Section 279, 338 and 201- **Motor Vehicles Act, 1988-** Section 181- Accused was driving a scooter in a rash and negligent manner – the scooter hit the complainant on her right leg – she sustained injuries – the accused was tried and convicted by Trial Court- an appeal was preferred, which was allowed- held in revision that the complainant has supported

the prosecution version – her statement is corroborated by PW-9 - there is nothing in the cross-examination of the prosecution witnesses to shake their testimonies – no motive or enmity was proved- the accused had failed to produce the driving licence, which shows that he was not possessing any driving licence at the time of accident – the witnesses consistently stated that the scooter was being driven with high speed which caused the accident - the injuries were proved by Medical Officer – the accident had taken place in a public place and the accused was under obligation to drive the vehicle carefully and with the slow speed- he had failed to do so- the Courts had rightly convicted the accused – revision dismissed. (Para-10 to 21) Title: Amar Singh Vs. State of Himachal Pradesh Page-97

Indian Penal Code, 1860- Section 323, 325, 504, 506 read with Section 34- **Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989-** Section 3- The complainant was returning to his home, when both the accused alongwith an unknown person attacked the complainant from the backside – they used filthy language against the complainant and told that they would not allow the Chamaar to move freely in the village and kill him and his family-wifeand brother of the complainant along with some other persons reached at the spot – the accused left on seeing them- the accused were tried and acquitted by the trial Court- held in appeal thatthere are improvements and contradictions in the testimony of the complainant – the medical examination of the complainant was conducted after ten days – the Trial Court had correctly appreciated the evidence- appeal dismissed.(Para-9 to 12) Title: State of Himachal PradeshVs. Sanjeev Kumar and another Page-229

Indian Penal Code, 1860- Section 323, 341, 376 and 511- Prosecutrix and her friend, D were returning through forest area, when the accused tried to sexually assault the prosecutrix by pulling her clothes- the accused snatched dupatta of the prosecutrix and tried to strangulate her with it – accused threw the prosecutrix in a drain – D narrated the incident to the mother of the prosecutrix – search was made for prosecutrix and she was found in an injured and unconscious condition – the accused was tried and acquitted by the Trial Court- held that Medical Officer had not found any evidence of sexual intercourse – injuries were in the nature of scratches – the identity of the accused was not established- name of different person was given in the FIR – the prosecutrix was acquainted with the accused- D was declared hostile – there are contradictions regarding the recovery of dupatta- the Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-8 to 26) Title: State of Himachal Pradesh Vs. Sanjeev Kumar (D.B.) Page-512

Indian Penal Code, 1860- Section 323, 380, 452 and 506 read with Section 34- Complainant and accused were running shops in Chintpurani adjacent to each other – the accused, his son and servant entered into the shop of complainant and gave beatings to the complainant and his son- the accused also removed Rs.3,000/- from his cash box - the accused were tried and convicted by the Trial Court- an appeal was preferred, which was allowed- held that independent witnesses were not associated by the prosecution and interested witnesses were associated, which made the prosecution case suspect – the recovery of stick was not made pursuant to any disclosure statement and cannot be relied upon- recovery of the cash was not established – Appellate Court had rightly reversed the judgment- appeal dismissed.(Para-9 to13) Title: State of Himachal Pradesh Vs. Baldev Parkash and another Page-393

Indian Penal Code, 1860- Section 326, 447 and 307- PW-1 and her father are in possession of the disputed land for more than 20 years- PW-1 and V were cutting the grass when the accused trespassed into the land and asked them not to cut the grass – the accused started beating them on their refusal- PW-1 shouted for help on which husband of PW-1 and his brother arrived at the spot – the accused also gave beatings to them – accused R inflicted multiple injuries on the head and right side of the neck of the husband of the PW-1 with Gupti – the accused were tried and convicted by the Trial Court- held in appeal that there are contradictions in the testimonies of witnesses in the Court and the version recorded by the police- PW-3did not support the

prosecution version and was declared hostile – the statement under Section 27 was not recorded prior to effecting recovery – all these factors made the prosecution version doubtful- appeal allowed and accused acquitted. (Para-7 to 15) Title: Dev Raj alias Raj and another Vs. State of Himachal Pradesh Page-431

Indian Penal Code, 1860- Section 376(2)(n) and 506- Prosecutrix was suffering from unknown disease – she was told that accused was treating the ailment – the prosecutrix went to the accused who told her that there was something in the house, which was to be removed – the accused visited the house of the prosecutrix and removed one mouli from her bed – he gave her some water to drink in the night and raped her – she was also raped subsequently – she was given some water and was shifted in a vehicle in a state of intoxication – she was left in the house of her parents on the next day- the accused was tried and acquitted by the Trial Court- held in appeal that the prosecutrix had made a statement in the police station that she had voluntarily gone with the accused and had returned on her own volition – there are contradictions in the testimony of the prosecutrix – her version is inherently improbable – prosecutrix had not disclosed to her husband about the commission of rape – Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.(Para-8 to 30) Title: State of Himachal Pradesh Vs. Prakash Chand (D.B.) Page-220

Indian Penal Code, 1860- Section 395- Complainant and his friend were returning from Pathankot to Paprola in a train - when they reached Panchrukhi, the accused boarded the coach – one person stood in front of the complainant and rest of them went to switch off the light – one of the accused asked the complainant to stand up and started threatening him by Darat – other accused tried to beat the friend of the complainant and snatched the bags– the bags contained clothes, documents, and Rs.1400/- - the mobile phones were also taken away – the accused were tried and convicted by the Trial Court- held in appeal that the presence of the accused was not disputed in the cross-examination; therefore the holding of test identification parade was not necessary- the Court had correctly appreciated the evidence, however, the sentence imposed upon the accused reduced to the period already undergone.(Para-8 to 11) Title: Ajay Kumar Vs. State of Himachal Pradesh Page-519

Indian Penal Code, 1860- Section 451, 323 and 506- Accused trespassed in the courtyard of the complainant, caught her from her arm, pushed her on the grounds and gave beatings with fist and kicks blows – the accused was tried and convicted by the Trial Court- he filed an appeal, which was dismissed- held in revision that there was variation between FIR and ocular version – Medical Officer admitted that injuries can be caused by way of fall – the prosecution version was not proved beyond reasonable doubt and the Courts had wrongly convicted the accused- revision allowed- judgments passed by the Courts set aside.(Para-8 to 11) Title: Gian Chand Vs. State of Himachal Pradesh Page-521

Indian Penal Code, 1860- Section 451, 325 and 323 read with Section 34- Complainant was riding a scooter – V was driving a vehicle, which hit the scooter - the complainant narrated the incident to two other persons – complainant and those two persons went to the house of V, where the parents of V were present- mother of V started abusing the complainant- father of Vand two other persons gave beatings to the complainant – V and two other persons gave beatings to the complainant with iron rods and physical blows –accused were tried and acquitted by the Trial Court- held in appeal that no independent witness has stated that the scooter of the complainant was hit by the vehicle being driven by V- the version that complainant and two other persons went to the house of V, where they were abused was also not proved – a cross case has been filed against the complainant – complainant has not explained as to what he was doing in the under construction complex at the wee hours of night – the Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.(Para- 7 to 22) Title: State of Himachal Pradesh Vs. Bishan Dass and another Page-344

Industrial Disputes Act, 1947- Section 25- The workmen were engaged on daily wage basis in the petitioner's department- their services were disengaged on various dates without any notice or compensation, whereas, their juniors were retained – they filed a petition before the Labour Court, which was allowed qua workmen No.1, 7 and 9 – Tribunal ordered their reinstatement with seniority and continuity in service – aggrieved from the order, present writ petition has been filed- held that workmen No.1, 7 and 9 successfully proved that they had completed 240 days preceding their termination and the Tribunal had rightly held the termination to be illegal- the delay cannot be a ground to deny the claim – the Tribunal had denied the back wages keeping in view the delay –Writ Court cannot re-appreciate the facts- writ petition dismissed.(Para-10 to 19) Title: The State of Himachal Pradesh and another Vs. Presiding Judge and another Page-128

Industrial Disputes Act, 1947- Section 25- Workman was engaged as daily wage beldar on muster roll basis-the workman claimed regularization – the Tribunal held the workmen entitled to continue in service and seniority with further direction to regularize his services as per the policy of the State – aggrieved from the award, the present writ petition has been filed- held that petition cannot be dismissed on the ground of delay – the reference was made by the Government and was answered by the Tribunal – Writ Court has limited jurisdiction to interfere with the award – writ petition dismissed.(Para-11 to 20)Title: State of Himachal Pradesh and another Vs. Mahinder Singh (D.B.) Page-314

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Land Acquisition Act, 1894- Section 18- Reference Court awarded the compensation @ Rs.60,000/- per bigha uniformly with respect to all the categories of land after placing reliance upon a sale deed by means of which 3-14 bighas of land was sold for a consideration of Rs.2,40,317/- - aggrieved from the award, the present appeal has been filed – held that the land sold by means of exemplar sale deed is located in close proximity to acquired land – the sale deed was executed 10 years prior to the acquisition – the price must have escalated since the date of execution of the sale deed- the purpose of acquisition was common and therefore, the uniform assessment of compensation cannot be faulted – appeal dismissed.(Para-2 to 8) Title: State of H.P. and another Vs. Hari Singh and others Page-390

Land Acquisition Act, 1894- Section 18- The reference petition was dismissed by the District Judge on the ground that he does not have jurisdiction to decide the question of the conferment of proprietary rights– aggrieved from the order, the present appeal has been filed- held that proprietary rights have not been conferred upon the respondent and the compensation was paid on the basis that respondent No.3 to 7 are tenants – the jurisdiction is not barred when the revenue officer has not conferred the proprietary rights- the evidence was led before the reference Court and the Court should have returned a finding on the basis of the same – appeal allowed- judgment of reference Court set aside- the case remanded with a direction to decide the same afresh in accordance with law. (Para-2 to 4) Title: Bachna Ram (since deceased) through his legal representatives and others Vs. Land Acquisition Collector and others Page-59

Limitation Act, 1963- Section 5- An application for condonation of delay has been filed pleading that the file was misplaced while carrying out the whitewash – the file was traced in January 2017 and thereafter the application for condonation of delay was filed- held that the explanation given by the applicant is implausible, weak and untenable – there is a delay of more than two years in filing the application, which cannot be condoned lightly – application dismissed.(Para-3 to 7) Title: Jagrup Chand Dogra Vs. Ramesh Kumar Ramkrishan Sharma and others Page-245

Limitation Act, 1963- Section 5- An application for condonation of delay was dismissed by the Trial Court – aggrieved from the order, present revision has been filed – held that the order dismissing the application for condonation of delay can be assailed by filing an appeal and no revision lies in respect of the same - the revision dismissed with liberty to file an appeal in

accordance with law– the time spent in pursuing the revision ordered to be excluded. (Para-2 and 3) Title: Khyalu Ram Vs. Mangla Nand Page-215

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N.D.P.S. Act, 1985- Section 20- Accused was found in possession of650 grams charas – he was tried and acquitted by the Trial Court- held in theappeal that Trial Court had placed reliance upon the judgment of **Sunil Vs. State of H.P., Latest HLJ, 2010 (HP) 207**but the said judgment was overruled in **State of H.P. Vs. Mehboob Khan, 2014 Cr. L.J., 705 (F.B.)-** Report of Chemical Examiner specifically stated about the presence of tetrahydrocannabinol and cystolithichair, which proved that the sample was of the charas – the recovery was effected from a bag and there was no requirement of complying with Section 50of N.D.P.S. Act- efforts were made to associate independent witness but no one joined- the official witnesses had supported the prosecution version and their testimonies were corroborated by the documents – the link evidence was proved – non-production of the seal will not make the prosecution case doubtful – the defence version was not probable – the prosecution has succeeded in proving his case beyond reasonable doubt- appeal allowed- accused convicted of the commission of offence punishable under Section 20 of N.D.P.S. Act.(Para-12 to 33) Title: State of H.P. Vs. Surender Kumar (D.B.) Page-446

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 1.6 kg. charas – he was tried and convicted by the Trial Court- held in appeal that setting of naka and presence of accused were not disputed- testimonies of police officials corroborated each other– contradictions in their testimonies are not material- statement of police officer cannot be doubted on the ground that he is a police officer and interested in the success of his case – police official was sent to call an independent witness but none could be found as it was a night time – difference of 0.62 grams or 1% is not material as the contraband was wrapped with poly wrappers, when it was weighed at the spot and poly wrappers were removed when the contraband was weighed in the FSL, which explains the difference in the weight – link evidence was established – failure to produce seal in the Court will not be fatal – the Court had rightly appreciated the evidence – appeal dismissed.(Para-6 to 28) Title: Naresh Bahadur Sahi Vs. State of Himachal Pradesh (D.B.) Page-162

Negotiable Instruments Act, 1881- Section 138- A complaint was filed against the accused for the commission of anoffence punishable under Section 138 of N.I. Act- accused was tried and convicted by the Trial Court- an appeal was preferred, which was also dismissed- held in revision that the returning memo was received on 2.1.2013 and 3.1.2013- legal notice was received by the accused on 12.1.2013 but the complaint was filed on 23.1.2013 before the expiry of 15 days- it is not permissible to file the complaint prior to the expiry of 15 days as such the complaint is premature and is liable to be quashed and set aside- revision allowed – judgments passed by the Courts set aside. (Para- 3 to 6) Title: Fina Dass Vs. Vinod Kumar Page-379

Negotiable Instruments Act, 1881- Section 138- A complaint was pending before the Court at Theog when the judgment titled ***Dashrath Rupsingh Rathod*** vs. ***State of Maharashtra and another(2014) 9 SCC 129*** was delivered and it was held that a complaint can be filed before a Court within whose jurisdiction drawee bank was located- the complaint was ordered to be returned for presentation before the court having jurisdiction – complainant filed a fresh complaint before the Court at Saket where drawee bank was situated – legislature amended Negotiable Instruments Act and nullified the effect of judgment in Dashrath – the complaint was transferred from Court at Saket to the Court at Theog – held that a new complaint was filed at Saket and not the complaint which was returned by the Court at Theog- the complainant could not have amended the complaint without seeking permission from the Court- it was not permissible to file a fresh complaint- proceedings on the basis of the fresh complaint are void ab

initio – the Court at Theog directed to restore the original complaint and to proceed on the basis of the same.(Para-9 to 22) Title: Arnab ChatterjeeVs. Joginder Thakur Page-21

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Protection of Women from Domestic Violence Act, 2005- Section 12- A complaint was filed alleging that the complainant was married to the appellant – she was turned out of her matrimonial home by her in-laws- she remained in her parental home for 8 months and when she returned, she was not allowed to enter into the house- she went to her parents' house and when she returned, shewas not allowed to enter her matrimonial home – she sought protection under Domestic Violence Act – the Trial Court dismissed the application- an appeal was filed, which was partly allowed- aggrieved from the order, present petition has been filed- held that no specific allegation of beatings was made in the complaint – the evidence on record shows that complainant had herself left the matrimonial home- petition allowed- order of Appellate Court set aside- however, compensation of Rs.10,000/- awarded to the complainant.(Para-13 to 16) Title: Anil Kumar Vs. Shashi Bala and others Page-179

Punjab Excise Act, 1914- Section 61(1)(a)- Accused were carrying 11 bags of country liquor No.1 containing 264 pouches and one gunny bag of country liquor Lalpari containing 50 pouches – they could not produce any permit on demand- the accused were tried and convicted by the Trial Court- an appeal was filed, which was allowed and the accused were acquitted by the Appellate Court-heldin appeal that the acquittal was recorded on the basis of contradictions in the testimonies of the prosecution witnesses- however, the contradictions were not significant – the identity of the case property was not disputed in the cross-examination – non-production of the seal in the Court will not adversely affect the prosecution version- independent witness turned hostile but admitted his signatures on the seizure memo – the samples were representative and it was not necessary to take sample from every pouch – the Appellate Court had wrongly recorded the acquittal- appeal allowed- judgment of Appellate Court set aside and that of the Trial Court restored.(Para-10 to 16) Title: State of Himachal Pradesh Vs. Baljit Singh Page-524

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Specific Relief Act, 1963- Section 20- Plaintiff filed a civil suit for specific performance of the agreement – it was pleaded that plaintiff and defendants No.7 and 8 had entered into an agreement with the predecessor-in-interest of defendants No.1 to 6 for sale of one bigha of land for a sum of Rs.40,000/- -plaintiff raised the construction over his share measuring 7 Biswas – the sale deed was not executed – hence, the suit was filed for seeking the relief – the suit was partly decreed by the Trial Court- an appeal was filed, which was dismissed- held in second appeal that no permission was granted by the State Government for the purchase of the land – there is no evidence of partition between the purchasers – the specific performance could not have been granted in these circumstances and the Courts had rightly ordered the return of the purchase money – appeal dismissed. (Para-11 to 30) Title: Benu Dhar BhanjaVs. Dyalo& Others Page-283

Specific Relief Act, 1963- Section 20- Predecessor-in-interest of defendants No.1 and 2 had agreed to sell complete first floor of the double storeyed building to the plaintiff for Rs.9,50,000/- - Rs.3,50,000/- was paid as earnest money – however, the sale deed was not executed and defendants No.1 and 2 executed the sale deed in favour of defendant No.3 – the plaintiff filed a civil suit seeking specific performance of the agreement and in the alternative for the recovery of the money- the suit was decreed for the refund of the money along with interest – an appeal was filed which was dismissed- it was contended in the second appeal that the suit for specific performance was barred by limitation and time was essence of contract – held that no specific date for execution of the sale deed or for the payment of balance consideration was mentioned in the agreement and time cannot be said to be the essence of the contract – the time is generally not of essence of contractin the agreements related to the sale of immovable property – the defendant has not denied the receipt of consideration, hence, the refund of the consideration is

the logical conclusion otherwise it would amount to unjust enrichment of the defendants at the expense of plaintiff – appeal dismissed.(Para-9 to 22)Title: Shruti Vs. Baldev Singh and others Page-467

Specific Relief Act, 1963- Section 34 and 38- Plaintiff filed a civil suit pleading that he is owner in possession of the suit land – the entries in the revenue record in favour of the defendants are wrong- the defendants are interfering with the suit land without any right to do so- hence, the suit was filed for seeking the relief of declaration and injunction - the defendants pleaded that they are joint owners in possession of the suit land- land was partitioned in the year 1994 and they are owners in possession of the suit land since then - the suit was decreed by the Trial Court- an appeal was filed, which was allowed- held in second appeal thatthe plea of the defendants regarding the partition was not proved – the evidence regarding Azadinama/relinquishment was beyond pleadings and cannot be looked into- relinquishment deed is not registered and not admissible in evidence- the Appellate Court had wrongly accepted the case of the defendants- appeal allowed- judgment of the Appellate Court set aside and that of the Trial Court restored.(Para-17 to 35) Title: Piar Chand & Others Vs. Sant Ram &Others Page-250

Specific Relief Act, 1963- Section 34 and 38- Plaintiff filed a civil suit pleading that he had become owner by way of adverse possession- the defendants were interfering with the suit land- hence, the suit was filed for seeking declaration and injunction- the suit was decreed by the Trial Court- an appeal was filed, which was allowed and the decree of the Trial Court was set aside- held in second appeal that the plea of adverse possession can only be taken in defence and a suit cannot be instituted on the basis of the same- the Appellate Court had rightly allowed the appeal – appeal dismissed.(Para-7 to11) Title: Brij Lal (since deceased) through his legal heirs Vs. Satya Devi and others Page-396

Specific Relief Act, 1963- Section 34 and 38- Plaintiff filed a civil suit for declaration that suit land is jointly owned by plaintiff and defendant with exclusive possession of the plaintiff – entry showing suit land under mortgage with the defendant in the column of ownership is wrong, illegal, null and void – the suit was decreed by the Trial Court- an appeal was preferred, which was allowed and the case was remanded to the Trial Court – an appeal was preferred before High Court, which was allowed - the judgment passed by Appellate Court was set aside and the case was remanded to the Appellate Court for a fresh decision- the appeal was dismissed by the Appellate Court- held in second appeal that defendant categorically admitted that plaintiff is owner to the extent of half share – this admission was not explained before the Appellate Court and is presumed to be correct- the Courts had correctly appreciated the facts- appeal dismissed.(Para-17 to 25) Title: Kartar Singh Vs. Satpal Singh & others Page-122

Specific Relief Act, 1963- Section 34 and 38- Plaintiff filed a civil suit for declaration and permanent prohibitory injunction pleading that S was joint owner in possession of the suit land- he had executed a Will bequeathing half share in favour of M and D and remaining half share in favour of his widow – the share of the widow was to revert to M and D in equal share on the death of widow – defendants No.1 to 3 got a Will of the widow registered in their favour and mutation was also attested on the basis of the said Will- the defendants threatened to interfere with the suit land – hence, the suit was filed for seeking the relief – the defendants pleaded that A had pre-existing right of maintenance – the land was given to her in recognition of that right and she became the owner of the property- she had executed the will in her sound disposing state of mind- hence, it was prayed that the suit be dismissed- the Trial Court decreed the suit – an appeal was filed, which was allowed and the decree of trial Court was set aside- held in second appeal that the Will executed by S conferred life estate in favour of his widow –life estate in lieu of maintenance would enlarge into absolute right under Section 14 (2) of Hindu Succession Act- Appellate Court had wrongly appreciated the evidence – appeal allowed. (Para-8 to 15) Title: Madho Ram Vs. Durga Ram & others Page-406

Specific Relief Act, 1963- Section 34 and 38- Plaintiff M filed a civil suit pleading that he had become owner by way of adverse possession- the revenue entriesare incorrect and the defendant R is interfering with the suit land taking advantage of the wrong revenue entries – the defendant R filed a separate suit pleading that he had mortgaged the suit land with the plaintiff M- the defendant R is ready to pay the mortgaged amount but the plaintiff M refused to accept the same- hence, the suit was filed for seeking the redemption of the mortgage – the suit filed by M was dismissed while the suit filed R was decreed –M filed separate appeals, which were dismissed– aggrieved from the judgments, the present appeal has been filed – held that an application was filed before the Appellate Court pleading that R was not heard for more than 7 years- this application was not decided by the Appellate Court- the suit was filed by R through his power of attorney – the Appeal allowed and case remanded to the Appellate Court with a direction to decide the application in accordance with law. (Para-14 to 16) Title: Mohi Ram Vs. Ram Saran Page-488

Specific Relief Act, 1963- Section 34 and 38- Plaintiffs filed a civil suit seeking declaration and injunction pleading that the suit land is owned by the plaintiffs and the entries in the revenue record are incorrect – the defendant is interfering with the suit land and has constructed a thatched roof chhan a few months ago- plaintiffs had obtained decree against R, whose name was reflected in the revenue record- defendant had filed an application before Land Reforms Officer, who had passed a wrong order – the suit was decreed by the Trial Court –an appeal was filed, which was dismissed – held in second appeal thatplaintiffs had sought the relief of possession in the alternative- the defendant pleaded an exchange and adverse possession in the alternative – plaintiffs are proved to be the owners of the suit land – exchange and adverse possession were not proved – the Courts had rightly decreed the suit – appeal dismissed.(Para-17 to19) Title: Ram LokVs. Amar Singh and others Page-440

Specific Relief Act, 1963- Section 34 and 38- Plaintiffs filed a civil suit pleading that the thumb impression and signatures of plaintiff No.1 were obtained by defendant No.1 on numerous papers by informing her that she was executing a power of attorney – she subsequently came to know that sale deeds were got executed from her – the defendants pleaded that the sale deeds were executed by plaintiff No.1 voluntarily after the receipt of sale consideration- they also filed a civil suit for seeking the injunction pleading that they are the owners by virtue of sale deeds – the suit filed by plaintiffs was decreed while suit filed by the defendants was dismissed – separate appeals were filed, which were allowed and plaintiffs were restrained from interfering with the ownership and possession of the defendants – held in second appeal that onus to prove fraud, misrepresentation and undue influence was upon the plaintiffs- no satisfactory evidence was led to prove these allegations- the plaintiff No.1 had also executed sale deeds in favour of other persons – the Appellate Court had correctly appreciated the evidence – appeal dismissed.(Para- 15 to 48) Title: Prito Devi & AnotherVs. Prem Singh &OthersPage-191

Specific Relief Act, 1963- Section 34 and 38- Plaintiffs filed a suit for seeking declaration and injunction pleading that they are in possession of the suit land as mortgagee and have become owners by efflux of time– the suit was dismissed by the Trial Court- an appeal was filed, which was dismissed- held in second appeal that the mortgage was a usufructuary mortgage and the mortgagee has a right to redeem the mortgage at any time – the Courts had rightly decided the suit – appeal dismissed. (Para-7 to11) Title: Ravinder Kumar Vs. Rani Devi and others Page-414

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit for declaration that suit land is ancestral property – the gift deed executed by defendant No.3 in favour of defendant No.1 and 2 is null and void and has no effect on the rights of the plaintiff- the suit was dismissed by the Trial Court- an appeal was filed, which was dismissed- held in second appeal that Appellate Court concluded that out of 27.10.03 bighas about 19 ½ bighas of land is mixture of ancestral and non-ancestral land while the remaining land was not proved to be ancestral – the evidence has not

proved the ancestral nature of the property – the Courts had rightly appreciated the evidence- appeal dismissed.(Para-14 to 31) Title: Lekh Ram & others Vs. Pal Singh & others Page-145

Specific Relief Act, 1963- Section 34- Plaintiffs claimed to be the exclusive owner in possession of the suit land to the exclusion of their brother M, the predecessor-in-interest of the defendants- they pleaded that D was the previous owner who had mortgaged the land with the plaintiffs and thereafter sold the same orally to them – entries were wrongly recorded in favour of M- the defendants pleaded that the land was purchased from the joint family funds – M was the member of joint family – the suit was decreed by the Trial Court- an appeal was preferred, which was allowed- held in second appeal that D was not examined – plaintiffs did not appear in the witness box and an adverse inference has to be drawn against them –the plea of the defendants is corroborated by revenue entries – the Appellate Court had rightly reversed the decree of the Trial Court – appeal dismissed.(Para-17 to27) Title: Sauju deceased through his LRs. NirmalKashyap and others Vs. Gulab Singh &ors. Page-42

Specific Relief Act, 1963- Section 34- Plaintiffs filed a civil suit for declaration that they have ½ share in the land while the defendants and F have 1/4th share – the entry in the name of the defendants regarding the ½ share is incorrect – the defendants were never inducted as tenants on the suit land – the suit was decreed by the Trial Court – an appeal was filed, which was dismissed- held in second appeal that the defendants pleaded that after the death of P his share was inherited by H and F in equal share – the defendants are the daughters and sons of H –name of predecessor-in-interest of the plaintiffs was recorded as owner in possession as Hissedar along with predecessor-in-interest of the defendants- names of defendants were recorded on the basis of NakalRapatRoznamacha- however, no statement was made by the owner nor any signatures/thumb impression was taken – the process for recording change was not followed – the Courts had properly appreciated the evidence – appeal dismissed.(Para-10 to 20) Title: Parvati Devi & Others Vs. Inder Singh & Others Page-435

Specific Relief Act, 1963- Section 34- Plaintiffs filed a civil suit for declaration pleading that an agreement for conveying 5½ marlas of land to K was executed with defendant No.2- defendant No.2 parted with the possession and K constructed a three-storeyed building – K was married to plaintiff No.1 and plaintiff No.2 is the adopted son – certain officials from the office of defendant No.1 askedthe plaintiffs to vacate the building on the ground that K had bequeathed the property in favour of defendant No. 1 – K had not executed the Will in favour of defendant no. 1– the suit was dismissed by the Trial Court- an appeal was preferred, which was dismissed – held in second appeal that the marriage certificate shows the name of the lady as KasongChammo , whereas the Will was executed by KalsangTsomo – plaintiffs also mentioned the name of deceased lady as KalsangTsomo– thus, both the ladies cannot be called to be the one and the same – the Courts had rightly held that marriage certificate was not connected to testatrix- the execution of the Will was proved by the scribe and the marginal witness- appeal dismissed. (Para-13 to17) Title: DorjeeGyaltson @ Abhuji and another Vs. Private Office His Holiness theDalai Lama and another Page-108

Specific Relief Act, 1963- Section 38- Parties are joint owners of the suit land – plaintiff pleaded that defendants were raising construction over the best portion of the suit land without getting it partitioned- he prayed for permanent prohibitory injunction for restraining them from raising construction and for mandatory injunction for directing the defendants to restore the suit land to its original condition by demolishing the construction raised on the same – suit was dismissed by the Trial Court- an appeal was filed, which was allowed and the suit was decreed – held in second appeal that the parties have constructed houses over some portion of the land and the rest of the portion is lying vacant – a Local Commissioner was appointed during the pendency of the suit who found the construction material lying upon the land –it was not proved that construction was being raised on the best portion of the land – when construction is being raised on the suit land, the co-sharer seeking injunction has to establish a prejudice to his rights – it was not proved that

proposed construction will diminish the value and utility of the property or would be detrimental to the interest of other co-owners – Learned District Judge had decreed the suit on the ground that defendants had failed to mention the collection of construction material in their written statement – however, the suit can be decreed on the strength of the plea raised by the plaintiff and not on the weakness of the plea of the defendants – plaintiff has failed to establish any adverse impact upon his right and the suit could not have been decreed- appeal allowed- judgment and decree passed by Learned District Judge set aside and that of the Trial Court is restored. (Para-5 to 29) Title: Piar Chand & othersVs. Sandhya Devi and others Page-152

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit seeking injunction pleading that plaintiff and defendants were co-sharers – the suit land is in exclusive possession of the plaintiff- defendants are forcibly trying to occupy the suit land – the suit was dismissed by the Trial Court- an appeal was filed, which was allowed- held in second appeal that plaintiff had admitted in cross-examination that he had filed the suit for taking possession from the defendant, which shows that plaintiff is not in possession- the evidence of the defendant also proved the possession of K- the findings recorded by the Trial Court that plaintiff had failed to prove his possession are the correct findings – appeal allowed- judgment of Appellate Court set aside.(Para-12 to 19) Title: Kalyan Singh and others Vs. Mehar Singh and others Page-298

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit for injunction pleading that suit land was owned by plaintiff and his brother as non-occupancy tenants- they became the owners on the commencement of H.P. Tenancy and Land Reforms Act- the defendants threatened to interfere with the suit land without any right to do so- hence, the suit was filed for seeking the relief of injunction- the defendants pleaded that plaintiff had entered into an agreement to sell his share in favour of P and had delivered the possession after receiving Rs.10,000/- - the Trial Court decreed the suit – an appeal was filed, which was dismissed- held in second appeal thatthe agreement to sell and the receipt were not properly proved by the defendant – the Courts had properly appreciated the evidence- appeal dismissed. (Para-8 to 12) Title: Dharam Chand and others Vs. Achhru Ram (since deceased) through his legal heir Sheela Page-484

Specific Relief Act, 1963- Section 38- Plaintiff pleaded that he is owner in possession of the suit land – defendants threatened to dispossess the plaintiff from the suit land without any right to do so- hence, the suit was filed for seeking injunction- the defendants pleaded that defendant No.2 had filed a suit for possession by way of ejectment in which the present plaintiff was arrayed as defendant No.4- the suit was decreed and defendant No.2 became the owner – plaintiff has no right over the suit land – the suit was decreed by the Trial Court- an appeal was filed, which was dismissed- held in second appeal that defendant No.2 had filed a civil suit in which original plaintiff was arrayed as defendant No.4- the suit was compromised and 9 Biswas of land was given to the original plaintiff - application for correction was filed, which was dismissed- plaintiff being the owner has a right to restrain the stranger from interfering with his ownership and possession- the suit was rightly decreed by the Trial Court- appeal dismissed. (Para- 11 to18) Title: Maina Devi & another Vs. Baru Devi & others Page-271

Specific Relief Act, 1963- Section 38- Plaintiffs filed a civil suit for seeking permanent prohibitory injunction for restraining the defendants from interfering in the possession of the plaintiffs over the suit land – it was pleaded that plaintiffs are in possession since 1931-32 – suit land was mortgaged but the mortgage was rejected by Tehsildar- possession of the plaintiffs continued- defendants are threatening to interfere in the possession of the plaintiffs – hence, the suit was filed for seeking the reliefof possession – the suit was decreed by the Trial Court- an appeal was filed, which was allowed and the judgment passed by Trial Court was set aside – held in second appeal that Revenue Court had recorded a finding regarding the entry made in the year 1931-32- this finding was affirmed by the Appellate Authority – Civil Court could not have re-considered the said finding of the Revenue Court – mutation was cancelled by the Revenue Authority and the plaintiffs cannot assert their possession on the basis of the mutation – suit

land was lying vacant and the plea that the plaintiffs are in cultivating possession was not established – there are variations in the pleasraised before the Revenue Authority and before the Civil Court – appeal dismissed.(Para-13 to20) Title: Ram Karan & Others Vs. Kaushalaya Devi &Others Page-260

Specific Relief Act, 1963- Section 38- Plaintiffs filed a civil suit for seeking injunction for restraining the defendants from interfering in their possession- it was pleaded that plaintiffs are owners in possession of the suit land and defendants were interfering with the same without any right to do so- the defendants pleaded that they were in possession since 13.2.1969 and had become owners by way of adverse possession- the suit was decreed by the Trial Court- an appeal was preferred, which was dismissed- held in second appeal thatownership of the plaintiffs was proved – defendants failed to prove the adverse possession- hence, the suit was rightly decreed by the Courts- appeal dismissed.(Para-11 to 14) Title: Leela Devi and others Vs. Virender Mahajan and another Page-340

Specific Relief Act, 1963- Section 38- Plaintiffs filed a civil suit for permanent prohibitory injunction and possession pleading that they are owners in possession of the suit land – the defendants are interfering with the suit land without any right to do so- they had encroached upon a portion of suit land, which fact was verified during demarcation- the suit was decreed by the Trial Court- an appeal was filed, which was allowed- held in second appeal that the plea of adverse possession taken by the defendants was not proved – consequently, plaintiffs are to be declared the owners of the suit land – the Trial Court had rightly decreed the suit and Appellate Court had wrongly set aside the decree- appeal allowed – judgment of Appellate Court set aside and that of Trial Court restored.(Para-10 to 22) Title: Mangla Devi (deceased) through L.Rs. and others Vs. Rattan Chand and others Page-186

Specific Relief Act, 1963- Section 38- Plaintiffs filed a civil suit for injunction on the ground that plaintiffs and defendants are recorded as co-owners over the suit land – the defendant No.1 started cutting the vacant land to raise structure over the same- he also cut the passage to create obstruction for the plaintiffs in reaching the road as well as the house of the plaintiffs- the suit was dismissed by the Trial Court- an appeal was filed, which was allowed- held in second appeal that plaintiffs had failed to prove the existence of specific path over the suit land connecting their house with the common village path – PW-2 and PW-3 admitted that there was a path of 2½ - 3 feet width- the filing of sketch of the path was necessary to identify the same- appeal allowed and judgment of Appellate Court set aside.(Para-12 to 17) Title: Naresh Kumar & others Vs. Shanti Devi & others Page-90

Specific Relief Act, 1963- Section 38- Plaintiffs filed a civil suit for injunction and possession pleading that the room was handed over to the defendants on the undertaking that it would be vacated as and when required by the plaintiffs – defendants had forcibly blocked the staircase and they were not allowing the plaintiffs to use the same- hence, the suit for possession and injunction was filed–the suit was decreed by the Trial Court – an appeal was filed, which was allowed – held in thesecond appeal that Appellate Court had relied upon the report of the demarcation to hold that plaintiffs are in possession; hence, the plaintiffs are not entitled to possession – objections were filed against the report of the Local Commissioner- however, these objections were not decided by the Court – it was not permissible to rely upon the report of Local Commissioner without deciding the objections – appeal allowed- case remanded to the Appellate Court for fresh adjudication after deciding the objections filed against the report of the Local Commissioner.(Para-11 to 17)Title: Beena&Ors. Vs. ParbhatBhushan& others Page-336

Specific Relief Act, 1963- Section 38- Theplaintiff filed a civil suit for injunction pleading that he is owner and defendants are interfering with the suit land without any right to do so- the defendants denied the interference and stated that a portion of the suit land is in their possession and they have become owners by way of adverse possession – they also filed a counter-claim to

this effect- the suit was dismissed by the Trial Court and the Counterclaim was partly decreed – separate appeals were filed - the District Judge allowed the appeal filed by the defendants and dismissed the appeal filed by the plaintiffs- defendants were declared to have become owners by way of adverse possession and plaintiff was restrained from interfering in the possession – held in second appeal that the defendants had taken the plea of true ownership in the written statement, thus, the plea of adverse possession is not available to them – Defendant No.1 stated that he would not have raised construction on the land if he had known that the land belongs to the plaintiff- the plea of adverse possession was not established as the hostile animus is lacking – appeal allowed – judgments and decrees passed by the Courts set aside.(Para- 17 to 32) Title: Khazan Singh & OthersVs. Ravinder Singh & Others Page-70

Specific Relief Act, 1963- Section 5- Plaintiff filed a civil suit for possession of the suit land pleading that the same is owned by plaintiff and his daughter – defendants got themselves recorded in possession and thereafter took forcible possession taking advantage of wrong revenue entries- the defendants pleaded that they had become owners by way of adverse possession – the suit was decreed by the Trial Court- an appeal was filed, which was dismissed- held in second appeal that husband of the plaintiff was recorded as owner in possession of the suit land – the names of the plaintiff and her daughter were recorded after his death – the names of the defendants were recorded in the column of possession but there is no order or remark explaining the entry in favour of the defendants- the Courts had rightly appreciated the evidence- appeal dismissed. (Para-11 to 24) Title: Joginder Singh & Others Vs. Lalita Devi Page-357

Specific Relief Act, 1963- Section 5- Plaintiffs filed a civil suit for possession pleading that A, the previous owner, had executed a Will in favour of his grandsons S and R, defendant No.2- they sold the property to V after the death of A and were left with no share - a gift deed was executed by defendant No.2 in collusion with S- V died in a motor accident and was survived by the plaintiffs- the defendants pleaded that the sale deed was fictitious, as the property was mortgaged with H.P. Financial Corporation, which sold the land on failure to pay the mortgaged amount to D – D sold the property to S and R, as per the agreement- the gift deed was validly executed – the suit was dismissed by the Trial Court– held in appeal that S had sold 17 Biswas of land to V as an owner and as power of attorney holder of R– R and S were left with the land- the subsequent gift deeds and sale deeds were regarding the remaining portion of the land- appeal dismissed. (Para-9 to 13)Title: Kiran Kumar and others Vs. Mohd. Ansari (since deceased) through his legal heirs and others Page-399

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

M/s D.P. Jagan Hardware Private Limited. ...Petitioner.

Versus

M/s D.P. Jagan & Sons and another. ...Respondents.

CMPM(O) No. 340/2016
Decided on: 8.3.2017

Code of Civil Procedure, 1908- Order 7 Rule 11- Plaintiff filed a civil suit for restraining the defendant from using the name Ms/ D.P. Jagan Hardware Private Limited or any similar name as the name M/s D.P. Jagan& Sons, which was being used by the plaintiff since 1985- an application for rejection of plaint was filed by the defendant, which was dismissed- however, the plaint was ordered to be returned – held that right of action of any person for passing off goods and services of another person and remedies thereof are not affected by Trade Marks Act, 1999- therefore, it cannot be said that the suit was not maintainable before the Civil Court- the suit was based upon unregistered trade mark and the application for registration is pending before Registrar Trade Mark – hence, the suit was to be instituted before the District Judge in accordance with Section 134(1)(c) of Trade Marks Act- Petition dismissed.(Para-6 to 11)

Case referred:

S. Syed Mohideen vs. P. Sulochana Bai, (2016) 2 SCC 683

For the Petitioner: Mr. Mohan Singh, Advocate.

For the Respondents: Mr. P.S. Goverdhan, Advocate for respondent No.1.
Mr. Sanjay Kumar Sharma, Advocate for proforma respondent No.2.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge(oral)**:**

By medium of this petition, the petitioner has prayed for setting aside the order passed by the trial court on 2.4.2016 whereby the application filed by it for rejection of the plaint came to be dismissed.

2. The bare minimal facts, as are necessary for determination of this petition, are that the plaintiff-respondent filed a suit for permanent injunction restraining the petitioner-defendant from using the name of "M/s D.P. Jagan Hardware Pvt. Ltd." or any similar name in any manner as the name M/s D.P. Jagan & Sons, which was being used by the plaintiff since 1985 and in addition thereto damages of Rs. 20 lakhs were also claimed.

3. The petitioner preferred an application under order 7 rule 11 of the of the Code of Civil Procedure with a prayer to reject the plaint filed by the respondent mainly on the ground of maintainability as according to it, the plaint was not maintainable in view of the provisions contained in the Trade Marks Act, 1999 (for short the "Act").

4. Learned trial court vide impugned order upheld the contention of the petitioner qua the applicability of section 134 of the Act, but concluded that the plaint could not be rejected but was required to be returned to be presented to the court of competent jurisdiction. It is this order, which has been assailed by the petitioner on the ground that the learned trial court ought to have rejected the plaint instead of ordering return of the same.

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

6. Learned counsel for the petitioner would heavily bank upon the provisions of section 27 of the Act to contend that the suit filed by the plaintiff-respondent is not at all maintainable. What appears to have been ignored is sub-section (2) of section 27 of the Act and, therefore, it is necessary to reproduce the entire section 27, which reads thus:

> **"27. No action for infringement of unregistered trade mark.**
>
> (1) No person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered trade mark.
>
> (2) Nothing in this Act shall be deemed to affect rights of action against any person for passing off goods or services as the goods of another person or as services provided by another person, or the remedies in respect thereof."

7. From the reading of sub-section (2) of section 27 of the Act, it is clear that the right of action of any person for passing off the goods/services of another person and remedies thereof are not affected by the provisions of the Act.Thus, the rights in passing off emanate from the common law and not from the provisions of the Act and they are independent from the rights conferred by the Act. This is evident from the reading of opening words of sub-section (2) of section 27) which are "Nothing in this Act shall be deemed to affect rights...."

8. Similar issue came up recently before the Hon'ble Supreme Court in ***S. Syed Mohideen*** vs. ***P. Sulochana Bai***, (2016) 2 SCC 683, wherein the Hon'ble Supreme Court has been held as under:

> "[24] Effect of registration is provided in Chapter IV of the Act in Section 27. This Section provides that no infringement will lie in respect of an unregistered trade mark. However, Section 27(2) recognises the common law rights of the trade mark owner to take action against any person for passing of goods as the goods of another person or as services provided by another person or the remedies thereof. Section 27 reads as under:
>
> "27. No action for infringement of unregistered trade mark.
>
> (1) No person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered trade mark.
>
> (2) Nothing in this Act shall be deemed to affect rights of action against any person for passing off goods or services as the goods of another person or as services provided by another person, or the remedies in respect thereof."
>
> 25. Section 28 which is very material for our purpose, as that provision confers certain rights by registration, is reproduced below in its entirety:
>
> 28. Rights conferred by registration.-(1) Subject to the other provisions of this Act, the registration of a trade mark shall, if valid, give to the registered proprietor of the trade mark the exclusive right to the use of the trade mark in relation to the goods or services in respect of which the trade mark is registered and to obtain relief in respect of infringement of the trade mark in the manner provided by this Act.
>
> (2) The exclusive right to the use of a trade mark given under Sub-section (1) shall be subject to any conditions and limitations to which the registration is subject.
>
> (3) Where two or more persons are registered proprietors of trade marks, which are identical with or nearly resemble each other, the exclusive right to the use of any of those trade marks shall not (except so far as their respective rights are subject to any conditions or limitations entered on the register) be deemed to have been acquired by any one of those persons as against any other of those persons merely by registration of the trade marks but each of those persons has otherwise the same rights as against other persons (not being registered users

using by way of permitted use) as he would have if he were the sole registered proprietor."

26. A bare reading of this provision demonstrates the following rights given to the registered proprietor of the trade mark.

"(i) Exclusive right to use the trade mark in relation to the goods or services in respect of which the trade mark is registered.

(ii) To obtain relief in respect of infringement of trade mark in the manner provided by this Act."

27. Sub-section (3) of Section 28 with which we are directly concerned, contemplates a situation where two or more persons are registered proprietors of the trade marks which are identical with or nearly resemble each other. It, thus, postulates a situation where same or similar trade mark can be registered in favour of more than one person. On a plain stand alone reading of this Section, it is clear that the exclusive right to use of any of those trade marks shall not be deemed to have been acquired by one registrant as against other registered owner of the trade mark (though at the same time they have the same rights as against third person). Thus, between the two persons who are the registered owners of the trade marks, there is no exclusive right to use the said trade mark against each other, which means this provision gives concurrent right to both the persons to use the registered trade mark in their favour. Otherwise also, it is a matter of common-sense that the Plaintiff can not say that its registered trade mark is infringed when the Defendant is also enjoying registration in the trade mark and such registration gives the Defendant as well right to use the same, as provided in Section 28(1) of the Act.

28. However, what is stated above is the reflection of Section 28 of the Act when that provision is seen and examined without reference to the other provisions of the Act. It is stated at the cost of repetition that as per this Section owner of registered trade mark cannot sue for infringement of his registered trade mark if the Appellant also has the trade mark which is registered. Having said so, a very important question arises for consideration at this stage, namely, whether such a Respondent can bring an action against the Appellant for passing off invoking the provisions of Section 27(2) of the Act. In other words, what would be the interplay of Section 27(2) and Section 28(3) of the Act is the issue that arises for consideration in the instant case. As already noticed above, the trial court as well as High Court has granted the injunction in favour of the Respondent on the basis of prior user as well as on the ground that the trade mark of the Appellant, even if it is registered, would cause deception in the mind of public at large and the Appellant is trying to encash upon, exploit and ride upon on the goodwill of the Respondent herein. Therefore, the issue to be determined is as to whether in such a scenario, provisions of Section 27(2) would still be available even when the Appellant is having registration of the trade mark of which he is using. After considering the entire matter in the light of the various provisions of the act and the scheme, our answer of the aforesaid question would be in the affirmative. Our reasons for arriving at this conclusion are the following:

30. "(A) Firstly, the answer to this proposition can be seen by carefully looking at the provisions of Trade Marks Act, 1999 (The Act). Collective reading of the provisions especially Section 27, 28, 29 and 34 of the Trade Marks Act, 1999 would show that the rights conferred by registration are subject to the rights of the prior user of the trademark. We have already reproduced Section 27 and Section 29 of the Act.

30.1. From the reading of Section 27(2) of the Act, it is clear that the right of action of any person for passing off the goods/services of another person

and remedies thereof are not affected by the provisions of the Act. Thus, the rights in passing off are emanating from the common law and not from the provisions of the Act and they are independent from the rights conferred by the Act. This is evident from the reading of opening words of Section 27(2) which are "Nothing in this Act shall be deemed to affect rights...."

30.2. Likewise, the registration of the mark shall give exclusive rights to the use of the trademark subject to the other provisions of this Act. Thus, the rights granted by the registration in the form of exclusivity are not absolute but are subject to the provisions of the Act.

30.3. Section 28(3) of the Act provides that the rights of two registered proprietors of identical or nearly resembling trademarks shall not be enforced against each other. However, they shall be same against the third parties. Section 28(3) merely provides that there shall be no rights of one registered proprietor vis- -vis another but only for the purpose of registration. The said provision 28 (3) nowhere comments about the rights of passing off which shall remain unaffected due to overriding effect of Section 27(2) of the Act and thus the rights emanating from the common law shall remain undisturbed by the enactment of Section 28(3) which clearly states that the rights of one registered proprietor shall not be enforced against the another person.

30.4. Section 34 of the Trade Marks Act, 1999 provides that nothing in this Act shall entitle the registered proprietor or registered user to interfere with the rights of prior user. Conjoint reading of Section 34, 27 and 28 would show that the rights of registration are subject to Section 34 which, can be seen from the opening words of Section 28 of the Act which states "Subject to the other provisions of this Act, the registration of a trade mark shall, if valid, give to the registered proprietor.." and also the opening words of Section 34 which states "Nothing in this Act shall entitle the proprietor or a registered user of registered trade mark to interfere..". Thus, the scheme of the Act is such where rights of prior user are recognized superior than that of the registration and even the registered proprietor cannot disturb interfere with the rights of prior user. The overall effect of collective reading of the provisions of the Act is that the action for passing off which is premised on the rights of prior user generating a goodwill shall be unaffected by any registration provided under the Act. This proposition has been discussed in extenso in the case of N.R. Dongre and Ors. v. Whirlpool Corporation and Anr, 1995 AIR(Del) 300wherein Division Bench of Delhi High Court recognized that the registration is not an indefeasible right and the same is subject to rights of prior user. The said decision of Whirlpool [supra] was further affirmed by Supreme Court of India in the case of N.R. Dongre and Ors v. Whirlpool Corporation and Anr, 1996 3 RCR(Civ) 697

30.5. The above were the reasonings from the provisions arising from the plain reading of the Act which gives clear indication that the rights of prior user are superior than that of registration and are unaffected by the registration rights under the Act.

31. Secondly, there are other additional reasonings as to why the passing off rights are considered to be superior than that of registration rights.

31.1. Traditionally, passing off in common law is considered to be a right for protection of goodwill in the business against misrepresentation caused in the course of trade and for prevention of resultant damage on account of the said misrepresentation. The three ingredients of passing off are goodwill, misrepresentation and damage. These ingredients are considered to be classical trinity under the law of passing off as per the speech of Lord Oliver laid down in the case of Reckitt & Colman Products Ltd. v. Borden Inc, 1990 1 AllER

873which is more popularly known as "Jif Lemon" case wherein the Lord Oliver reduced the five guidelines laid out by Lord Diplock in Erven Warnink v. Townend & Sons Ltd, 1979 AC 731(the "Advocate Case") to three elements: (1) Goodwill owned by a trader, (2) Misrepresentation and (3) Damage to goodwill. Thus, the passing off action is essentially an action in deceit where the common law rule is that no person is entitled to carry on his or her business on pretext that the said business is of that of another. This Court has given its imprimatur to the above principle in the case of Laxmikant V. Patel v. Chetanbhat Shah and Anr, 2002 3 SCC 65.

31.2. The applicability of the said principle can be seen as to which proprietor has generated the goodwill by way of use of the mark name in the business. The use of the mark/carrying on business under the name confers the rights in favour of the person and generates goodwill in the market. Accordingly, the latter user of the mark/name or in the business cannot misrepresent his business as that of business of the prior right holder. That is the reason why essentially the prior user is considered to be superior than that of any other rights. Consequently, the examination of rights in common law which are based on goodwill, misrepresentation and damage are independent to that of registered rights. The mere fact that both prior user and subsequent user are registered proprietors are irrelevant for the purposes of examining who generated the goodwill first in the market and whether the latter user is causing misrepresentation in the course of trade and damaging the goodwill and reputation of the prior right holder/former user. That is the additional reasoning that the statutory rights must pave the way for common law rights of passing off.

32. Thirdly, it is also recognized principle in common law jurisdiction that passing off right is broader remedy than that of infringement. This is due to the reason that the passing off doctrine operates on the general principle that no person is entitled to represent his or her business as business of other person. The said action in deceit is maintainable for diverse reasons other than that of registered rights which are allocated rights under Recent Civil Reports the Act. The authorities of other common law jurisdictions like England more specifically Kerry's Law of Trademarks and Trade Names, Fourteenth Edition, Thomson, Sweet & Maxwell South Asian Edition recognizes the principle that where trademark action fails, passing off action may still succeed on the same evidence. This has been explained by the learned Author by observing the following:--

15-033 "A claimant may fail to make out a case of infringement of a trade mark for various reasons and may yet show that by imitating the mark claimed as a trademark, or otherwise, the Defendant has done what is calculated to pass off his goods as those of the claimant. A claim in "passing off' has generally been added as a second string to actions for infringement, and has on occasion succeeded where the claim for infringement has failed"

32.1. The same author also recognizes the principle that Trade Marks Act affords no bar to the passing off action. This has been explained by the learned Author as under:--

15-034 "Subject to possibly one qualification, nothing in the Trade Marks Act 1994 affects a trader's right against another in an action for passing off. It is, therefore, no bar to an action for passing off that the trade name, get up or any other of the badges identified with the claimant's business, which are alleged to have been copies or imitated by the Defendant, might have been, but are not registered as, trade marks, even though the evidence is wholly addressed to what may be a mark capable of registration. Again, it is no defense to passing off that the Defendant's mark is registered. The Act offers advantages to those who register their trade marks, but imposes no penalty upon those who do not. It is

equally no bar to an action for passing off that the false representation relied upon is an imitation of a trade mark that is incapable of registration. A passing off action can even lie against a registered proprietor of the mark sued upon. The fact that a claimant is using a mark registered by another party (or even the Defendant) does not of itself prevent goodwill being generated by the use of the mark, or prevent such a claimant from relying on such goodwill in an action against the registered proprietor. Such unregistered marks are frequently referred to as "common law trade marks"

32.2. From the reading of aforementioned excerpts from Kerly's Law of Trademarks and Trade Names, it can be said that not merely it is recognized in India but in other jurisdictions also including England/UK (Provisions of UK Trade Marks Act, 1994 are analogous to Indian Trade Marks Act, 1999) that the registration is no defense to a passing off action and nor the Trade Marks Act, 1999 affords any bar to a passing off action. In such an event, the rights conferred by the Act under the provisions of Section 28 has to be subject to the provisions of Section 27(2) of the Act and thus the passing off action has to be considered independent Truttukadai Halwa' the provisions of Trade Marks Act, 1999.

33. Fourthly, It is also well settled principle of law in the field of the trade marks that the registration merely recognizes the rights which are already pre-existing in common law and does not create any rights. This has been explained by the Division Bench of Delhi High Court in the case of Century Traders v. Roshan Lal Duggar Company, 1978 AIR(Del) 250in the following words:

"First is the question of use of the trade mark. Use plays an all important part. A trader acquires a right of property in a distinctive mark merely by using it upon or in connection with his goods irrespective of the length of such user and the extent of his trade. The trader who adopts such a mark is entitled to protection directly the article having assumed a vendible character is launched upon the market. Registration under the statute does not confer any new right to the mark claimed or any greater right than what already existed at common law and at equity without registration. It does, however, facilitate a remedy which may be enforced and obtained throughout "THE State and it established the record of facts affecting the right to the mark. Registration itself does not create a trade mark. The trade mark exists independently of the registration which merely affords further protection under the statute. Common law rights are left wholly unaffected."

33.1. The same view is expressed by the Bombay High Court in the case of Sunder Parmanand Lalwani and Ors. v. Caltex (India) Ltd, 1969 AIR(Bom) 24in which it has been held vide paras '32' and '38' as follows:

"32. A proprietary right in a mark can be 'Iruttukadai Halwa" obtained in a number of ways. The mark can be originated by a person, or it can be subsequently acquired by him from somebody else. Our Trade Marks law is based on the English Trade Marks law and the English Acts. The first Trade Marks Act in England was passed in 1875. Even prior thereto, it was firmly established in England that a trader acquired a right of property in a distinctive mark merely by using it upon or in connection with goods irrespective of the length of such user and the extent of his trade, and that he was entitled to protect such right of property by appropriate proceedings by way of injunction in a Court of law. Then came the English Trade Marks Act of 1875, which was substituted later by later Acts. The English Acts enabled registration of a new mark not till then used with the like consequences which a distinctive mark had prior to the passing of the Acts. The effect of the relevant provision of the English Acts was that registration of a trade mark would be deemed to be equivalent to

public user of such mark. Prior to the Acts, Prior to the Acts, one could become a proprietor of a trade mark only by user, but after the passing of the Act of 1875, one could become a proprietor either by user or by registering the mark even prior to its user. He could do the latter after complying with the other requirements of the Act, including the filing of a declaration of his intention to use such mark. See observations of Llyod Jacob J. in 1956 RPC 1. In the matter of Vitamins Ltd.'s Application for Trade Mark at p. 12, and particularly the following:

"A proprietary right in a mark sought to be registered can be obtained in a number of ways. The mark can be originated by a person or can be acquired, but in all cases it is necessary that the person putting forward the application should be in possession of some proprietary right which, if questioned, can be substantiated". Law in India under our present Act is similar."

33.2. We uphold said view which has been followed and relied upon the courts in India over a long time. The said views emanating from the courts in India clearly speak in one voice which is that the rights in common law can be acquired by way of use and the registration rights were introduced later which made the rights granted under the law equivalent to the public user of such mark. Thus. we hold that registration is merely a recognition of the rights pre-existing in common law and in case of conflict between the two registered proprietors, the evaluation of the better rights in common law is essential as the common law rights would enable the court to determine whose rights between the two registered proprietors are better and superior in common law which have been recognized in the form of the registration by the Act.

34. When we apply the aforesaid principle to the facts of the present case, we find that the impugned judgment of the High Court, affirming that of the trial court is flawless and does not call for any interference. From the plethora of evidences produced by the Respondent she has been able to establish that the trade mark Truttukadai Halwa' has been used of by her/her predecessors since the year 1900. The business in that name is carried on by her family. It has become a household name which is associated with the Respondent/her family. The Court has also noted that the Halwa sold by the Respondent's shop as Truttukadai Halwa' is not only famous with the consumers living in Tirunelveli, but is also famous with the consumers living in other parts of India and outside. Reference is made to an article published in Ananda Viketan, a weekly Tamil magazine dated 14.9.2003, describing the high quality and the trade mark Iruttukadai halwa sold by the Plaintiff, the findings and conclusions reached by the Court below is perfectly in order, hence, the same does not call for interference, carries more merit, for, this name has been further acknowledged in a Tamil song from the movie "Samy" as follows:

"Tirunelveli Halwada, Tiruchy Malai Kottaida (Rock Fort)

Tirupathike Ladduthantha Samyda Iruttukadai Alwada, Idli Kadai Ayada (grandma)"

9. From the aforesaid exposition of law, it is abundantly clear that the suit of the plaintiff was maintainable in view of sub-section (2) of section 27 of the Act and, therefore, the application filed by the petitioner for rejection of the plaint was misconceived and not maintainable.

10. As regards the return of the plaint, the course adopted by the learned court below is perfectly in tune with the provisions of Section 134 of the Act, which reads thus:

“134. Suit for infringement, etc., to be instituted before District Court.

(1) No suit-

(a) For the infringement of a registered trade mark; or

(b) Relating to any right in a registered trade mark; or

(c) For passing off arising out of the use by the defendant of any trade mark which is identical with or deceptively similar to the plaintiffs trade mark, whether registered or unregistered, Shall be instituted in any court inferior to a District Court having jurisdiction to try the suit.

(2) For the purpose of clauses (a) and (b) of sub-section (1), a "District Court having jurisdiction" shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 or any other law for the time being in force, include a District Court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceeding, the person instituting the suit or proceeding, or, where there are more than one such persons any of them, actually and voluntarily resides or carries on business or personally works for gain.

Explanation: For the purposes of sub-section (2), "person" includes the registered proprietor and the registered user."

11. Admittedly, the case of the respondent-plaintiff is based upon unregistered trade mark and as per its own saying, the application for registration of trade mark is lying pending before the Registrar, Trade Mark, Ludhiana and, therefore, in the given facts, the provisions of section 134 (1) (c) of the Act would clearly come into operation.

12. In view of aforesaid discussion, I find no merit in the petition and the same is dismissed, leaving the parties to bear their own costs.

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

Parmod Sood ...Petitioner.

Versus

State of H.P. and another. ...Respondents.

Arb. Case No. 19 of 2012
Reserved on : 15.3.2017
Decided on: 23.3. 2017

Arbitration and Conciliation Act, 1996- Section 34- Parties entered into a contract to execute the work relating to strengthening of Chandigarh-Mandi- Manali highway – a dispute arose which was referred to sole arbitration of Superintending Engineer, Arbitration Circle, HPPWD, Solan who made an award – the award was challenged and was ordered to be set aside – an appeal was preferred, but the same was dismissed – the matter was referred to the sole arbitration of Superintending Engineer, National Highway Circle, HPPWD, Shimla who made the award – the petitioner assailed the award by filing the present petition- held that the overall deviation was less than 30% as it was only 14.53% although in individual cases some of the deviations exceeded 30% - as per the terms and conditions of the contract, the deviations in the items which individually, or jointly or collectively exceed 30% are liable to be compensated- therefore, Arbitrator could not have rejected the claim- petition allowed and the case referred to the Arbitrator with a direction to reconsider the matter in accordance with law.(Para-7 to 19)

Cases referred:

Oriental Insurance Company Limited vs Sony Cheriyanair, AIR 1999 SC 3252

Polymat India P Ltd and another vs National Insurance Co Ltd and other, AIR 2005 SC 286
Sumitomo He Avy Industries Limited vs Oil & Natural Gas Commission Of India, AIR 2010 SC 3400
Rashtriya Ispat Nigam Limited vs Dewan Chand Ram Saran, AIR 2012 SC 2829
Associate Builders vs. Delhi Development Authority, (2015) 3 SCC 49
Navodaya Mass Entertainment Limited vs. J.M. Combines, (2015) 5 SCC 698

For the Petitioner: Mr. J.S. Bhogal, Sr. Advocate with Mr. Himanshu Kapila, Advocate.
For the Respondents: Ms. Meenakshi Sharma, Addl. A.G. with Mr. J.S. Guleria, Asstt. A.G.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge:

By medium of this petition under section 34 of the Arbitration and Conciliation Act, 1996 (for short the 'Act'), the applicant has prayed for setting aside of the award made by the Arbitral Tribunal on 5.11.2011.

2. The facts are not in dispute. The parties entered into contract with respect to the execution of the work relating to strengthening of Chandigarh-Mandi-Manali road NH 21 in KM 105/0 to 127/0 (Sh: Strengthening of existing road pavement in Km.105/0 to 127/0) and a formal contract was duly executed between the parties on the standard form of contract adopted by the respondents for such works.

3. The disputes had arisen between the parties relating to the amounts claimed by the petitioner for execution of works beyond the agreed limits. The same were initially referred to the sole arbitration of the Superintending Engineer, Arbitration Circle, HPPWD, Solan, who heard the matter and made an award dated 21.6.2002. The award was challenged by the respondents before this Court by filing Arbitration Case No. 52 of 2002 and vide order dated 5.9.2005, the award was ordered to be set aside. The petitioner preferred an appeal being Arbitration Appeal No. 4 of 2005, but the same was also dismissed by this Court vide judgment dated 18.4.2009. Thereafter, the matter was referred to the sole arbitration of the Superintending Engineer, National Highway Circle, HPPWD, Shimla, who made the award on 5.11.2011.

4. Aggrieved by the aforesaid award, the petitioner has assailed the same on the ground that the learned Arbitrator has completely misconstrued and misapplied the provisions of the Contract entered into between the parties, especially the provisions of Clause 12-A thereof and thereby reached a wrong conclusion.

5. The respondents have filed reply to the petition wherein it has been averred that various clauses of the arbitration agreement, including the one contained in Clause 12-A have been correctly interpreted by the learned Arbitrator as the same was not to be read in isolation but was required to be read in conjunction alongwith the provisions of Clause 12-A of the agreement.

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

7. As the outcome of this petition hinges upon the interpretation to be given to Clauses 12 and 12-A of the agreement, it is necessary to reproduce the provisions in entirety and the same read as under:

> Clause 12 – The Engineer-in-Charge shall have power to make any alterations in, omissions from additions to or substitutions for, the original specifications, drawings, designs and instructions, that may appear to him to be necessary during the progress of the work, and the contractor shall carry out the work in accordance with any instructions may be given to him in writing signed by the

Engineer-in-charge, and such alterations, omissions, additions or substitutions shall not invalidate the contract and any altered, additional or substituted work which the contractor may be directed to do in the manner above specified as part of the work shall be carried out by the contractor on the same conditions in all respect on which he agreed to do the main work. The time for the completion of the work shall be extended in the proportion that the altered, additional or substituted work bears to the original contract work, and the certificate of the Engineer-in-charge shall be conclusive as to such proportion. Over and above this, a further period to the extent of 25 per cent of the time so extended shall be allowed to the contractor. The rates for such additional, altered or substituted work under this clause shall be worked out in accordance with the following provisions in their respective order:-

(i) The rates for the additional or substituted work are specified in the contract for the work, the contractors is bound to carry out the additional altered or substituted work at the same rates as are specified in the contract for the work.

(ii) If the rates for the additional, altered substituted work are not specifically provided in the contract for the work, the rates will be derived from the rates for similar class of work as are specified in the contract for the work.

(iii) If the rates for the altered, additional or substituted work includes any work for which no rates specified in the contract for the work and cannot be derived from the similar class of work in the contract, then such work shall be carried out at the rates entered in Himachal Pradesh Schedule of rate… of tender minus/plus percentage which the total tendered amount bears to the estimated cost of the entire work put to tender.

(iv) If the rates for the altered, additional or substituted work cannot be determined in the manner specified in clauses (i) to (iii) above, then the rates for such work shall be worked out on the basis of the schedule of rates of the district specified above minus/plus the percentage which the total tendered amount bears to the estimated cost of the entire work put to tender provided always that if the rate for a particular part or parts of the item is not in the schedule of rates, the rate for such part or parts will be determined by the Engineer-in-charge to the estimated cost of the entire work put to tender.

(v) If the rates for the altered, additional or substituted work cannot be determined in the manner specified in sub-clause (i) (iv) above, then the contractor shall, within 7 days of the date of receipt of order to carry out the work, inform the Engineer-in-charge of the rate which it is his intention to charge for such class of work, supported by analysis of the rate or rates claimed and the Engineer-in-charge shall determine the rate or rates on the basis of prevailing market rates and pay the contractor accordingly. However, the Engineer-in-charge, by notice in writing, will be at liberty to cancel his order to carry out such class of work and arrange to carry it out in such manner as he may consider advisable. But under no circumstances, the contractor shall suspend the work on the plea of non-settlement of rates of items falling under this clause.

(vi) Except in case of items relating to foundations, provisions contained in sub-clause (i) to (v) above shall not apply to contract or substituted items as individually exceed the percentage set out in the tender documents (referred to herein below as “deviation limit”) subject to the following restrictions:

a. The deviation limit referred to above is the net effect (allegorical sum) of all additions and deductions ordered.

b. In no case shall the additions/deductions (arithmetical sum) exceed twice the deviation limit.

c. The deviations ordered on items of any individual trade included in the contract shall not exceed plus/minus 50% of the value of that trade in the contract as a whole or half the deviation limit, whichever is less.

d. The value of additions of items of any individual trade not already included in the contract shall not exceed 10% of the deviation limit.

Note:- Individual trade means the trade sections into which a schedule of quantities annexed to the agreement has been divided or in the absence of any such divisions the individual sections of the Himachal Pradesh, Public Works Department Schedule of Rates specified above, such as excavation and earth work, concrete, wood work and joinery etc.

The rates of any such work except the items relating foundations which is in excess of the deviation limit shall be determined in accordance with the provisions contained in clause 12-A.

Annexure – A

a) For buildings plinth level or 1.2 meter (4 feet) above ground level whichever is lower, excluding item for flooring and D.P.C. but including base concrete below the floors.

b) For abutments piers, retaining walls of culverts and bridges walls of water reservoirs, the bed or floor level.

c) For retaining wall where floor level is not determine 1.2 meters above the average ground level or bed level.

d) For roads, all items of excavation and filling including treatment or sub-base and soling work.

e) For water supply lines, underground storm water drains and similar work all items of work below ground level except items of pipe work proper masonry work.

f) For open storm water drains, all items of work except lining of drains.

Clause 12-A-. In the case of contract or substituted items which individually exceed the quantity stipulated in the contract by more than the deviation limit except the items relating tio foundation work which the contractor is required to do under clause 12 above, the contractor shall within 7 days from the receipt of order, claim revision of the rates supporting by proper analysis in respect of such items for quantities in excess of the deviation limit, notwithstanding the fact that the rates for such items exist in the tender for the main work or can be derived in accordance with the provisions of sub-clause (ii) of clause 12 and the Engineer-in-charge may revise their rates, having regard to the prevailing market rates and the contractor shall be paid in accordance with the rates so fixed. The Engineer-in-charge shall, however, be at liberty to cancel as his order to carry out such increased quantities of work by giving notice in writing to the contractor and arrange to carry it out in such manner as he may be considered advisable. But, under no circumstances the contractor shall suspend the work on the plea of non-settlement of rates of items falling under this clause.

All the provisions of the preceding paragraph shall equally apply to the decrease in the rates of items for quantities in excess of the deviation limit,

> notwithstanding the fact that the rates for such items exist in the tender for the main work or can be derived in accordance with the provisions of sub-clause (ii) of the preceding clause 12 and the Engineer-in-charge may revise such rates having regard to the prevailing market rates."

8. The moot question that arises for consideration is: whether the petitioner was entitled to the deviation even though overall deviation was less than 30% being only 14.53% though in individual items, some of the deviations admittedly exceeded 30%.

9. It is not in dispute and rather admitted by the petitioner that overall deviation in this case is only 14.53%, however, he would contend that Clause 12-A clearly provides for payment of market rates in respect of "individual items", which exceed the deviation limit and would further contend that Arbitrator has erroneously and illegally combined and mixed up the provisions of Clause 12 (vi) of the agreement by holding the provisions of Clause 12-A was subject to this proviso.

10. It would be noticed that in so far as Clause 12 of the agreement is concerned, the same does not deal with the deviations of the kind that are subject matter of the instant lis, which otherwise have expressly been provided for in Clause 12-A. The contract in such like cases must be read as a whole and every effort should be made to harmonize the terms thereof keeping in mind that the rule of '*contra proferentum'* does not apply in case of commercial contract for the reason that a clause in collateral contract is bilateral and has mutually been agreed to (see: ***Oriental Insurance Company Limited*** vs ***Sony Cheriyanair*** AIR 1999 SC 3252, ***Polymat India P Ltd and another*** vs ***National Insurance Co Ltd and other*** AIR 2005 SC 286, ***Sumitomo He Avy Industries Limited*** vs ***Oil & Natural Gas Commission Of India,*** AIR 2010 SC 3400 and ***Rashtriya Ispat Nigam Limited*** vs ***Dewan Chand Ram Saran*** AIR 2012 SC 2829).

11. As observed earlier, it is Clause 12-A, which specifically deals with deviations in case of contract or substituted items, which ***'individually'*** exceed the quantity stipulated in the contract by more than the deviation limit except the items relating to foundation work, which the contractor is required to do under Clause 12, the contractor is required within 7 days from the receipt of the order, claim revision of the rates supported by proper analysis in respect of such items for quantities in excess of the deviation limit. The contract clearly contemplates of deviations in items, which '***individually'*** or '***jointly'*** or '***collectively'*** exceed the limit stipulated in the contract, i.e. 30% and, therefore, the claim of the petitioner could not have been rejected.

12. In ***Mehta Teja Singh and Co***. vs. ***Union of India***, Suit No. 623-A of 1997 decided on 25.11.1980, the Hon'ble Delhi Court was dealing with the similar proposition as involved in the instant case. Therein, the Clause in the contract with the Central Public Works Department provided that the contractor agreed to carry out such deviations as may be ordered upto a maximum of 20% (twenty per cent) at the rates quoted in the tender documents and those in excess of that limit at the rates to be determined in accordance with the provisions contained in Clause 12-A of the tender form. Clause 12-A provided that:

> Clause 12-A-. In the case of contract or substituted items which individually exceed the quantity stipulated in the contract by more than the deviation limit except the items relating tio foundation work which the contractor is required to do under clause 12 above, the contractor shall within 7 days from the receipt of order, claim revision of the rates supporting by proper analysis in respect of such items for quantities in excess of the deviation limit, notwithstanding the fact that the rates for such items exist in the tender for the main work or can be derived in accordance with the provisions of sub-clause (ii) of clause 12 and the Engineer-in-charge may revise their rates, having regard to the prevailing market rates and the contractor shall be paid in accordance with the rates so fixed. The Engineer-in-charge shall, however, be at liberty to cancel as his order to carry out such increased quantities of work by giving notice in

writing to the contractor and arrange to carry it out in such manner as he may be considered advisable. But, under no circumstances the contractor shall suspend the work on the plea of non-settlement of rates of items falling under this clause.

All the provisions of the preceding paragraph shall equally apply to the decrease in the rates of items for quantities in excess of the deviation limit, notwithstanding the fact that the rates for such items exist in the tender for the main work or can be derived in accordance with the provisions of sub-clause (ii) of the preceding clause 12 and the Engineer-in-charge may revise such rates having regard to the prevailing market rates."

13. The contractor claimed the determination of the rates of certain items for the quantities in excess of the deviation limit, under Clause 12-A above. The Government did not agree with the contractor's contention and relied upon sub-clause (vi) of Clause 12 of the said contract which was as follows:-

"Except in cases of items relating to foundations, provisions contained in sub-clause (i) to (v) above shall not apply to contract or substituted items as individually exceed the percentage set out in the tender documents (referred to herein below as deviation limit), subject to the following restrictions:

a. The deviation limit referred to above is the net effect (allegorical sum) of all additions and deductions ordered.

b. In no case shall the additions/deductions (arithmetical sum) exceed twice the deviation limit.

c. The deviations ordered on items of any individual trade included in the contract shall not exceed plus/minus 50% of the value of that trade in the contract as a whole or half the deviation limit, whichever is less.

d. The value of additions of items of any individual trade not already included in the contract shall not exceed 10% of the deviation limit.

Note:- Individual trade means the trade sections into which a schedule of quantities annexed to the agreement has been divided or in the absence of any such divisions the individual sections of the Himachal Pradesh, Public Works Department Schedule of Rates specified above, such as excavation and earth work, concrete, wood work and joinery etc.

14. It was held that in spite of condition of the deviation limit and the determination of the rates of the quantity in excess of the said deviation limit under Clause 12-A, which itself makes a mention of the excess in the quantities beyond the deviation limit in individual items, application of sub-clause (vi) of Clause of the contract would not be justified. It was further held that while reading the provisions of sub-clause (vi) of Clause 12, it would be obvious that the various percentage of the quantities of the individual items of the trade could have been ascertained only after the completion work and till then the rates for the quantities in excess of the deviation limit obviously cannot be determined. It was held that it was not the intention of the Clauses providing for the deviation limit and the determination of the rates of quantities in excess of the said deviation limit under Clause 12-A.

15. The factual and legal aspect of this case is not different from the one as referred in ***Mehta Teja Singh*** case (supra). Thus, the case being squarely covered deserves to be allowed and award to this extent requires to be set aside.

16. However, learned Deputy Advocate General would strongly contend that this Court while deciding objections against the award would not act as a court of appeal and interference is permissible only when the findings of the Arbitrator are arbitrary, capricious and perverse or when the conscience of the Court is shocked and lastly when the illegality is not

trivial but goes to the root of the matter. It is further contended that this Court will not interfere because another view is possible. It is the Arbitrator who is master of quality and quantity of evidence while drawing arbitral award, therefore, it was found that the arbitrator's approach is neither arbitrary nor capricious, the Court should loath to interfere.

17. In support of his contention, learned Deputy Advocate General has referred to the following judgments of the Hon'ble Supreme Court:

i) ***Associate Builders*** vs. ***Delhi Development Authority,*** (2015) 3 SCC 49 and

ii) ***Navodaya Mass Entertainment Limited*** vs. ***J.M. Combines***, (2015) 5 SCC 698

18. Obviously, there can be no quarrel with the proposition of law as expounded by the Hon'ble Supreme Court in the aforesaid cases. However, as already observed earlier, the question involved in this case is squarely covered by the judgment rendered by the Hon'ble Delhi High Court in ***Mehta Teja Singh*** case (supra). Moreover, once the Arbitrator fails to apply the relevant clause of the agreement, then perversity is obviously writ large. The claim raised by the petitioner has wrongly been denied to him by the learned Arbitrator.

19. In view of what has been stated hereinabove, I find merit in the petition and the same is accordingly allowed and the award made by the Arbitral Tribunal comprising of Superintending Engineer, NH Circle, HPPWD, Shimla Solan dated 5.11.2011 is set aside and the Arbitral Tribunal is directed to reconsider the claim of the petitioner in the light what has been observed above coupled with the material available on record. Since the claim is pending for nearly two decades, it is expected that the learned Arbitral Tribunal shall proceed to decide the same as expeditiously as possible and in no event later than 30th June, 2017. The parties to bear their own costs.

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

Rajiv Bhatia. ...Petitioner.

Versus

Indusind Bank Ltd. and another. ...Respondents.

CMPMO No. 96 of 2016
Decided on: 23.3. 2017

Constitution of India, 1950- Article 226- An execution petition was filed for executing the award passed by the Arbitrator – objections regarding the territorial jurisdiction of the Arbitrator and non-accounting of the amount paid by the objector in the statements of the account were raised- the objections were dismissed by the Court- held that there is distinction between venue of arbitration and the seat of arbitration – it was provided in the agreement that venue of arbitration is at Chennai- it cannot be said that Arbitrator had exercised jurisdiction not vested in it- the matter regarding non-accounting of the amounts paid by the objector is a matter of merit and cannot be gone into while deciding the objections – petition dismissed.(Para-5 to 12)

Cases referred:

A B C Laminart Pvt Limited vs A P Agencies, Salem, AIR 1989 SC 1239
Patel Roadways Limited vs Prasad Trading Company, 1991 (4) SCC 270
Enercon (India) Limited and others vs Enercon GMBH and another, (2014) 5 SCC 1

For the Petitioner: Mr. Ajay Sharma, Advocate.

For the Respondents: Mr. Ashwani Kaundal, Advocate for respondent No.1.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge (oral):

This petition, under Article 227 of the Constitution of India, takes exception to the order passed by the District Judge, Solan, whereby the objections filed by the petitioner, have been ordered to be dismissed and warrants of attachment of his property have been issued.

2. Brief facts of the case are that pursuant to the award passed by the Arbitrator in favour of the respondent/decree holder, an execution petition was filed before the court below. The petitioner primarily raised two objections; one with regard to the territorial jurisdiction of the Arbitrator and the other with regard to the amounts paid by him from time to time having not been accounted and reflected in the statement of accounts by the respondent.

3. It is vehemently argued by Mr. Ajay Sharma, Advocate that the entire loan was disbursed within the State of Himachal Pradesh and even the possession of the loaned vehicle was taken within the State, therefore, it was the Court/Arbitrator in Himachal Pradesh alone, which could have jurisdiction to entertain and adjudicate upon the proceedings and, therefore, the award being *quorum non judice* was liable to be set aside in the execution petition as it is settled law that a decision rendered without jurisdiction is a nullity. He would further contend that the petitioner has paid huge amount, but the same has not been accounted for by the decree holder.

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

5. The Clauses pertaining to law, jurisdiction and arbitration are contained in Clause 23.0 of the loan agreement dated 20.1.2006 (Annexure R-1/A) and reads thus:

"23.0 : Law, Jurisdiction, Arbitration

a) All disputes, differences and/or claim arising out of or touching upon this Agreement whether during its subsistence or thereafter shall be settled by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996, or any statutory amendments thereof and shall be referred to the sole Arbitration of an Arbitrator nominated by the lender. The award given by such an Arbitrator shall be final and binding on the Borrower and Guarantor to this agreement.

b) Dispute for the purpose of Arbitration includes default committed by the Borrower as per clause 14 of this Agreement. It is a term of this agreement that in the even of such an Arbitrator to whom the matter has been originally referred to dying or being unable to act for any reason, the lender, at the time of such death of the arbitrator or of his inability to act as arbitrator, shall appoint another person to act as arbitrator. Such a person shall be entitled to proceed with the reference from the state at which it was left by his predecessor.

c) The venue of Arbitration proceedings shall be at Chennai

d) The arbitrator so appointed herein above, shall also be entitled to pass an Award on the hypothecated asset and also on any other securities furnished by or on behalf of the Borrower/Guarantor.

e) All notices and other communications on the lender and the borrowers shall be to the following address:

For Lender : Corp. Off – Retail: Indusind Bank Ltd. 86 Sudarsan Building Chamiers Road, Chennai-600 018.

For Borrower: The residential address stated in the schedule or the property address described in the schedule.

6. It is trite and settled principle of law that parties by mutual consent cannot confer jurisdiction on a Court, which it does not have (Refer: ***A B C Laminart Pvt Limited*** vs ***A P Agencies, Salem***, AIR 1989 SC 1239 and ***Patel Roadways Limited*** vs ***Prasad Trading Company***, 1991 (4) SCC 270

7. However, the moot question is: whether by referring the matter for arbitration at Chennai, has the respondent really violated territorial jurisdiction and conferred the same to an authority, which practically had no jurisdictional authority to adjudicate such claim.

8. In the given circumstances, it is necessary to once again advert to Clause 23 of the agreement, more particularly, sub-clause (c) of Clause 23 thereof, which is once again reproduced and reads as under:

"The venue of Arbitration proceedings shall be at Chennai."

9. It is not that the seat of the Arbitrator is at Chennai, rather it is only the venue of jurisdiction that is at Chennai. There is a marked difference between '***venue of the arbitration'*** and '***seat of arbitration'***. It is only the seat of the arbitration which will give territorial jurisdiction and not the venue of the jurisdiction. "***Seat***" is place where the court or arbitration is located, which will have territorial jurisdiction with regard to the case or in the matter, whereas, "***venue***" is the place where the arbitral tribunal sits to hold the arbitration proceedings and this place need not essentially be the place "where the seat of the arbitration is located".

10. This distinction has been succinctly set out by the Hon'ble Supreme Court in ***Enercon (India) Limited and others*** vs ***Enercon GMBH and another***, (2014) 5 SCC 1, wherein it was observed as under:

> "[40] Mr. Nariman submitted that for the purposes of fixing the seat of arbitration the Court would have to determine the territory that will have the closest and most intimate connection with the arbitration. He pointed out that in the present case provisions of the Indian Arbitration Act, 1996 are to apply; substantive law of the contract is Indian law; law governing the arbitration is Indian Arbitration law; curial law is that of India; Patents law is that of India; IPLA is to be acted upon in India; enforcement of the award is to be done under the Indian law; Joint Venture Agreement between the parties is to be acted upon in India; relevant assets are in India. Therefore, applying the ratio of law in 'Naviera Amazonica Peruana S.A. Vs. Compania Internacional De Seguros Del Peru,1988 1 LloydsRep 116', the seat of arbitration would be India.
>
> The submission is also sought to be supported by the Constitution Bench decision of this Court in "Bharat Aluminium Company Vs. Kaiser Aluminium, 2012 9 SCC 552 ("BALCO"). Mr. Nariman submitted that the interpretation proposed by the Respondents that the venue London must be construed as seat is absurd. Neither party is British, one being German and the other being Indian. He submits that the Respondents have accepted that the choice of law of the underlying agreement is Indian. But, if 'venue of arbitration' is to be interpreted as making London the seat of arbitration it would:
>
> (a) make the English Act applicable when it is not chosen by the parties; (b) would render the parties' choice of the Indian Arbitration Act, 1996 completely nugatory and otiose. It would exclude the application of Chapter V of the Indian Arbitration Act, 1996 i.e. the curial law provisions and Section 34 of the Indian Arbitration Act, 1996. On the other hand, interpretation propounded by the Appellants would give full and complete effect to the entire clause as it stands.

[44] It was submitted on behalf of the Appellants that since the seat of arbitration is India, the Courts of England would have no jurisdiction. Appellants rely upon Oil & Natural Gas Commission Vs. Western Company of North America,1987 SCR 1024. Reliance was also placed upon Modi Entertainment Network & Anr. Vs. W.S.G. Cricket Pte. Ltd., 2003 4 SCC 341, in support of the submission that in exercising discretion to grant an anti-suit injunction, the Court must be satisfied that the defendant is amenable to the personal jurisdiction of the Court and that if the injunction is declined the ends of justice will be defeated. The Court is also required to take due notice of the principle of comity of Courts, therefore, where more than one forum is available, the Court would have to examine as to which is forum conveniens.

[97] In Balco, it has been clearly held that concurrent jurisdiction is vested in the Courts of seat and venue, only when the seat of arbitrations is in India (Para 96). Reason for the aforesaid conclusion is that there is no risk of conflict of judgments of different jurisdictions, as all courts in India would follow the Indian Law. Thus, the reliance placed by D. Singhvi on Balco in this context is misplaced.

[98] It is correct that, in virtually all jurisdictions, it is an accepted proposition of law that the seat normally carries with it the choice of that country's arbitration/Curial law. But this would arise only if the Curial law is not specifically chosen by the parties. Reference can be made to Balco , wherein this Court considered a number of judgments having a bearing on the issue of whether the venue is to be treated as seat.

However, the court was not required to decide any controversy akin to the one this court is considering in the present case.

The cases were examined only to demonstrate the difficulties that the court will face in a situation similar to the one which was considered in Naviera Amazonica.

[99] We also do not agree with Dr. Singhvi that parties have not indicated they had chosen India to be the seat of arbitration.

The judgments relied upon by Dr. Singhvi do not support the proposition canvassed. In fact, the judgment in the case Braes of Doune Wind Farm (Scotland) Limited Vs. Alfred McAlpine Business Services Limited,2008 EWHC 426, has considered a situation very similar to the factual situation in the present case.

[100] In Braes of Doune, the English & Wales High Court considered two Applications relating to the first award of an arbitrator. The award related to an EPC (engineering, procurement and construction) contract dated 4th November, 2005 (the EPC contract) between the claimant (the employer) and the defendant (the contractor), whereby the contractor undertook to carry out works in connection with the provision of 36 WTGs at a site some 18 km from Stirling in Scotland. This award dealt with enforceability of the clauses of the EPC contract which provided for liquidated damages for delay. The claimant applied for leave to appeal against this award upon a question of law whilst the defendant sought, in effect, a declaration that the court had no jurisdiction to entertain such an Application and for leave to enforce the award. The Court considered the issue of jurisdiction which arose out of application of Section 2 of the English Arbitration Act, 1996 which provides that:

"2. Scope of application of provisions.-(1) The provisions of this Part apply where the seat of the arbitration is in England and Wales or Northern Ireland."

[101] The Court notices the singular importance of determining the location of juridical seat in terms of Section 3, for the purposes of Section 2, in the following words of Akenhead, J.:

"15. I must determine what the parties agreed was the 'seat' of the arbitration for the purposes of Section 2 of the Arbitration Act, 1996. This means by Section 3 what the parties agreed was the 'juridical' seat. The word 'juridical' is not an irrelevant word or a word to be ignored in ascertaining what the 'seat' is.

It means and connotes the administration of justice so far as the arbitration is concerned. It implies that there must be a country whose job it is to administer, control or decide what control there is to be over an arbitration."

[104] Upon consideration of the entire material, the Court formed the view that it does have jurisdiction to entertain an Application by either party to the contract in question under Section 69 of the English Arbitration Act, 1996. The Court gave the following reasons for the decision:

"(a) One needs to consider what, in substance, the parties agreed was the law of the country which would juridically control the arbitration.

(b) I attach particular importance to Clause 1.4.1. The parties agreed that essentially the English (and Welsh) courts have 'exclusive jurisdiction' to settle disputes. Although this is 'subject to' arbitration, it must and does mean something other than being mere verbiage. It is a jurisdiction over disputes and not simply a court in which a foreign award may be enforced. If it is in arbitration alone that disputes are to be settled and the English courts have no residual involvement in that process, this part of Clause 1.4.1 is meaningless in practice. The use of the word 'jurisdiction' suggests some form of control.

(c) The second part of Clause 1.4.1 has some real meaning if the parties were agreeing by it that, although the agreed disputes resolution process is arbitration, the parties agree that the English court retains such jurisdiction to address those disputes as the law of England and Wales permits. The Arbitration Act, 1996 permits and requires the court to entertain applications under Section 69 for leave to appeal against awards which address disputes which have been referred to arbitration. By allowing such applications and then addressing the relevant questions of law, the court will settle such disputes; even if the application is refused, the court will be applying its jurisdiction under the Arbitration Act, 1996 and providing resolution in relation to such disputes.

(d) This reading of Clause 1.4.1 is consistent with Clause 20.2.2(c) which confirms that the arbitration agreement is subject to English law and that the 'reference' is 'deemed to be a reference to arbitration within the meaning of the Arbitration Act, 1996'. This latter expression is extremely odd unless the parties were agreeing that any reference to arbitration was to be treated as a reference to which the Arbitration Act, 1996 was to apply. There is no definition in the Arbitration Act, 1996 of a 'reference to arbitration', which is not a statutory term of art. The parties presumably meant something in using the expression and the most obvious meaning is that the parties were agreeing that the Arbitration Act, 1996 should apply to the reference without qualification.

(e) Looked at in this light, the parties' express agreement that the 'seat' of arbitration was to be Glasgow, Scotland must relate to the place in which the parties agreed that the hearings should take place. However, by all the other references the parties were agreeing that the curial law or law which governed the arbitral proceedings establish that, prima facie and in the absence of agreement otherwise, the selection of a place or seat for an arbitration will determine what the curial law or 'lex fori' or 'lex arbitri' will be, [we] consider that, where in substance the parties agree that the laws of one country will govern and control a

given arbitration, the place where the arbitration is to be heard will not dictate what the governing or controlling law will be.

(f) In the context of this particular case, the fact that, as both parties seemed to accept in front of me, the Scottish courts would have no real control or interest in the arbitral proceedings other than in a criminal context, suggests that they can not have intended that the arbitral proceedings were to be conducted as an effectively 'delocalised' arbitration or in a 'transnational firmament', to borrow Kerr, L.J.'s words in Naviera Amazonica.

(g) The CIMAR Rules are not inconsistent with my view. Their constant references to the Arbitration Act, 1996 suggest that the parties at least envisaged the possibility that the courts of England and Wales might play some part in policing any arbitration. For instance, Rule 11.5 envisages something called 'the court' becoming involved in securing compliance with a peremptory order of the arbitrator. That would have to be the English court, in practice."

[105] In our opinion, Mr. Nariman has rightly relied upon the ratio in Braes of Doune case . Learned senior counsel has rightly pointed out that unlike the situation in Naviera Amazonica , in the present case all the three laws: (i) the law governing the substantive contract; (ii) the law governing the agreement to arbitrate and the performance of that agreement (iii) the law governing the conduct of the arbitration are Indian. Learned senior counsel has rightly submitted that the curial law of England would become applicable only if there was clear designation of the seat in London. Since the parties have deliberately chosen London as a venue, as a neutral place to hold the meetings of arbitration only, it cannot be accepted that London is the seat of arbitration. We find merit in the submission of Mr. Nariman that businessmen do not intend absurd results. If seat is in London, then challenge to the award would also be in London. But the parties having chosen Indian Arbitration Act, 1996 - Chapter III, IV, V and VI; Section 11 would be applicable for appointment of arbitrator in case the machinery for appointment of arbitrators agreed between the parties breaks down. This would be so since the ratio laid down in Bhatia will apply, i.e., Part I of the Indian Arbitration Act, 1996 would apply even though seat of arbitration is not in India.

This position has been reversed in Balco, but only prospectively. Balco would apply to the agreements on or after 6th September, 2012. Therefore, to interpret that London has been designated as the seat would lead to absurd results.

[106] Learned senior counsel has rightly submitted that in fixing the seat in India, the court would not be faced with the complications which were faced by the English High Court in the Braes of Doune . In that case, the court understood the designation of the seat to be in Glasgow as venue, on the strength of the other factors intimately connecting the arbitration to England. If one has regard to the factors connecting the dispute to India and the absence of any factors connecting it to England, the only reasonable conclusion is that the parties have chosen London, only as the venue of the arbitration. All the other connecting factors would place the seat firmly in India.

[107] The submission made by Dr. Singhvi would only be worthy of acceptance on the assumption that London is the seat. That would be to put the cart before the horse. Surely, jurisdiction of the courts can not be rested upon unsure or insecure foundations. If so, it will flounder with every gust of the wind from different directions. Given the connection to India of the entire dispute between the parties, it is difficult to accept that parties have agreed that the seat would be London and that venue is only a misnomer. The parties having chosen the Indian Arbitration Act, 1996 as the law governing the substantive contract, the

agreement to arbitrate and the performance of the agreement and the law governing the conduct of the arbitration; it would, therefore, in our opinion, be vexatious and oppressive if Enercon GMBH is permitted to compel EIL to litigate in England. This would unnecessarily give rise to the undesirable consequences so pithily pointed by Lord Brandon and Lord Diplock in Abidin Vs. Daver., 1984 AC 398 It was to avoid such a situation that the High Court of England & Wales, in Braes of Doune, construed a provision designating Glasgow in Scotland as the seat of the arbitration as providing only for the venue of the arbitration.

[115] In Shashoua, such an expression was understood as seat instead of venue, as the parties had agreed that the ICC Rules would apply to the arbitration proceedings. In Shashoua, the ratio in Naviera and Braes Doune has been followed. In this case, the Court was concerned with the construction of the shareholders' agreement between the parties, which provided that "the venue of the arbitration shall be London, United Kingdom". It provided that the arbitration proceedings should be conducted in English in accordance with the ICC Rules and that the governing law of the shareholders' agreement itself would be the law of India. The claimants made an Application to the High Court in New Delhi seeking interim measures of protection under Section 9 of the Indian Arbitration Act, 1996, prior to the institution of arbitration proceedings. Following the commencement of the arbitration, the defendant and the joint venture company raised a challenge to the jurisdiction of the Arbitral Tribunal, which the panel heard as a preliminary issue. The Tribunal rejected the jurisdictional objection.

[116] The Tribunal then made a costs award ordering the defendant to pay $140,000 and 172,373.47. The English Court gave leave to the claimant to enforce the costs award as a judgment. The defendant applied to the High Court of Delhi under Section 34(2)(a)(iv) of the Arbitration Act, 1996 to set aside the costs award. The claimant had obtained a charging order, which had been made final, over the defendant's property in UK. The defendant applied to the Delhi High Court for an order directing the claimants not to take any action to execute the charging order, pending the final disposal of the Section 34 petition in Delhi seeking to set aside the costs award. The defendant had sought unsuccessfully to challenge the costs award in the Commercial Court under Section 68 and Section 69 of the English Arbitration Act, 1996 and to set aside the order giving leave to enforce the award.

[131] This conclusion is reiterated in Paragraph 46 in the following words:-

"46. The proposition that when a choice of a particular law is made, the said choice cannot be restricted to only a part of the Act or the substantive provision of that Act only. The choice is in respect of all the substantive and curial law provisions of the Act. The said proposition has been settled by judicial pronouncements in the recent past ."

[134] In A Vs. B, 2007 1 LloydsRep 237 again the Court of Appeal in England observed that:-

"..an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of arbitration."

[135] In our opinion, the conclusion reached by Justice Savant that the Courts in England would have concurrent jurisdiction runs counter to the settled position of law in India as well as in England and is, therefore, not sustainable. The Courts in England have time and again reiterated that an agreement as to the seat is analogous to an exclusive jurisdiction clause. This agreement of the parties would include the determination by the court as to the intention of the

parties. In the present case, Savant, J. having fixed the seat in India erred in holding that the courts in India and England would exercise concurrent jurisdiction. The natural forum for all remedies, in the facts of the present case, is only India.

11. It is thus clear from the aforesaid judgment that there is a difference between ***venue*** and ***seat*** and that merely because the arbitrator itself may choose to hold the arbitration at a venue, which is different than the seat of the Arbitration where the court situate, it cannot be said that Arbitrator has exercised jurisdiction not vested in it.

12. Adverting to the other contention of the petitioner that the amounts paid by him from time to time have not been accounted and reflected in the statement of accounts by the decree holder, I am afraid that these were the matters, which were required to be adjudicated before the learned Arbitrator and are not open to challenge in the execution petition as the executing court is bound by the decree/award of the Arbitrator and cannot go beyond it.

13. Having said so, I find no merit in the petition and the same is dismissed leaving the parties to bear their own costs.

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

Arnab Chatterjee. …Petitioner.
Versus
Joginder Thakur. …Respondent.

CrMMO No. 304/2016
Decided on: 6.4. 2017

Negotiable Instruments Act, 1881- Section 138- A complaint was pending before the Court at Theog when the judgment titled ***Dashrath Rupsingh Rathod*** vs. ***State of Maharashtra and another(2014) 9 SCC 129*** was delivered and it was held that a complaint can be filed before a Court within whose jurisdiction drawee bank was located- the complaint was ordered to be returned for presentation before the court having jurisdiction – complainant filed a fresh complaint before the Court at Saket where drawee bank was situated – legislature amended Negotiable Instruments Act and nullified the effect of judgment in Dashrath – the complaint was transferred from Court at Saket to the Court at Theog – held that a new complaint was filed at Saket and not the complaint which was returned by the Court at Theog- the complainant could not have amended the complaint without seeking permission from the Court- it was not permissible to file a fresh complaint- proceedings on the basis of the fresh complaint are void ab initio – the Court at Theog directed to restore the original complaint and to proceed on the basis of the same.(Para-9 to 22)

Cases referred:

Dashrath Rupsingh Rathod vs. State of Maharashtra and another, (2014) 9 SCC 129
Shamshad Begum (Smt) vs B. Mohammed, (2008) 13 SCC 77
K. Bhaskaran vs Sankaran Vaidhyan Balan and another, (1999) 7 SCC 510
Ambica Quarry Works v. State of Gujarat and others (1987) 1 SCC 213
Quinn v. Leathem (1901) AC 495
Krishena Kumar v. Union of India and others (1990) 4 SCC 207
State of Orissa v. Mohd. Illiyas (2006) 1 SCC 275
Islamic Academy of Education v. State of Karnataka (2003) 6 SCC 697,
Union of India v. Amrit Lal Manchanda and another (2004) 3 SCC 75

Som Mittal v. Government of Karnataka (2008) 3 SCC 574
Arasmeta Captive Power Company Private Limited and another v. Lafarge India Private Limited AIR 2014 SC 525

For the Petitioner: Mr. Nitin Mishra, Advocate.
For the Respondent: Mr. Subhash Sharma, Advocate.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge(oral)**:**

The present petition emanates from the proceedings initiated by the complainant-respondent against the petitioner under section 138 of the Negotiable Instruments Act (for short 'Act') pending before the learned Additional Chief Judicial Magistrate, Theog, District Shimla, H.P.

2. During the pendency of this complaint, a three Hon'ble Judges Bench of Supreme Court in ***Dashrath Rupsingh Rathod*** vs. ***State of Maharashtra and another***, (2014) 9 SCC 129 had with regard to place of filing of the complaint over ruled its earlier view in ***Shamshad Begum (Smt)*** vs ***B. Mohammed***, (2008) 13 SCC 77 and partly over ruled earlier view in ***K. Bhaskaran*** vs ***Sankaran Vaidhyan Balan and another***, (1999) 7 SCC 510 and held that the place,situs or venue of judicial inquiry and trial of the offence under section 138 of the Act must be restricted to where the drawee bank, is located.

3. It was further held that the territorial jurisdiction for filing of cheque dishonoured complaint was restricted to the Court within whose territorial jurisdiction the offence was committed, which is the location where the cheque is dishonoured, i.e. returned unpaid by the bank by which it was drawn and, therefore, place of issuance or delivery of the statutory notice or where the complainant chooses to present the cheque for encashment at his bank is not relevant for the purposes of determining territorial jurisdiction for filing of cheque dishonoured complaints. However, at the same time, in order to avoid hardship to the litigant, it was further directed that in case the court lacked the territorial jurisdiction then the complaints so filed should be returned to the complainants for filing the same before appropriate court, i.e. court having territorial jurisdiction.

4. Accordingly, learned Magistrate vide order dated 10.10.2014 ordered the complaint to be returned to the respondent alongwith documents and he was directed to file the complaint before the competent court.

5. Admittedly, as per the complainant, the drawer bank was situate at Lajpat Nagar and, therefore, the only court competent to try the same was the Saket Court, Delhi. However, the respondent instead of presenting the complaint which had already been filed by him and returned by the Court at Theog, filed a fresh complaint at Saket Court under sections 138, 142-B and 117 of the Act read with section 357 of the of the Code of Criminal Procedure.

6. There is no denying the fact that there is a substantial difference not only between the heading, facts and prayer of the complaint, but there is a substantial difference even in the pre-summoning evidence on the fresh complaint instituted by the respondent.

7. For completion of facts, it would be necessary to observe that consequent upon the amendment carried in the Negotiable Instruments Act, which virtually nullified the decision of the Hon'ble Supreme Court in ***Dashrath Rupsingh Rathod's*** case (supra), the fresh complaint filed by the respondent at Saket Court was again transferred to the court of learned Additional Chief Judicial Magistrate, Theog and is now pending adjudication.

8. In the given circumstances, the moot question is as to whether the respondent could have instituted a fresh complaint at Saket, that too, without obtaining leave of the court. The answer obviously is in the negative.

9. Admittedly, it was only on account of the judgment rendered by the Hon'ble Supreme Court in ***Dashrath Rupsingh Rathod's*** case (supra) that the cases were ordered to be returned to the complainants for being presented before a court having territorial jurisdiction, meaning thereby no fresh right had been created in favour of either of the party and only the place, situs or venue of the judicial inquiry and trial had been re-determined.

10. That apart, the complaint under the Act is governed and controlled by certain inherit statutory limitations including period of limitation. Therefore, the action of the respondent in amending the complaint without the leave of the court virtually amounts not only to filling up a lacuna in the complaint, but would virtually amount to playing fraud with the court.

11. However, Mr. Subhash Sharma, Advocate, at this stage would vehemently contend that the Hon'ble Supreme Court in ***Dashrath Rupsingh Rathod***'s case (supra) has clearly given an option to the complainant to re-file the complaint and would heavily bank upon the observations contained in para 22 of the judgment, which read thus:

> "22.....If such complaints are filed/refiled within thirty days of their return, they shall be deemed to have been filed within the time prescribed by law, unless the initial or prior filing was itself time barred."

12. I am afraid that the contention of the respondent is not only fallacious but based on a complete misreading of the aforesaid judgment. The expression "filed/re-filed" does not in any manner indicate that the complaint can be re-filed after carrying out amendment, that too, without leave of the court. It was only with a view to obviate and eradicate any legal complications that the complaints including those where the respondents/accused have not been properly served were ordered to be returned to the complainant for filing in the proper court in consonance with the exposition of law laid down in ***Dashrath Rupsingh Rathod's*** case (supra). It was in this background that the Hon'ble Supreme Court observed that in case such complaints are filed/re-filed within 30 days of the return, these shall be deemed to have been filed within the time limit prescribed by the law unless the initial or prior complaint itself was time barred. The expressions "filed/re-filed" have to be read in the context they are used and not otherwise.

13. Even otherwise, this is not the ratio of the judgment rendered by the Hon'ble Supreme Court in ***Dashrath Rupsingh Rathod's*** case (supra).

14. The Hon'ble Supreme Court in ***Ambica Quarry Works*** v. ***State of Gujarat and others*** (1987) 1 SCC 213 has held that the ratio of any decision must be understood in the background of the facts of that case. Relying on ***Quinn*** v. ***Leathem*** (1901) AC 495, it has been held that the case is only an authority for what it actually decides, and not what logically follows from it.

15. Lord Halsbury in the case of Quinn (supra) has ruled thus:-

> ".....there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all." (Emphasis supplied)

16. In ***Krishena Kumar*** v. ***Union of India and others*** (1990) 4 SCC 207, the Constitution Bench, while dealing with the concept of ratio decidendi, has referred to Caledonian

Railway Co. v. Walker's Trustees (1882) 7 App Cas 259 :46 LT 826 (HL) and Quinn (supra) and the observations made by Sir Frederick Pollock and thereafter proceeded to state as follows:-

> "The ratio decidendi is the underlying principle, namely, the general reasons or the general grounds upon which the decision is based on the test or abstract from the specific peculiarities of the particular case which gives rise to the decision. The ratio decidendi has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premise consisting of a preexisting rule of law, either statutory or judge-made, and a minor premise consisting of the material facts of the case under immediate consideration. If it is not clear, it is not the duty of the court to spell it out with difficulty in order to be bound by it. In the words of Halsbury (4th edn., Vol.26, para 573) "The concrete decision alone is binding between the parties to it but it is the abstract ratio decidendi, as ascertained on a consideration of the judgment in relation to the subject matter of the decision, which alone has the force of law and which when it is clear it is not part of a tribunal's duty to spell out with difficulty a ratio decidendi in order to bound by it, and it is always dangerous to take one or two observations out of a long judgment and treat them as if they gave the ratio decidendi of the case. If more reasons than one are given by a tribunal for its judgment, all are taken as forming the ratio decidendi." (Emphasis added)

17. In ***State of Orissa*** v. ***Mohd. Illiyas*** (2006) 1 SCC 275, it has been stated by the Hon'ble Supreme Court thus:-

> "12……According to the well-settled theory of precedents, every decision contains three basic postulates: (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment."

18. In ***Islamic Academy of Education*** v. ***State of Karnataka*** (2003) 6 SCC 697, the Hon'ble Supreme Court has made the following observations:-

> "2…..The ratio decidendi of a judgment has to be found out only on reading the entire judgment. Infact, the ratio of the judgment is what is set out in the judgment itself. The answer to the question would necessarily have to be read in the context of what is set out in the judgment and not in isolation. In case of any doubt as regards any observations, reasons and principles, the other part of the judgment has to be looked into. By reading a line here and there from the judgment, one cannot find out the entire ratio decidendi of the judgment."

19. Further, the judgments rendered by a court are not to be read as statutes. ***In Union of India*** v. ***Amrit Lal Manchanda and another*** (2004) 3 SCC 75, it has been stated that observations of courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. The observations must be read in the context in which they appear to have been stated. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes.

20. The Hon'ble Supreme Court in ***Som Mittal*** v. ***Government of Karnataka*** (2008) 3 SCC 574 observed that judgments are not to be construed as statutes. Nor words or phrases in judgments to be interpreted like provisions of a statute. Some words used in a judgment should be read and understood contextually and are not intended to be taken literally. Many a time a judge uses a phrase or expression with the intention of emphasizing a point or accentuating a

principle or even by way of a flourish of writing style. Ratio decidendi of a judgment is not to be discerned from a stray word or phrase read in isolation. (See: ***Arasmeta Captive Power Company Private Limited and another*** v. ***Lafarge India Private Limited*** AIR 2014 SC 525).

21. In view of the aforesaid discussion, this Court has no hesitation in concluding that the amendments carried in the complaint by the respondent herein were totally unauthorized and, therefore, the subsequent complaint filed at Saket Court is no complaint in the eyes of law.

22. Consequently, any proceedings carried on this complaint are *void ab initio* and without jurisdiction and are accordingly declared as such. Since the original complaint is already on the docket of the trial Magistrate, he would restore the same to its original number and thereafter proceed with it in accordance with law from the stage when the complaint was ordered to be returned to the complainant vide order 10.10.2014. Since the complaint is pending adjudication for the last more than three years, it is expected that the learned trial Magistrate shall dispose of the same as expeditiously as possible and in no event later than 30.6.2017.

23. Petition is disposed of in the aforesaid terms, leaving the parties to bear their own costs.

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

Secretary State Election Commission and others ....Petitioner.
Versus
Virender Kapil and another ....Respondent.

CMPMO No. 2 of 2015.
Date of Decision: 10th April, 2017.

Code of Civil Procedure, 1908- Order 7 Rule 11- Plaintiff filed a civil suit for damages for rejecting the nomination papers of plaintiff wrongly- an application for rejection of plaint was filed on the ground that defendants enjoy immunity against the acts done by them in the performance of their duties under Section 158(L) of H.P. Panchayati Raj Act, 1994- held that immunity is regarding the receipt of nomination and will not cover the rejection of the nomination papers- no statutory immunity is available regarding the rejection of nomination- petition dismissed.

(Para-2 and 3)

For the Petitioners: Ms. Nishi Goel, Advocate.
For Respondents No. 1: Mr. Ramakant Sharma, Senior Advocate with Mr. Basant Thakur, Advocate.
For Respondent No.2: Mr. Vivek Singh Attri, Dy. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

Respondent No.1 herein/plaintiff Virender Kapil instituted a suit against the defendants/petitioners herein, for monetary damages comprised in a sum of Rs.15,00,500/- only arising from the purported statutory omissions besides breaches of official duty(ies) by defendant No.3, in omissions/breaches whereof, other defendants vicariously recorded their participation vis-a-vis the aforesaid co-defendant, statutory omissions/breaches whereof purportedly arose from theirs illegally rejecting the nomination papers of the plaintiff/respondent No.1 herein on account of his father holding government land as an encroacher, whereas, this Court while deciding CWP No. 8497 of 2010 pronouncing therein qua the order of the Returning Officer

concerned, whereupon, he rejected the nomination papers of the plaintiff/respondent No.1, on the score qua his father unauthorisedly encroaching upon government land, conspicuously, when thereupon, the plaintiff stood not rendered to fall within the ambit of the coinage "family" occurring in Section 122 (1) (c) of the H.P. Panchayati Raj Act, thereupon, the apposite statutory ill consequence(s) not warranting their befallment upon him, warranting hence theirs standing quashed. In sequel thereto, the plaintiff/respondent No.1 herein was permitted to contest election(s) to the post of Vice President (Up Pradhan), of G.P. Tatapani. However, he did not succeed in the elections. Subsequent, to the pronouncement recorded by this Hon'ble Court in CWP No. 8497 of 2010, pronouncement whereof attained finality, given the Hon'ble Apex Court on standing seized with a SLP, as arose therefrom, dismissing the apposite SLP, whereafter, the apposite civil suit stood instituted before the learned trial Court.

2. In the suit, instituted by the plaintiff/respondent No.1 herein against the defendants, he claimed pecuniary damages from them, arising from theirs committing statutory omission(s) besides breaches, comprised in the Returning Officer concerned while holding vicarious consensus ad idem with other co-defendants, his illegally rejecting the nomination papers of the plaintiff/respondent No.1 herein, whereunder he aspired to contest elections to the post of Up Pradhan, Gram Panchayat, Tatapani. Subsequent to the institution of the suit aforesaid against the co-defendants, the latter through an application constituted before the learned trial Court under the provisions of Order 7, Rule 11 of the CPC, sought the rejection of the plaint, on the score of the co-defendants holding statutory protection/immunity against theirs standing subjected to criminal prosecution besides theirs standing clothed with a statutory immunity against any rearing of any claim for damages against them, for any act or omission on their part in the performance of official duties by them or theirs committing breaches thereto, omissions/statutory breaches whereof stand imputed against them, reiteratedly, thereupon, they espoused therein qua the suit of the plaintiff warranting its dismissal. The aforesaid application stood dismissed by the learned trial Court. The co-defendants, on standing aggrieved, hence, motion this Court for seeking reversal of the verdict pronounced thereon. For resolving the aforesaid conundrum, it is apt to peruse the relevant provisions of Section 158 (L) of the H.P. Panchayat Raj Act, provisions whereof read as under:

> "**Section 158-L- Breaches of Official duty in connection with election**.- (1) if any person to whom this section applies is without reasonable cause guilty of any act or omission in breach of his official duty he shall be punishable with fine which may extend to five hundred rupees.
>
> (2) An offence punishable under sub-section (1) shall be cognizable.
>
> (3) No suit or other legal proceedings shall lie against any such person for damages in respect of any such act or omission as aforesaid.
>
> (4) The persons to whom this section applies are the district election officers, returning officers, assistant returning officers, presiding officers, polling officers and any other person appointed to perform any duty in connection with the receipt of nominations or withdrawal of candidatures or the recording or counting of votes at an election; and the expression "official duty" shall for the purposes of this section be construed accordingly, but shall not include duties imposed otherwise than by or under this Act."

A perusal of sub-section (4) whereof, explicitly affords a clincher for testing the signification borne by the words " breaches of his official duties" or any act or omission, of/by any of the categories of the persons/officers/officials detailed therein, in categories whereof the co-defendants fall. The apposite words occurring in sub-section (4) pointedly with utmost clarity pronounce qua the category of officer(s), as detailed therein, standing appointed for performance of official duties in connection with the receipt of nomination papers or withdrawal of candidature or the recording or counting of votes polled at an election. An echoing occurs therein qua the signification borne by expression "official duty" holding synonimity therewith besides gauging signification thereof emanating on its standing read in tandem therewith. Consequently, any ascription qua the

signification borne by the statutory coinage "receipt of nomination" is to stand disintered besides is to ensue from the coinage borne by the expression "official duty", in respect to breach whereof, no suit is maintainable against any of the categories of officials elucidated in sub-section (4) besides the aforesaid officers/officials are not thereupon amenable for facing criminal prosecution. For gauging besides fathoming of the signification borne by the coinage "official duty", an allusion qua the preceding expression thereof is imperative, the expression preceding thereof conspicuously unveils qua the category of officials/officers marked in sub-section (4), standing pronounced therein qua theirs standing appointed to perform duties in connection with the "receipt of nominations", wherefrom the inevitable corollary is qua on the aforesaid duties standing breached or not performed, would thereupon render the "officials/officers" concerned to stand clothed with a statutory immunity against his/theirs facing criminal prosecution also thereupon he/she/they would stand clothed with a statutory immunity against any suit for damages standing filed thereagainst. However, the coinage "receipt of nomination" warrants imputation of a signification qua the official/officer concerned standing obliged to on the aspirant concerned tendering before him/them, his nomination papers, to hence receive them. The aforestated signification borne by the coinage "receipt of nomination", on refusal(s) whereof by the officers/officials on its standing tendered therebefore, thereupon, the purported breach of the apposite official duty by him/them would hence ensue, cannot stand extended to cover an order made by the officers/officials concerned, whereupon, he/she/they reject(s) the apposite nomination papers, after their standing scrutinized nor also it can tantamount to breach of official duties nor also it can be held qua in respect thereto the apposite statutory immunities being available to the official/officer concerned. Consequently, the statutory immunity as claimed by the co-defendants is unaffordable vis-a-vis them, whereupon also they cannot seek rejection of the plaint.

3. For the foregoing reasons, there is no merit in the instant petition and it is dismissed accordingly. In sequel, the order impugned hereat is maintained and affirmed. The parties are directed to appear before the learned trial Court on 27th May, 2017. All pending applications also disposed of.

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

Dr. Aarti Dhatwalia and others ...Petitioners

Versus

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

CWP No. 581 of 2017 a/w CWP Nos.587, 600, 602, 610, 618, 625, 640, 666, 667 and 676 of 2017.
Reserved on: 11.4.2017.
Date of Decision : 12th April, 2017.

Constitution of India, 1950- Article 226- The State Government issued a P.G. policy for pursuing P.G. (MD/MS) Degree/Diploma Courses within the State of H.P. for the academic session 2017-2018, in which it was provided that incentive @ 10% would be given to the in service G.D.O.s of the marks obtained in National Eligibility Entrance Test – PG (NEET-PG) for each completed year of services in the area declared as difficult/remote/backwards as per the notification – Medical Council of India framed Post Graduate Medical Education Regulation, 2000 and Regulation 9 provided that in determining the merit of in-service candidates incentives @ 10% of the marks obtained for each year of service in remote and/or difficult areas upto the maximum of 30% of the marks obtained in National Eligibility -cum- Entrance Test would be given - held that Regulation 9 is a self-contained Code and the admissions have to be made

strictly in accordance with the procedure prescribed therein- the term remote/difficult area is not to be literally construed – some overlapping in the areas will not make the notification bad – the Court cannot strike down a policy or decision taken by the Government merely because it feels that another decision would have been fairer or more scientific or logical or wiser – the petitioners have failed to show as to how the decision of the Government is arbitrary, irrational, capricious or whimsical – some of the petitions partly allowed with a direction to count the entire service rendered by the petitioners in remote/difficult areas on pro rata basis.(Para-9 to 34)

Cases referred:

State of Uttar Pradesh and others vs. Dinesh Singh Chauhan (2016) 9 SCC 749
State of Punjab and others versus Ram Lubhaya Bagga etc. etc. AIR 1998 SC 1703
Ram Singh Vijay Pal Singh and others versus State of U.P. and others (2007) 6 SCC 44
Villianur Iyarkkai Padukappu Maiyam versus Union of India and others (2009) 7 SCC 561
State of Kerala and another versus Peoples Union for Civil Liberties, Kerala State Unit and others (2009) 8 SCC 46
Census Commissioner and others vs. R. Krishnamurthy (2015) 2 SCC 796

For the Petitioner(s) :	M/s Sanjeev Bhushan, Satyen Vaidya, Mrs. Ranjana Parmar, Senior Advocates, with M/s. Rajesh Kumar, Vivek Sharma, Karan Singh Parmar, Anuj Gupta, M. L. Sharma, Surender Sharma, Mohit Thakur and Naresh Kaul, Advocates.
For the respondents:	Mr. Shrawan Dogra, Advocate General with Mr. Romesh Verma, Mr. Rupinder Singh, Addl. Advocate Generals and Mr. Kush Sharma, Dy. Advocate General, for the respondents-State.
	Mr. B.C. Negi, Senior Advocate, with Mr. Raj Negi, Advocate, for respondents No.3 in CWP Nos. 600 and 618 of 2017 and for respondent No.5 in CWP No. 625 of 2017-Medical Council of India.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Since common question of law and facts arise for consideration in this batch of writ petitions, the same were heard together and are disposed of by a common order.

2. All these writ petitions are directed against the notification issued by the State Government on 20.3.2017 whereby the State Government in pursuance to the judgment rendered by the Hon'ble Supreme Court in ***State of Uttar Pradesh and others vs. Dinesh Singh Chauhan (2016) 9 SCC 749*** issued PG Policy for pursuing PG (MD/MS) Degree/Diploma Courses within the State of Himachal Pradesh under Medical Education Department w.e.f. the academic session 2017-18, more particularly, insofar as it relates to Clause 1 (ii) thereof, which declares for the purpose of incentive at the rate of 10% to the in-service GDOs of the marks obtained in National Eligibility Entrance Test-PG (NEET-PG) for each completed year of service in any of the area declared as difficult/remote/backwards as per the notifications enclosed as Annexures A, B and C therewith.

3. However, before proceeding to deal with the issues on merit, it would be necessary to give a brief background of the case.

4. The Medical Council of India with the previous sanction of the Central Government had an exercise of power conferred by Section 33 read with Section 20 of the Indian Medical Council Act, 1956 framed Postgraduate Medical Education Regulations, 2000 (hereinafter referred to as 'Regulation of 2000'), which were amended, from time to time, and we are presently

concerned with Regulation 9 which was amended vide notification dated 15.2.2012 and same reads as under:

> ***"9. Procedure for selection of candidate for Postgraduate courses shall be as follows:***
>
> *(I) There shall be a single eligibility cum entrance examination namely 'National Eligibility-cum-Entrance Test for admission to Postgraduate Medical Courses' in each academic year. The superintendence, direction and control of National Eligibility-cum-Entrance Test shall vest with National Board of Examinations under overall supervision of the Ministry of Health & Family Welfare, Government of India"*
>
> *(II) 3% seats of the annual sanctioned intake capacity shall be filled up by candidates with locomotory disability of lower limbs between 50% to 70%:*
>
> *Provided that in case any seat in this 3% quota remains unfilled on account of unavailability of candidates with locomotory disability of lower limbs between 50% to 70% then any such unfilled seat in this 3% quota shall be filled up by persons with locomotory disability of lower limbs between 40% to 50% - before they are included in the annual sanctioned seats for General Category candidates.*
>
> *Provide further that this entire exercise shall be completed by each medical college/institution as per the statutory time schedule for admissions.*
>
> *(III) In order to be eligible for admission to any postgraduate course in a particular academic year, it shall be necessary for a candidate to obtain minimum of marks at 50th percentile in 'National Eligibility-cum-Entrance Test for Postgraduate courses' held for the said academic year. However, in respect of candidates belonging to Scheduled Castes, Scheduled Tribes, Other Backward Classes, the minimum marks shall be at 40th percentile. In respect of candidates as provided in clause 9(II) above with locomotory disability of lower limbs, the minimum marks shall be at 45th percentile. The percentile shall be determined on the basis of highest marks secured in the All-India common merit list in 'National Eligibility-cum-Entrance Test' for Postgraduate courses:*
>
> *Provided when sufficient number of candidates in the respective categories fail to secure minimum marks as prescribed in National Eligibility-cum-Entrance Test held for any academic year for admission to Post Graduate Courses, the Central Government in consultation with Medical Council of India may at its discretion lower the minimum marks required for admission to Post Graduate Course for candidates belonging to respective categories and marks so lowered by the Central Government shall be applicable for the said academic year only.*
>
> *(IV). The reservation of seats in medical colleges/institutions for respective categories shall be as per applicable laws prevailing in States/Union Territories. An all India merit list as well as State-wise merit list of the eligible candidate shall be prepared on the basis of the marks obtained in National Eligibility-cum-Entrance Test and candidates shall be admitted to Post-graduate courses from the said merit lists only:*
>
> *Provided that in determining the merit of candidates who are in- service of Government/public authority, weightage in the marks may be given by the Government/Competent Authority as an incentive at the rate of 10% of the marks obtained for each year of service in remote and/or difficult areas upto the maximum of 30% of the marks obtained in National Eligibility-cum Entrance Test, the remote and difficult areas shall be as defined by State Government/Competent authority from time to time.*

(V) No candidate who has failed to obtained the minimum eligibility marks as prescribed in sub-clause (II) shall be admitted to any Postgraduate courses in the said academic year.

(VI) In non-Governmental medical colleges/institutions, 50% (Fifty Per cent) of the total seats shall be filled by State Government or the Authority appointed by them, and the remaining 50% (Fifty Per Cent) of the seats shall be filled by the concerned medical colleges/institutions on the basis of the merit list prepared as per the marks obtained in National Eligibility-cum/Entrance Test.

(VII) 50% of the seats in Post Graduate Diploma Courses shall be reserved for Medical Officers in the Government service, who have served for at least three years in remote and/or difficult areas. After acquiring the PG Diploma, the Medical Officers shall serve for two more years in remote and/or difficult areas as defined by State Government/Competent authority from time to time.

(VIII) The Universities and other authorities concerned shall organize admission process in such a way that teaching in postgraduate courses starts by 2nd May and by 1st August for super specialty courses each year. For this purpose, they shall follow the time schedule indicated in Appendix-III.

(IX) There shall be no admission of students in respect of any academic session beyond 31st May for postgraduate courses and 30th September for super speciality courses under any circumstances. The Universities shall not register any student admitted beyond the said date.

(X) The Medical Council of India may direct, that any student identified as having obtained admission after the last date for closure of admission be discharged from the course of study, or any medical qualification granted to such a student shall not be a recognized qualification for the purpose of the Indian Medical Council Act, 1956. The institution which grants admission to any student after the last date specified for the same shall also be liable to face such action as may be prescribed by MCI including surrender of seats equivalent to the extent of such admission made from its sanctioned intake capacity for the succeeding academic year."

5. The interpretation to be given to Regulation 9 including 9(IV) was subject matter before the Hon'ble Supreme Court in ***Dinesh Singh Chauhan's*** case (supra) wherein the Hon'ble Supreme Court has categorically held that it remains no longer *resintegra* that Regulation 2000 including Regulation 9 is self contained Code laying down the procedure to be followed for admission to the Postgraduate degree courses. Even the validity of Regulation 9 (4) was examined by the Hon'ble Supreme Court and it was held that same was proper and reasonable and also fulfilled the test of Article 14 of the Constitution being larger public interest.

6. Now, a crucial question which emerges for consideration is how far the instructions issued by the State Government for admitting the students to the Postgraduate decree courses are in conformity with the Regulation 9 (4).

7. It is vehemently argued by the petitioners that in absence of a clear decision having being taken by the State Government identifying the difficult and remote areas, the incentive cannot be extended on the basis of notification dated 20.3.2017 or on the basis of Annexures A, B & C contained in the prospectus-cum-application form.

8. At the same time, it is urged that the State Government in terms of the judgment in ***Dinesh Singh Chauhan's case*** (supra) was required to make a declaration on the basis of the decision taken at the highest level; and the same was to be applicable for all the beneficial schemes of the State for such area and not limited to the matter of admission to the Post Graduation Medical Courses, whereas, the respondents have blindly adopted the earlier notifications and appended the same with the prospectus as Annexures A, B and C. It is further averred that though the petitioners have no quarrel with the areas identified in Annexure A to be remote and/or difficult areas, but insofar as the Annexures B and C are concerned, not only are

the areas mentioned therein are overlapping, but that apart even many of the areas as mentioned therein are neither backward and difficult areas and in many cases these areas cannot even be termed to be rural.

9. An additional argument is raised that the manner in which the percentage of marks to be awarded under Regulation 9 (IV) of the Regulations has not at all been specified by the respondents. Therefore, the regulations deserve to be quashed and set aside. In addition thereto, it is also averred that the mechanism as provided for in ***Dinesh Singh Chauhan's case*** (supra) was to apply prospectively and not from the Academic Sessions 2016-17. Lastly, in two of the petitions, a grievance has been made that the experience being rendered in the remote/difficult areas by the petitioners is not being counted on the pro-rata basis.

10. The respondents have filed their reply in CWP No.581 of 2017 and the same stands adopted in all other cases. It is averred in the reply that the prospectus-cum-application form for counseling has been issued strictly as per the policy of the State Government as notified vide notification dated 20.03.2017 and the same in turn has been notified as per the judgment of the Hon'ble Supreme Court in ***Dinesh Singh Chauhan's case*** (supra). It is further averred that in terms of the judgment of the Hon'ble Supreme Court, the State had been posited with the discretion to notify the areas in the given State to be remote, tribal or difficult areas, which declaration was made on the basis of the decision taken at the highest level and is applicable to all beneficial schemes of the State for such areas and not limited to the matter of admissions to Post Graduate Medical Courses. It is also averred that insofar as the overlapping of the area declared as difficult/remote/tribal/backward of the State Government is concerned, the notified policy itself contains a specific note that the areas mentioned in the three categories of the last notifications i.e. Annexures A, B and C are not mutually exclusive and there may be overlaps and further that though a particular General Duty Officer may be eligible under more than one category, but his eligibility would be covered only under one of the categories.

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

11. In order appreciate the controversy in issue, it would be apt to refer to the relevant observations of the Hon'ble Supreme Court in ***Dinesh Singh Chauhan's case*** (supra) which read thus:-

> *"24. By now, it is well established that Regulation 9 is a self-contained Code regarding the procedure to be followed for admissions to medical courses. It is also well established that the State has no authority to enact any law muchless by executive instructions that may undermine the procedure for admission to Post Graduate Medical Courses enunciated by the Central Legislation and Regulations framed thereunder, being a subject falling within the Entry 66 of List I to the Seventh Schedule of the Constitution (See: Preeti Srivastava v.. State of M.P.(1999) 7 SCC 120. The procedure for selection of candidates for the Post Graduate Degree Courses is one such area on which the Central Legislation and Regulations must prevail.*
>
> *25. Thus, we must first ascertain whether Regulation 9, as applicable to the case on hand, envisages reservation of seats for in-service Medical Officers generally for admission to Post Graduate "Degree" Courses. Regulation 9 is a composite provision prescribing procedure for selection of candidates - both for Post Graduate "Degree" as well as Post Graduate "Diploma" Courses.*
>
> *25.1. Clause (I) of Regulation 9 mandates that there shall be a single National Eligibility-cum- Entrance Test (hereinafter referred to as "NEET") to be conducted by the designated Authority.*
>
> *25.2. Clause (II) provides for three per cent seats of the annual sanctioned intake capacity to be earmarked for candidates with locomotory disability of lower limbs. We are not concerned with this provision.*

25.3.Clause (III) provides for eligibility for admission to any Post Graduate Course in a particular academic year.

25.4.Clause (IV) is the relevant provision. It provides for reservation of seats in medical colleges/institutions for reserved categories as per applicable laws prevailing in States/Union Territories. The reservation referred to in the opening part of this clause is, obviously, with reference to reservation as per the constitutional scheme (for Scheduled Caste, Scheduled Tribe or Other Backward Class Candidates); and not for the in-service candidates or Medical Officers in service. It further stipulates that All India merit list as well as State wise merit list of the eligible candidates shall be prepared on the basis of the marks obtained in the NEET and the admission to Post Graduate Courses in the concerned State shall be as per the merit list only. Thus, it is a provision mandating admission of candidates strictly as per the merit list of eligible candidates for the respective medical courses in the State. This provision, however, contains a proviso. It predicates that in determining the merit of candidates who are in-service of Government or a public Authority, weightage in the marks may be given by the Government/Competent Authority as an incentive at the rate of 10% of the marks obtained for each year of service in specified remote or difficult areas of the State upto the maximum of 30% of the marks obtained in NEET. This provision even if read liberally does not provide for reservation for in-service candidates, but only of giving a weightage in the form of incentive marks as specified to the class of in-service candidates (who have served in notified remote and difficult areas in the State).

26 to 32… XXX XXX XXX

33. As aforesaid, the real effect of Regulation 9 is to assign specified marks commensurate with the length of service rendered by the candidate in notified remote and difficult areas in the State linked to the marks obtained in NEET. That is a procedure prescribed in the Regulation for determining merit of the candidates for admission to the Post Graduate "Degree" Courses for a single State. This serves a dual purpose. Firstly, the fresh qualified Doctors will be attracted to opt for rural service, as later they would stand a good chance to get admission to Post Graduate "Degree" Courses of their choice. Secondly, the Rural Health Care Units run by the Public Authority would be benefitted by Doctors willing to work in notified rural or difficult areas in the State. In our view, a Regulation such as this subserves larger public interest. Our view is reinforced from the dictum in Dr. Snehelata Patnaik v.State of Orissa (1992) 2 SCC 26. The three Judges' Bench by a speaking order opined that giving incentive marks to in-service candidates is inexorable. It is apposite to refer to the dictum in the said decision which reads thus: (SCC pp.26-27, paras1-2)

> *"1. We have already dismissed the writ petition and special leave petitions by our order dated December 5, 1991. We would however, like to make a suggestion to the authorities for their consideration that some preference might be given to in-service candidates who have done five years of rural service. In the first place, it is possible that the facilities for keeping up with the latest medical literature might not be available to such in- service candidates and the nature of their work makes it difficult for them to acquire knowledge about very recent medical research which the candidates who have come after freshly passing their graduation examination might have. Moreover, it might act as an incentive to doctors who had done their graduation to do rural service for some time. Keeping in mind the fact that the rural areas had suffered grievously for non-availability of qualified doctors giving such incentive would be quite in order. Learned counsel for the respondents has, however, drawn our*

attention to the decision of a Division Bench of two learned Judges of this Court in Dr. Dinesh Kumar v. Motilal Nehru Medical College, (1986) 3 SCC 727. It has been observed there that merely by offering a weightage of 15 per cent to a doctor for three years' rural service would not bring about a migration of doctors from the urban to rural areas. They observed that if you want to produce doctors who are MD or MS, particularly surgeons, who are going to operate upon human beings, it is of utmost importance that the selection should be based on merit. Learned Judges have gone on to observe that no weightage should be given to a candidate for rural service rendered by him so far as admissions to post-graduate courses are concerned (see Dinesh Kumar case, SCC para 12 at page 741).

2. In our opinion, this observation certainly does not constitute the ratio of the decision. The decision is in no way dependent upon these observations. Moreover, those observations are in connection with all India Selection and do not have equal force when applied to selection from a single State. These observations, however, suggest that the weightage to be given must be the bare minimum required to meet the situation. In these circumstances, we are of the view that the authorities might well consider giving weightage up to a maximum of 5 per cent of marks in favour of in-service candidates who have done rural service for five years or more. The actual percentage would certainly have to be left to the authorities. We also clarify that these suggestions do not in any way confer any legal right on in-service students who have done rural service nor do the suggestions have any application to the selection of the students up to the end of this year." (emphasis supplied)

34. The crucial question to be examined in this case is: whether the norm specified in Regulation 9 regarding incentive marks can be termed as excessive and unreasonable? Regulation 9, as applicable, does not permit preparation of two merit lists, as predicated in State of M.P. v. Gopal D.Tirthani (2003) 7 SCC 83 . Regulation 9 is a complete Code. It prescribes the basis for determining the eligibilities of the candidates including the method to be adopted for determining the inter se merit, on the basis of one merit list of candidates appearing in the same NEET including by giving commensurate weightage of marks to the in-service candidates.

43. Presumably, realizing this position writ petition has been filed to challenge the validity of proviso to Clause IV of Regulation 9. According to the writ petitioners, the prospectus provided for 30% reservation in favour of in-service candidates for admission to post- graduate medical courses. The application of Regulation 9 results in an absurd situation because of giving weightage to specified in-service Medical Officers in the State. There is neither any committee set up nor guidelines made as to which area can be notified as remote and difficult area. The power vested in the State is an un-canalized power and disregards the settled position that for consideration after the graduate level, merit should be the sole criteria. Further, there is no nexus with the object sought to be achieved for providing weightage to the extent of 10% of the marks obtained by the candidate in the common competitive test and to the extent of maximum of 30% marks so obtained.

44. Dealing with this contention, we find that the setting in which the proviso to Clause (IV) has been inserted is of some relevance. The State Governments across the country are not in a position to provide health care facilities in remote and difficult areas in the State for want of Doctors. In fact there is a proposal to make one year service for MBBS students to apply for admission to Post Graduate Courses, in remote and difficult areas as compulsory. That is kept on hold, as was stated before the Rajya Sabha. The provision in the form of granting weightage of

marks, therefore, was to give incentive to the in-service candidates and to attract more graduates to join as Medical Officers in the State Health Care Sector. The provision was first inserted in 2012. To determine the academic merit of candidates, merely securing high marks in the NEET is not enough. The academic merit of the candidate must also reckon the services rendered for the common or public good. Having served in rural and difficult areas of the State for one year or above, the incumbent having sacrificed his career by rendering services for providing health care facilities in rural areas, deserve incentive marks to be reckoned for determining merit. Notably, the State Government is posited with the discretion to notify areas in the given State to be remote, tribal or difficult areas. That declaration is made on the basis of decision taken at the highest level; and is applicable for all the beneficial schemes of the State for such areas and not limited to the matter of admissions to Post Graduate Medical Courses. Not even one instance has been brought to our notice to show that some areas which are not remote or difficult areas have been so notified. Suffice it to observe that the mere hypothesis that the State Government may take an improper decision whilst notifying the area as remote and difficult, cannot be the basis to hold that Regulation 9 and in particular proviso to Clause (IV) is unreasonable. Considering the above, the inescapable conclusion is that the procedure evolved in Regulation 9 in general and the proviso to Clause (IV) in particular is just, proper and reasonable and also fulfill the test of Article 14 of the Constitution, being in larger public interest."

12. It would be evidently clear from a perusal of the aforesaid extracted portion that regulation 9 of the regulations has been held to be a self-contained code and the admissions to the Medical Courses have to be made strictly in accordance with the procedure prescribed therein. Indisputably, the present scheme of regulations do not provide for reservation to the in-service candidates in Post Graduate Degree Courses and the same only postulates giving weightage of marks to the "specified in-service candidates" who have worked in notified remote and/or difficult areas in the State, both for the Post Graduate Degree Courses as also Post Graduate Diploma Courses. It is also evidently clear that the proviso added to the Clause 4 of Regulation 9 further envisages that while determining merit of the candidates, who are in-service of government/public authority, weightage in marks has to be given as incentive @ 10% of the marks obtained for each year of the service in remote and/or difficult areas upto 30% of the marks obtained in NEET Examination. As regards question as to which is the difficult areas, the same has been left open for the State Government/competent authority to define from time to time with a rider that the declaration is made on the basis of decision taken at the highest level; and is applicable for all the beneficial schemes of the State for such areas and not limited to the matter of admissions to Post Graduate Medical Courses.

13. Adverting to the facts of the case, learned counsel for the petitioners would vehemently argue that once the Hon'ble Supreme Court has categorically held the regulation 9 to be a self-contained code, then the expression therein has to be strictly construed. It is vehemently argued that the expressions used in regulation 9(IV) are limited or rather are confined to "difficult, and/or remote areas" and not to any other areas like hard, difficult etc.

14. We are afraid that keeping in view the avowed and laudable object of the regulations, such a hyper construction is not permissible. What is the object of having such a provision has clearly been underlined by the Hon'ble Supreme Court in its judgment in ***Dinesh Singh Chauhan's case*** in paras 30 to 33 (supra) wherein it has been categorically held that the imperative of giving some incentive marks to doctors working in the State in the notified areas cannot be under-scored for the concentration of doctors is in urban areas, whereas, the rural areas are neglected.

15. Now, further question as to whether the expression "remote and difficult areas' are to be literally construed, the answer as observed would be in the negative for the simple

reason that while construing these provisions in ***Dinesh Singh Chauhan's case*** (supra), the Hon'ble Supreme Court itself has used varied expressions like remote, difficult, rural, tribal etc.

16. Now, adverting to the notification dated 20.03.2017 and the Annexures B and C appended with the prospectus, it would be noticed that these notifications have been issued at the highest level by different departments of the Government and are applicable to all beneficial schemes of the State Government for such area and are not at all limited to the matter of admissions to the Post Graduate Medical Courses. Though, an attempt has been made to vehemently canvass that the notification B which is in continuation of the already existing notification dated 18.11.2015 was infact issued with regard to admission. However, a perusal of the earlier notifications dated 09.12.2011, 02.04.2013, 30.09.2013 in continuation whereof this notification dated 18.11.2015 has been issued completely belies and contradicts the stand of the petitioners and these notifications were infact not issued for the purpose of admission alone.

17. As regards the other contention of the petitioners that these notifications, i.e. Annexures 'B' and 'C include areas, which are overlapping, we really find no merit in the same, as the overlapping is inconsequential. Even otherwise it stands clarified in the prospectus itself that there could be overlapping and the eligibility would only be considered under one category, as is evidently clear from the notification dated 20.3.2017 wherein note appended to Clause 1 (C) reads thus:

> "The areas mentioned in the above three categories of letters/notifications are not mutually exclusive and there may be overlaps.
>
> Though a particular General Duty Officer (GDO) may be eligible under more than one category mentioned supra but it is sufficient if his/his eligibility is covered in any one of the category".

18. That apart, there is bound to be overlapping of areas since the notifications (Annexures 'B' and 'C') have been issued by different Departments of the Government for different purposes and are applicable for beneficial schemes of the State for such areas and not limited to the matter of admissions to Post-Graduate courses.

19. In addition to the above, we really do not find that there can by any literally/dictionary meaning of 'remote and difficult', which can be borrowed and it is always open for the State Government to take its decision in identifying such areas where the doctors are not temperamentally inclined to go and render their services.

20. Above all, it is for the State Government to take its decision in identifying the remote and difficult areas irrespective of the nomenclature and such decisions are not open to judicial review or scrutiny unless there is impeachable evidence on record in rebuttal to revisit the decision of the State Government.

21. Notably, the petitioners have not placed on record any such material whereby this Court can be persuaded to have a re-look or revisit the decision of the State Government.

22. It is more than settled that so long as the decision of the Government is not actuated with any malice or is not an outcome of arbitrary and whimsical act, the same should not be interfered by the Court of law under Article 226 of the Constitution of India.

23. It cannot be disputed that when the Government forms a policy, it is based upon number of circumstances on facts, law including constraints based on its resources. It is also based upon expert opinion. It would be dangerous if Court is asked to test the utility, beneficial effect of the policy or its appraisal based on facts set out on affidavit. The Court would dissuade itself from entering into this realm which belongs to the executive (Refer: ***State of Punjab and others*** versus ***Ram Lubhaya Bagga etc. etc***. AIR 1998 SC 1703).

24. It is well settled that the Court cannot strike down a policy on decision taken by the Government merely because it feels that another decision would have been fairer and more scientific or logical or wiser. The wisdom and advisability of the policies are ordinarily not

amenable to judicial review unless the policies are contrary to statutory or constitutional provision or arbitrary or irrational or an abuse of power. (See: ***Ram Singh Vijay Pal Singh and others*** versus ***State of U.P. and others*** (2007) 6 SCC 44, ***Villianur Iyarkkai Padukappu Maiyam*** versus ***Union of India and others*** *(2009) 7 SCC 561,* **State of Kerala and another** versus ***Peoples Union for Civil Liberties, Kerala State Unit and others*** (2009) 8 SCC 46.

25. The scope of judicial review and its exclusion was a subject matter of a recent decision by three Judges of the Hon'ble Supreme Court in ***Census Commissioner and others*** vs. ***R. Krishnamurthy*** (2015) 2 SCC 796 and it was held that it is not within the domain of Courts to embark upon enquiry as to whether particular public policy is wise and acceptable or whether better policy could be evolved, Court can only interfere if the policy framed is absolutely capricious or not informed by reasons or totally arbitrary and founded on ipse dixit offending Article 14. It was held as under:

> "23. The centripodal question that emanates for consideration is whether the High Court could have issued such a mandamus commanding the appellant to carry out a census in a particular manner.
>
> 24. The High Court has tried to inject the concept of social justice to fructify its direction. It is evincible that the said direction has been issued without any deliberation and being oblivious of the principle that the courts on very rare occasion, in exercise of powers of judicial review, would interfere with a policy decision.
>
> 25. Interference with the policy decision and issue of a mandamus to frame a policy in a particular manner are absolutely different. The Act has conferred power on the Central Government to issue Notification regarding the manner in which the census has to be carried out and the Central Government has issued Notifications, and the competent authority has issued directions. It is not within the domain of the Court to legislate. The courts do interpret the law and in such interpretation certain creative process is involved. The courts have the jurisdiction to declare the law as unconstitutional. That too, where it is called for. The court may also fill up the gaps in certain spheres applying the doctrine of constitutional silence or abeyance. But, the courts are not to plunge into policy making by adding something to the policy by way of issuing a writ of mandamus. There the judicial restraint is called for remembering what we have stated in the beginning. The courts are required to understand the policy decisions framed by the Executive. If a policy decision or a Notification is arbitrary, it may invite the frown of Article 14 of the Constitution. But when the Notification was not under assail and the same is in consonance with the Act, it is really unfathomable how the High Court could issue directions as to the manner in which a census would be carried out by adding certain aspects. It is, in fact, issuance of a direction for framing a policy in a specific manner.
>
> 26. In this context, we may refer to a three-Judge Bench decision in Suresh Seth V. Commr., Indore Municipal Corporation, (2005) 13 SCC 287 wherein a prayer was made before this Court to issue directions for appropriate amendment in the M.P. Municipal Corporation Act, 1956 so that a person may be debarred from simultaneously holding two elected offices, namely, that of a Member of the Legislative Assembly and also of a Mayor of a Municipal Corporation. Repelling the said submission, the Court held: (SCC pp. 288-89, para 5)
>
> "5……In our opinion, this is a matter of policy for the elected representatives of people to decide and no direction in this regard can be issued by the Court. That apart this Court cannot issue any direction to the legislature to make any particular kind of enactment. Under out constitutional scheme Parliament and Legislative Assemblies exercise sovereign power to enact laws and no outside power or authority can issue a direction to enact a particular piece of legislation.

In Supreme Court Employees' Welfare Assn. v. Union of India (1989) 4 SCC 187 (SCC para 51) it has been held that no court can direct a legislature to enact a particular law. Similarly, when an executive authority exercises a legislative power by way of a subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact a law which it has been empowered to do under the delegated legislative authority. This view has been reiterated in state of J & K v A.R. Zakki, 1992 Supp (1) SCC 548. In A.K. Roy v. Union of India, (1982) 1 SCC 271, it was held that no mandamus can be issued to enforce an Act which has been passed by the legislature."

27. At this juncture, we may refer to certain authorities about the justification in interference with the policy framed by the Government. It needs no special emphasis to state that interference with the policy, though is permissible in law, yet the policy has to be scrutinized with ample circumspection.

28. In N.D. Jayal and Anr. V. Union of India & Ors.(2004) 9 SCC 362, the Court has observed that in the matters of policy, when the Government takes a decision bearing in mind several aspects, the Court should not interfere with the same. In Narmada Bachao Andolan V. Union of India (2000) 10 SCC 664, it has been held thus: (SCC p. 762, para 229) "

229. "It is now well settled that the courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision. Whether to have an infrastructural project or not and what is the type of project to be undertaken and how it has to be executed, are part of policy-making process and the courts are ill-equipped to adjudicate on a policy decision so undertaken. The court, no doubt, has a duty to see that in the undertaking of a decision, no law is violated and people's fundamental rights are not transgressed upon except to the extent permissible under the Constitution."

29. In this context, it is fruitful to refer to the authority in Rusom Cavasiee Cooper V. Union of India, (1970) 1 SCC 248, wherein it has been expressed thus: (SCC p. 294, para 63)

"63....It is again not for this Court to consider the relative merits of the different political theories or economic policies... This Court has the power to strike down a law on the ground of want of authority, but the Court will not sit in appeal over the policy of Parliament in enacting a law".

30. In Premium Granites V. State of Tamil Nadu, (1994) 2 SCC 691 while dealing with the power of the courts in interfering with the policy decision, the Court has ruled that: (SCC p.715, para 54)

"54. it is not the domain of the court to embark upon unchartered ocean of public policy in an exercise to consider as to whether a particular public policy is wise or a better public policy could be evolved. Such exercise must be left to the discretion of the executive and legislative authorities as the case may be. The court is called upon to consider the validity of a public policy only when a challenge is made that such policy decision infringes fundamental rights guaranteed by the Constitution of India or any other statutory right."

31. In M.P. Oil Extraction and Anr. V. State of M.P. & Ors.(1997) 7 SCC 592, a two-Judge Bench opined that: (SCC p. 611, para 41)

"41..... The executive authority of the State must be held to be within its competence to frame a policy for the administration of the State. Unless the policy framed is absolutely capricious and, not being informed by any reason whatsoever, can be clearly held to be arbitrary and founded on mere ipse dixit of the executive functionaries thereby offending Article 14 of the Constitution or such policy offends other constitutional provisions or comes into conflict with

any statutory provision, the Court cannot and should not outstep its limit and tinker with the policy decision of the executive functionary of the State."

32. In State of M.P. V. Narmada Bachao Andolan & Anr.(2011) 7 SCC 639, after referring to the State of Punjab V. Ram Lubhaya Bagga (1998) 4 SCC 117 , the Court ruled thus: (SCC pp. 670-71, para 36)

"36. The Court cannot strike down a policy decision taken by the Government merely because it feels that another decision would have been fairer or more scientific or logical or wiser. The wisdom and advisability of the policies are ordinarily not amenable to judicial review unless the policies [pic]are contrary to statutory or constitutional provisions or arbitrary or irrational or an abuse of power. (See Ram Singh Vijay Pal Singh v. State of U.P., (2007) 6 SCC 44, Villianur Iyarkkai Padukappu Maiyam v. Union of India, (2009) 7 SCC 561 and State of Kerala v. Peoples Union for Civil Liberties, (2009) 8 SCC 46.)"

33. from the aforesaid pronouncement of law, it is clear as noon day that it is not within the domain of the courts to embark upon an enquiry as to whether a particular public policy is wise and acceptable or whether a better policy could be evolved. The court can only interfere if the policy framed is absolutely capricious or not informed by reasons or totally arbitrary and founded ipse dixit offending the basic requirement of Article 14 of the Constitution. In certain matters, as often said, there can be opinions and opinions but the Court is not expected to sit as an appellate authority on an opinion."

26. Notably, scope of judicial review was yet again subject matter of a very recent decision rendered by the Hon'ble Supreme Court in ***Center for Public Interest Litigation*** Vs. ***Union of India*** W.P.(C) No. 382 of 2014, decided on 8.4.2016, wherein the spectrum usage charges granted to various telecom companies by the Government of India was questioned and it was held that unless a policy decision was found to be arbitrary, based on irrelevant considerations or malafide or against statutory provisions, the same does not call for any interference by the Court in exercise of powers of judicial review. It is apt to reproduce the following observations:-

"19. Such a policy decision, when not found to be arbitrary or based on irrelevant considerations or mala fide or against any statutory provisions, does not call for any interference by the Courts in exercise of power of judicial review. This principle of law is ingrained in stone which is stated and restated time and again by this Court on numerous occasions. In Jal Mahal Resorts (P) Ltd. v. K.P. Sharma, 2014 8 SCC 804, the Court underlined the principle in the following manner:

116. From this, it is clear that although the courts are expected very often to enter into the technical and administrative aspects of the matter, it has its own limitations and in consonance with the theory and principle of separation of powers, reliance at least to some extent to the decisions of the State authorities, specially if it is based on the opinion of the experts reflected from the project report prepared by the technocrats, accepted by the entire hierarchy of the State administration, acknowledged, accepted and approved by one Government after the other, will have to be given due credence and weightage. In spite of this if the court chooses to overrule the correctness of such administrative decision and merits of the view of the entire body including the administrative, technical and financial experts by taking note of hair splitting submissions at the instance of a PIL petitioner without any evidence in support thereof, the PIL petitioners shall have to be put to strict proof and cannot be allowed to function as an extraordinary and extra-judicial ombudsmen questioning the entire exercise undertaken by an extensive body which include administrators, technocrats and financial experts. In our considered view, this might lead to a friction if not collision among the three organs of the State and would affect the principle of

governance ingrained in the theory of separation of powers. In fact, this Court in M.P. Oil Extraction v. State of M.P., (1997) 7 SCC 592 at p. 611 has unequivocally observed that:

> "41. The power of judicial review of the executive and legislative action must be kept within the bounds of constitutional scheme so that there may not be any occasion to entertain misgivings about the role of judiciary in outstepping its limit by unwarranted judicial activism being very often talked of in these days. The democratic set-up to which the polity is so deeply committed cannot function properly unless each of the three organs appreciate the need for mutual respect and supremacy in their respective fields."

117. However, we hasten to add and do not wish to be misunderstood so as to infer that howsoever gross or abusive may be an administrative action or a decision which is writ large on a particular activity at the instance of the State or any other authority connected with it, the Court should remain a passive, inactive and a silent spectator. What is sought to be emphasised is that there has to be a boundary line or the proverbial laxman rekha while examining the correctness of an administrative decision taken by the State or a central authority after due deliberation and diligence which do not reflect arbitrariness or illegality in its decision and execution. If such equilibrium in the matter of governance gets disturbed, development is bound to be slowed down and disturbed specially in an age of economic liberalization wherein global players are also involved as per policy decision."

20. Minimal interference is called for by the Courts, in exercise of judicial review of a Government policy when the said policy is the outcome of deliberations of the technical experts in the fields inasmuch as Courts are not well-equipped to fathom into such domain which is left to the discretion of the execution. It was beautifully explained by the Court in Narmada Bachao Andolan v. Union of India, (2000) 10 SCC 664 and reiterated in Federation of Railway Officers Assn. v. Union of India (2003) 4 SCC 289 in the following words:

> "12. In examining a question of this nature where a policy is evolved by the Government judicial review thereof is limited. When policy according to which or the purpose for which discretion is to be exercised is clearly expressed in the statute, it cannot be said to be an unrestricted discretion. On matters affecting policy and requiring technical expertise the court would leave the matter for decision of those who are qualified to address the issues. Unless the policy or action is inconsistent with the Constitution and the laws or arbitrary or irrational or abuse of power, the court will not interfere with such matters."

21. Limits of the judicial review were again reiterated, pointing out the same position by the Courts in England, in the case of G. Sundarrajan v. Union of India[6] in the following manner: 15.1. Lord MacNaughten in Vacher & Sons Ltd. v. London Society of Compositors (1913 AC 107: (1911-13) All ER Rep 241 (HL) has stated:

> "... Some people may think the policy of the Act unwise and even dangerous to the community. But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction."

> 15.2. In Council of Civil Service Unions v. Minister for the Civil Service (1985 AC 374, it was held that it is not for the courts to determine whether a particular policy or particular decision taken in fulfilment of that policy are fair. They are concerned only with the manner in which those decisions have been taken, if that manner is unfair, the decision will be tainted with what Lord Diplock labels as "procedural impropriety."

15.3 This Court in M.P. Oil Extraction v. State of M.P. (1997) 7 SCC 592 held that unless the policy framed is absolutely capricious, unreasonable and arbitrary and based on mere ipse dixit of the executive authority or is invalid in constitutional or statutory mandate, court's interference is not called for.

15.4 Reference may also be made of the judgments of this Court in Ugar Sugar Works Ltd. v. Delhi Admn. (2001) 3 SCC 635, Dhampur Sugar (Kashipur) Ltd. v. State of Uttaranchal (2007) 8 SCC 418 and Delhi Bar Assn. v. Union of India (2008) 13 SCC 628.

15.5. We are, therefore, firmly of the opinion that we cannot sit in judgment over the decision taken by the Government of India, NPCIL, etc. for setting up of KKNPP at Kudankulam in view of the Indo-Russian Agreement."

22. When it comes to the judicial review of economic policy, the Courts are more conservative as such economic policies are generally formulated by experts. Way back in the year 1978, a Bench of seven Judges of this Court in Prag Ice & Oil Mills v. Union of India and Nav Bharat Oil Mills v. Union of India, (1978) 3 SCC 459 carved out this principle in the following terms:

"We have listened to long arguments directed at showing us that producers and sellers of oil in various parts of the country will suffer so that they would give up producing or dealing in mustard oil. It was urged that this would, quite naturally, have its repercussions on consumers for whom mustard oil will become even more scarce than ever ultimately. We do not think that it is the function of this Court or of any court to sit in judgment over such matters of economic policy as must necessarily be left to the government of the day to decide. Many of them, as a measure of price fixation must necessarily be, are matters of prediction of ultimate results on which even experts can seriously err and doubtlessly differ. Courts can certainly not be expected to decide them without even the aid of experts.

23. Taking aid from the aforesaid observations of the Constitution Bench, the Court reiterated the words of caution in Peerless General Finance and Investment Co. Limited v. Reserve Bank of India, (1992) 2 SCC 343 with the following utterance:

"31. The function of the court is to see that lawful authority is not abused but not to appropriate to itself the task entrusted to that authority. It is well settled that a public body invested with statutory powers must take care not to exceed or abuse its power. It must keep within the limits of the authority committed to it. It must act in good faith and it must act reasonably. Courts are not to interfere with economic policy which is the function of experts. It is not the function of the courts to sit in judgment over matters of economic policy and it must necessarily be left to the expert bodies. In such matters even experts can seriously and doubtlessly differ. Courts cannot be expected to decide them without even the aid of experts.

24. It cannot be doubted that the primary and central purpose of judicial review of the administrative action is to promote good administration. It is to ensure that administrative bodies act efficiently and honestly to promote the public good. They should operate in a fair, transparent, and unbiased fashion, keeping in forefront the public interest. To ensure that aforesaid dominant objectives are achieved, this Court has added new dimension to the contours of judicial review and it has undergone tremendous change in recent years. The scope of judicial review has expanded radically and it now extends well beyond the sphere of statutory powers to include diverse forms of 'public' power in response to the changing architecture of the Government. (See : Administrative Law: Text and Materials (4th Edition) by Beatson, Matthews, and Elliott) Thus, not only has judicial review grown wider in scope; its intensity has also increased. Notwithstanding the same,

> "it is, however, central to received perceptions of judicial review that courts may not interfere with exercise of discretion merely because they disagree with the decision or action in question; instead, courts intervene only if some specific fault can be established for example, if the decision was reached procedurally unfair.
>
> 25. The raison d'etre of discretionary power is that it promotes decision maker to respond appropriately to the demands of particular situation. When the decision making is policy based judicial approach to interfere with such decision making becomes narrower. In such cases, in the first instance, it is to be examined as to whether policy in question is contrary to any statutory provisions or is discriminatory/arbitrary or based on irrelevant considerations. If the particular policy satisfies these parameters and is held to be valid, then the only question to be examined is as to whether the decision in question is in conformity with the said policy."

27. It would be noticed that though there may be certain sections of Medical Officers which may not subscribe and approve the decision of the Government, but the same cannot be nullified on this ground alone and this Court would only interfere with such decision if the petitioners can carve out a case falling within the well settled parameters of law relating to judicial review.

28. The petitioners have failed to point out as to how and in what manner the impugned decision of the Government is either arbitrary, irrational, much less, capricious or whimsical. They have further failed to point out that the decision is either arbitrary or based on irrelevant consideration or is malafide or against any statutory provisions, thus calling for no interference.

29. As regards one of the contentions raised by the petitioners that there is no mechanism as to how the percentage of marks under Regulation 9 (IV) is to be worked out, we find the said contention to be meritless as the mechanism for the same is already provided in Regulation 9 itself.

30. As regards the other contention of the petitioners that the procedure prescribed in Regulation 9 was to apply prospectively and could not be made applicable to this academic session. Suffice it to say that the Hon'ble Supreme Court has specifically directed the admission process as laid down in the case to be followed from the academic year 2016-17 and onwards, as would be evident from para 46 of the judgment, relevant observation whereof read thus:

> "46……In the peculiar facts on hand, we may instead mould the relief in the appeals before us by directing all concerned to follow the admission process for Academic Year 2016-17 and onwards strictly in conformity with the Regulations in force, governing the procedure for selection of candidates for Post Graduate Medical Degree Courses and including determination of relative merit of the candidates who had appeared in NEET by giving weightage of incentive marks to eligible in-service candidates."

31. Lastly, adverting to the contention raised by the petitioners in CWP No. 625 of 2017 and 667 of 2017 that the weightage as provided under Regulation 9 (IV) should be considered on pro rata basis commensurate with the actual length of service rendered in the remote/difficult areas, we feel inclined to accept the said submission.

32. The Hon'ble Supreme Court in ***Dinesh Singh Chauhan'***s case (supra) has in paragraph 35, (as extracted above), clearly observed that the proviso appended to the Regulation prescribes the measure in giving incentive marks to the in-service candidates, who have worked in notified remote and difficult areas in the State. Once that be the position, we really see no reason why the experience gained by the in-service candidate should only be calculated and rounded off in years and the services rendered in days and months should be totally written off. We really see no nexus and are even otherwise of the considered opinion that such interpretation would not only be harsh and oppressive but would be contrary to the provisions, more

particularly, when it cannot be denied that the in-service candidate has no say in the matters of his postings and transfers and is bound to abide by the same or else face disciplinary proceedings or any other coercive or punitive action.

33. On the pointed query of the Court, it was informed by the learned Advocate General that the allocation of marks for weightage, as per the proviso, would only be either 10%, 20% or would be 30% and in no case can a candidate be awarded any marks between the said range. We really find this to be illogical and contrary to the spirit of the Regulation, which clearly provides for the proviso, as being a measure to giving incentive marks to the in-service candidates, who have worked in the notified remote and difficult areas of the State. For example, in ***Dr. Sohil Sharma's*** case, the petitioner has worked in the remote/difficult area for 2 years and 357 days and according to the respondents, he would be only entitled to 2 years weightage ignoring his service of 357 days in the 3rd year, which is short only by a week. Such interpretation would not only be absurd but would be harsh and oppressive defeating the very awed object of the Regulation.

34. Having said so, we find no merit in these petitions, except CWP Nos. 625 of 2017 and 667 of 2017, and the same are accordingly dismissed. In so far as CWP Nos. 625 of 2017 and 667 of 2017 are concerned, the same are partly allowed by directing the respondents to count the entire services rendered by these petitioners in remote/difficult areas on pro rata basis for the purpose of availing benefit of Regulation 9 (IV).

35. All the petitions are disposed of in the aforesaid terms, leaving the parties to bear their own costs.

****

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

Sauju deceased through his LRs. Nirmal Kashyap and others. .....Appellants.

Versus

Gulab Singh & ors. .....Respondents.

RSA No. 181 of 2002.
Decided on: 12.4.2017.

Specific Relief Act, 1963- Section 34- Plaintiffs claimed to be the exclusive owner in possession of the suit land to the exclusion of their brother M, the predecessor-in-interest of the defendants- they pleaded that D was the previous owner who had mortgaged the land with the plaintiffs and thereafter sold the same orally to them – entries were wrongly recorded in favour of M- the defendants pleaded that the land was purchased from the joint family funds – M was the member of joint family – the suit was decreed by the Trial Court- an appeal was preferred, which was allowed- held in second appeal that D was not examined – plaintiffs did not appear in the witness box and an adverse inference has to be drawn against them –the plea of the defendants is corroborated by revenue entries – the Appellate Court had rightly reversed the decree of the Trial Court – appeal dismissed.(Para-17 to27)

For the appellant(s): Mr. J.L.Kashyap, Advocate.
For the respondents: Mr. Ramakant Sharma, Sr.Advocate with Mr. Basant Thakur, Advocate.

The following judgment of the Court was delivered:

Justice Dharam Chand Chaudhary, J (Oral).

This judgment shall dispose of the present appeal and also an application under Order 41 Rule 27 CPC registered as CMP No. 193 of 2012. As a matter of fact, the appeal was initially disposed of vide judgment dated 5.6.2015. Since an application under Order 41 Rule 27

CPC filed by the appellants (plaintiffs in the trial Court) escaped the notice of this Court while considering this appeal and as the judgment in the appeal was passed without taking into consideration said application, therefore, a petition (review Petition No. 110 of 2016) with a prayer to review the judgment in question came to be filed in this Court. The Review Petition has been allowed vide separate judgment of the day and the judgment passed in this appeal on 5.6.2015 stands recalled. Consequently, the parties on both sides have been heard afresh.

2. As a matter of fact, it is the plaintiffs who are in second appeal. They are aggrieved by the judgment and decree passed on 8th March, 2002, by learned Additional District Judge, Solan, in Civil Appeal No.31-S/13 of 2001, whereby while allowing the appeal, the judgment and decree passed by learned trial Court in Civil Suit No.6/1 of 1995, has been reversed and as a consequence thereof the suit dismissed.

3. The bone of contention in the present lis is land bearing Khasra Nos.574/66/2 and 303, measuring 6-2 bighas, situate at village Sheel, Tehsil and District Solan, HP. The appellants-plaintiffs claim themselves to be the exclusive owners in possession of the suit land in exclusion of their brother Matha, the predecessor-in-interest of the respondents, hereinafter to be referred as 'the defendants'. The suit so filed by Ghanu, Sauju, appellant-plaintiff No.2 and Devi Saran, predecessor-in-interest of appellants No.2 to 8, for declaration to the effect that the plaintiffs are the owners in possession of the suit land and that the revenue entries showing the defendants also co-owners in possession thereof are wrong, illegal, null and void, hence inoperative against the plaintiffs. According to them, the previous owner of the suit land was one Devi Ram. He initially mortgaged the same with the plaintiffs, three brothers and later on by way of oral sale sold the same to them. Mutation Nos.491 and 492 and also the entries in Jamabandi for the year 1960-61 have been pressed into service in this behalf. The entries for the first time in the Jamabandi for the year 1969-70 showing their brother Matha as co-owner-in-possession of the suit land, are stated to be against the order of mutation. The subsequent entries in the Jamabandis for the years 1973-74 and 1993-94 showing the defendants to be the co-owners-in-possession of the suit land are also stated to be illegal, null and void. It has further been pleaded that the defendants on the basis of wrong entries have started causing interference in the suit land. The plaintiffs though requested them to desist from such unlawful activities, but of no avail.

4. In the written statement by way of preliminary objections, questions of maintainability of the suit and the plaintiffs having no locus-standi to file the same have been raised. It is contended that in view of the constant entries in the Jamabandis for the years 1969-70, 1973-74 and 1993-94, they are co-owners in possession of the suit land and such long standing entries in the revenue record cannot be held illegal, null and void. As regards mutation Nos.491 and 492, the same are stated to be wrong. The defendants claim themselves to be co-owners-in-possession of the suit land. As per their further case set out in the written statement, the plaintiffs and their brother deceased-defendant Matha had joint family. The affairs of the family and lands used to be managed by them jointly. The suit land is stated to be purchased from the common fund of the joint family. The plaintiffs, therefore, have no legal right to claim that the suit land is in their exclusive ownership and possession.

5. Learnedtrial Court has framed the following issues:

1. Whether the plaintiffs are owners-in-possession of the suit land as alleged? OPP.
2. Whether the plaintiffs are entitled to decree of declaration as prayed? OPP.
3. Whether the suit is not maintainable as alleged? OPD.
4. Whether the defendants are co-owner and co-sharers on the suit land as alleged? OPD.
5. Whether the entry in mutation No.491 and 492 are wrong as alleged?OPD.
6. Relief.

6. The parties were put to trial. The plaintiffs in turn have examined Shri Paras Ram, appellant No.8 as PW-1 and Leela Dutt (PW-2). They have also placed reliance on the orders of mutation Exts.P-7 and P-8 and the entries in the Jamabandi for the year 1960-61, Ext.P-2. They have also produced in evidence the Jamabandis for the years 1964-65 Ext.P-3, 1969-70 Ext.P-4, 1973-74 Ext.P-5 and 1993-94 Ext.P-6.

7. On the other hand, defendant No.1 has stepped into the witness box as DW-1. They have also placed reliance on the same documents, i.e., Jamabandis for the years 1969-70, 1973-74, 1993-94 and 1998-99 Exts. D-1 to D-4.

8. Learned trial Court on appreciation of the evidence, has decreed the suit. However, learned lower appellate Court in appeal has reversed the judgment and decree so passed by learned trial Court and dismissed the suit.

9. The legality and validity of the judgment and decree under challenge has been questioned on the grounds inter alia that learned lower appellate Court has not appreciated the facts that the suit land was mortgaged with the plaintiffs by its previous owner Devi Ram and later on the same was sold to them. Mutations No.491 and 492 attested qua the sale/redemption of the suit land have been wrongly brushed aside. The entries in the Jamabandis for the years 1960-61 and 1964-65 Exts.P-2 and P-3 were also wrongly ignored. The factum of name of Matha for the first time appeared in the Jamabandi for the year 1969-70, Ext.P-4, without any basis has also not been taken into consideration. There being no evidence that Matha had also any role in creation of the mortgage and subsequently acquisition thereof by way of sale, the findings to the contrary recorded by learned lower appellate Court are stated to be without any basis. It is further contended that the defendants have miserably failed to prove that the suit land was purchased from common funds of joint Hindu family. The findings to the contrary recorded are also stated to be neither legally nor factually sustainable. The findings that the sale could have only been effected by way of registered sale deed are also not correct, as according to plaintiffs, oral sale was permissible at that time and there was no need of registration of the sale deed. The issue of limitation was wrongly taken up, as no plea to this effect was ever taken by the defendants. Otherwise also, the limitation being mixed question of law and facts could have not been taken up suo-moto by learned lower appellate Court. The evidence available on record has also not been appreciated in its right perspective. The judgment and decree has, therefore, been sought to be quashed and set aside.

10. The appeal has been admitted on the following substantial questions of law:

(1) Whether the findings of the learned first appellate Court are against the evidence on record?

(2) Whether the Registration Act was not in force in the District of Solan at the relevant time? If so, the sale in question was valid?

(3) Whether it was not open to the learned District Judge to go into the question of limitation when such plea was not raised by the defendants?

(4) Whether the findings of the learned District Judge are result of misreading and misconstruing the evidence on record?

11. Since the appellants had opted not to put in appearance on the appointed day, therefore, they were proceeded against exparte and the appeal disposed of finally. Now, they have appeared and on review of the judgment passed previously, heard through learned counsel representing them.

12. During the pendency of appeal, an application registered as CMP No. 193 of 2012 came to be filed under Oder 41 Rule 27 CPC on behalf of the appellants-plaintiffs for seeking permission to produce in evidence the certificate issued by Patwari, Patwar Circle Barethi and the communication dated 27.1.2012 addressed by Tehsildar Solan to Paras Ram, the husband of appellant No. 1(a) Smt. Nirmal Kashyap, on the ground that such evidence is essentially required

to belie the case of the defendants that Matha, their predecessor-in-interest was recorded joint owner-in-possession of the suit land. As per the documents sought to be produced in evidence, the entries in the Jamabandi for the year 1969-70 Ext. P-4, allegedly being not recorded on the basis of an order passed by the competent revenue authority have been claimed to be without any basis, hence of no help to the case of the defendants.

13. Mr. J.L. Kashyap, Advocate, representing the appellants-plaintiffs has strenuously contended that the entries in the revenue record relied upon by both courts below to arrive at a conclusion that Matha, the predecessor-in-interest of the defendants was joint owner-in-possession of the suit land to the extent of his share are without any basis, hence could have not been relied upon. Therefore, according to Mr. Kashyap, being so, the suit was rightly decreed for possession of the suit land in favour of the plaintiffs. According to him, learned lower appellate Court has went wrong while setting aside the well reasoned judgment and decree passed by learned trial Court on appreciation of the evidence available on record in its right perspective.

14. Shri Ramakant Sharma, Advocate, learned Counsel representing the respondents-defendants has vehemently argued that learned lower appellate Court has rightly appreciated the long standing revenue entries showing the respondents-defendants to be co-owners in possession of the suit land to the extent of 1/4th share. The issue of limitation being legal in nature, according to him, can even be raised without there being any pleadings to this effect available on record. Further that the appellants-plaintiffs have miserably failed to prove that it is they alone to whom the suit land was mortgaged by its previous owner Devi Ram and later on the same was sold to them. Mr. Sharma, therefore, has urged that the judgment and decree under challenge calls for no interference by this Court in the present appeal.

15. As regards the application filed by the plaintiffs for producing in evidence the certificate issued by Patwari, Patwar Circle Barethi and the letter dated 27.1.2012 addressed to the husband of appellant-plaintiff No. 1(a) Smt. Nirmal Kashyap by Tehsildar, Solan, Mr. Ramakant Sharma, Sr. Advocate has contended that in view of the own admission of the plaintiffs that possession of Matha over 1/4th of the suit land was recorded by the Patwari at the time of Girdawri on the spot, the documents now sought to be produced in evidence are neither relevant nor essentially required to decide the point in issue. Therefore, the appeal along with application has been sought to be dismissed.

16. The question that the evidence sought to be produced by way of additional evidence, if essentially required to decide the point in issue or not is left open to be considered in later part of this judgment as and when the occasion to do so arises.

17. Now, if coming to the substantial questions of law No.1 and 4 supra, the same pertain to the misreading, misconstruction and misappreciation of the evidence available on record and on that count the judgment and decree under challenge is allegedly vitiated. The 2nd question of law pertains to the non-applicability of the Registration Act in that part of Solan District where the suit land is situated and as such the findings to the contrary that the registered sale deed was required for effective and valid transfer of the suit land are stated to be erroneous and legally unsustainable. As per 3rd substantial question of law, without there being any pleadings in the written statement, the question of limitation allegedly a mixed question of law and facts should have not been gone into nor any conclusion drawn that the suit was time-barred.

18. I proceed to dispose of the questions of law with the help of given facts and circumstances and the evidence available on record and also the submissions made on behalf of the respondents-defendants. The suit land is measuring 6-2 bighas and comprised under Khasra Nos.574/66/2 and 303. If mutation No.491, Ext.P-7, attested and sanctioned on 19th June, 1963 at village Deothi, is seen Devi Ram owner thereof has been shown as mortgagor, whereas Ghanu, Sauju and Devi Saran, the plaintiffs have been shown as mortgagees. It is seen from this document that the suit land was later on sold by mortgagor to the mortgagees by way of oral sale

in a sum of Rs. 5,500/-. Another mutation bearing No.492, Ext.P-8, reveals that the suit land was got redeemed. Learned lower appellate Court has dismissed the suit on account of being persuaded with the facts that the plaintiffs and their brother deceased Matha were members of joint Hindu family and the long standing entries in the revenue record show said Shri Matha as co-owner in possession of the suit land. An adverse inference was drawn against the plaintiffs on account of their failure to examine Devi Ram, the previous owner of the suit land to prove that they alone were mortgagees/vendees in exclusion of their brother Matha.

19. Learned lower appellate Court has rightly drawn an adverse inference against the plaintiffs because it was Shri Devi Ram, who alone could have thrown some light to substantiate the plaintiffs' case that it is they who were mortgagees and subsequently purchased the suit land from him in exclusion of their brother deceased Matha. Shri Devi Ram aforesaid has, however, not been examined. Not only this, but either of the plaintiffs did not appear in the witness box and satisfied by examining PW-1 Paras Ram, their Special Power of Attorney. True it is that as per the testimony of PW-1, the plaintiffs were old and aged, as such, he was appointed by them their attorney. He, however, admits in his cross-examination that one of the plaintiffs Shri Sauju Ram used to come to the Court and attend each and every hearing. He could move out and his mental condition was also good. He and plaintiff Devi Saran, however, are stated to be hard of hearing and their eye-sight also weak. The plaintiffs themselves could have stepped into the witness box, however, as they failed to do so and may be to avoid their cross-examination, which would have been conducted by learned Counsel representing the defendants and hence an adverse inference on this score can also be drawn against them.

20. Even if orders of mutations Exts.P.-7 and P-8 are believed to be true, though not supported by any other and further evidence, in that event also when Matha was found to be in possession of the suit land to the extent of 1/4th share during Girdawari conducted in the area where the suit land is situated he must have occupied the same being the real brother of the plaintiffs and their remaining holdings joint. The defendants' case that Matha was co-owner in possession of the suit land, is substantiated from the own statement of Paras Ram (PW-1) as according to him, he came to be recorded in possession of the suit land during the course of Girdawari of the land conducted in the area in the year 1968. If coming to his own testimony in the cross-examination, he tells us that the Girdawari generally is conducted by the Patwari by sitting at one place and collecting information from the right-holders and sometimes from third persons also. Meaning thereby that as per own version of PW-1 deceased Matha was recorded co-owner in possession of the suit land during the course of Girdawari conducted by the Patwari. PW-2 also admits that Patwari visits the village to conduct the Girdawari and made the entries, i.e., Girdawari as per the factual position on the spot. Meaning thereby that deceased Matha was in possession of the suit land and it is for this reason during the Girdawari on the suit land was entered in his name being co-owner in possession thereof. It is the Girdawari so entered in the name of deceased Matha in the year 1968 was given effect in the revenue record because in the subsequent Jamabandi for the year 1969-70, Ext.P-4/Ext.D-1 his name came to be entered as co-owner in possession of the suit land alongwith his brothers Ghanu, Sauju and Devi Saran, the plaintiffs.

21. The present, therefore, is not a case where the entries showing deceased Matha being co-owner in possession are without any basis and rather on the basis of entries in the Girdawari which are being entered on the spot and placed before the revenue officer concerned for perusal and it is thereafter given effect in the revenue record. As such it is not a case where it can be said that the entries showing deceased Matha as co-owner in possession of the suit land are without any basis.

22. In view of the own admission of the plaintiffs as noticed supra and also that deceased Matha came to be recorded in possession of the suit land along with plaintiffs to the extent of his share consequent upon the Girdawri of the land having taken place on the spot and as the entries in the Girdawri used to be carried to the Jamabandi being prepared subsequently,

therefore, the documents which no doubt reveal that in the remarks column of the Jamabandi for the year 1969-70, no order on the basis of which Matha was recorded in possession of the suit land to the extent of his share find mention, however, the same is not required for just decision of the case. The application, as such, deserves dismissal and the same is accordingly dismissed.

23. The subsequent entries in the Jamabandis for the years 1973-74, Ext.P-5/Ext.D-2, 1993-94, Ext.P-6/Ext.D-3, also substantiate the claim of the defendants. The red entries below remarks column of the Jamabandi for the year 1973-74, Ext.P-5 further reveal that on the death of Matha, mutation No.591 of the suit land came to be sanctioned and attested in favour of the present respondents-defendants. It is not the case of the plaintiffs that mutation No.591 was not sanctioned or attested in their presence. Therefore, on this score also, it lies ill to say that they were not in the knowledge of entries showing deceased Matha and his successors, the present respondents as co-owners in possession of the suit land. It was, therefore, well within the knowledge of the plaintiffs that Matha has also been recorded co-owner in possession of the suit land and after his death the suit land to the extent of the share of said Shri Matha was mutated in the names of the present respondents. It is, therefore, doubtful that the suit having been instituted on 20th September, 1995 is well within the period of limitation.

24. Now coming to the legal position, even if the question of limitation has not been raised in the written statement as a defence, the suit in case is time barred, can be dismissed. Support in this regard can be drawn from the ratio of the judgment rendered by a Division Bench of this Court in M/s. Roshan lal Kuthiala and another v. Raja Rana Yogendra Chandra and others, 1995 (1) Sim.L.C. 2. The Apex Court has also held in V.M. Salgaocar and Bros. v. Board of Trustees of Port of Mormugao and another, (2005) 4 SCC 613 that it is the duty of the Court to dismiss a suit instituted after the period of limitation prescribed irrespective of the plea of limitation having not been set up as a defence.

25. The discussion hereinabove leads to the only conclusion that learned lower appellate Court has appreciated the evidence in its right perspective while reversing the judgment and decree passed by the trial Court and dismissing the suit. The issue of limitation has also been rightly taken up by learned lower appellate Court in view of the legal position discussed supra. The contentions to the contrary in the memorandum of appeal are neither factually nor legally sustainable. As a matter of fact in the given facts and circumstances and the evidence available on record, the plaintiffs can not claim themselves to be exclusive owners in possession of the suit land. One of the plaintiffs, Ghanu expired issueless. The surviving plaintiffs Sauju and Devi Saran alone cannot claim themselves to be his legal representatives. Matha and on his death the present respondents being real brother/nephews of said Shri Ghanu are also his legal representatives. On this score also, they would have become co-owners in the suit land. It being so, substantial questions of law No.1, 3 and 4 do not arise at all in the present appeal.

26. If coming to the substantial question of law No.2, it is no where the case of the plaintiffs that Registration Act was not applicable in that part of District Solan where the suit land is situated. No such issue, therefore, can be raised in the second appeal. Otherwise also, the suit land having been acquired by way of sale is not in controversy. The defendants have also not raised any such question in the written statement and rightly so because to question the sale would have been contrary to their stand also that they are co-owners in possession of the suit land. As a matter of fact this being not a point in issue, learned lower appellate Court has taken up the same at its own without there being any pleadings in this regard brought on record by either side. This point cannot either be set up in issue nor any substantial question on this score arises for adjudication in the present appeal.

27. In view of what has been said hereinabove, I find no illegality or infirmity in the judgment and decree under challenge. The same, therefore, calls for no interference by this Court in the present appeal and rather deserves to be affirmed. The appeal is accordingly dismissed. No order as to costs.

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

Lalit Singh .....Petitioner
Versus
State of H.P. & others .....Respondents

Cr. MMO No : 326 of 2016
Reserved on : 29.03.2017
Decided on : 17.04.2017

Code of Criminal Procedure, 1973- Section 482- A challan was filed against the petitioner –the petitioner filed the present petition seeking the cancellation of the same- held that specific allegations have been made against the petitioner, which have been supported by independent witnesses – police had found a case against the petitioner and filed the charge-sheet – the power to quash charge-sheet cannot be exercised in such circumstances- petition dismissed.

(Para-8 to 14)

Case referred:
State of Haryana and others vs. Bhajan Lal and others, (1992) Supp (1) SCC 335

For the appellant Dr. Lalit Kumar Sharma, Advocate.
For the respondents : Mr. Pushpinder Jaswal, Dy. AGwith Mr. Rajat Chauhan, Law Officer, for respondent No. 1.
Mr. V.D. Khidta, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present petition is maintained by the petitioner under Section 482 of the Code of Criminal Procedure (hereinafter to be called as "the Code") for quashing of criminal case, titled as State of H.P. vs. Lalit Singh, under Section 3(1) (x) of Scheduled Caste & Scheduled Tribe (Prevention of Atrocities) Act, 1989 (hereinafter to be called as "the Act") and under Section 506-A of the Indian Penal Code, which is pending adjudication before the learned Judicial Magistrate 1st Class, Court No-II, Rohru, District Shimla, H.P.

2. Briefly stating the facts giving rise to the present petition are that as per the petitioner, vide resolution dated 24.05.2014, Gram Panchayat Sundha Bhonda have authorized the petitioner to take appropriate action as per law against the residents of the Panchayat, who are indulged in polluting the environment surrounding the Panchayat by obstructing regular flow of filthy drain water. On 02.06.2014 the petitioner reported the incident of digging of septic tank on Government land, which was at the instance of respondent No. 2, due to which all roads were blocked and dirty water was flowing in other houses. When the petitioner has advised him not to indulge in such activities, respondent No. 2 not even started abusing, but also tried to quarrel with the petitioner. After the said occurrence the petitioner informed the incident to the Police and reported that his action is in the capacity of public servant and since respondent No. 2 has obstructed him to discharge such duties, an appropriate action is required to be taken by the Police. However, as per the petitioner, no action in this regard has yet been taken against respondent No. 2. To the contrary, on 04.06.2014, respondent No. 2 has also registered FIR No. 32/2014, under Section 3(1) (x) of the Act, against the petitioner. But, as per the petitioner he was falsely implicated in the present case and instead of any independent witness, respondent No. 2 has produced his family member as witnesses. Now the challan has been presented before the learned Judicial Magistrate 1st Class, Court No-II, Rohru, District Shimla, H.P. and a total false case has been registered against the petitioner, the proceedings pending before the learned Court below are thus, required to be quashed.

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

4. Dr. Lalit Kumar Sharma, learned counsel for the petitioner has argued that the case made out against the petitioner, is an outcome of revenge, which the complainant wanted to take and without there being any independent witness, a total false case was got registered against the petitioner, so present is a fit case where this Court should exercise inherent powers and quash the criminal proceedings pending against the petitioner.

5. On the other hand, Mr. Pushpinder Jaswal, learned Deputy Advocate General has argued that challan has been presented before the learned Court below and there is a good case against the petitioner, from the statement of the complainant and other witnesses, it is clear that the petitioner has committed the offence and the present petition is required to be dismissed.

6. Mr. V.D. Khidta, learned counsel for respondent No. 2 has brought the attention of this Court to the specific averments, as found mentioned in the record and argued that a clear case is made out against the petitioner. He further states that there are averments against the petitioner, so proceeding pending before the learned Court below needs no interference and the present petition required to be dismissed straightway.

7. To appreciate the arguments of learned counsel for the parties, I gone through the record in detail.

8. From the documents on record i.e., statement of the complainant/respondent No. 2, as made by him before the Police, wherein he alleged that when he alongwith his wife and father was breaking stones for making wall of septic tank, the petitioner came there and in order to insult him, called him by his caste, he said that from this septic tank dirty water will go to his land. The complainant further stated that the proposed septic tank is quit away from the land of the petitioner. Similar are the statements of Krishna Devi and Sushil Kumar and other witnesses.

9. When there are clear allegations with respect to certain offence and on the basis of which the case was registered, this Court in exercising the power under Section 482 of the Code, is not required to search for evidence, which is not part of the record to conclude the innocence of the petitioner. There are clear allegations against the petitioner, whereas Sushil Kumar is an independent witness who has supported the case of the prosecution. The powers under Section 482 of the Code are in the nature of exercising exceptional jurisdiction and required to be exercised in rarest of rare cases, however as far as the present case is concerned, it do not falls in such category and when there is a clear evidence against the petitioner, as well as there is an independent witness also to that effect, which *prime facie* prove the guilt of the accused and there seems no violation of natural justice in the present case.

10. It is well settled law that the Police have powers to investigate a cognizable case and in the present case, the prosecution on the basis of material on record, which is sufficient, proceeded against the petitioner. As discussed above, there is no reason to quash the proceedings.

11. Their Lordships of the Hon'ble Supreme Court in ***State of Haryana and others*** vs. ***Bhajan Lal and others,*** (1992) Supp (1) SCC 335, have clearly defined the categories of cases wherein inherent powers under Section 482 of the Code should be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice. Their Lordships have held as under:

> (I) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.
>
> (ii) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(iii) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(iv) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(v) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(vi) Where there is a express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(vii) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

12. In the present case, none of these conditions are attracted, only a little assertion in the present petition is that in order to take revenge from the petitioner, the false case is made out against him, however from the evidence on record and the statement of independent witness, the same is otherwise not clear.

13. From FIR and the statement of the witnesses, it is revealed that prima facie offence is committed by the petitioner, and he is liable to be proceeded under sections, for which he is being charged. This Court did not find the present case to be a fit case to exercise powers under Section 482 of the Code to quash the proceedings against the petitioner.

14. In view of the law, discussed hereinabove and evidence on record, I find no merit in the present petition, the same deserves dismissal and is accordingly dismissed. Pending application(s), if any, shall also stands disposed of.

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

Prabhi Devi & others .....Petitioners

Versus

Madan Lal & others .....Respondents

CMPMO No. 391 of 2016
Reserved on 01.04.2017
Decided on: 17.04.2017

Indian Evidence Act, 1872- Section 137- An application for recalling PW-5 was filed, which was dismissed by the Trial Court- aggrieved from the order, present petition has been filed- held that witness had stated in examination-in-chief that the defendants never remained in possession but admitted in cross-examination that defendant G is cultivating the land- K is cutting the grass from the suit land and M is ploughing the suit land – if the witness is recalled, the basic principle of cross-examination of witness namely to bring out the truth will be frustrated- the Trial Court correctly exercised the jurisdiction by dismissing the application – petition dismissed.

(Para-10 to 13)

For the petitioners: Mr. Bimal Gupta, Sr. Advocate with Ms. Kusum Chaudhary, Advocate.
For the respondents: Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present petition is maintained by the petitioners/plaintiffs (hereinafter to be called as "the plaintiffs") under Article 227 of the Constitution of India, for quashing and setting aside the order dated 09.08.2016, passed by the learned Civil Judge (Jr. Div.) Kasauli, District Solan, H.P., in an application No. 73/6, under Section 137 of the Indian Evidence Act, read with Section 151 of the Code of Civil Procedure, wherein the application for allowing the plaintiffs to re-examine PW-5, was dismissed.

2. Briefly stating facts giving rise to the present petition are that the plaintiffs have filed a suit for permanent prohibitory and mandatory injunction against the respondents/defendants (hereinafter to be called as "the defendants") and also sought directions from the Court to restrain the defendants from causing any type of interference in the land comprised in Khata/Khatauni No. 3/10, Khasra No. 178/81, 84, 87, 89, 91, 94, 103, 111, 114, 116, 119, 131, 138, 139, 177/81 all Kita 12, measuring 24-16 Bighas and Khata/Khatauni No. 2/6, Khasra No. 172/19, measuring 1-15 Bighas, situated in Mauza Dochi, Pargana Basal, Tehsil Kasauli, District Solan, H.P. (hereinafter to be called as "the suit land") and further prayer to restrain the defendants from realizing the amount of compensation, lying with the Land Acquisition Collector. As per the plaintiffs, they are owners-in-possession of the suit land, which was purchased by the husband and father of the plaintiffs namely late Sh. Dhani Ram, in the year 1963-64, from Smt. Dropti, widow of late Sh. Khaiali Ram, for a consideration of Rs. 2000/- (Rupees two thousand), which amount was duly paid by late Sh. Dhani Ram in cash, after obtaining loan from friends and relatives. After purchasing the suit land, the plaintiffs were using the land for cultivation and they have also raised a cow shed, out houses garage etc. thereon. The suit land is in exclusive possession of the plaintiffs, however, revenue record showing the names of defendants No. 1 to 5 as co-owners in the suit land. As per the plaintiffs, the defendants are resident of Villge Gusam and defendants No. 4 & 5 are residing in Village Dochi out of love and affection, as the husband and father of the plaintiff, late Sh. Dhani Ram has given some land to their younger brother, Gian Chand and also gave him a house with clear understanding that he will not sell or dispose of the same, nor he will create any charge on the house and he will hand over the possession of the land and house as and when demanded by Gian Chand. It is averred in the petition that the land was purchased by late Sh. Dhani Ram for a consideration of Rs. 2,000/- and after his death, the plaintiffs are in exclusive and peaceful possession of the suit land and the fact of ownership and possession of late Sh. Dhani Ram was also admitted by Sadh Ram, Sant Ram, Gian Chand and Karam Chand, in a family settlement dated 22.05.1974, whereas defendant No. 1, Madan Lal is a property dealer and out of greed in connivance with the Revenue Department, got the mutation attested in his and in favour of his sisters. Plaintiff No. 1, being an illiterate villager, was not aware of the said settlement and in the month of March, 2009, when the house was being whitewashed, she found some papers and only then she came to know about that fact. It is alleged that defendant No. 1, only to harass the plaintiffs, started threatening to interfere with their possession and with ulterior mala fide motive, filed a civil suit No. 461 of 2006/2003 for injunction, qua portion of the suit land i.e., Khasra No. 131 and 138. Even defendant No. 2, in collusion with other defendants has also filed a civil suit No. 24/1 of 2009 for injunction, qua portion of suit land i.e., Khasra No. 131, 138 and 139.

3. By filing reply, the defendants resisted and contested the claim of the plaintiffs and raised preliminary objections qua estoppel on account of acts, conduct deeds acquiescence, limitation, cause of action and locus standi. On merits, the defendants denied the ownership of the plaintiffs over the suit land. It was also averred in the reply that the suit land is joint land, which was not yet partitioned and the partition proceedings are pending in the Court of learned

Assistant Collector, 1st Grade. The defendants denied the relinquishment or abandonment of rights over the suit land and averred that the land was purchased by their brother, in the year 1964 and mutation was attested in accordance with law. Thus, they prayed that the application may be dismissed with costs.

4. The plaintiff, by filing replication, refuted the allegations of the defendants, as made in the reply.

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

6. Mr. Bimal Gupta, learned senior Counsel for the plaintiffs has argued that the learned trial Court after completion of pleadings have framed the issues and the case was fixed for plaintiffs evidence. After closure of the plaintiff's evidence when the case was fixed for defendant's evidence, the plaintiffs filed an application, under Section 137 of the Indian Evidence Act for recalling one of their witness, i.e. PW-5, Sh. Jia Lal. The learned trial Court vide order dated 09.08.2016, dismissed the application filed by the plaintiffs. He further argued that the learned trial Court has failed to exercise the jurisdiction vested in it for not allowing the plaintiffs to call the witness for re-examination.

7. On the other hand, Mr. Neeraj Gupta, learned Counsel for the defendants has argued that there is no justification to call the witness for re-examination and the impugned order, passed by the learned trial Court, needs no interference.

8. In rebuttal, Mr. Bimal Gupta, learned senior Counsel has argued that PW-5, Jia Lal, has not supported the facts in his cross-examination, which has been stated by him in his examination-in-chief, so ends of justice demands that the witness should be re-called and order dated 09.08.2016, passed by the learned trial Court be set aside and application be allowed.

9. To appreciate the arguments of the learned counsel for the parties, I have gone through the records in detail.

10. At the stage, it is pertinent to mention here that the plaintiffs in their application, under Section 137 of the Indian Evidence Act, read with Section 151 CPC, have categorically stated that the defendants were never remained in possession of the suit land, but in his very short cross-examination conducted by learned defence counsel, he has admitted that defendants i.e, Sh. Gian Chand, is cultivating the land, Sh. Karam Chand is cutting the grass from land and Sh. Madan Lal is plowing the suit land and the land is joint amongst all the brothers. It was further averred therein that the statement made by the witness in his examination-in-chief is correct, whereas the contents of his cross-examination are in-correct, hence the statement is required to be clarified. However, this fact is totally denied by the defendants in their reply. The defendants further averred that the purpose of re-examination is not to elucidate veracity of truth and the same is to be considered by the Court at the time of cross-examination, the witness has only mentioned genuine facts and feeling anxious from the true statement of the witness, the plaintiff moved this application.

11. The suit has been filed by the plaintiffs for declaration to the effect that they are owners-in-possession over the suit land and revenue entries depicting the defendants to be co-owners in possession over the suit land alongwith the plaintiffs are not binding their rights. Apart from PW-5, four other witnesses were examined by the plaintiffs to support their case, but the statement made by this witness in his examination-in-chief and in his cross-examination are contrary. The purpose of Section 137 of the Evidence Act, is to give an opportunity to the party calling the witness to re-examine him after his cross-examination, if some new facts arises in his cross-examination requiring elucidation of the matter in dispute, but if the version given by the witness in his examination-in-chief stood differentiate to some extent from the facts of his cross-examination, it cannot be said to be a ground for re-examination of the witness.

12. In the above circumstances, if re-examination of the witness is allowed on the grounds that the witness when cross-examined has stated the truth or something contrary to

what he has stated in his examination-in-chief, the basic principle of cross-examination of the witness to bring the truth will be frustrated.

13. In view of the above stated facts, I find no illegality in the orders passed by the learned trial Court and the present petition deserves dismissal and is accordingly dismissed. However, in the peculiar facts and circumstances of the case, parties are left to bear their own cost(s).The parties are directed to appear before the learned Court below on ***3rd May, 2017***.

14. In view of the aforesaid terms, the petition stands disposed of, so also pending application(s), if any.

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

Shri Raja Ram and another .....Appellants.
Versus
Oriental Insurance Company & another .....Respondents.

FAO No. 206 of 2014.
Decided on : 18th April, 2017.

Employees Compensation Act, 1923- Section 4- Deceased died in a motor vehicle accident – a claim petition was filed, which was dismissed by the Commissioner – held that it was not disputed that deceased was present in the vehicle at the time of accident- the owner had engaged C as driver who had engaged the deceased as a cleaner – hence, the engagement was by the owner- the appeal is allowed- the case remanded for fresh adjudication. (Para- 4 to 7)

For the Appellant: Mr. B.N. Sharma, Advocate.
For Respondent No.1: Mr. Bunesh Pal, Advocate.
For Respondent No.2: Mr. Naresh Verma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The instant appeal arises from the impugned verdict recorded by the learned Commissioner exercising powers under the Employee's Compensation Act, 1923, (for short the "Commissioner"), whereby he dismissed the application preferred therebefore by the claimants/appellants herein, wherein they sought grant of compensation under the Employee's Workmen Compensation Act (for short the "Act").

2. The claimants-appellants herein, standing aggrieved by the rendition, recorded by the learned Commissioner, hence, concert to assail it, by preferring an appeal therefrom, before this Court.

3. When the appeal came up for admission, on 25.06.2014, this Court, admitted the appeal, instituted herebefore by the claimants/appellants herein, appeal whereof stands directed against the verdict recorded by the learned Commissioner, on the hereinafter extracted substantial questions of law:-

a) Whether in the facts and circumstances of the present case, the learned Commissioner below as justified not to frame the proper issue especially whether the deceased was Cleaner in the vehicle and comes under the definition of Workmen's Compensation Act or not?

b) Whether the deceased who died in the accident during the course of employment was working as workman and was entitled for the compensation under the Workmen Compensation Act?

c) Whether the learned Commissioner below has misconstrued the record, evidence and statements of the witnesses and failed to appreciate the same in proper application of mind thereby causing grave injustice?

Substantial questions of law No.1 to 3.

4. Deceased Sanjay Sharma, on anvil, qua the appellants/claimants, "not" proving the trite pleaded factum qua the aforesaid standing engaged as a driver in the relevant offending vehicle by its owner, who stands impleaded in the apposite petition as respondent No.2, hence, stood concluded to, not hold any subsisting contract of employment under his purported employer, whereupon, the learned Commissioner stood constrained, to dismiss the apposite claim petition. The emanation of the aforesaid conclusion was sparked, by the learned Commissioner, meteing reverence to Ex.RW3/D, exhibit whereof, constitutes the claim preferred by the owner before the Insurer, wherein, recitals occur qua the owner of the offending vehicle engaging thereon, one Chuni Lal, as its driver. Even though, the authorship of Ex. RW3/D remains unproven, nonetheless, the aforesaid infirmity gripping Ex. RW3/D, would not erode the veracity of the recitals occurring therein, qua respondent No.2, at the relevant time of occurrence of the ill-fated mishap involving the offending vehicle, his engaging thereon one Chuni Lal, as its driver. Concomitantly, thereupon obviously the factum of deceased Sanjay Sharma holding a contract of employment under respondent No.2 as a driver thereon, stood also hence, displaced. The inference aforesaid, acquires enhanced fortification, from Shri Roshan Lal, the owner of the offending vehicle while stepping into the witness box as RW-1, he in his examination-in-chief, during course whereof, he tendered his affidavit bearing Ex.RW1/A, his making echoings therein qua at the relevant time, his engaging Chuni Lal, as a driver upon the offending vehicle, more so when factum thereof remains unconcerted to be shred of its efficacy, by the counsel for the appellants while holding him to cross-examination. Consequently, the findings recorded by the learned Commissioner qua hence the inability of the claimants to prove the pleaded factum of deceased Sanjay Sharma being engaged as a driver in the relevant vehicle by respondent No.2, do not hence warrant any interference.

5. Be that as it may, the parties do not wrangle qua the factum of deceased Sanjay Sharma, the predecessor-in-interest of the claimants being aboard the offending vehicle, at the crucial time whereat it rolled into a deep gorge, in sequel whereof, Sanjay Sharma, suffered his demise. The claimants, would be entitled to claim compensation from the owners also the latter would hold the apposite leverage to seek indemnification from the insurer, of the compensation amount determined upon him, under the apposite award, if evidence, surges forth in display, qua dehors, the factum of their inability to prove the pleaded factum of deceased Sanjay Sharma being engaged as a driver by its owner upon the relevant vehicle, of, his at the relevant time being engaged, in some other capacity, by the owner, upon the relevant offending vehicle, whereupon, this Court would hold of hence with a subsisting contract of employment coming into existence inter se both, thereupon, it paving way for erecting an inference, of the dismissal of the claim petition, for want of proof in respect to the pleaded factum probandum, hence, warranting interference. In disintering, the aforesaid evidence, an allusion to the deposition of the owner held in Ex.RW1/A, unfolds qua his acquiescing to the fact, qua a few days prior to the occurrence, Chuni Lal, the driver of the offending vehicle, engaging deceased Sanjay Sharma, as a cleaner thereon, engagement whereof, emanating on Chuni Lal being appositely authorized by RW-1, the owner of the offending vehicle also he echoes in Ex.RW1/A qua after Chunil Lal , engaging deceased Sanjay Sharma, as a cleaner, on the relevant offending vehicle, his intimating him of the aforesaid engagement also his intimating him qua the wages of engagement of deceased, in the aforesaid capacity being constituted in a sum of Rs.3000/- per month, wherefrom, it is befitting to conclude, of hence a contract of employment inter se deceased Sanjay Sharma vis-a-vis respondent No.2, coming into being besides in existence, though in a capacity contradistinct vis-a-vis the pleaded factum. Even though, hence, the aforesaid evidence, as

surges forth, is apparently beyond pleadings, nonetheless given the uncontroverted factum of the deceased predecessor-in-interest of the claimants, being evidently engaged in the aforesaid capacity, only a few days prior to the accident involving the offending vehicle, taking place, in vehicle whereof the deceased was aboard as its cleaner, thereupon, any existence of an averment in the apposite petition qua his being engaged by respondent No.2, as a driver thereon, is construable to be an ensual of unawareness of the claimants, of the actual capacity in respect whereof deceased Sanjay Sharma, was engaged by Chuni Lal, with the consent of respondent No.2, in the offending vehicle. In aftermath, the fact as pleaded in the claim petition would not constitute, as an estoppel, for hence ousting evidence, making contradistinctive bespeakings vis-a-vis the pleaded capacity, in respect whereof he stood engaged by respondent No.2, in the relevant vehicle nor this Court would be precluded to therefrom draw a conclusion qua its proving the fact of coming into being inter se both, the relevant contract of employment. Conspicuously, also when the befitting capacity to depose qua the factum probandum, is held alone by the owner, whereupon, he also holds the capacity to adduce "best evidence" in respect thereof, evidence whereof he unveils, rendering hence the deposition of RW 1, to prevail upon the pleaded factum also to prevail upon the normal principle of law, qua evidence beyond pleadings hence warranting rejection.

6. In aftermath, this Court concludes qua the evidence of the owner of the offending vehicle, meriting reverence rather than its standing discarded, especially when it, establishes an entrenched inference qua existence of a contract of employment coming into being inter se deceased Sanjay Sharma vis-a-vis respondent No.2. The effect of the aforesaid discarding of evidence, has sequeled the inapt consequence of the impugned award, suffering from a pervasive vice of vitiation, arising from its apparently overlooking the aforesaid germane and apt evidence, wherefrom, the trite fact of deceased Sanjay Sharma, being engaged as a cleaner by respondent No.2 upon the relevant vehicle, hence stands clinched. Consequently, all the substantial questions of law are 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 quashed and set aside. In sequel, the matter is remanded to the learned Commissioner, for enabling him/her to determine afresh, the compensation amount defrayable qua the applicants/claimants/appellants, decision whereof shall stand recorded by the learned Commissioner, within two months from today. The apposite liability qua the defrayment of compensation amount determined vis-a-vis the claimants, may stand fastened upon the Insurer, of the offending vehicle, subject to ascertainment qua the liability of deceased Sanjay Sharma evidently engaged as a cleaner upon the relevant vehicle, being encompassed within the domain of the relevant comprehensive insurance cover issued vis-a-vis the aforesaid offending vehicle. All pending applications also stand disposed of. No order as to costs.

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

M/s. Shimla Automobile Pvt. Ltd. ...Petitioner.

Versus

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

C.R. No. 57 of 2016
Reserved on : 18.4.2017
Decided on: 22.4. 2017

Himachal Pradesh Value Added Tax Act, 2005-Section 34- Petitioner had made the payments for the purchase of vehicles to the manufacturer- when the consignment was checked, it was found that one out of six vehicles was neither declared electronically nor crossed through any of

multipurpose barriers of the State – a penalty of Rs.3,21,658/- was imposed- an appeal was filed, which was rejected- another appeal was filed before H.P. Tax Tribunal, which was partly allowed- aggrieved from the order, the present revision has been filed- held that the Court can interfere with the findings recorded by the authority in case it involves any question of law arising out of erroneous decision of law or failure to decide a question of law- the orders of authorities are based upon categorical admission of the representative of the petitioner- the admission was not withdrawn- the representative had not only admitted his mistake but had agreed to pay the penalty – the petitioner had not sought the recall of the order – no question of law arises- petition dismissed.(Para-9 to22)

For the Petitioner: Mr. Rakesh Sharma & Ms. Bhawana Dutta, Advocate.
For the Respondents: Mr. Shrawan Dogra, A.G. with Mr. Anup Rattan and Mr. Romesh Verma, Addl. A.Gs. for respondents No. 1 to 3/State.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge:

This revision petition, under section 48 (1) of Himachal Pradesh Value Added Tax Act, 2005 (for short 'Act'), has been filed by the assessee/petitioner against the decision rendered by the Himachal Pradesh Tax Tribunal, Dharamshala (Camp at Shimla) on 29.12.2015, whereby it upheld the penalty levied against the petitioner under section 34 (7) whereas the penalty levied under section 34 (2-A) of the Act was ordered to be set aside.

Certain facts may be noticed:

2. The petitioner is registered under the provisions of the Act and Central Sales Tax, 1956. In pursuance to demand communicated and advance payments made by the petitioner for the purchase of vehicles, the manufacturer, M/s Mahindra & Mahindra Limited on 19.8.2013 drew the following sales invoices in its favour:

Sr.No.	Invoice No.	Invoice date	Vehicle Serial number
1.	7014338534	19/8/2013	D2G88600
2.	7014338535	19/8/2013	D2G88602
3.	7014338536	19/8/2013	D2G88601
4.	7014338590	19/8/2013	D2H31053
5.	7014338588	19/8/2013	D2H31049
6.	7014338589	19/8/2013	D2H31052

3. The petitioner was charged for transportation of the above vehicles and these were to be delivered at its business place for which the services of the transporter, respondent No.4, i.e. Mohan Tractor Private Limited were engaged. While these vehicles were on the way to Ner Chowk, Mandi, respondent N.3, i.e. Deputy Excise and Taxation Commissioner-cum-Assessing Authority on 25.8.2013 intercepted these vehicles near Ram Shahar, Tehsil Nalagarh, District Solan. On checking, it was found that one out of the aforesaid six vehicles was neither declared electronically nor crossed through any of the multi purpose Barrier (for short MPB Barrier) of the State.

4. Respondent No.3 initiated assessment proceedings for the assessment year 2013-2014 (detention dated 25.8.2013) and on the basis of the admission, made by the representative of the petitioner before it on 30.8.2013, imposed the penalty of Rs. 3,21,658/- in the following manner:

Value of Vehicle	9,19,024
Penalty u/s 34 (7) for violation of section 34 (4) of HP VAT Act	2,29,756
Penalty u/s 34 (2) (A) of HP VAT Act	91,902
Total additional demand	3,21,658/-

5. The order passed by respondent No.3 was assailed before respondent No.2, i.e. Excise and Taxation Commissioner-cum-Appellate Authority. However, the said appeal was rejected with the observations that the Assessing Authority had ensured and completed all the codal facilities.

6. The petitioner still being aggrieved by the orders passed by the authorities below preferred an appeal before the H.P. Tax Tribunal, Dharamshala (camp at Shimla), which was partly allowed by deleting the penalty under section 34 (2-A) whereas the penalty under section 34 (7) was upheld.

7. It is against these orders passed by the statutory authorities that the petitioner has filed the instant revision petition on the ground that in absence of any finding to the effect that the petitioner has attempted to evade the tax; the impugned order cannot be sustained.

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

9. At the outset one needs to note the scope and ambit of the revisional jurisdiction of this Court as provided and contemplated under section 48 of the Act, which reads thus:

> "48. (1) Any person aggrieved by an order made by the tribunal under sub-section (2) of section 45 or under subsection (3) of section 46, may, within 90 days of the 85 communication of such order, apply to the High Court of Himachal Pradesh for revision of such order if it involves any question of law arising out of erroneous decision of law or failure to decide a question of law.
>
> (2) The application for revision under sub-section (1) shall precisely state the question of law involved in the order, and it shall be competent for the High Court to formulate the question of law.
>
> (3) Where an application under this section is pending, the High Court may, or on application, in this behalf, stay recovery of any disputed amount of tax, penalty or interest payable or refund of any amount due under the order sought to be revised:
>
> Provided that no order for stay of recovery of such disputed amount shall remain in force for more than 30 days unless the applicant furnishes adequate security to the satisfaction of the Assessing Authority concerned.
>
> (4) The application for revision under sub-section (1) or the application for stay under sub-section (3) shall be heard and decided by a bench consisting of not less than two judges.
>
> (5) No order shall be passed under this section which adversely affects any person unless such person has been given a reasonable opportunity of being heard."

10. It would be evidently clear from the aforesaid provisions that this Court would only interfere with the findings recorded by the authorities below in case it involves any question of law arising out of erroneous decision of law or failure to decide a question of law.

11. However, this is not the fact situation obtaining in the instant case as the findings recorded by the authorities below are based on categorical admission of the

representative of the petitioner. This would be clearly evident from the order passed by respondent No.3 on 30.8.2013 (Annexure P-2) wherein it was observed as under:

> "On 30.8.2013, present Shri Daljit Singh, Director M/s Shimla Automobiles Pvt. Ltd. Registered office Chandigarh Sector 7-C, Cabin No. 09, SCO 38 in response to the ongoing hearing of the case. He when asked to explain as why the vehicle in question has not been declared on-line or on the MPB Barrier Brotiwala or Baddi while entering into the State of H.P. He admitted that this has happened a grave mistake in the part of their office as well as the driver of the said vehicle. He also regretted that again there was a mistake on the part of the driver as he did not go the any of the MPB of HP State, which attracts penalty u/s 34 (2) (A) of the HP VAT Act, 2005. In the mean time an inquiry was conducted and it was enquired from the the ETO Incharge of MPB Baddi and Barotiwala on phone whether the said vehicle has approached any of these two MPBs. The ETO Incharge after going through the details intimated on phone that this vehicle has not approached any of these MPBs on 24.8.2013 and 25.8.2013. The said Sh. Daljit Singh admitted his mistake and expressed his readiness to pay the penalties imposed/due without seeking any more opportunity. The case was decided as under:-

Value of Vehicle (Scorpio) as per Tax Invoice	9,19,024/-
Penalty imposed u/s 34 (7) for violation of Section 34 (4) of HP VAT Act	2,29,756/-
Penalty u/s 34 (2) (A) of of HP VAT Act 2005 for not approaching any of HP MPB	91,902/-
Total	Rs. 3,21,658.00

13. It is trite law that the admission is the best evidence that an opposing party can rely upon and though not conclusive is decisive of the matter, unless successfully withdrawn or proved erroneous.

14. Even while filing an appeal before respondent No.3, the petitioner has only alleged that "*respondent, i.e. respondent No.4 of its own recorded the admission of mistake of the appellant and compelled the appellant to pay penalty. The appellant succumbed to the pressure of the respondent and acted as directed by the authority to secure the release of vehicle to ensure timely delivery to the customer having advance booking.*"

15. Evidently, the aforesaid ground was clearly an afterthought as the petitioner took no steps to explain or withdraw the admission by adducing clinching material so as to out way the admission and, therefore, learned first appellate authority committed no irregularity much less any illegality in dismissing the appeal by observing that respondent No.3 had imposed the penalty after following all the codal formalities.

16. As regards the order passed by the learned Tribunal below, it would be noticed that all the contentions raised by the petitioner were dealt with threadbare and it was only thereafter that the levy of penalty upon the petitioner under section 34 (7) of the Act was upheld and whereas the penalty under section 34 (2-A) was set aside.

17. Mr. Rakesh Sharma and Ms. Bhawana Dutta, learned counsel for the petitioner, would, however, argue that before imposing a penalty under section 34 (7) of the Act, the authorities below were required to satisfy themselves that there was an attempt of the petitioner to evade the tax and in absence of such findings, the penalty as imposed cannot be sustained.

18. Section 34 (7) of the Act reads thus:

> "34 (7) - The officer detaining the goods shall record the statement, if any, given by the owner of the goods or his representative or the driver or other person–in-charge of the goods carriage or vessel and shall require him to produce proper and genuine documents as referred to in sub-section (2) or sub-section (4), as the case may be, before him in his office on a specified date on which date the officer shall submit the proceeding along with the connected records to such officer as may be authorised in that behalf by the State Government for conducting necessary enquiry in the matter. The said officer shall, before conducting the enquiry, serve a notice on the owner of the goods and give him an opportunity of being heard and if, after the enquiry, such officer finds that there has been an attempt to evade the tax due under this Act, he shall, by order, impose on the owner of the goods a penalty not exceeding twenty–five percentum of the value of the goods but which shall not be less than fifteen percentum of the value of the goods, and in case he finds otherwise, shall order the release of the goods."

20. We find no merit in the contention raised by the petitioner for the simple reason that it was the representative of the petitioner who himself before respondent No.3 on 30.8.2013 had not only admitted his mistake but had expressed his readiness to pay the penalty imposed/due without seeking any more opportunity.

21. The petitioner had at no time approached respondent No.3 for recall of the said order or claimed that the admission so recorded was wrong or that he may be permitted to withdraw the same.

22. The findings recorded by the authorities below are pure findings of facts and no question of law arises for consideration. Accordingly, the revision petition is dismissed, leaving the parties to bear their own costs.

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

Bachna Ram (since deceased) through his legal representatives and others. ..Appellants.

Versus

Land Acquisition Collector and others ..Respondents.

RFA No. 193 of 2010.
Date of Decision: 24th April, 2017.

Land Acquisition Act, 1894- Section 18- The reference petition was dismissed by the District Judge on the ground that he does not have jurisdiction to decide the question of the conferment of proprietary rights– aggrieved from the order, the present appeal has been filed- held that proprietary rights have not been conferred upon the respondent and the compensation was paid on the basis that respondent No.3 to 7 are tenants – the jurisdiction is not barred when the revenue officer has not conferred the proprietary rights- the evidence was led before the reference Court and the Court should have returned a finding on the basis of the same – appeal allowed- judgment of reference Court set aside- the case remanded with a direction to decide the same afresh in accordance with law. (Para-2 to 4)

Case referred:
Chuniya Devi versus Jindu Ram, 1991(1) Sim. L. C., 223

For the Appellants: Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate.
For Respondent No.1: Mr. S.C. Sharma, Advocate.

For Respondent No.2: Mr. Vijay Sharma, Advocate.
For Respondent No.3 & 4: Mr. Ramakant Sharma, Senior Advocate with Mr. Basant Thakur, Advocate.
For Respondents No. 5 to 7: Ms. Sashi Kiran, Advocate vice to Mr. R.P. Singh, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The landowners/appellants herein are aggrieved by the verdict recorded by the learned District Judge, Solan, H.P. in Land Reference Petition No.2-S/4 of 2007, whereby, he dismissed their petition preferred under Section 18/30 of the Land Acquisition Act, on ground of his not possessing jurisdiction, to decide the question of conferment of proprietary rights upon respondents No.3 to 7 by the Revenue Officer concerned, exercising powers under the Himachal Pradesh Tenancy and Land Reforms Act. Also, the learned Reference Court, remanded the petition aforesaid, to the Land Acquisition Collector, with a direction that after the Civil Court concerned, decides the fact of conferment of proprietary rights upon the respondents concerned, in respect to the land(s) brought to acquisition, thereafter, his making a reference under Section 30 of the Land Acquisition Act, with respect to the apportionment of compensation inter se the landlords vis-a-vis the tenant(s).

2. The reason, which prevailed upon the learned Reference Court, to make the aforesaid pronouncement, ensued, from its depending upon the pronouncement of this Court reported in ***1991(1) Sim. L. C., 223 titled as Chuniya Devi versus Jindu Ram,*** wherein, this Court has barred Civil Courts, to test the legality of decision(s) recorded by a Revenue Officer/ Land Reforms Officer(s) concerned, exercising powers under the H.P. Tenancy and Land Reforms Act, whereby, he proceeds to make an order, conferring proprietary rights upon a "gair maurusi". The reason aforesaid, as projected by the learned Reference Court, to omit to answer the Reference Petition, palpably arises from a gross mis-appreciation of the import of the aforesaid decision, in decision whereof, though, a Civil Court is barred to contest the legality of an adjudication made by the Land Reforms Officer concerned, exercising powers under the H.P. Tenancy and Land Reforms Act, whereby, he confers proprietary rights upon a "gair maurusi", yet in the instant case, no order has been made by the Land Reforms Officer concerned, whereby, he has conferred proprietary rights upon respondents No.3 to 7, with respect to the land(s) brought to acquisition, contrarily, compensation amount has been assessed upon respondents No.3 to 7, on the ground of theirs holding the status of tenants under the landowners, with respect to the land(s) brought to acquisition, factum whereof, of the aforesaid status, of the respondents concerned, is contested by the landowners. The aforesaid contest was reared by the landowners, by theirs making an application before the Land Acquisition Collector, application whereof stands constituted under the provisions of Sections 18/30, of the Land Acquisition Act. The aforesaid application, preferred by the landlords, before the Land Acquisition Collector, was transmitted by the latter, to the learned Reference Court. The respondents/tenants, furnished a reply to the petition, received by the learned Reference Court, from the Land Acquisition Collector. On the contentious pleadings of the parties, the learned Reference Court proceeded to strike the following issues:-

1. Whether the respondents No.3 to 7 are not entitled to any share in the compensation amount as payable to the petitioners? OPA
2. Whether the respondents No.3 to 7 have become owners of the suit land under H.P. Tenancy and Land Reforms Act, as such, entitled to whole of the compensation amount?OPR3 to 7.
3. Whether the respondents No.3 to 7 are not the tenant of respondents No.2, as such, not entitled to any compensation as payable to respondent No.2?OPR-2
4. Relief.

3. Also evidence thereon stood adduced before it. However, as aforestated, the learned Reference Court, did not either appraise the evidence in respect thereto adduced before it nor answered either of the aforesaid issues. The reason which prevailed upon it, for not answering the aforesaid issues, stood anchored upon the aforesaid decision of this Court rendered in ***Chuniya Devi's case supra***. Consequently, this Court is enjoined to test whether the applicability of the decision recorded by this Court in ***Chuniya Devi's case*** supra, by the learned Reference Court, with respect to the facts at hand, being appropriate or not. In making, the aforesaid answer, an allusion to the ratio decidendi propounded, in the aforesaid judgment of this Court, is imperative. The ratio decidendi held in ***Chuniya Devi's case supra*** is extracted hereinafter:-

> "64. We have attempted to do it in the present case and have come to the conclusion that the Legislature has envisaged a complete Code in the provisios of the H.P. Tenancy and Land Reforms Act, 1972, inter alia for effectuating its purpose of land reforms and has ruled out determination of any question connected therewith by the Civil Court.
>
> **The Answer**
>
> Our answer, therefore, is:
>
> (a) That an order made by the competent authority under the H.P. Land Revenue Act, 1954, is open to challenge before a civil court to the extent that it relates to matters falling within the ambit of section 37(3) and section 46 of that Act; and
>
> (b) the civil court has no jurisdiction to go into any question connected with the conferment of proprietary rights under section 104 of the H.P. Tenancy and Land Reforms Act, 1972, except in a case where it is found that the statutory authorities envisaged by that Act had not acted in conformity with the fundamental principles of judicial procedure or where the provisions of the Act had not been complied with."

4. A reading of the afore-extracted ratio decidendi, propounded by this Court, in Chuniya Devi's case supra, makes it abundantly clear qua its warranting attraction, only when an order(s) is pronounced by the Revenue Officer concerned, exercising powers under the H.P. Land Revenue Act, 1954 or when an order is pronounced by the Land Reforms Officer concerned, exercising powers under the H.P. Tenancy and Land Reforms Act, 1972, whereby, he confers proprietary rights upon, a gair maurusi tenant. However, in the instant case, there is no order recorded either by the competent authority exercising powers under the H.P. Land Revenue Act, 1954 or by the Land Reforms Officer concerned, exercising powers under the H.P. Tenancy and Land Reforms Act, 1972, whereby, proprietary rights with respect to the land(s) brought to acquisition, stand conferred upon respondents No.3 to 7. Consequently, the ratio decidendi, propounded by this Court in ***Chuniya Devi's case supra,*** was not applicable with respect to the facts of the instant case. Conspicuously, also with the parties adducing their respective evidence, on the aforesaid issues, it was incumbent upon the learned Reference Court, to appraise the probative worth of the relevant evidence, besides it was incumbent upon it, to also accordingly answer the apposite issues, whereupon, the parties were at contest. However, the learned Reference Court, has abandoned to perform its statutory duty, especially when, it was, under Section 30 of the Land Acquisition Act, exercising the jurisdiction of a Civil Court, hence, was bound to make a pronouncement upon the aforesaid reference petition, preferred before it, by the landowners. Consequently, the abandonment of jurisdiction, by the learned Reference Court, warrants its standing discountenanced. In aftermath, the appeal is allowed and the impugned verdict, of the learned Reference Court, pronounced in Land Reference Petition No. 2-S/4 of 2007, is quashed and set aside. The learned District Judge, is directed to decide afresh the aforesaid reference petition within four months from today. The parties are directed to appear before the learned Reference Court on 26th May, 2017. All pending applications also stand disposed of.

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

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

Cr.

Revision No. 60 of 2009

Date of Decision: 24.04.2017

Indian Penal Code, 1860- Section 279 and 304-A- Accused was driving a tipper – the deceased, complainant and other persons were loading the same – deceased was standing behind the tipper – the complainant requested the accused to reverse the tipper and also cautioned that deceased was standing behind it – the accused reversed the tipper and hit the deceased- when the complainant raised alarm, the accused stopped the tipper – the accused was tried and convicted by the Trial Court- an appeal was preferred, which was dismissed- held in revision that revisional power can be exercised to prevent failure of justice or misuse of judicial mechanism – prosecution witnesses stated that the accident took place due to the negligence of the accused but the detail of negligence was not given- the deceased had suffered injury on the neck while opening/closing the tail gate (dala) – it was not established as to how the act of the accused led to the death of the deceased – accident had taken place at the stone crusher and not on the highway, therefore, ingredients of Section 279 are not satisfied - medical evidence also does not prove that the injury was caused in a manner suggested by the prosecution – Courts had not correctly appreciated the evidence- appeal dismissed. (Para-8 to 23)

Cases referred:

State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri (1999)2 Supreme Court Cases 452
Krishnan and another Versus Krishnaveni and another, (1997) 4 Supreme Court Case 241
Braham Dass v. State of H.P., AIR 2009 SC 3181
State of Karnataka v. Satish,"1998 (8) SCC 493

For the petitioner: Mr. Anup Chitkara, Advocate.
For the respondent: Mr. Ramesh Thakur, and Mr.R.K. Sharma, Deputy Advocate Generals.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (*Oral)*

The instant criminal revision petition filed under Section 397 read with Section 401 of the Cr.PC, is directed against the judgment dated 12.3.2009, (in short 'the impugned judgment') passed by the learned Additional Sessions Judge, Fast Track, Kullu, District Kullu, HP, in Criminal Appeal No. 10 of 2008, affirming the judgment of conviction and sentence dated 8.8.2008, passed by the learned Judicial Magistrate, Ist Class, Manali, District Kullu, H.P. in Criminal Case No. 340-1/07/72-II/07, whereby the petitioner accused has been convicted and sentenced as under:-

> ***"Section 279 IPC***
>
> ***To undergo simple imprisonment for a period of three months and to pay fine of Rs. 1000/- and in default of payment of fine to undergo simple imprisonment for a period of one month.***
>
> ***Section 304-A of the IPC***
>
> ***To undergo simple imprisonment for a period of one year and to pay fine of Rs. 10,000/- and in default of payment of fine to undergo simple imprisonment for six months under Section 304-A of the IPC."***

2. Briefly stated facts as emerge from the record are that complainant namely Ram Samuj, got his statement recorded under Section 154 of the Cr.PC (Ext.PW2/A), before the police, stating therein that on 21.6.2007, at about 4:00pm, he along with deceased Dalip Rana, Dhokhe Lal, Shiv Shankar and Shyam Lal was loading tipper bearing registration No. HP-58-1665. He further stated that deceased Dalip Rana was standing on back side of the tipper and the complainant requested the accused to slightly reverse the tipper, but cautioned him to let deceased Dalip Rana move away from there. It was also reported to the police that the labourers namely Dhokhe Lal, Shiv Shankar and Shyam Lal were standing by the side of the tipper with deceased Dalip Rana, when all of a sudden the accused reversed back the tipper, as a result of which vehicle hit deceased Dalip Rana on his neck . The complainant further reported that on his raising alarm, tipper was stopped by the accused. The complainant also reported to the police that the injured was brought to the Mission Hospital Manali where he was declared brought dead. The complainant also reported to the police that accident took place due to negligent driving of the petitioner accused. On the aforesaid statement having been made by the complainant under Section 154 of the Cr.PC., police registered a formal FIR against the petitioner and took into possession Tipper along with documents. After completion of investigation, accused was challaned by the police for commission of offence punishable under Sections 279 and 304 of the IPC before the competent Court of law.

3. Learned Judicial Magistrate, Ist Class, Manali, District Kullu, H.P., after satisfying itself that prima facie case exists against the accused put a notice of accusation under Sections 279 and 304-A, to which he pleaded not guilty and claimed trial. Learned trial Court on the basis of evidence adduced on record by the prosecution, found the accused guilty of having committed offence under the aforesaid Sections and accordingly, convicted and sentenced him as per description already given above.

4. The present petitioner-accused being aggrieved with the judgment of conviction passed by the learned trial Court, filed an appeal under Section 374 of Cr.PC before the Court of learned Additional Sessions Judge, Fast Track, Kullu, District Kullu, HP, who vide judgment dated 12.3.2009, dismissed the appeal. Hence, this criminal revision petition before this Court.

5. Mr. Anup Chitkara, Advocate, representing the petitioner vehemently argued that the impugned judgment passed by the court below is not sustainable in the eye of law as the same is not based upon the correct appreciation of material made available on record by the prosecution and as such, same deserves to be quashed and set-aside. Mr. Chitkara, while inviting attention of this Court to the impugned judgment passed by the Court below argued that bare perusal of the judgments suggest that both the courts below have not read the evidence in its right perspective, as a result of which erroneous findings have come on record to the detriment of the petitioner-accused, who is otherwise an innocent person. Mr. Chitkara while inviting attention of this Court to the Section 279 IPC forcefully contended that both the courts below committed grave illegality while holding the petitioner accused guilty of having committed offence under Section 279 of the IPC because no evidence worth the name is available on record, suggestive of the fact that the accident, if any, took place on the “public way” as prescribed under Section 279 of the IPC. With a view to substantiate his aforesaid argument, Mr. Chitkara made this Court to travel through the evidence led on record by the prosecution to demonstrate that there is no evidence worth the name available on record suggestive of the fact that the accident occurred on public way, rather it is an admitted case of the prosecution that accident took place near crusher, which by no stretch of imagination, could be termed as public way and as such, conviction recorded under Section 279 of the IPC, is required to be quashed and set-aside. Mr. Chitkara further contended that there is no evidence suggestive of the fact that at the time of accident vehicle in question was being driven rashly and negligently by the petitioner accused, rather collective reading of the evidence led on record by the prosecution itself suggests that the petitioner accused suffered injury on account of being hit by the tipper, rather he sustained injury while closing the tail gate of the tipper involved in the accident. In this regard, he invited attention of this Court to the statement of PW2, who stated before the Court that at the time of accident, tipper was being loaded and vehicle was standing and not moving and six people in all

were loading the said tipper. Mr. Anup while placing reliance upon the statement of PW2 stated that it has specifically come in the statement of PW2 that tail gate of the tipper was open and as such, possibility of accident occurred on account of falling of the dalla/tail gate could not be ruled out by the court below, but unfortunately, both the court below failed to consider the aforesaid glaring aspect of the matter, which would have changed the entire complexion of the case. Mr. Chitkara, also invited attention of this court to the statement of PW8 to suggest that there are major/material contradictions in his as well as statement of PW1 because both of them have given altogether different version with regard to sustaining of injury by the deceased Dalip Rana. Mr. Chitkara further argued that otherwise also if statements of both the witnesses are read in conjunction, one thing clearly emerges that at that relevant time sand was being loaded and vehicle was stationary. In the aforesaid background, Mr. Chitkara, forcefully contended that if entire evidence, as led on record by the prosecution, is examined and analyzed, by no stretch of imagination, driver of the tipper could be held responsible for the unfortunate accident, rather entire evidence made available on record indicates that the deceased suffered injury on his head due to falling of shutter/dala. He further contended that leaving everything aside, if entire evidence adduced on record by the prosecution is examined to ascertain whether there is any rashness/negligence on the part of the accused, it can be safely concluded that there is no evidence as such, led on record by the prosecution with regard to rashness/negligence, if any, on the part of the petitioner-accused and as such, he could not be held guilty of having committed offence under Sections 279 and 304-A, of the IPC. In the aforesaid background, Mr. Chitkara, prayed that present petitioner may be acquitted of the offence punishable under Sections 279 and 304-A of the IPC after setting aside the judgment of conviction recorded by the court below.

6. Per contra, Mr. Ramesh Thakur, learned Deputy Advocate General, duly assisted by Mr. R.K. Sharma, learned Deputy Advocate General, representing the respondent-State supported the impugned judgments of conviction passed by the courts below. Mr. Thakur, while refuting the aforesaid contentions/submissions having been made by the learned counsel representing the petitioner, vehemently argued that bare perusal of impugned judgments passed by both the courts below suggests that there is no illegality and infirmity in the same, rather same are based upon the correct appreciation of evidence adduced on record by the prosecution and as such, there is no scope of interference, whatsoever, of this Court, especially in view of the concurrent finding of fact and law recorded by the courts below. Mr. Thakur while specifically placing reliance upon the statement of PWs 1 and 2 contended that prosecution proved beyond reasonable doubt that the deceased Dalip Rana suffered injuries on his head after being hit by the tipper being driven by the petitioner accused. While inviting attention of this court to the statement of PW1, Mr. Thakur, contended that it has specifically come in his statement that when the petitioner accused was asked to reverse the vehicle, he was informed that the deceased Dalip Singh is standing but despite that petitioner accused hurriedly reversed the vehicle, as a result of which, Dalip suffered injuries and finally passed away. Mr. Thakur, further contended that there is no force in the argument of Mr. Chitkara that person can only be charged under Section 279, if he drives vehicle on public way, wherever a vehicle goes and passes through, can be considered a public way and in the instant case, though crusher was not on the road head but certainly 40-50 mts. away from the road. Mr. Thakur, further contended that crusher could be reached by the tipper being driven by the accused only using same path and as such, it cannot be said that the accident, if any, did not occur on public way. Mr. Negi placed reliance on judgment passed by the Hon'ble Apex Court titled ***State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri*** (1999)2 Supreme Court Cases 452, to suggest that this court has limited jurisdiction under Section 397 of the Cr.PC.

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

8. As far as scope of power of this Court while exercising revisionary jurisdiction under Section 397 is concerned, the Hon'ble Apex Court in ***Krishnan and another*** *Versus* ***Krishnaveni and another,*** **(1997) 4 Supreme Court Case 241**; has held that in case Court notices that there is a failure of justice or misuse of judicial mechanism or procedure, sentence or

order is not correct, it is salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/incorrectness committed by inferior criminal court in its judicial process or illegality of sentence or order. The relevant para of the judgment is reproduced as under:-

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

9. In the instant case, prosecution with a view to prove its case examined as many as nine witnesses, but close scrutiny of the evidence made available on record, suggests that only two material witnesses can only be said to be the eye witnesses to the alleged accident. In his statement recorded under Section 313 Cr.PC, the petitioner-accused denied the case of the prosecution in toto, and stated that accident did not take place due to negligent driving of the vehicle and he has been falsely implicated in the case. However, fact remains that no evidence was led on record by the accused in support of his case.

10. This Court solely with a view to ascertain the genuineness and correctness of the statement having been made by the learned counsel representing the petitioner accused as well as to the impugned judgments passed by the Courts below undertook an exercise to peruse the evidence led on record by the prosecution, perusal whereof suggest that there is considerable force in the arguments having been made by the learned counsel for the petitioner accused that both the courts below have failed to appreciate the evidence in its right perspective, as a result of which erroneous findings to the detriment of the petitioner have come on record.

11. In the instant case, PW2 Ram Samuj, the complainant stated before the Court that in the month of June, 2007, he along with Sham Sunder, Dhoke Lal and deceased Dalip Rana was working at Stone Crusher. He further stated that at that relevant time, deceased Dalip Rana was opening the shutter of the tipper and accused reversed back the tipper, as a result of which, Dalip sustained injuries on his neck. He also stated that Dalip was rushed to the hospital, where he was declared brought dead.

12. True it is that this witness while deposing before the Court stated that accident took place due to negligence of the accused but there is no whisper, if any, that in what manner accused was negligent at the time of alleged accident. If the statement of PW2 is perused, he stated that at around 4 pm, he along with deceased Dalip Rana, Dhoke Lal and Shiv Shankar was loading the Tipper in question. He further stated that they were at the back side of the tipper and he asked the petitioner accused to reverse it a little bit. He further stated that he cautioned the accused to let Dalip Rana take side first. However, Kumar Lama (petitioner) reversed the vehicle, as a result of which accused Dalip Rana received injury on his neck having been hit by the tail gate of the tipper. PW2 in his statement further stated that Dalip Kumar deceased was opening the dala/tail gate of the tipper, then accused hit the tipper on his neck, as a result of which Dalip received injury on his neck. If the cross examination conducted on this witness is perused carefully, it suggests that at the relevant time, sand was being loaded in the tipper and it was stationary because PW2 in his cross examination has specifically stated that at the time of accident, vehicle was stationary and sand was being loaded on the tipper. He also admitted that while loading sand, shutter of the tipper is kept upon towards upper side. He further admitted

that two or three people are required to open and close the shutter/dala. Though PW2 in his cross examination denied that deceased Dalip Rana suffered injury while closing the shutter but he specifically stated that at the time of accident shutter was being opened by Dhoke Lal and deceased Dalip Rana.

13. PW8 Dhoke Lal stated that he along with Shyam Lal, Shankar, deceased Dalip Rana and Ram Samuj was loading the sand in the tipper. He further stated that accused was driver of the tipper. It has also come in his statement that there should be a distance of 5ft. and Deceased Dalip Rana was opening the shutter of the Tipper. Rather PW2 in his statement stated that at that relevant time, shutter/dala of the tipper was opened by Dhoke Lal as well as deceased Dalip Rana. PW8 in his statement stated that all of a sudden, accused revesred back the tipper as a result of which Dalip was crushed and his neck sustained injury. It is not understood that if at that time, as per version put forth by the prosecution, shutter/dala of the tipper was open, how deceased could be hit by the vehicle which was being reversed, as claimed by the prosecution. It has also come in the statement of PW8 that at the time of accident, deceased Dalip Rana was standing 5 ft. away from the vehicle and was opening the shutter. Aforesaid version put forth by PW2 also could not be accepted simply for the reason that if Dalip Singh was standing 5 ft. away from the vehicle, how he could open the shutter/dala of the vehicle. PW8 in his cross examination admitted that at the time of accident, vehicle was in start condition and he was also standing behind the vehicle. If the statement of PWs 2 and 8 are read juxtaposing each other, it can be safely inferred that version putforth by them could not have been believed merely on its face value by the courts below, especially in view of the material contradictions in their statements. PW8 Dhoke Lal stated that Dalip Rana was standing 5 ft. behind the tipper and was opening its dala/tail gate of the tipper, but if the statement of PW2 is seen there is no mention of standing of Dalip Kumar 5ft. away from the vehicle, rather PW2 only stated that deceased Dalip Rana was at the back side of the tipper and he asked the petitioner accused to reverse it a little bit. There is no corroboration, to the version put forth by the PW2 in the statement of PW8 and PW8 stated that he was all alone at the time of the accident.

14. PW2 has specifically stated in his cross-examination that at the time of incident shutter/dala/tail gate of the tipper was being opened by PW8 namely Dhoke Lal and deceased Dalip Rana. If aforesaid version put forth by PW2 is taken to be correct, version put forth by PW8, cannot be accepted at all that deceased Dalip suffered injury on his neck after being hit by the tipper. Similarly, perusal of Ext.PW2/A (statement) recorded under Section 154 of the Cr.PC suggests that PW2 reported that on 21.6.2007 at about 4pm, he along with Shyam Lal, Dhoke Lal, deceased Dalip Rana and Shiv Shankar, was loading the tipper. In his statement under Section 154 of the Cr.PC, the complainant i.e. PW2 stated that the deceased Dalip was on the back side of the tipper, whereas in his statement before the Court, he stated that Dalip Rana was opening the dala gate of the tipper and then, he was hit by the tipper, as a result of which, he suffered injury on his neck.

15. This Court after carefully examining the statements of PW2 and PW8 sees substantial force in the argument having been made by the learned counsel for the petitioner that there are material contradictions in the statements of PW2 and PW8 and no conviction, if any, could be recorded by the courts below on the statement of these so called eye witnesses i.e. PW2 & PW8.

16. Leaving everything aside, this Court was unable to lay its hand to any evidence worth the name led on record by the prosecution suggestive of the fact that there was act of rashness and negligence on the part of the petitioner accused while loading sand at the stone crusher because none of the witnesses stated anything specific with regard to the negligence on the part of the accused. Both the PWs as referred above, merely stated that accident occurred due to rashness and negligence of the petitioner accused but I am afraid that merely this statement was sufficient to hold the petitioner guilty of having committed offence under Section 279 and 304-A IPC. Rather, this Court after carefully examining the entire evidence led on record, has reason to believe/infer that the deceased Dalip Rana suffered injury on his neck while

opening the dala/tail gate or closing the same. Both the aforesaid material prosecution witnesses have stated altogether differently with regard to positioning of deceased Dalip Rana at the spot of the accident. But interestingly, if the statements made by both the witnesses are seen/perused carefully, it may be easily inferred that at that relevant time, vehicle was stationary and sand was being loaded on the same. True it is, that at that relevant time, there was no conductor, as stood proved, alongwith Tipper but if the statement of PW 1 is read, he specifically stated that he asked the petitioner accused to reverse it a little bit and as such, it cannot be stated that petitioner-accused without ascertaining whether person is standing behind or not, reversed the vehicle rashly and negligently. PW2 though in his statement stated that at the time of reversing of the vehicle he asked the petitioner accused to let Dalip Rana get aside first, however his aforesaid version was nowhere corroborated by PW8, who admittedly, as per evidence led on record by the prosecution was, with the deceased Dalip Rana at the back of the tipper.

17. True it is that in the unfortunate incident one person lost his life but after carefully examining the evidence adduced on record by the prosecution, this court has no hesitation to conclude that the prosecution was not able to prove beyond reasonable doubt that the petitioner committed offence punishable under Section 279 of the IPC. To constitute an offence under Section 279 IPC, it is/was the bounden duty of the prosecution to prove beyond reasonable doubt that the accused was driving the vehicle on a "public way". Apart from above, prosecution while proving its case under Sections 279 IPC is/was also expected to prove that the petitioner accused was driving rashly or negligently that it endangered human life or caused hurt or injury to any other person. But unfortunately in the instant case, all the aforesaid ingredients/factors, which were required to be weighed/considered at the time of ascertaining whether the offence under Section 279 of the IPC, has been committed by the petitioner accused or not, have been not proved. It would be apt to reproduce Section 279 of the IPC, herein below:-

> *"Rash driving or riding on a public way*
>
> *Whoever drives any vehicle, or rides, on any public way in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both."*

Aforesaid provision of law clearly suggests that the person/individual, who drives the vehicle rashly and negligently on public way can be charged under Section 279 IPC.

18. It has specifically come in the statement of PW2 (complainant) that the accident occurred at stone crusher, which was at the distance of 40/50 fts., away from the highway, otherwise apart from above, evidence available on record clearly suggests that at that relevant time sand was being loaded on the vehicle and tipper was just standing near to the crusher as is clearly evident from the photographs (Ext.PA/12 to 15). In this regard, the Hon'ble Apex Court, in case titled ***Braham Dass v. State of H.P., AIR 2009 SC 3181***, has held that Section 279 IPC deals with rash driving or riding on a public way and it must be established that the accused was driving any vehicle on a public way which endangered human life or was likely to cause hurt or injury to any other person. But in the instant case, there is no evidence led on record by the prosecution to prove that at that relevant time, vehicle in question was being driven by the petitioner accused on public way as provided under Section 279 of the IPC and as such, aforesaid provision could not be attracted in the present case, where the petitioner-accused was not admittedly driving tipper on the public way at that relevant time. The relevant para of the judgment referred supra, is being reproduced herein below:-

> *"6.In support of the appeal, learned counsel for the appellant submitted that there was no evidence on record to show any negligence. It has not been brought on record as to how the accused- appellant was negligent in any way. On the contrary what has been stated is that one person had gone to the roof top and driver started the vehicle while he was there. There was no evidence to show that the driver had knowledge that any passenger was on the roof top of the bus. Learned counsel for*

the respondent on the other hand submitted that PW1 had stated that the conductor had told the driver that one passenger was still on the roof of the bus and the driver started the bus.

7.In the cross-examination PW1 categorically stated that he does not know who the driver was. It is of relevance that the conductor was not examined as a witness.

8. Section 279 deals rash driving or riding on a public way. A bare reading of the provision makes it clear that it must be established that the accused was driving any vehicle on a public way in a manner which endangered human life or was likely to cause hurt or injury to any other person. Obviously the foundation in accusations under Section 279 IPC is not negligence. Similarly in Section 304-A the stress is on causing death by negligence or rashness. Therefore, for bringing in application of either Section 279 or 304-A it must be established that there was an element of rashness or negligence. Even if the prosecution version is accepted in toto, there was no evidence led to show that any negligence was involved."

19. Similarly perusal of medical evidence led on record nowhere gives specific details/description of the injury suffered by the deceased Dalip Rana in the alleged accident. PW4 Dr. Alka Walter, Medical Officer, Mission Hospital, Manali, stated that when the patient was brought to the hospital, he had no pulse, recordable blood pressure, cardiac activity or spontaneous respiration and she issued MLC Ext.PW3/A. However, there is nothing in MLC Ext.PW3/A from where, something can be inferred with regard to the alleged injury suffered by the deceased Dalip Rana. PW7 Dr. Sishu Pal, Regional Hospital Kullu, who had conducted the post-mortem of the body, issued post-mortem report Ext.PW7/A and according to him, cause of the death was head injury, which ultimately resulted into coma and death of deceased Dalip Rana. He further stated that injury could be sustained due to hitting of vehicle while being reversed but definitely, there is no positive statement of him, if any, with regard to injury caused to the deceased. Since in the instant case, prosecution has miserably failed to prove on record that the deceased suffered injury on his head after being hit by the vehicle, aforesaid medical evidence adduced on record by the prosecution is/was of no help. Hence, finding returned by the courts below that medical evidence led on record is also in consonance with the oral evidence adduced on record by the prosecution qua the accident is totally irrelevant.

20. This court was unable to lay its hand to any evidence led on record by the prosecution to prove the negligence, if any on the part of the petitioner-accused. It is well settled by now that for the purpose of criminal law, high degree of negligence is required to be proved before the felony is established. But in the instant case, there is hardly any evidence suggestive of the fact that the petitioner accused was negligent at the time of alleged accident, rather, evidence available on record, especially, statements of PW2 and 8 compel this Court to agree with the contention having been made by the learned counsel representing the petitioner that the deceased Dalip Rana suffered injury on his neck due to fall of shutter/tail gate of the tipper. Prosecution with a view to prove negligence, if any, on the part of the petitioner accused ought to have proved on record gross negligence on the part of the accused petitioner. In such like cases, there should be evidence to prove on record the amount of recklessness or negligence and same should be more than normal or ordinary. Though, in the instant case, prosecution made an attempt to prove on record that the deceased Dalip Rana suffered injury due to the negligence of the accused but statements of PWs 2 and 8 nowhere prove the case of prosecution because none of the aforesaid witnesses stated something specific with regard to the negligent act, if any, committed by the petitioner at the time of the alleged incident. Mere bald statement that the petitioner accused was negligent, by no stretch of imagination, could be termed to be sufficient to hold the petitioner accused guilty of having committed offences punishable under Sections 279 and 304 of the IPA. In the instant case, it has come on record that at the time of accident, tipper was stationary and it was not being driven by its driver. Hence, this Court has no hesitation to conclude that prosecution has failed to prove reckless or careless driving of the petitioner accused beyond reasonable doubt. A person cannot be held criminally accountable for his rashness and negligence merely because evil consequences flow from his act, rather rashness must be such as

to endanger human life or personal safety of others. Similarly, for criminal liability, the rashness or negligence must show a disregard for human life or personal safety of others. Question whether an act is criminally rash or negligent is question of fact depending upon the circumstances of particular case and as such, needs to be elucidated minutely and with certain degree of precision. In the instant case, PW2 himself stated that he had asked the petitioner to reverse the vehicle a little bit and as such, it cannot be said that vehicle if at all reversed by the petitioner-accused, was a sheer act of negligence because the petitioner-accused reversed the vehicle on being asked by PW2.

21. Reliance is placed on judgment passed by the Hon'ble Apex Court in case titled "***State of Karnataka v. Satish,"1998 (8) SCC 493***. The relevant paras of which are being reproduced herein below:-

> *"1. Truck No. MYE-3236 being driven by the respondent turned turtle while crossing a "nalla" on 25-11-1982 at about 8.30 a.m. The accident resulted in the death of 15 persons and receipt of injuries by about 18 persons, who were travelling in the fully loaded truck. The respondent was charge-sheeted and tried. The learned trial court held that the respondent drove the vehicle at a high speed and it was on that account that the accident took place. The respondent was convicted for offences under Sections 279, 337, 338 and 304A IPC and sentenced to various terms of imprisonment. The respondent challenged his conviction and sentence before the Second Additional Sessions Judge, Belgaum. While the conviction and sentence imposed upon the respondent for the offence under Section 279 IPC was set aside, the appellate court confirmed the conviction and sentenced the respondent for offences under Sections 304A, 337 and 338 IPC. On a criminal revision petition being filed by the respondent before the High Court of Karnataka, the conviction and sentence of the respondent for all the offences were set aside and the respondent was acquitted. This appeal by special leave is directed against the said judgment of acquittal passed by the High Court of Karnataka.*
>
> *2. We have examined the record and heard learned counsel for the parties.*
>
> *3. Both the trial court and the appellate court held the respondent guilty for offences under Sections 337, 338 and 304A IPC after recording a finding that the respondent was driving the truck at a "high speed". No specific finding has been recorded either by the trial court or by the first appellate court to the effect that the respondent was driving the truck either negligently or rashly. After holding that the respondent was driving the truck at a "high speed", both the courts pressed into aid the doctrine of res ipsa loquitur to hold the respondent guilty.*
>
> *4. Merely because the truck was being driven at a "high speed" does not bespeak of either "negligence" or "rashness" by itself. None of the witnesses examined by the prosecution could give any indication, even approximately, as to what they meant by "high speed". "High speed" is a relative term. It was for the prosecution to bring on record material to establish as to what it meant by "high speed" in the facts and circumstances of the case. In a criminal trial, the burden of providing everything essential to the establishment of the charge against an accused always rests on the prosecution and there is a presumption of innocence in favour of the accused until the contrary is proved. Criminality is not to be presumed, subject of course to some statutory exceptions. There is no such statutory exception pleaded in the present case. In the absence of any material on the record, no presumption of "rashness" or "negligence" could be drawn by invoking the maxim "res ipsa loquitur". There is evidence to show that immediately before the truck turned turtle, there was a big jerk. It is not explained as to whether the jerk was because of the uneven road or mechanical failure. The Motor Vehicle Inspector who inspected the vehicle had submitted his report. That report is not forthcoming from the record and*

the Inspector was not examined for reasons best known to the prosecution. This is a serious infirmity and lacuna in the prosecution case.

5. There being no evidence on the record to establish "negligence" or "rashness" in driving the truck on the part of the respondent, it cannot be said that the view taken by the High Court in acquitting the respondent is a perverse view. To us it appears that the view of the High Court, in the facts and circumstances of this case, is a reasonably possible view. We, therefore, do not find any reason to interfere with the order of acquittal. The appeal fails and is dismissed. The respondent is on bail. His bail bonds shall stand discharged. Appeal dismissed."

22. After having carefully perused the record and the statements of the witnesses and applying ratio of law laid down by the Hon'ble Apex Court, this court is of the view that the judgments passed by the courts below are not based upon correct appreciation of the evidence adduced on record and as such, same deserve to be quashed and set-aside.

23. Consequently, in view of the detailed discussion made herein above, the present petition is allowed and the judgments passed by the courts below are quashed and set-aside. Accordingly, petitioner-accused is acquitted of the charges so framed against him. Bail bonds are ordered to be discharged and interim order, if any, is vacated. All applications, if any, also stand disposed of.

****

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

Khazan Singh & Others ....Appellants-Plaintiffs

Versus

Ravinder Singh & Others ....Respondents-Defendants

Regular Second Appeal No.221 of 2003.
Judgment Reserved on: 10.04.2017
Date of decision: 25.04.2017

Specific Relief Act, 1963- Section 38- Theplaintiff filed a civil suit for injunction pleading that he is owner and defendants are interfering with the suit land without any right to do so- the defendants denied the interference and stated that a portion of the suit land is in their possession and they have become owners by way of adverse possession – they also filed a counter-claim to this effect- the suit was dismissed by the Trial Court and the Counterclaim was partly decreed – separate appeals were filed - the District Judge allowed the appeal filed by the defendants and dismissed the appeal filed by the plaintiffs- defendants were declared to have become owners by way of adverse possession and plaintiff was restrained from interfering in the possession – held in second appeal that the defendants had taken the plea of true ownership in the written statement, thus, the plea of adverse possession is not available to them – Defendant No.1 stated that he would not have raised construction on the land if he had known that the land belongs to the plaintiff- the plea of adverse possession was not established as the hostile animus is lacking – appeal allowed – judgments and decrees passed by the Courts set aside.(Para- 17 to 32)

Cases referred:

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

Hemaji Waghaji Jat vs. Bhikhabhai Khengarbhai Harijan & Ors., AIR 2009 SC 103

Nasgabhushanammal (D) By LRs. Vs. C.Chandikeswaralingam, AIR 2016 SC 1134

Bangalore Development Authority vs. N.Jayamma, AIR 2016 SC 1294

Prem Nath Khanna and others vs. Narinder Nath Kapoor (Dead) Through L.Rs. and others, AIR 2016 SC 1433.

Sebastiao Luis Fernandes (Dead) through LRs and Others vs. K.V.P. Shastri (Dead) through LRs and Others, (2013)15 SCC 161

For the Appellants: Mr.N.S. Chandel, Advocate.
For Respondents 1(a to e): Mr.Rajnish K.Lall, Advocate vice Mr.Sanjeev Sood, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

This Regular Second Appeal filed under Section 100 of the Code of Civil Procedure is directed against the judgment and decree dated 17.3.2003, passed by learned District Judge, Bilaspur in Civil Appeal No.96 of 1995, affirming the judgment and decree dated 4.5.1995 passed by learned Sub Judge Ist Class, Bilaspur, H.P., whereby suit for permanent prohibitory injunction having been filed by the plaintiffs-appellants *(hereinafter referred to as the 'plaintiff')* has been dismissed and the counter claims filed by the defendants have partly been decreed.

2. Briefly stated facts, as emerged from the record, are that the plaintiff filed a suit for permanent prohibitory injunction against defendant No.1 in the Court below on the allegations that the he is owner in possession of land comprised in Khata No.7min, Khatauni No.7 min, Khasra No.87, measuring 0-12 bighas, situated in village Dali, Pargana and Tehsil Sadar, District Bilaspur, H.P.. It is averred by the plaintiff that defendants have no right, title or interest in the suit land as they have started interfering with his ownership and possession over the suit land w.e.f. 25.1.1991, for which act the plaintiff requested the defendants not to do so, but without any result. It is further averred by the plaintiff that the defendants threatened him to dispossess him from the suit land by raising construction over the same as defendant No.1 has claimed himself to be the owner of Khasra No.80, which is adjacent to the suit land. The plaintiff has prayed that the defendants be restrained from raising any construction or interfering with the possession of the plaintiff over the suit land by issuance of a decree of perpetual injunction, in the alternative, the plaintiff prayed for a decree of possession.

3. Defendants, by way of detailed written statement, refuted the aforesaid claim having been put forth on behalf of the plaintiff. Defendants No.1 and 2 admitted the ownership and possession of defendant No.1 over Khasra No.80, which has a common boundary with Khasra No.87 of the plaintiff. The defendants denied the allegation that they are interfering with the ownership and possession of the plaintiff over the suit land. It is averred that a portion of the suit land described in Khasra No.87/1, measuring 0-1 biswa, was under the possession of defendant No.1 and his predecessor-in-interest for the last more than 12 years, prior to the institution of the suit over which defendant No.1 and his predecessor-in-interest constructed water tank and a platform. It is further averred that there was a water tap in a portion of the house of defendant No.1 and his predecessor-in-interest in Khasra No.87/1 over which they were having open, continuous, un-interrupted, peaceful and hostile possession and were also having acquired rights of ownership by way of adverse possession.

4. Defendants No.1 and 2 also filed counter claim, thereby claiming ownership of Khasra No.87/1, measuring 0-1 biswa by adverse possession and the plaintiff was sought to be restrained from interfering with the ownership and possession of defendant No.1 over said Khasra number, by issuance of a decree of perpetual injunction. Defendants No.1 and 2 also denied the allegation that they are/were interfering in any manner with the ownership and possession of the plaintiff over the rest of the area measuring 0-11 biswas of Khasra No.87 and prayed that the plaintiff is not entitled to any relief of permanent injunction as well as for possession. In this background, the defendants prayed for dismissal of the suit filed by the plaintiff.

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

"1. Whether the plaintiff is owner in possession of the suit land comprising in Khasra No.87 land measuring 0-12 bighas as alleged in para No.1 of the plaint? OPP.

2. Whether the defendant No.1 has become full fledged owner of land measuring one biswas comprising in Khasra No.87/1 by way of adverse possession? OPD-1/counter Claimant.

3. Whether the plaintiff is entitled for the relief of permanent injunction as prayed for? OPP.

4. Whether the plaintiff is entitled for the alternative relief of possession by way of dismantling the structure if raised during the pendency of the suit? OPP.

5. Whether no cause of action has arisen to the plaintiff OPD/counter claimant.

6. Relief."

6. Learned trial Court vide common judgment and decree dated 4.5.1995 dismissed the suit of the plaintiff for permanent prohibitory injunction and partly decreed the counter claim filed by the defendants.

7. Feeling aggrieved and dissatisfied with the aforesaid judgment and decree passed by the learned trial Court, whereby suit filed by the plaintiff was dismissed and the counter claim filed by the defendants was partly decreed, plaintiff as well as defendants filed separate appeals bearing Civil Appeal Nos.75 of 1995 and 96 of 1995 respectively under Section 96 of the Code of Civil Procedure *(for short 'CPC')* assailing therein common judgment and decree dated 4.5.1995 passed by learned Sub Judge Ist Class, Bilaspur.

8. Learned District Judge, Bilaspur vide a common judgment and decree dated 17.3.2003 allowed the appeal preferred by the defendants against the plaintiff by declaring defendant No.1 as owner of the suit land by way of adverse possession and dismissed the appeal preferred by the plaintiff against defendants No.1 and 2 and restrained him from interfering with the ownership and possession of defendant No.1 over the suit land by issuance of a decree of perpetual injunction against him.

9. In the aforesaid background the present appellants-plaintiffs filed this Regular Second Appeal before this Court, details whereof have already been given above.

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

"(1) Whether there exist sufficient material justifying the learned District Judge in substituting his findings to the contrary arrived at by the learned Trial Court to the effect that the possession of the respondent over the suit land in question is adverse and perfected in title to it.

2. Whether the learned Court below have overlooked or misread the evidence existing on the record of the case which if taken into consideration or perused in proper prospective would lead to finding contrary to those returned by the Court."

11. Mr.N.S. Chandel, learned counsel appearing for the appellants-plaintiffs, vehemently argued that the impugned judgment passed by learned District Judge is not sustainable in the eye of law as the same is not based upon correct appreciation of evidence as well as law on the point and as such the same deserves to be quashed and set aside. While referring to the impugned judgment passed by learned appellate Court, Mr.Chandel contended that bare perusal of the same suggests that evidence led on record by the respective parties has not been taken in to consideration in its right perspective, as a result of which erroneous findings have come on record to the detriment of plaintiff, who successfully proved on record that he is owner in possession of the suit land. Mr.Chandel further stated that the finding returned by

learned District Judge to the effect that defendant No.1 Sohan Lal acquired title of the suit land described as Khasra No.87/1, measuring 0-1 biswas by way of adverse possession is totally perverse and by no stretch of imagination could be returned that too on the basis of evidence led on record by the plaintiff. Mr.Chandel contended that there is no evidence available on record suggestive of the fact that the said defendant and his predecessor-in-interest had constructed their house more than 30 years back treating the land, underneath the house, under their ownership.

12. With a view to substantiate his aforesaid submissions, Mr.Chandel, learned counsel appearing for the appellants, invited the attention of this Court to the statement having been made by defendant; namely; Sohan Singh, wherein he has stated that construction over the suit land was raised on the presumption that the same belongs to them. Similarly, learned counsel invited the attention of this Court to the admission having been made by defendant that prior to 1991 i.e. when demarcation of land was given, it was not in their knowledge that ownership of land vests with the appellants. Mr.Chandel further contended that learned first appellate Court below miserably failed to appreciate statement having been made by defendant, wherein he, while making statement, offered another land to the appellant in exchange of the suit land and as such by no stretch of imagination, findings, if any, could be returned by the learned first appellate Court to the effect that the defendant has become owner by way of adverse possession.

13. While concluding his arguments, Mr.Chandel made this Court to travel through the evidence led on record by the respective parties to demonstrate that there is no iota of evidence suggestive of the fact that the defendant was able to prove on record by way of cogent and convincing evidence that he had acquired ownership by way of adverse possession because, defendant neither in the pleadings nor in his statement stated anything specific with regard to time when his possession qua the suit land turned hostile. Mr.Chandel, while inviting the attention of this Court to the statement of PW-1, made an attempt to persuade this Court to take a view that possession of the respondent over the land in question, if any, was permissive and finding contrary to the same, as returned by the first appellate Court, deserves to be quashed and set aside being contrary to the evidence led on record by the respective parties. While making prayer to accept the instant appeal, Mr.Chandel contended that there has been total mis-appreciation and mis-construction of evidence by learned first appellate court and as such finding returned by the learned trial Court, whereby plea of adverse possession taken by the defendant was rejected, is required to be restored after setting aside the judgment and decree passed by the first appellate Court. Mr.Chandel, during arguments having been made by him, fairly conceded that there is concurrent findings of fact recorded by the Courts below with regard to possession of the respondent over the land in question for the last more than 30 years and as such eviction, if any, can be sought by the true owner in accordance with law by way of filing suit for possession, if any.

14. Mr.Rajnish K.Lall, learned counsel representing the defendants, supported the impugned judgment passed by learned first appellate Court. Mr.Lall with a view to refute the contention having been made by learned counsel representing the plaintiff made this Court to travel through the impugned judgment passed by learned first appellate Court to demonstrate that evidence adduced on record by the respective parties, especially the defendant, has been read in its right perspective and there is no mis-appreciation as claimed by the counsel representing the plaintiff. While referring to the statement having been made by PW-1 i.e. power of attorney of plaintiff; namely; Prabhu Ram, Mr.Lall contended that the plaintiff himself admitted the possession of defendant No.1 over the suit land for the last more than 30 years and as such there is no illegality and infirmity in the findings returned by the learned first appellate Court. Learned counsel representing the defendants, while refuting the contention of the learned counsel for the plaintiff that candid admission has been made by the defendant that construction over the suit land was raised by them under presumption that they are actual owner of the suit land, invited attention of this Court to the statement of DW-1 to demonstrate that if statement having been made by defendant No.1 read in its entirety, it clearly suggests that construction over the

suit land was raised 30 years back by the forefathers of the defendant and at no point of time resistance, if any, was shown by the plaintiff or his predecessor-in-interest Mr.Lall further contended that the plaintiff cannot be allowed to read certain portion of statement of DW-1 in isolation to conclude that possession/ construction, if any, over the suit land was permissive in nature, rather close reading of statement having been made by DW-1 as well as other defendant witnesses proves beyond reasonable doubt that defendants have become owners by way of adverse possession. Mr.Lall also invited the attention of this Court to the written statement filed by the defendants to refute the contention having been made on behalf of the plaintiff that no specific pleadings, if any, have been made with regard to the adverse possession as claimed by the defendants.

15. While concluding his arguments, Mr.Lall contended that since both the Courts below have dealt with each and every aspect of the matter meticulously, there is no scope of interference, especially in view of the concurrent findings of fact recorded by Courts below. In this regard, to substantiate his aforesaid plea, he placed reliance upon the judgment passed by Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,*** **(2015)4 SCC 264.**

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

17. At the very outset, it may be stated that this Court need not to look into the validity and correctness of findings returned by the Courts below with regard to possession of defendants over the suit land as well as entitlement of plaintiff for decree of permanent prohibitory injunction, in view of concurrent findings of fact and law recorded on the point by both the Courts below and more particularly in view of fair stand adopted by learned counsel representing the appellants-plaintiffs.

18. Otherwise also, in the instant Regular Second Appeal, this Court is only bound to answer substantial questions of law framed at the time of admission of the appeal. Perusal of substantial questions of law, as reproduced hereinabove, nowhere suggests that dispute, if any, with regard to findings qua possession over the suit land as well as entitlement of plaintiff for decree of permanent prohibitory injunction is/was in issue, rather, controversy at hand is with regard to findings returned by learned first appellate Court, whereby defendant has been held to be in adverse possession of the suit land.

19. Perusal of pleadings available on record suggests that plaintiff filed a suit for permanent prohibitory injunction against the defendants praying therein that defendants be restrained permanently from interfering in the suit land in any manner or in the alternative plaintiff claimed that if plaintiff is dispossessed during the pendency of the suit or is not found in possession of any portion of the suit land or any construction is found in any portion of the suit land, the same may be ordered to be dismantled and possession of vacant land be restored to the plaintiff. In nutshell, plaintiff claimed that the suit land bearing Khasra No.87, Khewat No.7min, Khatauni No.7 min, land measuring 0-12 bighas, situated in village Dali, Pargana and Tehsil Sadar, District Bilaspur, H.P. is under the ownership as well as possession of plaintiff. He further claimed that the defendants have no right, title or interest in the suit land in any manner, whatsoever.

20. Defendants by way of written statement refuted the aforesaid claim of the plaintiff and claimed that plaintiff is not the owner of the suit land and defendant No.1 has become full fledged owner of the land measuring one biswa by way of adverse possession. Defendant No.1 further claimed that his father was in adverse possession of the same for the last more than 60 years and after his death in the year 1972, he continued to be in adverse possession of the land. Defendants further claimed that they constructed houses in the years 1962 and 1982 on the part of the suit land. Apart from above, defendants also claimed that they constructed a water tank and Tulsi Chaura in 1964 on the part of suit land as owner of this land.

21. Before proceeding to explore answer to the substantial questions of law, as referred hereinabove, this Court deems it fit to take note of paras 1 and 2 of the written statement filed by the defendants, which are reproduced here-in-below:

> *"1. That para No.1 of the plaint is not admitted to be correct and is denied. The plaintiff is not in the possession of the land measuring 1 biswa comprised in Khasra No.87/1 as shown in the Tatima attached herewith. The plaintiff is not the owner of this land as well and the defendant No.1 has become full-fledged owner of land measuring 1 biswa as shown in the Tatima and marked as 87/1 as the father of defendant No.1 was in the adverse possession of the same for the last more than 60 years and after his death in 1972 the defendant No.1 continued to remain in adverse possession of this land as owner. The defendant has constructed houses in 1962 and 1982 part of which is located on the land mentioned in this para. The defendant has also constructed a water tank and Tulsi Chaura in 1964 and fixed a tap in the part of this land mentioned in Khasra No.87/1 as owner of this land. These constructions were made in the presence of the plaintiff and he did not object at any time to the constructions made by the defendant. The passage of the defendant and his family members & acquaintances is also in existence in this Khasra No.87/1 and we have been passing through this passage as considering ourselves owners of this Khasra No. openly as a matter of right without any objection or resistance from the plaintiff.*
>
> *2. That para No.2 of the plaint is admitted to be correct to the extent of defendants residence but it is incorrect to say that the defendants have no right, title or interest in the suit land. The defendants are in the possession of Khasra No.87/1 adversely, openly, as a matter of right of being owner in possession from the time of defendant No.1's father who became the owner of this Khasra No.87/1 in 1942."*

22. If stand taken/adopted by the defendants in their written statement is perused carefully, it certainly compel this Court to agree with the contention raised by learned counsel representing the plaintiff that construction, if any, on the suit land was raised by the defendants presuming themselves to be the owners of the land. Defendants, while refuting the claim of plaintiff that he is owner in possession of the suit land, specifically stated in their written statement that they constructed their houses in 1962 and 1982. Defendants further averred in the written statement that they raised construction of water tank and Tulsi Chaura in 1964 and fixed a tap on the part of land bearing Khasra No.87/1, as an owner of this land. Once defendants in their written statement claimed themselves to be true owners of the suit land, it is not understood how plea of adverse possession could be taken by them. Apart from above, defendants also stated in the written statement that passage of defendants, his family members and acquaintances is also in existence in this Khasra No.87/1 and they have been passing through this passage considering themselves to be the owners of this Khasra number openly as a matter of right without any objection or resistance from the plaintiff.

23. Apart from above, defendants in para-2 of written statement, as reproduced hereinabove, again claimed that they are in possession of Khasra No.87/1, adversely, openly as a matter of right being owner in possession from the time of their forefathers, who became the owner of this Khasra Number in 1942. If the aforesaid stand taken by the defendants in their written statement is perused minutely, this Court has no hesitation to conclude that construction, if any, over the suit land, be it of house or water tank or Tulsi Chaura, was raised by the defendants presuming themselves to be the owners of the suit land and as such plea of adverse possession, as taken by them in the present suit, could not have been taken by them, while opposing the claim of plaintiff. This Court also, with a view to ascertain genuineness and correctness of submissions having been made by learned counsel representing the plaintiff, carefully perused statement of DW-1 i.e. defendant No.1 Mr.Sohan Singh, who, at the very outset, claimed himself to be the owner of the disputed land, rather, he has gone a step ahead by stating that land is in his name. Defendants also claimed that this land is in their possession since the

time of their forefathers and upon which they have raised two houses, water tank and Tulsi Chaura. Defendants also stated that their possession over the suit land is open and at no point of time plaintiff Prabhu Ram claimed it to be his land. But, interestingly, defendant No.1, in his examination-in-chief, has stated that they raised construction over the suit land presuming themselves to be the owners of the suit land. Similarly, this Court sees substantial force in the arguments having been made by learned counsel representing the plaintiff that there is no specific statement, if any, with regard to timing on which date defendants came into adverse possession of the suit land, rather defendant No.1 in his entire statement feigned ignorance with regard to specific day, month on which this land came into their possession. Most importantly, defendant No.1 in his cross-examination admitted that till today he did not know that land measuring 1 biswa belongs to plaintiff. He further stated that had he knew that land belongs to plaintiff, he would not have raised construction of his house over the same. He also admitted that one year ago plaintiff had taken demarcation of the suit land. Defendant No.1 has further admitted in his cross-examination that he is in possession of one biswa of land belonging to plaintiff Shri Prabhu Ram. He further stated that he did not know that when he came into possession qua the aforesaid one biswa of land and claimed that he is in possession of the same from the time of his father. Record further suggests that defendant, while answering Court questions, admitted that his uncle, plaintiff Prabhu Ram, had told him after demarcation that some land of his comes under his house, Tulsi Chaura and water tank. He also admitted that uncle had asked him to vacate that. Most importantly, while answering the aforesaid question, defendant No.2 admitted/stated that he had told his uncle that since he is his uncle, he may take exchange of the land, as he does not want to go to Court.

24. This Court, after carefully examining the pleadings, more particularly written statement having been filed by the defendants as well as statement of DW-1 i.e. defendant No.1 Sohan Singh, is persuaded to accept the contention having been made on behalf of the plaintiff, that learned first appellate Court while holding defendants to be in adverse possession of suit land mis-appreciated and misread the evidence, as a result of which erroneous findings have come on record.

25. This Court, after carefully perusing the evidence led on record, sees no basis of findings returned by learned first appellate Court that defendants have perfected their title by way of adverse possession. Since plea of adverse possession was taken by the defendants in their written statement, burden was upon them to specifically prove on record that at what point of time his possession has become hostile to the plaintiff and at what point of time it matured into title by way of adverse possession after the lapse of period of 12 years. But, in the instant case, for the reasons stated hereinabove, it can be safely concluded that defendants have failed to prove hostile animus, if any, towards the plaintiff, rather entire defence, if perused carefully juxtaposing written statement as well statement of DW-1, it can be easily inferred that defendant No.1 claimed himself to be true owner in possession of the suit land. Once defendant claimed that construction over the suit land was raised by him, presuming himself to be owner, plea of adverse possession could not have been taken by him. Similarly, as clearly emerged from the statement of DW-1 that once the defendants have made offer for exchange of the land, no plea of adverse possession could be taken by them.

26. It is well settled law that plea of adverse possession is not a pure question of law but a blended one of fact and law. As such, a person who claims adverse possession should prove; (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. The Hon'ble Apex Court in ***Hemaji Waghaji Jat vs. Bhikhabhai Khengarbhai Harijan & Ors., AIR 2009 SC 103,*** has held that since a person claiming adverse possession intends to defeat the rights of the true owner, onus is heavily upon him to clearly plead and establish all facts necessary to establish his adverse possession. Rather, in the case referred above, Hon'ble Apex Court termed the law of adverse possession as irrational, illogical and wholly disproportionate and recommended Union of India to

seriously consider and make suitable changes in the law of adverse possession. The Hon'ble Apex Court has held:-

> *"18. In Karnataka Board of Wakf v. Govt. of India (2004) 10 SCC 779 at para 11, this court observed as under:-*
>
> > *"In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period."*
>
> *The court further observed that plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession.*
>
> *19. In Saroop Singh v. Banto (2005) 8 SCC 330 this Court observed:*
>
> > *"29. In terms of Article 65 the starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff but commences from the date the defendant's possession becomes adverse. (See Vasantiben Prahladji Nayak v. Somnath Muljibhai Nayak (2004) 3 SCC 376)*
> >
> > *30. 'Animus possidendi' is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence. As in the instant case, the appellant categorically states that his possession is not adverse as that of true owner, the logical corollary is that he did not have the requisite animus. (See Md. Mohammad Ali (Dead) by LRs. v. Jagdish Kalita and Others (2004) 1 SCC 271)"*
>
> *20. This principle has been reiterated later in the case of M. Durai v. Muthu and Others (2007) 3 SCC 114 para 7. This Court observed as under:*
>
> > *"...In terms of Articles 142 and 144 of the old Limitation Act, the plaintiff was bound to prove his title as also possession within twelve years preceding the date of institution of the suit under the Limitation Act, 1963, once the plaintiff proves his title, the burden shifts to the defendant to establish that he has perfected his title by adverse possession."*
>
> *21. This court had an occasion to examine the concept of adverse possession in T. Anjanappa & Others v. Somalingappa & Another [(2006) 7 SCC 570]. The court observed that a person who bases his title on adverse possession must show by clear and unequivocal evidence that his title was hostile to the real owner and amounted to denial of his title to the property claimed. The court further observed that the classical requirements of acquisition of title by adverse possession are that such possession in denial of the true owner's title must be peaceful, open and continuous. The possession must be open and hostile enough to be capable of being known by the parties interested in the property, though it is not necessary that there should be evidence of the adverse possessor actually informing the real owner of the former's hostile action.*

22. In a relatively recent case in P. T. Munichikkanna Reddy & Others v. Revamma & Others (2007) 6 SCC 59] this court again had an occasion to deal with the concept of adverse possession in detail. The court also examined the legal position in various countries particularly in English and American system. We deem it appropriate to reproduce relevant passages in extenso. The court dealing with adverse possession in paras 5 and 6 observed as under:-

> *"5. Adverse possession in one sense is based on the theory or presumption that the owner has abandoned the property to the adverse possessor on the acquiescence of the owner to the hostile acts and claims of the person in possession. It follows that sound qualities of a typical adverse possession lie in it being open, continuous and hostile. [See Downing v. Bird 100 So. 2d 57 (Fla. 1958), Arkansas Commemorative Commission v. City of Little Rock 227 Ark. 1085 : 303 S.W.2d 569 (1957); Monnot v. Murphy 207 N.Y. 240, 100 N.E. 742 (1913); City of Rock Springs v. Sturm 39 Wyo. 494, 273 P. 908, 97 A.L.R. 1 (1929).]*
>
> *6. Efficacy of adverse possession law in most jurisdictions depend on strong limitation statutes by operation of which right to access the court expires through effluxion of time. As against rights of the paper-owner, in the context of adverse possession, there evolves a set of competing rights in favour of the adverse possessor who has, for a long period of time, cared for the land, developed it, as against the owner of the property who has ignored the property. Modern statutes of limitation operate, as a rule, not only to cut off one's right to bring an action for the recovery of property that has been in the adverse possession of another for a specified time, but also to vest the possessor with title. The intention of such statutes is not to punish one who neglects to assert rights, but to protect those who have maintained the possession of property for the time specified by the statute under claim of right or color of title. (See American Jurisprudence, Vol. 3, 2d, Page 81). It is important to keep in mind while studying the American notion of Adverse Possession, especially in the backdrop of Limitation Statutes, that the intention to dispossess can not be given a complete go by. Simple application of Limitation shall not be enough by itself for the success of an adverse possession claim."*

34. Before parting with this case, we deem it appropriate to observe that the law of adverse possession which ousts an owner on the basis of inaction within limitation is irrational, illogical and wholly disproportionate. The law as it exists is extremely harsh for the true owner and a windfall for a dishonest person who had illegally taken possession of the property of the true owner. The law ought not to benefit a person who in a clandestine manner takes possession of the property of the owner in contravention of law. This in substance would mean that the law gives seal of approval to the illegal action or activities of a rank trespasser or who had wrongfully taken possession of the property of the true owner.

36. In our considered view, there is an urgent need of fresh look regarding the law on adverse possession. We recommend the Union of India to seriously consider and make suitable changes in the law of adverse possession. A copy of this judgment be sent to the Secretary, Ministry of Law and Justice, Department of Legal Affairs, Government of India for taking appropriate steps in accordance with law."

27. Reliance is also placed upon the judgments of Hon'ble Apex Court in ***Nasgabhushanammal (D) By LRs. Vs. C.Chandikeswaralingam, AIR 2016 SC 1134, Bangalore Development Authority vs. N.Jayamma, AIR 2016 SC 1294*** and ***Prem Nath Khanna and others vs. Narinder Nath Kapoor (Dead) Through L.Rs. and others, AIR 2016 SC 1433.***

28. After bestowing my thoughtful consideration to the pleadings as well as evidence led on record by respective parties, I see no reason to uphold the findings returned by learned first appellate Court, whereby defendant No.1 has been declared owner of the suit land by way of

adverse possession. Rather, after carefully examining the material evidence led on record by the respective parties, this Court is compelled to observe that learned first appellate Court has mis-appreciated, misread and overlooked the evidence made available on record by respective parties, perusal whereof certainly would not suggest that defendant No.1 was able to prove on record by leading cogent and convincing evidence that he has become owner by way of adverse possession qua the suit land. Substantial questions are answered accordingly.

29. Hon'ble Apex Court in ***Laxmidevamma's*** case *supra*, has held as under:-

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

30. Perusal of the judgment, referred hereinabove, suggests that in exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. There can be no quarrel (dispute) with regard to aforesaid observation made by the Court and true it is that in normal circumstances High Courts, while exercising powers under Section 100 CPC, are restrained from re-appreciating the evidence available on record, but as emerges from the case referred above, there is no complete bar for this Court to upset the concurrent findings of the Courts below, if the same appear to be perverse.

31. In this regard reliance is placed upon judgment passed by Hon'ble Apex Court in***Sebastiao Luis Fernandes (Dead) through LRs and Others vs. K.V.P. Shastri (Dead) through LRs and Others, (2013)15 SCC 161,*** whereinthe 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)

32. In the case at hand, learned Courts below have ignored/mis-appreciated the evidence led on record by the defendants and have also drawn wrong inferences from the proven facts, as has been discussed in the earlier part of this judgment. Hence, this Court sees reason to interfere in the matter and set aside the judgments and decrees, which are apparently perverse.

33. Accordingly, the present appeal is allowed and the judgments and decrees passed by both the Courts below are set aside. Pending applications, if any, are disposed of. Interim orders, if any, are vacated.

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

Sh. Paras Ram .....Appellant/Defendant.

Versus

Sh. Inder Singh .....Respondent/Plaintiff.

RSA No. 158 of 2016.
Reserved on : 7th April, 2017.
Decided on : 25th April, 2017.

Code of Civil Procedure, 1908- Section 100- Plaintiff filed a civil suit seeking recovery of Rs.1,00,000/- on the ground that plaintiff had sold apple crop in the year 2005 to the defendant – the defendant issued a cheque, which was dishonoured- the suit was decreed by the Trial Court- an appeal was filed, which was also dismissed- held in second appeal that plaintiff had admitted in a previous suit that the apple crop becomes ready by the end of July and that he had sold the crop to V – this fact was denied by the defendant in the present suit- the Courts had wrongly placed reliance upon the conviction of the defendant in a criminal case.(Para-7 to 12)

For the Appellant: Mr. B.C. Verma, Advocate.
For the Respondent: Mr. Sumeet Raj Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiff/respondent herein instituted, a suit against the defendant, for recovery of Rs.1,00,000/- along with interest @ 6% per annum. The suit of the plaintiff stood decreed by the learned trial Court. In an appeal carried therefrom, by the aggrieved defendant, before the learned First Appellate Court, the latter Court dismissed the appeal of the defendant. The defendant standing aggrieved by the impugned verdict, hence, concerts to assail it, by preferring an appeal therefrom before this Court.

2. Briefly stated the facts of the case are that the plaintiff instituted a suit for recovery of Rs.1,00,000/- along with interest with the pleadings that he was owner in possession of orchard having fruit bearing apple plants at Neri. The plaintiff sold apple crop in the year 2005 to the defendant. The defendant purchased 350 apple boxes and approximately 130 bag for a sum of Rs.1,00,000/- on 30.09.2005. In discharge of this lawful liability and to pay price of apples, the defendant issued cheque No.904502, of 30.09.2005 drawn at State Bank of India, Kali Bari, Shimla, amounting to Rs. 1,00,000/-. The aforesaid cheque was presented by the plaintiff with his bankers. The cheque was dishonoured for want of sufficient funds and was returned along with intimation memos dated 11.10.2005 and 15.11.2005. The plaintiff requested the defendant to make payment of Rs.1,00,000/- by issuing notice dated 23.11.2005, however, despite receipt of notice, the defendant failed to make the paying. It has been further pleaded that the plaintiff preferred a criminal complaint under Section 138 of the N.I. Act, which was also pending before the learned Judicial Magistrate 1st Class,Court No.4, Shimla.

3. The defendant contested the suit and filed written statement. The defendant denied that he had purchased boxes of apple for a sum of Rs.1,00,000/- from the plaintiff. The defendant pleaded that he cheque was issued to one Sh. Inder Singh, son of Dharam Dass, who had lost the cheque while travelling in a bus. The matter was reported to the police vide Rapat No.6, dated 23.10.2005 at Police Post, Deha. It was denied that there was any subsisting and existing liability of the defendant to the plaintiff. The defendant admitted that complaint under Section 138 of the Negotiable Instrument Act was pending before the learned Judicial Magistrate 1st Class, Shimla.

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

1. Whether the plaintiff is entitled for the recovery of Rs.1,00,000/- along with interest @ 6% on the basis of the cheque dated 30.09.2005, as prayed for?OPP.
2. Whether the defendant has not issued the cheque No.904502 dated 30.09.2005, as alleged?OPD
3. Whether the plaintiff has no cause of action, as alleged?OPD
4. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiff/respondent herein. In an appeal, preferred therefrom by the defendant/appellant herein before the learned First Appellate Court, the first Appellate Court dismissed the appeal and affirmed the findings recorded by the learned trial Court.

6. Now the defendant/appellant herein has instituted the instant Regular Second Appeal before this Court, for assailing the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on 23.05.2016, this Court, admitted the appeal instituted by the defendant/appellant against the impugned judgment and decree, on the hereinafter extracted substantial questions of law:-

a) Whether on account of misappreciation of the pleadings and misreading of the oral as well as documentary evidence available on record the findings recorded by both Courts

below are erroneous and as such the judgment and decree impugned in the main appeal being perverse is vitiated and not legally sustainable?

Substantial question of Law No.1:

7. Both the learned Courts below, had decreed the suit of the plaintiff, wherein he had staked a claim qua his entitlement to recover a sum of Rs.1,00,000/- from the defendant, sum whereof constituted the price of 350 apple boxes and of 130 gunny bags of apples, as stood respectively purchased from him by the defendant. In respect of the aforesaid transaction, Ex.PW1/A stood issued to him, cheque whereof, as evident from memo comprised in Ex.PW1/C, on its presentation before the bank concerned, stood, for deficient funds in the account of the defendant, hence, refused to be honoured by the bank concerned. Both the learned Courts below, had placed implicit reliance upon Ex.PW2/B, exhibit whereof, comprises a verdict recorded by the learned Judicial Magistrate 1st Class (1), Shimla, in the apposite Criminal Complaint No. 9/3 of 2006, whereunder, an order of conviction stood pronounced upon the appellant/defendant, for his committing an offence punishable under Section 138 of the Negotiable Instruments Act, Consequently, on anvil thereof, they concurrently recorded a conclusion, qua ipso facto, especially for want of adduction of sufficient evidence, standing adduced by the defendant, for belying the presumption held in Section 139 of the Negotiable Instruments Act, provisions whereof stand extracted hereinafter, hence the statutory presumption qua in the plaintiff holding it, his receiving it from its signatory, in discharge of a liability arising out of a commercial transaction entered into inter se both, getting aroused. The leveraging of the aforesaid statutory presumption qua the plaintiff, is also galvanized, when reiteratedly no evidence for rebutting the aforesaid presumption, stood adduced by the defendant. Provisions of Section 139 of the Negotiable Instruments Act read as under:-

> "**139. Presumption in favour of the holder.**- It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debut or other liability."

8. In drawing vis-a-vis the plaintiff, the aforesaid presumption constituted under Section 139 of the Negotiable Instrument Act, the learned Courts below,hence, dispelled the vigour of the defence reared by the defendant, qua his issuing Ex.PW1/A qua DW-4, whereas, the latter misplacing it, in a bus. Also both the learned Courts below dispelled, the vigour of an affidavit sworn by DW-4, affidavit whereof stands borne on Ex.DW2/A and is sworn on 23.10.2005, besides displaced the vigour of recitals borne in an application comprised in Mark-X, application whereof was transmitted on 24.10.2005 by DW-4 to the bank concerned. Both the aforesaid documents tendered into evidence by DW-4, Inder Singh, respectively echo qua his misplacing Ex.PW1/A also qua its standing issued to him by the defendant besides articulate an intimation purveyed by DW-4, to the bankers concerned, whereat the defendant/appellant held his account, to stop payment of the amount borne in Ex.PW1/A. However, previous thereto, on presentation of Ex.PW1/A, the bank concerned under memo comprised in Ex.PW1/C , refused, for deficient funds in the account of defendant, hence, honour it. The reason aforesaid stood anchored, on anvil, of Ex.DW2/A and Mark "X" being prepared subsequent, to a intimation purveyed by the Bank concerned, to the plaintiff qua dishonour of cheque held in Ex.PW1/C, whereupon, an inference stood erected qua DW-4 in collusion with the defendant/appellant herein, hence, fabricating the aforesaid documents. The vigour of the aforesaid reason, has to be tested not in isolation nor fragmentarily rather has to be construed in conjunction with the testimony of the plaintiff, who while testifying in Civil Suit No. 111/1 of 2008, as PW-1 accepts in his cross-examination, the veracity of portion(s) 'A to A' existing in Ex. D-1, exhibit whereof comprises, his statement recorded, on 19.06.2008 in Civil Suit No. 144/1 of 2005, titled as Vinod Bhota versus Inder Singh, hence, an allusion thereto is necessitated. An advertence to portion 'A to A' of Ext. D-1, unravels qua the plaintiff, articulating therein, of his orchard standing located at a low height also he makes a communication therein, qua his apple crop being ready for harvesting by the end of July. He has also bespoken therein qua the apples, borne on the apple trees falling therefrom onto the ground, given the plaintiff in the aforesaid civil suit, resiling from

his promise of purchasing his apple crop. The aforesaid communications, occurring in Ex. D-1, veracity whereof stands accepted by the plaintiff, emphatically underline the factum of the plaintiff, selling his "standing" apple crop to one Vinod Kumar Bhota also the relevant portion of the aforesaid statement of the plaintiff, Inder Singh, comprised in Ex. D-1, emphasizes with vividity, the trite factum of his apple crop dropping onto the ground, mishap whereof arising from Vinod Kumar Bhota, wheretowhom the plaintiff had agreed to sell his apple crop, resiling from his promise. The further effect of the aforesaid emphatic underscorings, unfolded in Ex. D-1, is qua the apt deposition of the plaintiff, in the instant civil suit, wherein, he feigns his ignorance qua his selling his apple crop to one Vinod Kumar Bhota, hence, standing belied also his deposition recorded in the extant suit qua his not selling his apple produce to one Vinod Kumar Bhotta also standing imbued with a vice of falsehood, wherefrom, the concomitant sequel, is qua the plaintiff/respondent herein, contriving the factum of his selling, his "packed" apple crop, to the defendant/appellant herein. Furthermore, in the extant suit, the plaintiff/respondent has echoed qua his selling his "packed" apple produce on 30.09.2005, to defendant/appellant herein, factum whereof, apparently stands contradicted besides stands imbued with an inherent vice of falsehood, given the evident display in Ex. D-1, of his orchard standing located at a low height, besides by occurrence of echoings therein, qua the apple(s) reared in his orchard, ripening for plucking by the end of July. Significantly also with his in Ex. D-1, deposing qua the apples reared in his apple orchard falling onto the ground, on one Vinod Kumar Bhota, refusing to honour his promise to purchase his apple produce, renders the purported sale of "packed" apple produce by the plaintiff to the defendant/appellant herein, belatedly on 30.09.2005, to be ipso facto contrived, "unless" evidence stood adduced by the plaintiff qua after his apple crop evidently falling onto the ground in the end of July, his thereafter picking up the fallen apples, evidence whereof stood comprised in his leading into the witness box, all the labourers deployed by him, to pick up the fallen apples also his leading into witness box, the work force employed by him to grade and pack them in apple boxes or in gunny bags. However, the aforesaid evidence remained unadduced by the plaintiff, wherefrom it is apt to conclude, qua the apple crop reared in the orchard of the plaintiff, apple crop whereof, the plaintiff in Ex. D-1, acquiesces qua its falling onto the ground, hence, remaining unattended by the plaintiff or the apple crop hence perishing on the ground, corollary whereof, is qua the plaintiff, rearing a false claim against the defendant qua his belatedly on 30.09.2005, selling his apple produce to the defendant, in respect whereof the latter purportedly issued Ex.PW1/A.

9. Even though, exhibit Ex.DW2/A and Mark "X" stood prepared subsequently to dishonour of Ex.PW1/A also therefrom prima facie a derivative upsurges, qua in their preparation by DW-4, the latter conniving with the defendant, yet with the defendant establishing by leading into the witness box DW-4 qua hence his not rearing a fictitious identity of the latter also when knowledge with respect to misuse of Ex.PW1/A, would stand acquired by the plaintiff, besides by DW-4, only on its presentation, by the plaintiff before the banker concerned. Consequently, the mere factum of the belated tendering, of Ex. DW2/A and Mark "X" by DW-4, cannot per se ipso facto, bely the defence of the defendant qua his neither holding any commercial transaction with the plaintiff nor his in discharge of his liability in respect thereto, issuing Ex.PW1/A qua the plaintiff nor thereupon, it was befitting for both the learned Courts below, to merely on anvil of a verdict pronounced by the learned Judicial Magistrate 1st Class (4), Shimla, verdict whereof stands comprised in Ex.PW2/B, to hence conclude qua the plaintiff, thereupon standing entitled to a decree for recovery of a sum of Rs.1,00,000/-, given no evidence standing adduced by the defendant, for eroding the tenacity of the presumption held in Section 139 of the Negotiable Instruments Act, qua the holding of Ex.PW1/A by the plaintiff/respondent herein, being amenable, to a construction qua thereupon, it standing issued by the defendant vis-a-vis the plaintiff, in discharge of his commercial (contractual) liability with respect to the plaintiff. Conspicuously, also when the deposition of the plaintiff embodied in Ex. D-1 belies the apposite statutory presumption, contrarily, also when Ex. D-1, portrays qua Ex.PW1/A warranting erection of an inference qua the plaintiff, selling his "standing" apple crop to one Vinod Bhota. In aftermath, for reasons aforesaid, the factum of his selling, his apple produce in apple cartons or gunny bags, to the defendant, stands negatived, rather it provides accelerated impetus, to the

espousal of the defendant qua Ex.PW1/A, being not issued to the plaintiff rather its standing issued to DW-4, dehors Ex.DW2/A and Mark "X" standing delivered upon the bankers concerned, subsequent to the dishonour of Ex.PW1/A. Significantly also, when the fact of its standing misplaced besides standing misused by the plaintiff, would stand known to the plaintiff and to DW-4, only on its presentation, by the plaintiff, before the banker concerned.

10. Be that as it may, the plaintiff had relied upon the deposition of one Ved Prakash, for proving the pleaded fact qua DW Ved Prakash, carrying in his truck gunny bags, holding therewithin his apple produce also for succoring his averment qua a commercial transaction inter se him and the defendant, occurring in his presence. However, the entire effect of the deposition of DW-5, as held in his examination-in-chief, stand blunted, by his in his cross-examination, voicing his abysmal ignorance qua the nature of the commercial transaction entered inter se the plaintiff and the defendants also his feigning utter lack of knowledge qua the nature of the lis in respect whereto they stand engaged. DW-5 has also deposed, qua cartons of apples being carried in another truck/vehicle, vehicle whereof moved simultaneously along with his vehicle yet he feigned ignorance qua the identity of the other vehicle whereon cartons of apples stood transported, wherefrom an inference is erectable qua his, in collusion with the plaintiff, contriving the factum of the latter, transporting gunny bags carrying apples, in his truck also his inventing the factum of the other vehicle purportedly carrying carton/boxes of apple, moving simultaneously along with his vehicle, to their common destination. More so, he has been unable to place on record any receipt in personification of the freight defrayed to him by the defendant, hence, also his testification, holds no veracity. With his Court concluding qua DW-5 inventing the crucial factum probandum, of his in his truck/vehicle transporting, the gunny bags of apples, thereupon, when the effect of the pointed marked testimony of the plaintiff existing in Ex. D-1, is construed in tandem therewith, hence, capitalizes an inference qua the defendant succeeding in proving his defence, also his succeeding in dislodging the statutory presumption held in Section 139 of the Negotiable Instruments Act.

11. In summa, the reliance placed by both the learned Courts below upon the judgment of conviction recorded by the learned Judicial Magistrate 1st Class (4), Shimla in Cr. Complaint No. 9/3 of 2006 was inapt nor it was also apt for both the learned courts below, to thereupon ipso facto conclude qua the suit of the plaintiff warranting its standing decreed.

12. The above discussion unfolds the fact that the conclusions as arrived at by both the learned Courts below being not based upon a proper and mature appreciation of evidence on record. While rendering their findings, 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 defendant/appellant herein and against the plaintiff/respondent.

13. In view of the above discussion, the present Regular Second Appeal is allowed and the impugned judgment(s) and decrees are quashed and set aside. In sequel, the suit of the plaintiff/respondent herein stands dismissed. All pending applications also stand disposed of. No order as to costs.

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

State Bank of India ....Plaintiff.

Versus

Kishan Chand and others ....Defendants.

Civil Suit No. 4017 of 2013.
Reserved on : 12.04.2017.
Date of Decision: 25th April, 2017.

Code of Civil Procedure, 1908- Order 1 Rule 3- Plaintiff filed a civil suit claiming that the defendants opened 18 fake accounts in which the amount mentioned in the suit was transferred- hence, a suit for recovery was filed- the defendants took the preliminary objection regarding suit being bad for misjoinder of parties and causes of action and the suit having not been properly valued for the purpose of court fees and jurisdiction– held that Order 1 Rule 3 and Order 2 Rule 3 of the CPC provides that the plaintiff can join the defendants in one suit, if the relief arises out of same act and transaction or series of acts and transactions and a common question of law or fact would arise if separate suits are brought against those persons - the defendant No.1 had opened fake accounts in connivance with other defendants on different dates and their joinder in the suit for recovery of money is bad- the objection accepted and the suit held to be bad for misjoinder of defendants No.3 to 5. (Para- 6 to 13)

For the Plaintiff: Mr. Arvind Sharma, Advocate.
For defendants No.1: Mr. Dalip K. Sharma, Advocate.
For defendants No.2 to 4, 6 and 7: Mr. S.D. Gill, Advocate.
For defendant No. 5: Mr. R.L. Sood, Senior Advocate with Mr. Arjun Lall, Advocate.
For defendants No. 11, 12 and 14 to 16: Mr. Ajay Sharma, Advocate.
For defendant No. 17: Ms. Anita Parma, Advocate.
For defendants No. 19 and 20: Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiff, made an averment in the instant suit, that principal defendant No.1 in connivance with other co-defendants, opened 18 fake accounts, wherein, amounts depicted in the table reflected below paragraph No.5 of the plaint, stood hence transferred, amounts whereof stand averred, to be respectively embezzled by principal defendant No.1 alongwith other co-defendants, with theirs holding complicity with each other. Consequently, the plaintiff in its suit, reared a claim for a decree for a sum of Rs.1,41, 98,259.33 paisa along with future interest @18 % per annum along with monthly rest, till the realization of the aforesaid amount, being recorded upon the defendants also claimed a relief of the aforesaid liability being jointly fastened upon the defendants, given theirs in respect thereof, being jointly and severally liable.

2. The defendants instituted separate written statements to the plaint. Defendants No.1 and 5, in their written statement(s) to the plaint, respectively raised therein preliminary objections, of the suit of the plaintiff being bad for joinder of several causes of action as also it being bad for mis joinder of parties, particularly of the defendants, thereupon, they espoused qua the suit warranting its dismissal. Besides, the aforesaid submission, of the suit, hence being bad for mis joinder of parties and causes of action, particularly of the co-defendants along with defendant No.1, an objection of the suit being not properly valued for the purposes of court fees and jurisdiction also stood reared.

3. On the aforesaid preliminary objections qua the maintainability of the suit, this Court, on 27.5.2015, framed the hereinafter extracted preliminary issues, for hence an adjudication standing pronounced thereon:-

(1). Whether the present civil suit is not maintainable on account of clubbing different cause of action as well as different defendants together in one suit, as alleged?.....OPD 1&5.

(2). Whether the plaint is not properly valued for the purpose of court fee and jurisdiction, if so its effect? ...OPD 1&5.

(3). Relief.

4. A perusal of the order sheets makes a disclosure of the defendants concerned, whereuponwhom, the onus for adducing evidence thereon, stood cast, communicating their intention to not adduce evidence thereon, whereupon this Court proceeded to list the matter for hearing, on the aforesaid preliminary issues.

5. The entire fulcrum, of the preliminary objection, of defendants No.1 and 5 of the suit of the plaintiff, being bad for misjoinder of co-defendants along with principal defendant No.1 and mis joinder of causes of action, is grooved in the statutory provisions embodied in Order 1, Rule 3 of the Code of Civil Procedure (hereinafter referred to as the 'CPC'), besides is embedded in the provisions held in Order 2, Rule 3 of the CPC, provision(s) whereof stand extracted hereinafter. Provisions of Order 1, Rule 3 of the CPC read as under:-

> "**3. Who may be joined as defendants**
>
> All persons may be joined in one suit as defendants where-
>
> (a) any right of relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist against such persons, whether jointly, severally or in the alternative; and
>
> (b) if separate suit were brought against such persons, any common question of law or fact would arise."

Provisions of Order 2, Rule 3 of the CPC read as under:-

> **"3. Joinder of causes of action**
>
> (1) Save as otherwise provided, a plaintiff may unite the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.
>
> (2) Where causes of action are united, the jurisdiction of the court as regards the suit shall depend on the amount or value of the aggregate subject matters at the date of instituting the suit."

6. Both the afore extracted statutory provisions, though "respectively" cast, an interdiction upon the plaintiff against his joining several defendants, in one suit, "unless" the relief reared against them in the plaint, strikingly or palpably, arises out of the same act or transaction or series of acts or transactions "and" if separate suits are brought against such persons, any common question of law or fact would arise "AND" also foist a leverage in the plaintiff, to unite in the "same suit" several causes of action against the same defendant or the same defendants. However, the aforesaid leverage foisted in the plaintiff, by the provisions occurring in Order 2, Rule, 3 of the CPC, "is" given the occurrence of the opening words therein "save and otherwise provided", is hence with an obvious conspicuous reservation, of other provisions apposite thereto, engrafted in the CPC, "not" prohibiting the aforesaid statutory facilitation. Consequently, with the aforestated statutory right, occurring in Order 2, Rule 3 of the CPC, hence standing vested in the plaintiff, "subject" to operation besides sway of other statutory provisions, thereupon, the mandate, held in the statutory provisions engrafted in Order 1, Rule 3 of the CPC, also acquire their relevant tremendous clout. In sequel, the leveraging of the aforesaid right in the plaintiff, warrants its bestowment upon the latter, only, on this court concluding qua the suit of the plaintiff constituted against principal defendant No.1 along with whom other co-defendants stand arrayed, being not amenable to a conclusion of its suffering failure, failure whereof, arising from mis joinder of other co-defendants alongwith principal defendant No.1, and mis joinder of causes of action would occur, on the plaintiff, in espousing relief against principal defendant No.1, his prima facie "not" establishing of the relief asserted by it, against principal defendant No.1 also warranting the arraying along with him of other co-defendants, markedly given the relief asserted by it, against principal defendant No.1, prima facie standing established, to arise out of the same act or transaction or series of acts or transactions, "common" with respect to all co-defendants, "common" acts/transactions whereof, stand

conjointly reared in the suit, against all the defendants. He was also enjoined to prima facie establish, of, if separate suits were brought against such persons, any common question of law or fact would arise. Succinctly, hence, prima facie pleadings were enjoined to bespeak, the trite fact of the transactions with respect to the aforesaid sums of money concerted to be realised severally or jointly from the defendants, hence, arising out of the same act or transaction or series of acts or transactions. Also the fact of inter se intrinsic blending of an act or of a transaction or series of acts or transactions, whereupon, the relief reared by the plaintiff against the defendants, is rooted or embedded, warranted its prima facie satiation, by apposite averments in respect thereto, being constituted in the plaint.

7. In summa, prima facie the fact of commonality or inter se innate blending of an act or of a transaction or series of acts or transactions, whereupon, a purported conjoint relief stands reared against all the defendants, stood enjoined, to make its candid bespeaking, by averments in respect thereto, standing constituted in the plaint. Contrarily, if the aforesaid fact of inter se intrinsic blending of an act or of a transaction or series of acts or transactions, whereon conjoint relief(s) are reared against all the co-defendants, remains prima facie uncommunicated in the plaint, thereupon, the joinder of the principal defendant No.1 along with other co-defendants as also joinder of causes of action, would render the suit to be mis-constituted, for hence mis joinder of co-defendants along with principal defendant No.1. In sequel, this Court would stand constrained, to hence conclude qua findings in the affirmative being rendered upon preliminary issue No.1.

8. Having culled out, the subtle nuance of the afore extracted statutory provisions, thereupon, their applicability, besides attraction hereat, is enjoined to be gauged, gauging whereof warrants, an allusion to the relevant averments in respect thereto, constituted in the plaint, apposite averments whereof exist, in paragraph No.5 of the plaint, wherein, the plaintiff concedes qua defendant No.1, in connivance with other co-defendants, opening 18 fake accounts, details whereof are depicted hereinafter: -

Sr. No.	Account No.	Name of borrower	Date of Loan/Deposit account opened	Amount in Rs.
1.	31562884013	Parvinder Jeet	30.12.2010	7.50 lacs
2.	31630162409	Parvinder Jeet	15.02.2001	12.00 lacs
3.	31726136073	Parvinder Jeet	28.04.2011	15.00 lacs
4.	30807959536	Star Electrical & Trading Co.	29.06.2009	23.00 lacs
5.	31016329721	Star Electrical & Trading Co.	07.01.2010	18.00 lacs
6.	31766770274	Star Electrical & Trading Co.	30.05.2011	18.00 lacs
7.	31101868968	Satish Kumar	20.03.2010	18.00 lacs
8.	31882525831	Satish Kumar	12.08.2011	13.00 lacs
9.	31929813886	Satish Kumar	09.09.2011	18.00 lacs
10.	31445916084	Star Electrical Recording	28.09.2010	5.00 lacs

11.	31504686111	Star Electrical Recording	19.11.2010	9.50 lacs.
12.	31971585289	Star Electrical Recording	03.10.2011	9.50 lacs.
13.	31169654779	Sai Electrical Works	13.05.2010	5.00 lacs
14.	31206549560	Sai Electrical Works	11.06.2010	18.50 lacs
15.	30681578823	Vijay Singh	10.03.2009	15.00 lacs
16.	30682429869	Vijay Singh	17.02.2009	CA
17.	31726135321	Vijay Singh	28.04.2011	19.50 lacs
18.	30967445314	Vijay Singh	23.11.2009	23.50 lacs.

9. A perusal of the afore extracted table, drawn below paragraph No.5 of the plaint, makes graphic unfoldments, qua 18 fake accounts, as stood opened by principal defendant No.1, purportedly in connivance respectively with other co-defendants, of their opening "not" occurring on one date rather their openings, occurring on contradistinct dates, wherefrom, apparently, hence, an apt conclusion ensues qua the mandate, engrafted in Order 1, Rule 3 of the CPC, of the plaintiff holding a right to join other co-defendants along with principal defendant No.1, on satiation, standing begotten qua his espoused relief, of recovery of sums of money jointly and severally from the defendants, being rooted or grooved, in the fact of same act or transaction or series of acts or transactions, hence, prima facie not begetting its apt statutory satiation. Consequently, the joinder of other co-defendants along with principal defendant No.1, is rendered open to erection of an inference of their joinder along with principal defendant No.1, in the suit for recovery of sums of money, jointly and severally from them, being hence bad.

10. However, the aforesaid statutory conditions when stand concluded to not beget satiation, yet with mandate of sub rules (b) of Order 1, Rule 3, of the CPC also warranting its conjoint satiation along with the mandate held in sub rule (a) thereto, conspicuously when the aforesaid sub rules (a) and (b) of Order 1, Rule 3 of the CPC, stand separated by the conjunctive "AND". Consequently, it is imperative to adjudge qua mandate thereof also begetting satiation. In making the aforesaid discernment, the contradistinctivity of acts or transaction or series of acts or transaction vis-a-vis co-defendants arrayed along with principal defendant No.1, per se, hence, constrains an inference qua hence distinct question(s) of law, as well as of fact, spurring from each of the separate, "uncommon act" or transaction or series of acts or transactions, especially, with hence the plaintiff standing driven to institute separate suits against the defendant(s), thereupon, also no common question of law or fact would arise in each of the separate suits. In aftermath, though the import of sub rule (b), is rooted in the salutary objective, of obviating multiplicity of litigation, whereas, for reasons aforestated, the mandate of both sub rules (a) and (b) of Order 1, Rule 3 of the CPC not begetting satiation, hence, the suit of the plaintiff, wherein he, with respect to a contradistinct act or transaction or series of acts or transactions inter se each, joins each of them as co-defendants along with principal defendant No.1, is palpably bad for misjoinder of defendants.

11. The learned counsel appearing, for the plaintiff has made a concerted assay, to oust the vigour of the aforesaid inference, by contending qua with in paragraph No.24 of the plaint, an averment existing, qua from account No.31726135321 opened by principal defendant No.1 in the name of Vijay Singh, co-defendant No.2, the respective onward transmission of funds

occurring in the bank accounts of other co-defendants, hence, with the aforesaid account, constituting the "corpus fund" also its holding, the apt linkage of similarity inter se each/all bank accounts, of all co-defendants besides its holding commonality with respect to subsequent transactions which occurred therefrom. In aftermath, he proceeds to contend of, hence, all the subsequent series of acts or transactions, holding the apt alignment with the initial opening of account No. 31726135321 by principal defendant No.1 qua co-defendant No.2, thereupon, hence the joining of all co-defendants along with principal defendant No.1, being not bad. However, the aforesaid submission warrants its rejection, in the trite fact of principal defendant No.1, being averred to, in connivance with other co-defendants opening 18 fake accounts, whereupon it was imperative for the plaintiff bank, to prima facie establish of hence, the opening of fake accounts, by principal defendant No.1 with respect to other co-defendants, spurring from each of the co-defendants, holding knowledge qua the relevant factum probandum, wherefrom, alone an inference would surge forth, of theirs holding complicity with principal defendant No.1, rendering hence their joinder with principal defendant No.1, to be apt. However, the judgment of conviction, pronounced by the learned Special Judge, CBI, Shimla in Sessions Trial No. 20-S/7 of 2014/2013, upon defendant No.1, naturally unfolds, of the co-defendants being "not" along with principal defendant No.1 arrayed, as accused, in the aforesaid Sessions trial, wherefrom, an inevitable inference, is of the prosecution acquiescing, of all the co-defendants "not" holding knowledge nor obviously theirs colluding with one K.C. Tundkia, in the latter opening fake accounts in their respective names. Corollary whereof, is qua prima facie, the veracity of the averments, constituted in the plaint of the opening of fake bank accounts, by principal defendant No.1 with respect to the other co-defendants, spurring from each colluding with principal co-defendant No.1, hence, prima facie standing dislodged. In aftermath, the aforesaid averment, cast in paragraph No.24 qua the account reflected therein, constituting the "corpus fund", wherefrom, funds flowed into the subsequently opened "fake" bank accounts of each of the co-defendants, whereupon, the counsel for the plaintiff concerts, of there hence existing an apt commonality inter se the initial opening of account(s) vis-a-vis the subsequently opened fake accounts, by the principal defendant No.1 with respect to each of the other co-defendant(s), hence, the mandate of Order 1 Rule 3 CPC standing satiated, "not" for reasons aforesaid, displacing the effect of the inference recorded hereinabove. Consequently, issue No.1 is decided in favour of the defendants and against the plaintiff.

Issue No.2.

12. Be that a it may, the suit of the plaintiff against the co-defendants, who stand arrayed along with principal defendant No.1, when stands construed to be suffering from a vice of mis joinder of parties and causes of action, yet it would "not" oust the plaintiff, to, in consonance with the table occurring under para 25 of the plaint, institute separate suits with respect to separate causes of action arising against principal defendant No.1, wherein, other apposite co-defendants stand arrayed, as defendant(s) along with him. In sequel thereto, the suit instituted by the plaintiff against co-defendant No.1, arraying, along with co-defendant No.2, is properly constituted, whereas the suit constituted against defendant No.1 jointly, arraying, alongwith him, co-defendants No.3, 4 and 5, is misconstituted. However, the suit for recovery of money instituted against principal defendant No.1 arraying, along with co-defendant No.2, if falls, within the pecuniary limits of the jurisdiction of this Court, it, be retained hereat and if, it falls outside the pecuniary limits of the jurisdiction of this Court, it be transferred to the appropriate Court holding the appropriate pecuniary jurisdiction. Sequelly, also it is open to the plaintiff to in the appropriate Civil Court, holding the apposite pecuniary jurisdiction to try it, institute civil suit(s) against principal defendant No.1, arraying, along with him the apposite co-defendants, wherewithwhom, he holds alikeness or commonality of act or commercial transaction or series of acts or transactions. Issue No.2 stands decided accordingly.

Relief.

13. For the foregoing reasons, it is held that the suit of the plaintiff suffers from a vice of mis joinder of defendants and causes of action. However, the suit instituted by the plaintiff against principal defendant No.1, arraying, along with co-defendant No.2 is properly

constituted, whereas, the suit constituted against principal defendant No.1 jointly, arraying, along with him, co-defendants No.3, 4 and 5, is mis-constituted. However, the suit for recovery of money against principal defendant No.1 along with co-defendant No.2, if falls within the pecuniary limits of the jurisdiction of this Court, it be retained hereat and if it falls outside the pecuniary limits of jurisdiction of this Court it be transferred to the appropriate Court holding the appropriate pecuniary jurisdiction to hold trial thereof. Sequelly, also it is open to the plaintiff to in the appropriate Court holding the apposite pecuniary jurisdiction to try it/them, appropriate institute civil suit(s) against principal defendant No.1, arraying along with the apposite co-defendants, wherewithwhom, he holds alikeness of commonality of act or commercial transaction or series of acts or transactions. Court fees respectively, in accordance with law be refunded to the plaintiff for facilitating him to institute civil suits in the aforesaid manner against principal defendant No.1 arraying along with him the apposite co-defendants "except" co-defendant No.2, in respect whereto, the suit be transmitted, if not falling within the pecuniary limits of the jurisdiction of this Court, to the Court holding the pecuniary limits of jurisdiction, to try it, "after" making necessary deletions from the array of co-defendants, of defendants No.3 to 20. All pending applications also stand disposed of. However, it is made clear that the observations made hereinabove shall not, in any manner, affect the merits of the case in the "suits".

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

Naresh Kumar & others ....Appellants
Versus
Shanti Devi & others ...Respondents

RSA No. 267 of 2005
Reserved on : 22.3.2017
Decided on : 26.4.2017

Specific Relief Act, 1963- Section 38- Plaintiffs filed a civil suit for injunction on the ground that plaintiffs and defendants are recorded as co-owners over the suit land – the defendant No.1 started cutting the vacant land to raise structure over the same- he also cut the passage to create obstruction for the plaintiffs in reaching the road as well as the house of the plaintiffs- the suit was dismissed by the Trial Court- an appeal was filed, which was allowed- held in second appeal that plaintiffs had failed to prove the existence of specific path over the suit land connecting their house with the common village path – PW-2 and PW-3 admitted that there was a path of 2½ - 3 feet width- the filing of sketch of the path was necessary to identify the same- appeal allowed and judgment of Appellate Court set aside.(Para-12 to 17)

For the appellants Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate.
For the respondent : Mr. Ajay Sharma, Advocate, for respondents No. 1 to 4.

The following judgment of the Court was delivered:

Per Justice Ajay Mohan Goel, Judge

By way of this appeal, the appellants have challenged the judgment and decree, passed by the Court of learned District Judge, Kinnaur in Civil Appeal No. 34 of 2004, dated 19.2.2005, vide which learned appellate Court while allowing the appeal, so filed by the present respondents (hereinafter referred to as "the plaintiffs", for short), reversed the judgment and decree, passed by learned trial Court and restrained the present appellants (hereinafter referred to as "the defendants", for short) from obstructing the path connecting the house of plaintiffs, situated over the suit land with the general village path by issuing a decree of permanent and

mandatory injunction against the defendants.

2. Brief facts, necessary for the adjudication of the present appeal, are that the plaintiffs filed a suit for permanent prohibitory injunction on the ground that the plaintiffs and defendants were recorded as co-owners over the suit land comprised in Khata Khatauni No. 163 min 55 khasra No. 610 measuring 0-04-62 hectare situated in Mauza Jarind, Pargana Sarahan, Tehsil Rampur, District Shimla, H.P. As per the plaintiffs, Jai Singh was common ancestor of both the parties, who left behind legal heirs, namely, Ram Kali, Murtu Devi, Debli Devi, Ganu Devi, Ishwar Singh, Vasu Dev, Badri Dass and Inder Singh. As per the plaintiffs, the suit land was undivided on the spot, over which legal heirs of late Shri Jai Singh had equal shares, on which two houses were also existing, which were in possession of plaintiffs as well as defendants. It was further mentioned in the plaint that most of the land was lying vacant on the spot and there was a passage, one for the village and another for the road from the said houses. As per the plaintiffs, about two weeks before filing of the suit, defendant No. 1 had started cutting the vacant land with the intention to raise structure over the same with the help of other defendants. Defendant No. 1 had also cut the passage with the intention to create obstruction for the plaintiffs in reaching the road as well as to the plaintiffs' house, which was the only passage from the spot. FIR was also lodged to this effect by the plaintiffs at Police Station, Jhakri. As per the plaintiffs, defendants were trying to dispossess the plaintiffs from the suit land, as the same was valuable land and as plaintiffs were poor persons, defendants were trying to dominate them with malafide intentions. It was further the case of the plaintiffs that they had requested the defendants not to cut the path, raise any structure and interfere in their peaceful possession over the suit land, till partition in accordance with law. however, defendants were not heeding to their requests and threatening to sell the disputed property. It was further mentioned in the plaint that the land in issue had not been partitioned amongst the co-sharers and the same was joint amongst the co-sharers and defendants had no right to raise any structure/construction over the same or dispossess the plaintiffs from the same, till the suit land was partitioned. It was also mentioned in the plaint that defendants had recently encroached upon the suit land and raised pillar for raising structure beyond his share, for which defendant No. 1 had no right to do so, till the suit land was partitioned. It was on these basis that the suit was filed by the plaintiffs praying that the defendants be restrained from raising any structure and also be restrained from digging pits over the common passage to raise any pillar etc. and also from dispossessing the plaintiffs from the suit land till the suit land was partitioned, in accordance with law.

3. A decree for mandatory injunction was also prayed for directing the defendants to restore the land in its original position and demolish the unauthorized structure, constructed by defendant No. 1.

4. By way of written statement filed by the defendants, claim of the plaintiffs was disputed. It was mentioned in the written statement that entries in Jamabandi qua the possession of Khasra No. 610 were not correct since, the said Khasra number is in possession of heirs of Inder Singh, Badri Dass and Jai Dev. It was further mentioned in the written statement that in fact the possession thereupon was in accordance with the spot Tatima prepared by Halqua Patwari, wherein Khasra No. 610/1 measuring 0-01-69 was shown in possession of defendant No. 1 and Khasra No. 610/2 was shown in possession of plaintiffs and possession of Khasra No. 610/3 was shown in possession of defendants No. 8 and 9. It was further mentioned in the written statement that the share inherited by the heirs of Vasudev stood relinquished by them in favour of defendant No. 1 and plaintiffs in fact were occupying Khasra No. 610, in excess of their share for which they were not entitled. It was further mentioned in the written statement that though there were houses over the said Khasra number, but the plaintiffs were having possession qua only three rooms in a single storey and one kitchen over Khasra No. 610/2. There was vacant land on both sides of their house. It was also mentioned in the written statement that defendant No. 1 was having four rooms in single storey under construction along with one kitchen which was almost complete over Khasra No. 610/1 and portion in possession of defendants No. 8 and 9, comprised in Khasra No. 610/3 was vacant except one single storied kitchen. It was further mentioned in the written statement that there was one passage which was

below the edge of Khasra No. 610 towards Khasra No. 609 and said passage passes through Khasra No. 609 and the same was open and had not been obstructed by anyone and said passage had nothing to do with the land of defendant No. 1, comprised in Khasra No. 610/1. It was also mentioned in the written statement that though the land had not been partitioned by metes and bounds, the suit land was separately in occupation of the parties as had been mentioned in para-1 of the written statement. On this basis, claim of the plaintiffs was denied by the defendants.

5. By way of replication, plaintiffs reiterated their claim and also mentioned therein that legal heirs of Vasu Dev had never relinquished their shares in favour of defendant No. 1 nor plaintiffs were occupying more than their share, out of the suit land. It was also mentioned in the replication that the spot Tatima had been got prepared by defendant No. 1 of the disputed land, in collusion with the Patwari.

6. On the pleadings of the parties, the following issues were framed by learned trial Court on 16.12.2003:

1) Whether defendant No. 1 is raising any construction over land comprised in Khasra No. 610, as alleged? OPP

2) If issue No. 1 is proved in affirmative, whether land denoted by Khasra No. 610/1 has been in possession of defendant No. 1, as alleged? OPD

3) If issue No. 2 is proved in affirmative, whether the plaintiff is entitled to the relief of permanent prohibitory injunction, as prayed for? OPP

4) Relief.

7. Learned trial Court vide its judgment and decree dated 27.4.2004 dismissed the suit of the plaintiffs. Learned trial Court held that though the pleaded case of the plaintiff was that the suit land was in possession of the co-sharers, however, at the time of leading evidence, plaintiffs had tried to demonstrate that the suit land was only in the possession of the plaintiffs. Learned trial Court also held that revenue documents placed on record by the parties demonstrated that the suit land was shown in possession of the plaintiffs as well as one Shanti Devi and Vasu Dev. Learned trial Court held that entry of the land was shown as “gair mumkin abadi”. It further held that though the presumption of truth was attached to the entries incorporated in Jamabandi, but in view of the pleadings, as were contained in para-5 of the plaint, it could be held to be admitted by the plaintiffs that the suit land was in possession of all the co-sharers. Learned trial Court held that though PW-2 Shanti Devi, PW-3 Tikkam Ram and PW-4 Lachhu Ram in their affidavits filed in support of their examination-in-chief had asserted that it was only plaintiffs, who were in possession of the suit land but, in their cross-examination, they admitted that the defendants were also in possession of the same. On these basis, it was held by learned trial Court that though the suit land was joint interse the parties, but they were in possession over the separate parcel of it, specifically denoted by Khasra Nos 610/1, 610/2 and 610/3. Learned trial Court held that it appeared that defendant No. 1 had raised construction over that piece of land, which was earlier in his possession and as such the act of the defendants in raising construction over the same could not be said to be having legal consequences. Learned trial Court also held that though plaintiffs had pleaded about existence of a path over the suit land, but they were not specifically able to demonstrate its existence by tendering any evidence. Learned trial Court also held that PW-1 Kewal Ram, the Halqua Patwari, during his cross-examination had stated that the path existing on the spot passes in between Khasra No. 609 and 610 and that the same was still in existence and was being used by the parties. Learned trial Court also held that it had come in the statement of PW-2 Shanti Devi that 2½-3 feet path was in existence on the spot and even PW-3 Tikkam Ram had admitted that there was a path passing through the boundaries of Khasra No. 609 and 610 and the same was still in existence. On these basis, it was held by learned trial Court that it could not be held that there was any path over the suit land, as pleaded by the plaintiffs, which was obstructed by the defendants. Learned trial Court also held that there was nothing in the statements of DW-1 Ishwar Singh and DW-2 Molak Ram to demonstrate that defendant No. 1 has usurped more share than his actual share in the

suit land and had obstructed the alleged path. On these basis, learned trial Court dismissed the suit, filed by the plaintiffs.

8. In appeal, findings returned by learned trial Court have been set aside by learned appellate Court. Learned appellate Court held that learned trial Court did not take into consideration the ground realities while denying the relief, as was prayed by the plaintiffs. Learned appellate Court held that it was admitted case of the defendants that plaintiffs were owners in possession of the house, situated in a portion of the suit land, which had collapsed as a result of heavy rain in the year 1977. Learned appellate Court held that as plaintiffs were owners in possession of a house situated on the suit land, necessarily, there had to be an approach to the said house from the general village path. It further held that it was not the case of the defendants that house of the plaintiffs abutted the general village path. Learned appellate Court further held that plaintiffs were not required to tender in evidence sketch of path connecting their house with the general path, since defendant No. 1 was said to have encroached upon the path in question. It further held that learned trial Court had not correctly considered the evidence of PW-1 Kewal Ram, Patwari, who in fact was deposing in collusion with defendant No. 1 and who in his cross-examination had stated that he had prepared the field map Ext. PW1/A, as per the situation at the spot. Learned appellate Court further held that it could not be believed that plaintiffs had no approach to their house from the common village path, from the very beginning. It further held that house of plaintiffs had collapsed as a result of heavy rain in the year 1977 and thereafter, plaintiffs were said to have constructed a new house and defendant No. 1 wanted the plaintiffs to approach the general path from their house through stairs of defendants No. 8 and 9. Learned appellate Court held that it was the own case of the defendants that they were not on good terms with the plaintiffs and further field map Ext.PW1/A prepared by PW-1 qua Khasra No. 610 was not correct. Learned appellate Court also held that defendant No. 1 had dug up portion of a suit land and had lowered the level thereof, causing obstruction to the approach of the plaintiffs to their house from general village path. It further held that general village path connecting the house of defendant No. 1 had not been reflected in field map Ext. PW1/A, which clearly demonstrated that general village path had not been at a distance of 2-3 feet from the house of plaintiffs and beyond the house of defendant No. 1. Learned appellate Court further held that after dispossessing the plaintiffs from a portion of the site of their old house and encroaching upon the path of the plaintiffs, defendant No. 1 states that there is path for the plaintiffs through the field of Krishanu, whereas Krishanu was said to be the owner of a field in front of the house of the plaintiffs. Learned appellate Court further held that it was nowhere the case of defendant No. 1 that he had no approach to his new house situated in the suit land from the general village path, whereas plaintiffs had consistently stated that defendant No. 1 had obstructed path, which connected their house with the general village path. On these basis, it was held by learned appellate Court that plaintiffs were entitled to relief of permanent injunction against the defendants restraining them from obstructing path connecting the house of the plaintiffs situated in the suit land, with the general village path. Learned appellate Court, thus, while allowing the appeal filed by the plaintiffs, reversed the findings returned by learned trial Court and restrained defendants from obstructing the path connecting house of the plaintiffs situate in the suit land with the general village path by way of issuance of permanent and mandatory injunction.

9. The Judgment and decree dated 19.2.2005 in Civil Appeal No. 34 of 2004, so passed by learned appellate Court stands assailed by the appellants/defendants in this appeal. The present appeal was admitted by this Court on the following substantial questions of law on 22.8.2005:

a) Whether respondent/plaintiffs have failed to plead alleged right of use of path over joint land and therefore, he is not entitled to any relief?

b) Whether instead of filing suit for injunction, the plaintiffs were required to file suit for partition which is more speedy and efficacious remedy and therefore, discretionary relief of injunction could not be claimed?

10. I have heard learned counsel for the parties and gone through the record of the case as well as judgments and decrees, passed by both the courts below.

11. I will deal with both the substantial questions of law, on which this appeal had been admitted independently:

Substantial question of law No. 1

12 The suit filed by the plaintiffs was for permanent prohibitory injunction for restraining the defendants from raising any structure, digging pits over common passage, raising pillars and dispossessing the plaintiffs from the suit land and further for restraining the defendants from selling the suit land till partition of the same, in accordance with law and for grant of mandatory injunction directing the defendants to restore the land in its original position after demolishing the unauthorized structure found on the same. While learned trial Court dismissed the suit of the plaintiffs, the same was decreed by the learned appellate Court to the extent that defendants were restrained from obstructing the path connecting the house of the plaintiffs, situated over the suit land, with the general village path, by issuance of a decree of permanent prohibitory and mandatory injunction against the defendants. A perusal of the plaint demonstrates that there are no specific pleadings in the same with regard to the alleged path which was existing on the suit land connecting the house of the plaintiffs with the common village path. In order to appreciate this same, para-3 of the plaint is being reproduced hereinunder:

> *"That the land comprised in Khata-Khatauni No. 163 min 55 Khasra No. 610, measuring 0-04-62 hectare situated in Mauza Jarind, Pargana Sarahan, Tehsil Rampur, District Shimla, H.P. is undivided on the spot and which are in equal shares of all eight legal heirs of late Sh. Jai Singh. It is pertinent to mention here that adjoining this land there is two houses which are in the possession of plaintiffs and as well as defendants. Most of the land lying vacant on the spot and there is passage one for village another for road from the houses.*

13. A perusal of the said para demonstrates that pleadings therein with regard to passage leading to the village from the house are, vague. Para 1 and 3 of the written statement demonstrate that defendants had categorically mentioned therein that though there was one passage, same is below the edge of Khasra No. 610, comprised in Khasra No. 609 and that the said passage was passing through Khasra No. 609, but the same was open and had not been obstructed by anyone and in fact the said passage had nothing to do with the land of defendant No. 1, comprised in Khasra No. 610. It was further denied in the written statement by the defendants that they had either cut any passage, as was alleged, or they were interfering in any portion of the land, occupied by the plaintiffs. In replication, the stand reflected in para-3 of the same by the plaintiffs was that in fact possession over Khasra No. 610, as per Jamabandi on the spot of defendant No. 1 was being reflected, in collusion with Patwari, who had prepared the spot Tatima of the disputed land.

14. Now in this background, on the perusal of the documents, placed on record by the plaintiffs to prove its case, it is evident from the perusal of the same that the plaintiffs have failed to demonstrate existence of any specific path over the suit land connecting their house with the common village path by tendering in evidence any site plan of the same. Though, learned appellate Court has come to conclusion that PW-1 had deposed in connivance with defendant No. 1, but one fails to understand as to how the said conclusion has been arrived at by the learned appellate Court. In fact PW-1 was examined at the behest of the plaintiffs. Similarly, the cross-examination of PW-2 Shanti Devi demonstrates that she admitted the suggestion given to her that there was a path 2½-3 feet wide, which passes through the fields. Cross-examination of PW-3 Tikkam Ram also demonstrates that this witness also admitted that from the fields of Krishanu, there was a path 2 ½-3 wide, which passes from the boundaries of Khasra No.610 and 609. Now, when the plaintiffs were alleging the existence of path over the suit land, which according to the plaintiffs, was being obstructed by the defendants, onus was upon the plaintiffs to have had established on record the existence of the said path by brining on record some cogent evidence, from which such inference could be drawn by the Court. However, there is nothing on record,

from which it can be inferred that there existed a path, as was being claimed by the plaintiffs, which was being obstructed by the defendants. In other words, neither existence of the path nor obstruction being caused upon the same by the defendants, stood proved by the plaintiffs. While this fact was correctly appreciated by learned trial Court, learned appellate Court misread the evidence placed on record and erred in coming to the conclusion that there was no necessity for the plaintiffs to have had filed any sketch of the alleged path, which according to them was being interfered with by the defendants. Similarly, perusal of the pleadings also demonstrates that plaintiffs having failed to plead the right of use of path over the joint land and have also miserably failed to demonstrate the existence of any such path, which was being interfered with by the defendants, as was the case put forth by the plaintiffs. The conclusion, to the contrary, drawn by the learned appellate Court, in my considered view, is not sustainable in law, as the said conclusions is based on conjectures and surmises, rather than on the basis of pleadings and evidence on record. Not only this, even otherwise, a perusal of the judgment passed by learned appellate Court demonstrates that the findings, which have been returned by the trial Court in favour of the plaintiffs are based on conjectures and surmises and not on the facts of the case, which is apparent from the fact that while returning the findings of the fact that defendants were interfering with the path, which was allegedly connecting the house of plaintiffs with the village common path, the findings which have been returned by learned appellate Court are that the plaintiffs were having house over the suit land, therefore, it is but to be assumed that there was a path connecting the said house with the common village path, as was the case put forth by the plaintiffs and that the same was being interfered by the defendants.

15. I am afraid the Court of law cannot pronounce its judgment on surmises ,as the findings which have to be returned by the Court of law, are to be based on facts and to be supported by evidence, which has been led on record by the parties concerned.

16. It is not understood that in the absence of there being anything substantive on record to demonstrate that there was path on the suit land, which was being obstructed by the defendants, how decree of injunction, was passed by the learned appellate Court, was to be executed. It was not sufficient for the plaintiffs to have had made vague allegations in the plaint that there was a path connecting their house over the suit land to the village path and the same was being interfered with by the defendants. It was incumbent upon the plaintiffs to have had demonstrated as to which was that path, which existed on the suit land connecting their house with the common village path and what was the obstruction being caused upon the said land by the defendants. However, plaintiffs have not been able to prove and demonstrate the same. Accordingly, in this view of matter, the judgment and decree, passed by learned appellate Court in Civil Appeal NO. 34 of 2004 is not at all sustainable in the eyes of law and in fact, learned appellate Court has erred in setting aside the well-reasoned judgment and decree, passed by learned trial Court in Civil Suit No. 75-1 of 2003, on 27.4.2004. The substantial question of law No. 1 is decided accordingly.

Substantial question of law No. 2.

17. As far as the present substantial question of law is concerned, now it is only of academic interest, especially in view of the fact that this Court has already held while deciding substantial question of law No. 1 that the plaintiffs were not able to prove their case and hence, learned appellate Court had erred in decreeing the suit, so filed by the plaintiffs. However, as far as maintainability of the suit filed by the plaintiffs is concerned, in my considered view, as it is not a disputed fact that the plaintiffs are in fact co-sharers over the suit land, they had a right to file a suit praying for injunction, in case any right of there was being infringed by any of the co-sharer. Filing a suit for injunction or praying the appropriate authority for the purpose of partition, cannot be said to be a ground, on which the plaintiffs could have been debarred from filing the suit for injunction. However, as I have already held that while deciding the substantial question of law No. 1, in case plaintiffs were not able to prove that either their existed any path connecting their house to the common village path and the same was being interfered with by the defendants, judgment and decree was granted in their favour by the learned appellate Court, was not sustainable in the eyes of law.

18. In view of my findings returned above, this appeal is allowed and the judgment and decree passed by learned appellate Court in Civil Appeal No. 34 of 2004 is set aside , whereas the judgment and decree, passed by learned trial Court in civil suit No. 75-1 of 2003 is hereby affirmed. No order as to costs.

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

Subhash Chand .....Petitioner.
Versus
Mukesh Chand ....Respondent.

Cr.MMO No. 306 of 2016.
Date of Decision: 26th April, 2017.

Indian Evidence Act, 1872- Section 45- An application for comparison of the signatures of the accused on the cheque, vakalatnama and acknowledgment was filed, which was dismissed by the Trial Court – held that vague suggestions were put to the witnesses, which shows that the accused had not contested his signatures on the cheque – the Trial Court had rightly dismissed the application- petition dismissed.(Para-2 and 3)

For the Petitioner: Mr. N.K. Thakur, Senior Advocate with Mr. Divya Raj Singh, Advocate.
For the Respondent: Mr. Dheeraj Kumar Vashist, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The instant petition stands directed against the order recorded by the learned Judicial Magistrate 1st Class, Court No.1, Una, District Una, H.P., whereby, he dismissed the application preferred before him, by the accused, in application whereof, he made a prayer "for" sending the relevant scribings occurring in cheque, power of attorney/vaklatnama and acknowledgement, "for" their comparison by the Handwriting expert, with the admitted scribings/writings of the accused. The accused/petitioner herein, is aggrieved by the aforesaid pronouncement, hence, for assailing it, he has instituted the instant petition before this Court.

2. It is stated before this Court by the learned counsel appearing for the parties, that after completion of the recording of the complainant's evidence and after the recording of the statements of the accused under Section 313 of the Cr.P.C., by the learned trial Court, the case now is listed before the learned trial Court, for the recording of the evidence in defence of the accused/petitioner. The application, upon which the impugned verdict, stands recorded by the learned trial Court, was preferred before it, on 21.09.2015. However, the institution of the instant application before the learned trial Court, after completion of recording of the complainant's evidence, would not per se bar the accused/petitioner, to, by preferring an application before it, seek a direction from it, "for" transmission to the expert concerned, the scribings/writings occurring on the relevant documents along with the admitted writings of the accused, for hence the expert concerned making an opinion, whether both hold similarity or not. However, the belated preferment of the aforesaid application by the accused, especially after completion of the aforesaid proceedings before it, would operate as a bar, against its preferment, only when no suggestions stood put by the counsel for the accused/petitioner, to the complainant's witnesses, with echoings therein, qua the accused delivering a blank cheque to the complainant, "whereas", the details of sums of money borne on the dishonoured negotiable instrument, being filled in besides scribed by somebody else. For determining, the aforesaid

facet, it is imperative to allude, to a singular statement, occurring in the cross-examination of one of the complainant's witnesses, statement(s) whereof were produced before this Court, by the counsel for the accused/petitioner. An allusion thereto unveils that disclosures occur in the cross-examination of the complainant, disclosures whereof unveil that the counsel for the accused, had merely put vague suggestion(s) to him that the relevant signature(s) occurring in the dishonoured negotiable instrument, being inked with an ink of a colour different from the one with user whereof, the details of the amount of money reflected therein "stand inked", as also, with respect to the name of the drawer reflected therein, being inked in a colour different than the ink with user whereof, the accused signatured the relevant cheque. The aforesaid vague suggestions, hence, cannot, at all enhance any inference, that the accused/petitioner, ever contested that he had not filled/scribed, the amount borne on the dishonoured negotiable instrument also it cannot rear any inference, that he urged a defence that a blank signatured cheque was handed over by him to the complainant and that the details of the amount of money borne therein, were scribed by the complainant or somebody else. In aftermath, with the aforesaid relevant defence being never espoused by the accused, he cannot belatedly through the instant application be permitted, to engineer it

3. For the foregoing reasons, I find no merit in the instant petition and it is dismissed accordingly. In sequel, the order impugned before this Court is maintained and affirmed. All pending applications stands disposed of.

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

Amar Singh ... Petitioner

Versus

State of Himachal Pradesh ... Respondent

Cr. Revision No. 167 of 2011
Reserved on: 20.04.2017
Date of decision: 27.04.2017

Indian Penal Code, 1860- Section 279, 338 and 201- **Motor Vehicles Act, 1988-** Section 181- Accused was driving a scooter in a rash and negligent manner – the scooter hit the complainant on her right leg – she sustained injuries – the accused was tried and convicted by Trial Court- an appeal was preferred, which was allowed- held in revision that the complainant has supported the prosecution version – her statement is corroborated by PW-9 - there is nothing in the cross-examination of the prosecution witnesses to shake their testimonies – no motive or enmity was proved- the accused had failed to produce the driving licence, which shows that he was not possessing any driving licence at the time of accident – the witnesses consistently stated that the scooter was being driven with high speed which caused the accident - the injuries were proved by Medical Officer – the accident had taken place in a public place and the accused was under obligation to drive the vehicle carefully and with the slow speed- he had failed to do so- the Courts had rightly convicted the accused – revision dismissed. (Para-10 to 21)

Case referred:

State of Karnataka Vs. Satish, (1998) 8 Supreme Court Cases 493

For the petitioner: Mr. Deepak Kaushal, Advocate.

For the respondent: Mr. V.S. Chauhan, Additional Advocate General with Mr. Vikram Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.:

By way of this revision petition, petitioner has challenged the judgment passed by the Court of learned Sessions Judge, Sirmaur District at Nahan in Criminal Appeal No. 42-Cr.A/10 of 2009 dated 01.08.2011, vide which learned Appellate Court while dismissing the appeal so filed by the present petitioner upheld the judgment passed by the Court of learned Judicial Magistrate Ist Class, Court No. 1, Paonta Sahib in Cr. Case No. 159/2 of 2006/05 dated 24/08/2009/27.08.2009, whereby learned trial Court had convicted the present petitioner for commission of offences punishable under Sections 279, 338, 201 of Indian Penal Code and Section 181 of M.V. Act and sentenced him to undergo simple imprisonment of one month and to pay fine of Rs.500/- for commission of offence under Section 279 of Indian Penal Code, simple imprisonment of three months and to pay fine of Rs.500/- for commission of offence under Section 338 of Indian Penal Code, simple imprisonment of one month and to pay fine of Rs.500/- for commission of offence under Section 201 of Indian Penal Code and sentenced to pay fine of Rs.500/- for commission of offence under Section 181 of M.V. Act.

2. The case of the prosecution in brief was that on 12.04.2005 a telephonic message was received at Police Station, Paonta Sahib, at around 11.55 A.M., from Medical Officer, Civil Hospital Poanta Sahib, about the occurrence of an accident. Thereupon, ASI Shyam Lal alongwith other police officials visited the hospital, where they recorded the statement of victim Shaweta Sharma daughter of Ashok Kumar, resident of village Bangran. Victim stated that on the fateful day i.e. 12.04.2005, she had gone to Government Senior Secondary School, Shivpur for taking admission in 9th class alongwith her friend Swati. At around 10.40 A.M. when the said bus reached near the school, they alighted from the same and as they intended to make certain purchases, therefore, she alongwith her friend started crossing the road but in the meanwhile a scooter came from Bangran side and struck against her right leg, as a result of which, she fell down. She further stated that scooter driver drove away the scooter back towards Bangran side. She also stated that she did not remember the number of the scooter but the driver of the same was known to her, as he was resident of village Bangran. On the statement of the victim, FIR Ext. PW10/A was registered. In the course of investigation, spot map Ext. PW10/C was prepared. Scooter alongwith R.C. and insurance were taken into possession by the police. Driving licence could not be produced by the accused. The scooter was also subjected to mechanical examination. MLC of the injured was obtained by the police. Statements of the witnesses were recorded as per their versions by the Investigation Officer.

3. After the completion of investigation, challan was presented in the Court and as a prima facie case was found against the accused for commission of offences punishable under Sections 279, 337, 338 and 201 of Indian Penal Code and Section 181 of M.V. Act, accordingly notice of accusation was put to him, to which, he pleaded not guilty and claimed trial.

4. On the basis of evidence produced on record by the prosecution, learned trial Court held that prosecution had succeeded in establishing the guilt of the accused beyond reasonable doubt. Learned trial Court convicted the accused by holding that it stood proved on record that it was the accused who was driving the scooter at the relevant time. While arriving at the said conclusion, learned trial Court relied upon the statement of complainant Shaweta Sharma, who entered the witness box as PW-8 as well as upon the testimony of PW-9 Swati Sharma, who was accompanying the complainant when the accident took place. Learned trial Court held that the complainant had categorically deposed that on 12.04.2005 at 10.55 A.M. while she was on her way alongwith PW-9, a scooter came from Bangran side in high speed and struck against her leg, as a result of which, she fell down. Learned trial Court also took note of the fact that the complainant had categorically deposed that she had identified the person who had hit her with the scooter and the said person was the accused who belonged to her village. Learned trial Court held that the complainant was specific in stating that it was the accused who was driving the scooter in high speed who struck the scooter against her resulting into the

alleged injury upon her body. Learned trial Court disbelieved the version of the accused that on the fateful day he was not driving the scooter and it was in fact his father Mangat Ram who was driving the scooter and that it was the complainant who struck against their scooter and thereafter her father demanded money to the tune of Rs.20,000/- and threatened that in case the amount was not paid, then the accused would be falsely implicated and as the said amount was not paid, it was on that account that a false case was lodged against the accused. Learned trial Court also took note of the fact that when Mangat Ram entered the witness box he did not depose anything with regard to the alleged demand having been raised by the father of the complainant. Learned trial Court further relied upon the testimony of PW-9, who was an eye witness to the accident and who proved that the accident in fact had taken place due to rash and negligent driving of the accused. Learned trial Court also held that the complainant was medically examined by PW-5 Dr. Amitab Jain whose testimony alongwith MLC Ext. PW5/A established the injuries which were received by PW-8 on account of the accident which occurred because of the rash and negligent driving of the accused. Learned trial Court also held that it had come in the statement of complainant that after the accident took place, the accused ran away from the spot which demonstrated that the accused wanted to conceal the real facts of the incident. On these basis, it was held by learned trial Court that this demonstrated that the accused ran away from the spot to cause disappearance of the evidence of the commission of the said accident on the spot. Learned trial Court also held that the accused had not produced his driving licence to demonstrate that he possessed a valid licence to drive the scooter. On these basis, learned trial Court convicted the accused for commission of offences punishable under Sections 279, 338, 201 of Indian Penal Code and Section 181 of M.V. Act.

5. In appeal, the findings so returned by learned trial Court were upheld by learned Appellate Court. Learned Appellate Court also by relying upon the statements of the complainant as well as PW-9 upheld the judgment of conviction so passed by learned trial Court. It was held by learned Appellate Court that the testimony of the complainant was corroborated by the statement of PW-9, who was accompanying the complainant at the time when the accident took place. Learned trial Court also held that though it had come in the award passed by MACT-I, Sirmaur at Nahan, that it was Mangat Ram who was driving the scooter at the relevant time, however the findings so returned by the MACT-I were not binding on the said Court. It is pertinent to mention at this stage that the findings to this effect were also returned by learned trial Court. Learned Appellate Court also held that statements of PW-8 and PW-9 provided satisfactory proof of accused driving the vehicle at the relevant time and that the accident in fact had taken place on account of his negligent driving.

6. Feeling aggrieved, the accused has filed this revision petition.

7. Mr. Deepak Kaushal, Advocate, learned counsel for the petitioner vehemently argued that the judgments of conviction passed by both the learned Courts below are not sustainable in the eyes of law as there was perversity in the findings so returned by both learned Courts below. As per Mr. Kaushal, both the learned Courts below erred in not appreciating that there was no evidence on record from which it could be inferred that it was the accused who was driving the vehicle at the relevant time when the accident took place. In the alternative, it was argued by Mr. Kaushal that even if it is assumed that it was the accused who was driving the vehicle, even then both the learned Courts below erred in not appreciating that it had neither come in the statement of PW-8 nor in the statement of PW-9 that the accident took place because of rash and negligent driving of the accused. On these points, he urged that the judgments under challenge be set aside. No other point was urged.

8. On the other hand, Mr. V.S. Chauhan, learned Additional Advocate General, argued that there was no merit in the present revision petition as both the learned Courts below had rightly returned the findings of conviction against the accused as the guilt of the accused stood proved beyond reasonable doubt by the evidence which was placed on record by the prosecution. Mr. Chauhan argued that identity of the accused was duly established by the

complainant who had suffered injuries in the accident which were caused on account of rash and negligent driving of the accused and further the accused had not been able to produce any evidence to prove that it was his father who was driving the scooter when the accident took place. Mr. Chauhan further argued that the very fact that the accused was taking contrary pleas to assail the judgments passed by both learned Courts below established the fact that it was he and not his father who in fact was driving the scooter at the relevant time. Mr. Chauhan further argued that even otherwise in exercise of such revisional jurisdiction it was not open for this Court to interfere with the findings returned by both learned Courts below by re-appreciating the evidence. It was urged by Mr. Chauhan that there was no merit in the present petition and the same be dismissed.

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

10. The primary perversity which has been attributed by the learned counsel for the petitioner to the judgments passed by both learned Courts below is that both the said Courts erred in not appreciating that the prosecution was not able to prove that it was the accused who was driving the scooter at the relevant time.

11. In order to appreciate the said contention of learned counsel for the petitioner, this Court perused the records of the case to ascertain as to whether the findings returned by both learned Courts below that it was the accused who was driving the scooter were borne out from the records of the same or were perverse.

12. Statement of the complainant recorded under Section 154 Cr.P.C. is Ext. PW8/A. This statement was recorded at around 12.30 Noon, whereas the accident took place at around 10.40 A.M. A perusal of the statement demonstrates that it was mentioned therein that the complainant who had passed her Class-8 examination from Government Senior Secondary School Shivpur, had gone on 12.04.2005 for taking admission in Class-9 at around 10.30 A.M. and when she alongwith her friend Swati reached near the school at around 10.40 A.M. and after they alighted from the bus and were in the process of crossing the road, a scooter which was coming from Bangran side in high speed struck against her right leg, as a result of which, she fell down. It is further recorded therein that the scooter driver ran way with the scooter and though the complainant could not note the number of the scooter but she recognized the driver who was a resident of Bangran. Now, when we peruse the statement of the complainant recorded in Court as PW-8 we find that all these facts have been stated by her in the Court and there is neither any improvement nor any contradiction in the same as compared to her statement recorded under Section 154 Cr.P.C., on the basis of which, FIR was lodged. This witness has also categorically stated in the Court that the scooter was being driven by the accused in high speed, which hit her and that she recognized the accused as he was a resident of her village. In her cross-examination, this witness categorically denied the suggestion that the accused was falsely implicated in the case as accused had refused to pay money as was being demanded by the father of the complainant. Even otherwise, it is not the case of the defence that initially the complainant had not stated that she recognized the person who was driving the scooter and this improvement was subsequently made by her with the passage of time in her statement.

13. Besides this, a perusal of the statement of PW-9 Swati Sharma, who was an eye witness to the accident also demonstrates that this witness also categorically stated that it was the accused who was driving the offending scooter in high speed, as a result of which, the same struck the complainant, who suffered injuries on the said account.

14. In my considered view, statements of these witnesses are cogent, reliable, trustworthy and they inspire confidence. The credibility of the statements of PW-8 and PW-9 could not be impeached by the defence in the course of their cross-examination. The defence has also not been able to establish that both P-8 and PW-9 had some motive to make false

allegation against the accused as it has not been proved on record that there was any enmity or animosity between the complainant or the accused and PW-9 and accused.

15. Besides this, both the learned Courts below have rightly held that the findings returned by MACT Tribunal were not binding upon them and the factum whether or not the scooter was being driven by the accused had to be decided by them on the basis of evidence produced before learned trial Court by the prosecution. The fact that the accused was not able to produce driving licence before learned trial Court assumes significance because it is apparent that the accused was not possessing any driving licence. Therefore, a story was concocted by him to the effect that it was not he but his father who was driving the scooter.

16. In view of above discussion, in my considered view, in the present case, there is no perversity with the findings returned by both learned Courts below to the effect that it was the accused who was driving the scooter when the same struck against the complainant and this fact is duly borne out from the statement of complainant PW-8 as well as from the statement of other eye witness i.e. PW-9.

17. Now, I will deal with the second point raised by learned counsel for the petitioner that both the learned Courts below erred in not appreciating that the prosecution was not able to prove that the accident took place on account of rash and negligent driving of the accused as it had not come in the testimony of PW-8 and PW-9 that the accident took place due to rash and negligent driving of the accused. In support of his arguments, Mr. Deepak Kaushal, learned counsel for the petitioner has relied upon the judgment of Hon'ble Supreme Court in ***State of Karnataka Vs. Satish***, ***(1998) 8 Supreme Court Cases 493***.

18. In my considered view, there is no merit in the said contention of learned counsel for the petitioner also. A perusal of the statements of PW-8 and PW-9 demonstrates that both these witnesses have categorically stated that the scooter in question was being driven in high speed by the accused who struck the same against the complainant as a result of which the complainant fell down and as far as grievous injury caused to the victim is concerned, the same has been duly proved on record by the prosecution on the strength of statement of PW-5 Dr. Amitab Jain who had medically examined the injured after she was taken to Civil Hospital Paonta Sahib after the accident. I have already held above that there is no perversity with the findings returned by both learned Courts below that it was the accused who was driving the scooter at the time when the accident took place. Besides this, the accident has not taken place at a spot whichwasisolated, not frequented by public at large where vehicles are in routine driven in high speed. In the present case, as is evident from the spot map, the accident has taken place at a spot which was frequented by the general public, where there were houses and shops in vicinity as well as a Government Senior Secondary School. From this, it is apparent that the place was frequented by public including students. In such circumstances, a person who is plying a vehicle is bound to drive the same safely and not rashly and negligently, which means that a driver is not supposed to drive his vehiclein high speed.

19. In ***State of Karnataka Vs. Satish***, ***(1998) 8 Supreme Court Cases 493***, Hon'ble Supreme Court was dealing with a matter wherein a truck turned turtle while crossing a "Nalla" and allegation against the driver was that the accident took place as the driver was driving the vehicle at a high speed. In the background of factual controversy involved in the said matter, the Hon'ble Supreme Court held:

> "4. Merely because the truck was being driven at a "high speed" does not bespeak of either "negligence" or "rashness" by itself. None of the witnesses examined by the prosecution could give any indication, even approximately, as to what they meant by "high speed". "High speed" is a relative term. It was for the prosecution to bring on record material to establish as to what it meant by "high speed" in the facts and circumstances of the case. In a criminal trial, the burden of providing everything essential to the establishment of the charge against an

accused always rests on the prosecution and there is a presumption of innocence in favour of the accused until the contrary is proved. Criminality is not to be presumed, subject of course to some statutory exceptions. There is no such statutory exception pleaded in the present case. In the absence of any material on the record, no presumption of "rashness" or "negligence" could be drawn by invoking the maxim "res ipsa loquitur". There is evidence to show that immediately before the truck turned turtle, there was a big jerk. It is not explained as to whether the jerk was because of the uneven road or mechanical failure. The Motor Vehicle Inspector who inspected the vehicle had submitted his report. That report is not forthcoming from the record and the Inspector was not examined for reasons best known to the prosecution. This is a serious infirmity and lacuna in the prosecution case."

20. Coming to the facts of the present case, herein the accident has not taken place at a secluded road but in the midst of populated place wherein besides shops and residential houses even Government Senior Secondary School was situated. Both PW-8 and PW-9 have categorically stated that the accident took place as the scooter was being driven by the accused in high speed. As has been held by the Hon'ble Supreme Court high speed is a relative term. In the present case, the prosecution has placed on record material to establish that this high speed in the facts and circumstances of the case amounts to "negligence" and "rashness" because it stands established on record by the prosecution that the scooter was being driven by the accused in high speed in a place frequented by public at large. Therefore, it is not as if the prosecution has not brought on record the material to establish as to what was meant by "high speed". Thus, there is no merit in the contention of the learned counsel for the petitioner that there were perversity in the judgments passed by both learned Courts below to the effect that they erred in not appreciating that the prosecution had not proved the rashness or negligence of the accused on record.

21. Therefore, in view of the discussion held hereinabove, it cannot be said that the findings of conviction returned against the accused by learned Courts below are perverse or not borne out from the records of the case. Thus, as there is no merit in the present revision petition, the same is accordingly dismissed, so also the pending miscellaneous applications, if any.

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

Court on its own motion ....Petitioner.

Versus

State of H.P. & others ...Respondents.

CWPIL No.15 of 2015
Date of Decision: 27.4.2017

Constitution of India, 1950- Article 226- The Court had taken suomoto cognizance of the report made by Registrar Vigilance as well as the news report published in Tribune pertaining to the failure in the regulation of the traffic in and around the town of Manali–S.P., Kullu wrote a letter to D.C., Kullu outlining the long-term vision plan to regulate and manage the traffic – the government has also made a plan to ease the traffic congestion – various notification have been issued by the Government to regulate the traffic – directions issued to complete the work of construction of bridges, to formulate long-term vision plan and associate all the stakeholders in the implementation of the same. (Para-1 to 18)

For the Petitioner : Mr. K.D. Shreedhar, Senior Advocate as Amicus Curiae with Ms Shreya Chauhan, Advocate.

For the respondents : Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan, Mr. Romesh Verma, Additional Advocates General, and Mr. J.K. Verma, Deputy Advocate General, for respondents No.1 to 6, 1 and 12.

Ms Jyotsna Rewal Dua, Senior Advocate, with Ms Charu Bhatnagar, Advocate, for respondent No.8.

Mr. Ashok Sharma, Assistant Solicitor General of India, with Ms Sukarma, for respondents No.11 and 13.

Mr. Abhinandan Thakur, Advocate, for respondent No.14.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice

This Court took *suo motu* cognizance of the report made by the Registrar (Vigilance) as well as news item published in *"The Tribune"* dated 26th June, 2015 pertaining to failure in the regulation of traffic in and around the town of Manali in District Kullu, Himachal Pradesh.

2. Perturbed by the difficulty which tourists were facing while visiting District Kullu in general and Manali in particular, this Court on 01.07.2015 directed the State to file a status report indicating what mechanism was in place to check the traffic congestion in Manali and also to come out with a mechanism which ensures that Manali is made accessible and comfortable for the tourists, otherwise the same would adversely affect not only the tourism in Manali but the entire State of Himachal Pradesh, which would be at the costs of the Tourism Industry of the State of Himachal Pradesh in particular and the people of the State in general.

3. The town of Manali is nestled in the land of majestic Himalayas in District Kullu and breath taking beauty of its marvelous landscapes, which includes lush apple orchards as well as steep standing mountain ranges awe-strucks one and all. The town of Manali is situated at a distance of approximately 40 Kms. from District headquarter of Kullu. There are two approach roads leading from Kullu to Manali on each side of river Beas commonly and popularly known as *'Left Bank Road'* and *'Right Bank Road'*. The main approach road is the '*Right Bank Road'.*

4. The town of Manali is named after the Sanatan Hindu lawgiver Manu. This town lies in North of Kullu valley, which valley is often referred to as the 'Valley of the Gods'. In fact old Manali village has an ancient temple dedicated to sage Manu. This town is a very popular tourist destination and it attracts not only tourists from the country but from the entire world. However, one can also not shy away from the fact that the small town of Manali perhaps does not has, as of now, the infrastructure which is required to cope with the number of tourists, which this town attracts. Besides the tourist vehicles which tourists ply to the said town, the limited road length of the town has to cater to the vehicles of the localites also both private as well as commercial. One just dreads as to how the Gods might be reacting to this 'Valley of Gods' in the present scenario where the valley is chock-a-block with vehicles.

5. Before we proceed any further, it is necessary to understand the way traffic moves to the town of Manali from Bajaura onwards, which primarily is the first major station of District Kullu. The town of Bhuntar is situated at a distance of 5 Kms. from Bajaura. This town has an Airport and is also center for accessing areas such as Kasol, Manikaran and Manali. From Bhuntar, majority of traffic is being diverted now-a-days to the left bank from a bailey bridge. In fact in the floods which devastated the valley of Kullu somewhere in the year 1995-96, many bridges over river Beas were destroyed and one of them happens to be the one which was on river Beas at Bhuntar connecting Buntar with Manikaran. It cannot be termed anything else but apathy of the Government that for the last almost two decades, no permanent bridge has been

constructed at Bhuntar and the entire traffic has to go through a bailey bridge, which is the first point of congestion leading to long traffic blockades. It is not uncommon to be struck at this point during peak tourist season for hours together. The traffic thereafter moves on the left bank and after crossing Akhara bazaar of Kullu town, there is a bridge built over river Beas, which thereafter diverts the traffic to the right bank and from this point onwards, the traffic moves to Manali town on the right bank.

6. When one reaches the town Manali, just before the Mall Road of the town, which is otherwise closed for traffic, there is a diversion towards the right hand side, which takes the traffic either to places in Manali town like Hiddimba temple, Log huts etc. or by using this road, traffic proceeds towards Rohtang pass and Lahul Spitti. The area of Manali town which has come upon the left side of river Beas is also accessible by using this road. Across river Beas at this point also, there are no permanent bridges and there are two bailey bridges, which are used by the traffic and this entire area is a point of permanent congestion.

7. On record, there is a communication dated 28.08.2014 (at page-23 of the paper-book) addressed by Superintendent of Police, Kullu to Deputy Commissioner, Kullu on the subject *"Long term vision plan to regulate and manage traffic in Kullu, Manali to Rohtang, Kasol and Manikaran."* The long term measures and suggestions which find mention in this communication are quoted hereinbelow:

> "1. Identification of land for developing parking sites.
>
> 2. Creation of pedestrian paths alongwith roads passing through district head quarter and tourist places.
>
> 3. Creation of over head bridges for crossing crowded areas in the city/towns.
>
> 4. In case of scarcity of space multistoried parking need to be created in the towns.
>
> 5. Widening of bridges and narrow roads passing through this district head quarter and tourist places.
>
> 6. Immediate removal of encroachments from the road side.
>
> 7. Identification of proper places for the stoppage of buses etc. on the highway. Special sites need to be earmarked and developed for the same.
>
> 8. Strict enforcement of MC Act and Rules by police as well as other agencies responsible for the implementation of MC Act and Rules.
>
> 9. Provision to install high powered CCTV night vision cameras at places mentioned above also need to be made to check violations of traffic rules etc.
>
> 10. In order to ensure the effective performance of Police/HHG, officials deployed for the regulation of traffic, the area in question need to be divided into various sectors so as to fix up the responsibility of regulating traffic of concerned official in the area.
>
> 11. It has generally been observed that thousands of vehicles are plying on the road from Manali to Rohtang everyday during tourist season and lot of traffic jams are witnesses on the road, which also need to be widened with the development of parking places at all places of tourist interest.
>
> 12. Presently three to four reserves of police personnel are being used to regulate traffic during tourist season from Manali to Rohtang, which has also been found insufficient during peak tourist season to regulate traffic effectively in the area due to narrow roads and non-availability of sufficient/adequate parking places. A separate proposal for the creation of staff to be deployed on the high way from Manali to Rohtang pass is being sent to PHQ.

13. Special drive will be organized to check idle parking and remove all abandoned vehicles found on the road side with the help of crane etc."

8. Various status reports stand filed on record of the case in compliance to various orders passed in this regard by this Court from time to time. There is also a response filed to the petition on behalf of respondent No. 8 (page No. 47 of the paper-book), in which the following has been stated with regard to Manali town:

"**5. <u>Manali Town itself:</u>**

That to remove the traffic congestion in Manali town, construction of 1.7. km bypass road has been envisaged and incorporated in 37 km. Kullu Manali two laned road with paved shoulders with realignments at congested areas proposal. With the construction of the Manali bye-pass road, Army vehicles, heavy vehicles and other vehicles proceeding to Lahaul-Sapiti, Leh etc. will go through this bypass without disturbing Manali town, hence easing out traffic congestion in Manali town itself.

The Kullu Manali project stands approved by the Ministry of Road Transport and Highway. Financial bids have also been received however the same have not been opened due to non-availability of 90% encumbrances free land and Forest clearance from Ministry of Environment and Forest for transfer of forest land. Special attention is required from the State Govt. to expedite the redressal on this issue for early execution of project."

9. Respondents have also placed on record various notifications issued from time to time for the purpose of regulating the flow of traffic in Manali town and one of such notifications is at page 73 of the paper-book dated 17.06.2014.

10. An affidavit filed by the Superintendent of Police Kullu, dated 06.07.2016 (at page-113 of the paper-book) demonstrates that for the purpose of traffic management, 2 ASIs., 3 HCs., 20 HHCs./Constables, 65 HHCs. alongwith one Recovery Van, Four Motorcycles and 25 Hand Wireless sets and one VHF set of 20 watt were deployed in Manali town to ensure free flow of vehicular traffic. This affidavit also discloses that 1 ASI, 3 HCs., 21 Constables and 25 HHGs. were deployed in between Manali and Rohtang pass to comply with the directions of National Green Tribunal as well as for the purpose of regulating vehicular traffic in that area and in addition one patrolling Van consisting of 1 SI/ASI was regularly deputed.

11. There is also on record a status report filed on behalf of respondents No. 5 to 7 dated 23rd February, 2017 in compliance to directions passed by this Court on 21.12.2016, relevant extract of which is quoted hereinbelow:

"4. That the work of execution of two bridges i.e. construction on Bridge across river Beas at Km. 310/00 on NH 21 at Manali on EPC Mode, and construction of 33.60 mtrs. Span RCC box cell bridge over river Beas at Km. 260/280 (Bhunter) on NH-21 (New NH03) are in progress on NH-21. The latest status of these two Bridges from Km 260/0 to 310/0 on NH 21 (Now NH-03) is as under:

(a) <u>Manali Bridge:</u>

Administrative Approval, Technical and Financial sanction for construction of 4-Lane Bridge acrodd river Beas Manali was accorded by the MORT &H New Delhi letter No. RW-NH-1014/HP(1)/2014-S &R(B) dated 19.09.2014 Job No. 12014/HP(1) 14-001-S&R(B) for Rs.1188.29 lacs. The letter of acceptance was issued vide Chief Engineer (NH) letter No. PW-CE-NH-21 Manali Bridge/2015-5470-75 dated 14.10.2015 to M/s. Welkin India Inc. Near PWD Rest House, GT Road, Moga-142001, Punjab for a contract price of Rs.9,40,00,000/- which is 4.56% above the amount put to tender. The notice to proceed with the execution of the work issued vide Executive Engineer National

Highway Division HPPWD, Pandoh letter NO. PNH/AB/Tender Manali Bridge/2015-8349-59 dated 18.11.2015. The time period of completion of work is 24 months. The temporary diversion of the vehicular traffic has been completed on 27.07.2016. The contractor and Authority Engineer i.e. M/S Feedback Infra-Gurgaon have mobilized to the site of work. The Authority Engineer has requested the Contractor to submit the General Arrangement Drawing showing span arrangement and alignment as per contract agreement drawings. The Contractor has submitted General Arrangement Drawing to Authority Engineer. The Authority Engineer has raised certain observations on 03.01.2017 and 06.01.2017 and the contractor has replied to the observations on 10.01.2017. Till date no work has been done by the Contractor. Superintending Engineer, NH Circle, HPPWD, Shahpur has inspected work on 17th December, 2016 and directed the Contractor to start the work. Despite of the Contractor assurance to start the work practically no work has been done by the Contractor till date. This bridge will reduce the traffic congestion in Manali Town.

(b) <u>Bhunter Bridge:</u> Administrative Approval, Technical and Financial sanction for construction of this bridge has been accorded by Ministry vide letter No.RW/NH-12014/1014/HP/2015/NH-1 dated 09.12.2015. Job No. NH-21 (New-03)-HP-2015-16-420 for Rs.143.72 lacs. The letter of acceptance was issued vide Chief Engineer (NH) HPPWD, Shimla letter No. PW-CE-NH-21 CTR-Bhunter Bridge/2016-3319-24 dated 16.07.2016 to M/s. Gorsi Const. Pvt. Ltd. Village Takoli PO Panarsa, Sub Tehsil Aut, Distt. Mandi, H.P. for a contract price of Rs.1,23,51,129/-. The notice to proceed with the work has been issued vide Executive Engineer (NH) Division HPPWD, Pandoh letter No. PNH/AB/Tender Bhunter Bridge/2016-5064-73 dated 19.08.2016. The time period for completion of the work is one year. The contractor has been requested by the Executive Engineer NH Division HPPWD, Pandoh letter No. 9943-45 dated 15.11.2016 to start execution of bridge immediately. The contractor has requested for closure of all type of traffic on this bridge for 10 months for construction and completion of whole bridge structure. The Contractor has intimated that the new bridge will not be constructed without dismantling existing Bailey bridge. The Superintending Engineer, National Highway Circle HPPWD Shahpur inspected the bridge site on 17th December, 2016 and decided to re-launch 130 feet span new double lane Bailey bridge to avoid complete closure of traffic. Hence, Executive Engineer National Highway Division HPPWD, Pandoh requested the Executive Engineer, Mechanical Division HPPWD, Kullu to prepare the estimate of re-launching of old bailey bridge by providing new-relaunching 130 feet span double lane bailey bridge. It is further respectfully submitted that estimate has been framed amounting to Rs.171,78,200/- by Executive Engineer, Mechanical Division HPPWD Kullu. BY constructing this 130 feet TDR bailey bridge suitable for IRC class loading will cater to the demand of the commutes and to avoid any mishap on this bridge. It is humbly submitted that after construction of this bridge traffic congestion at Bhunter will be minimized. It is further respectively submitted that National Highway Authority of India shall be constructing four laning NH-21 (New NH-03) from Nerchowk to Kullu and two laning from Kullu to Manali.

It is, therefore, respectfully prayed that this status report may kindly be taken on record and orders as deemed fit and proper may kindly be passed in the interest of justice."

12. A perusal of the said status report demonstrates that practically till date, no work has been commenced by the Contractors concerned for construction of bridges for one reason or other over river Beas at Bhuntar and Manali, which bridges in fact were washed away almost two decades back.

13. The tone and tenor of various status reports on record and various affidavits filed by the respondent(s)-authorities also reflect that the construction of the said bridges is of utmost importance for the purpose of regulation of traffic, both for Kullu area as well as Manali town so as to check the congestion of traffic.

14. Besides this, need of the hour is also to implement the long term vision plan which was forwarded by Superintendent of Police, Kullu to the Deputy Commissioner, Kullu vide communication dated 28.08.2014. This long term vision plan has been suggested by an authority not less than the Superintendent of Police, Kullu, whose duty it is to enforce law and order in the District as well as to manage traffic. Many of the measures/suggestions which find mention in this long term vision plan can be redressed by the administration without any difficulty. Suggestions such like immediate removal of encroachments from the road side, identification of proper places for the stoppage of buses etc. on the highway, strict enforcement of M.V. Act and Rules by police as well as other agencies, provisions of installing high powered CCTV night vision cameras at places to check violations of traffic rules, division of areas in various sectors to ensure effective performance of police officials/officers and also to fix their responsibilities, proposal of creation of staff to be deployed on the highway from Manali to Rohtang pass, special drive to check idle parking and removal of all abandoned vehicles found on the road side with the help of crane etc. can be implemented and should be implemented by all the stakeholders forthwith.

15. The management of traffic management has many facets. Mere widening of roads or construction of new roads may not solve the issue *per se.* Traffic management includes many factors, like traffic control, which envisages measures of traffic flow, management of parking areas and removal of encroachments on roads etc. It has to be understood that driving through a traffic congested area is tedious and the same adversely affects the health of one and all. There is not only wastage of fuel and gasoline for moving automobiles, but it also pollutes the environment. Haphazard parking of vehicles, encroachments on roads, absence of civic sense and lack of strict enforcement of traffic Rules, all lead to traffic congestion.

16. Articles 47 and 48-A of the Constitution of India *inter alia* confer upon the State the duty to raise the level of standard of living and to improve public health as well as protect and improve the environment and safeguard the forests etc. Better management of traffic in eco-fragile areas like District Kullu in general and the areas of Manali in particular, is also otherwise a Constitutional duty mandated upon the State.

17. Therefore, in view of the above discussion, we close this Public Interest Litigation at this stage by passing the following directions:

A. All endeavour should be made to commence and complete the work of construction of bridges over river Beas at Bhuntar and Manali, reference of which finds mention in the status report filed on the affidavit of Chief Engineer (Mandi Zone), H.P. P.W.D., Mandi (H.P.) dated 23rd February, 2017, within a period of one year from today. Quarterly status report in this regard shall be filed regularly on the affidavit of respondent No. 5 in the Registry of this Court.

B. Long term vision plan be framed and implemented to regulate and manage traffic in District Kullu, Manali, Rohtang pass, Kasol and Manikaran as per the suggestions contemplated in communication dated 28.08.2014 addressed by Superintendent of Police, Kullu to the Deputy Commissioner, Kullu, within a period of six months from today.

C. All the stakeholders shall be involved in the formulation and implementation of the said long term vision plan. It is clarified that the said long term vision plan shall also encompass all such measures and suggestions which in addition may be required to regulate and manage traffic in District Kullu in particular and the town of Manali in general.

18. With these directions, this petition stands disposed of, so also miscellaneous applications, if any. No order as to costs.

We place on record our appreciation for the valuable assistance rendered by Mr. K.D. Shreedhar, Senior Advocate as Amicus Curiae.

****

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

Dorjee Gyaltson @ Abhuji and another .....Appellants.

Vs.

Private Office His Holiness the Dalai Lama and another .....Respondents.

RSA No.: 585 of 2008
Reserved on: 19.04.2017
Date of Decision: 27.04.2017

Specific Relief Act, 1963- Section 34- Plaintiffs filed a civil suit for declaration pleading that an agreement for conveying 5½ marlas of land to K was executed with defendant No.2- defendant No.2 parted with the possession and K constructed a three-storeyed building – K was married to plaintiff No.1 and plaintiff No.2 is the adopted son – certain officials from the office of defendant No.1 askedthe plaintiffs to vacate the building on the ground that K had bequeathed the property in favour of defendant No. 1 – K had not executed the Will in favour of defendant no. 1– the suit was dismissed by the Trial Court- an appeal was preferred, which was dismissed – held in second appeal that the marriage certificate shows the name of the lady as KasongChammo , whereas the Will was executed by KalsangTsomo – plaintiffs also mentioned the name of deceased lady as KalsangTsomo– thus, both the ladies cannot be called to be the one and the same – the Courts had rightly held that marriage certificate was not connected to testatrix- the execution of the Will was proved by the scribe and the marginal witness- appeal dismissed. (Para-13 to17)

Cases referred:

Pentakota Satyanarayana and others Vs. Pentakota Seetharatnam and others, (2005) 8 Supreme Court Cases 67

Mahesh Kumar (dead) by LRs Vs. Vinod Kumar and others (2012) 4 Supreme Court Cases 387

For the appellants: Ms. Vidushi Sharma, Advocate.

For the respondents: Mr. Vivek Sharma, Advocate, vice Mr. Ajay Kochhar, Advocate, for respondent No. 1.
None for respondent No. 2.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge :

By way of this appeal, the appellants/plaintiffs have challenged the judgment and decree passed by the Court of learned Additional District Judge-I, Kangra at Dharamshala in Civil Appeal No. 157-D/05, dated 18.08.2007, vide which learned appellate Court while dismissing the appeal filed by the present appellants, upheld the judgment and decree passed by the Court of learned Civil Judge (Junior Division)-II, Dharamshala in RBT CS 223/99/97, dated 08.07.2005, whereby learned trial Court dismissed the suit for declaration filed by the present appellants/plaintiffs before it.

2. Brief facts necessary for the adjudication of the present case are that the appellants/plaintiffs (hereinafter referred to as "the plaintiffs") filed a suit for declaration before the learned trial Court to the effect that land comprised in Khata No. 177 min, Khatauni No. 336 min, Khasra No. 1976/1902, measuring 1-61-20 hectares as per jamabandi for the year 1992-93, situated in Up Mahal McLeodganj, Upper Dharamshala, District Kangra was recorded in ownership and possession of defendant No. 2. According to the plaintiffs, an agreement dated 30.10.1990 was entered into between defendant No. 2 and late Smt. Kalsong Tsomo alias Maya, as per which, land measuring 5 ½ marlas, i.e., about 100 sq. mtrs. was agreed to be conveyed to Smt. Kalsong Tsomo alias Maya Devi. According to the plaintiffs, defendant No. 2 had already parted the possession of 5 ½ marlas of land and a three storeyed building known as "K.T. International Guest House" stood constructed upon the same by Smt. Kalsong Tsomo alias Maya Devi and it was plaintiff No. 1, who had spent most of the money out of love and affection for his wife Smt. Kalsong Tsomo alias Maya, though ownership of the said property was maintained in the name of Smt. Kalsong Tsomo alias Maya Devi. According to plaintiffs, Smt. Kalsong Tsomo alias Maya Devi was married to plaintiff No. 1 on 09.06.1983 under the Special Marriage Act, which was duly registered before the District Marriage Officer, Agra. It was further the case of the plaintiffs that plaintiff No. 1 and Smt. Kalsong Tsomo alias Maya Devi lived as husband and wife till the death of the latter and plaintiff No. 2 was their adopted son. It was further the case of the plaintiffs that late Smt. Kalsong Tsomo alias Maya Devi was residing in the ground floor of K.T. International Guest House, which was still occupied by the plaintiffs. Smt. Kalsong Tsomo alias Maya Devi was suffering from T.B. and other complications and after a prolonged illness, she expired on 07.09.1996 at Dehradun. After her death, certain officials from the office of defendant No. 1 started demanding complete vacation of the suit property, i.e., K.T. International Guest House building on the ground that Smt. Kalsong Tsomo alias Maya Devi had bequeathed the said Guest House building to defendant No. 1 as per Will dated 25.03.1995, purported to have been executed by Smt. Kalsong Tsomo alias Maya Devi in favour of defendant No. 1. According to the plaintiffs, Smt. Kalsong Tsomo alias Maya Devi had never executed any such Will and she in fact was ailing for quite some time and on 25.03.1995 was undergoing treatment in Tibetan Delek Hospital, Dharamshala as an indoor patient and was not fit either physically or mentally to have had executed the so called Will dated 25.03.1995. It was further the case of the plaintiffs that plaintiff No. 1 was himself present in the hospital looking after his wife and that he was asked to sign a document which was written in English and that he was told that it was customary for Tibetans to gift or bequeath some part of their moveable assets as a token of offering to His Holiness the Dali Lama and that his wife was asked to agree to the said tradition. Further, according to the plaintiffs, plaintiff No. 1 was conversant with Tibetan language and could speak and understand Hindi, but he had absolutely no knowledge and education in English. However, believing that document concerned was only an offer or donation of some part of cash to revered His Holiness the Dalai Lama, plaintiff No. 1 signed the same. According to the plaintiffs, after they obtained copy of Will dated 25.03.1995, they realized that officials of defendant No. 1 had misrepresented to plaintiff No. 1 and his late wife and got the same prepared fraudulently at the time when his wife was lying seriously sick in the hospital and they (defendant No. 1) took advantage of the fact that they (plaintiff No. 1 and his wife) were illiterate and were unable to understand and read the contents of the alleged Will. According to the plaintiffs, thumb impressions of Smt. Kalsong Tsomo alias Maya Devi were obtained when she was in a state of delirium and was unable to understand as to what was going on. On these bases, it was contended by the plaintiffs that the Will was not a validly executed document and was prepared collusively, fraudulently and by misrepresentation and that plaintiffs were not bound by the said Will. On these bases, plaintiffs filed the suit praying for a decree of declaration that they were legal heirs and successors to the estate of late Smt. Kalsong Tsomo alias Maya Devi and were entitled to inherit the moveable property known as K.T. International Guest House and that defendant No. 1 had no right or title in the suit property and any Will or bequest purported to have been executed in favour of defendant No. 1 was not legal or valid and that Will, if any, was the result of fraud, misrepresentation, coercion and collusion and not binding upon the plaintiffs. Plaintiffs also prayed that decree of permanent injunction be passed against defendant No. 1 restraining defendant No. 1, its officials, agents and servants etc. from proclaiming defendant No. 1 as owner of suit property in any manner.

3. The suit so filed by the plaintiffs was contested by the defendants. Defendants No. 1 and 3 filed a joint written statement, whereas defendant No. 1 filed a separate written statement. Defendants No. 1 and 3 resisted the suit on the grounds that Smt. Kalsong Tsomo alias Maya Devi was not the wife of plaintiff No. 1 and no marriage in fact had taken place between Smt. Kalsong Tsomo alias Maya Devi and plaintiff No. 1. As per defendants No. 1 and 3, International Guest House was constructed by Smt. Kalsong Tsomo alias Maya Devi and it was denied by the said defendants that plaintiff No. 1 had spent any amount on the construction of the said Guest House on account of alleged love and affection for his alleged wife. It was further mentioned in the written statement by defendants No. 1 and 3 that the name of owner of International Guest House was Kalsong Tsomo and not Maya Devi, as she never used the name "Maya Devi". The factum of marriage of plaintiff No. 1 with Kalsong Tsomo was denied. Correctness of marriage certificate was also denied. The factum of plaintiff No. 1 and Kalsong Tsomo having lived together as husband and wife till the death of Kalsong Tsomo was also denied. The factum of plaintiff No. 2 being adopted son of late Kalsong Tsomo was also denied. Defendants No. 1 to 3 denied that plaintiffs were natural legal heirs to the estate of Kalsong Tsomo or that after the death of Kalsong Tsomo, they were entitled to inherit the said property. It was further the stand of defendants No. 1 and 3 that after the death of Kalsong Tsomo, ownership and possession of International Guest House passed over to defendant No. 1, who had rented out the same to defendant No. 3. It was further the case of defendants No. 1 and 3 that the contention of the plaintiffs that no Will was executed by Kalsong Tsomo was incorrect. According to the said defendants, in fact plaintiff No. 1 was a marginal witness to the Will so executed by Kalsong Tsomo dated 25.03.1995. Defendants No. 1 and 3 denied that Kalsong Tsomo was ailing on 25.03.1995 or was not in a fit condition physically or mentally to have had executed any Will. Said defendants also denied that plaintiff No. 1 was called to sign a document, which purportedly was by way of a custom to gift some part of the property to the revered Guru, as alleged. According to defendants No. 1 and 3, Kalsong Tsomo was mentally and physically fit at the time when she executed the Will, to which plaintiff No. 1 was one of the signatories, as marginal witness. According to defendants No. 1 and 3, Kalsong Tsomo had put her thumb impression over the Will after fully understanding the contents of the same and thereafter marginal witness plaintiff No. 1 had appended his signatures and the Will in issue was duly registered. The factum of thumb impression of Kalsong Tsomo having been obtained when she was in a state of delirium and was not in a position to understand as to what was going on, was also denied. It was also denied that the Will was not a validly executed document or that the same was prepared as a result of collusiveness, fraud or misrepresentation. On these bases, defendants No. 1 and 3 denied the claim of the plaintiffs.

4. Defendant No. 2 by way of a separate written statement contested the case as was set up by the plaintiffs. Said defendant also denied that Kalsong Tsomo's other name was Maya Devi or that plaintiff No. 1 spent money for the construction of the suit property. According to defendant No. 2, plaintiff No. 1 was never married to Kalsong Tsomo and Kalsong Tsomo spent her own money on the construction of the Guest House.

5. By way of replication, the plaintiffs reiterated their stand taken in the plaint.

6. On the basis of pleadings of the parties, learned trial Court framed the following issues:

> *"1. Whether Smt. Kalsong Tsomo @ Maya Devi is legally wedded wife of plaintiff No. 1? OPP*
>
> *2. Whether the plaintiffs are the natural heirs and successors of late Smt. Kalsong Tsomo alias Maya Devi and are entitled to succeed and inherit the suit property? OPP*
>
> *3. Whether the plaintiff No. 2 is adopted son of late Smt. Kalsong Tsomo @ Maya Devi and plaintiff No. 1? OPP*
>
> *4. Whether the plaintiffs are entitled to the relief of injunction, as prayed for? OPP*

5. Whether Smt. Kalsong Tsomo @ Maya Devi executed a Registered Will dated 25.03.1995 in favour of the defendant No. 1? If so, its effect? OPD1

6. Whether the suit is not maintainable in the present form? OPD

7. Whether this Court has no jurisdiction to file the present suit? OPD

8. Whether the plaintiff is estopped to file the present suit by his act and conduct? OPD

9. Whether the provision of O.32 R.1 CPC is not complied with? OPD.

10. Relief.

7. On the basis of evidence adduced by the respective parties in support of their respective claims, the following findings were returned by learned trial Court on the issues so framed:

"Issue No. 1:	*No.*
Issue No. 2:	*No.*
Issue No. 3:	*No.*
Issue No. 4:	*No.*
Issue No. 5:	*Yes.*
Issue No. 6:	*Yes.*
Issue No. 7:	*No.*
Issue No. 8:	*No.*
Issue No. 9:	*No.*
Relief:	*The suit of the plaintiffs is dismissed as per operative portion of this judgment.*

8. Learned trial Court thus dismissed the suit so filed by the plaintiffs by holding that Kalsong Tsomo was not the legally wedded wife of plaintiff No. 1 and that plaintiffs were not the natural heirs and successors of late Smt. Kalsong Tsomo. Learned trial Court also held that plaintiff No. 2 was not the adopted son of late Smt. Kalsong Tsomo alias Maya Devi and plaintiff No. 1 and that Smt. Kalsong Tsomo had executed a valid registered Will dated 25.03.1995 in favour of defendant No. 1. While arriving at the said conclusion, it was held by the learned trial Court that perusal of Marriage Certificate Ex.PY demonstrated that marriage under the Special Marriage Act took place on 09.06.1983 between Dorjee Gyaltson and one Kalsong Chammo @ Maya Devi. Learned trial Court held that letter issued by District Marriage Officer, Agra Ex. PX revealed that marriage was solemnized between Dorjee Gyaltson and Kalsong Chammo @ Maya Devi on 9.6.83. It further held that report of Local Commissioner Ex. PZ demonstrated that marriage was solemnized between Dorjee Gyaltson and Kalsong Chammo @ Maya Devi. Learned trial Court held that opening line of Ex. DW2/A demonstrated that the name of the testator was "Kalsong Tsomo" and it was written therein " Kalsong Tsomo, daughter of late Tsultrim Dakpa, aged 60 years, Kalsong Tsomo International Guest House, Jogibara Road, Macleodganj Dharamshala." Learned trial Court held that onus to prove the fact that Kalsong Tsomo and Kalsong Chammo was one and the same person was upon the plaintiffs. It further held that plaintiff No. 1 contended that his marriage was solemnized with Kalsong Tsomo on 9.6.1993, but Ex. Py revealed that marriage of Dorjee Gyaltson was solemnized with one Kalsong Chammo @ Maya Devi. Learned trial Court held that there was nothing on record to demonstrate that Kalsong Tsomo was ever known as Maya Devi. On these bases, it was held by the learned trial Court that plaintiffs could not take any benefit from Ex. PY as well as Ex. PX and the report of the Local Commissioner Ex. PS, which demonstrated that marriage was solemnized in the year 1983 between plaintiff No. 1 and Kalsong Chammo @ Maya Devi and not between him and Kalsong Tsomo. Learned trial Court further held that even as per plaintiff No. 1,

his marriage was solemnized with Kalsong Tsomo in the year 1983. Learned trial Court held that admittedly the land in issue was purchased by Kalsong Tsomo in the year 1977. It further held that when marriage even as per plaintiff No. 1 was solemnized between him and Kalsong Tsomo in the year 1983, it could not be understood as to how plaintiff No. 1 was stating that he had met the expenses for purchase of land which was purchased by deceased Kalsong Tsomo and was being possessed by her since the year 1977. It was further held by the learned trial Court that plaintiff No.1 had failed to establish on record that he and deceased Kalsong Tsomo lived as husband and wife since 1983 till her death. Learned trial Court held that plaintiff had not examined any witness to prove this fact. It was also held by learned trial Court that whereas as per plaintiff No. 1, the age of his deceased wife at the time of her death was 40-42 years, but this version of his was also contrary to evidence on record, as the age of deceased in Will Ex. DW2/A was mentioned as 60 years, whereas that in prescription slips Ex. PW1/A to Ex. PW1/H was mentioned as 54 and 55 years. Learned trial Court also held that according to plaintiff No. 1, he was married with deceased owner of the suit land, who was also known as Maya Devi, whereas records demonstrated that plaintiff No. 1 was married with one Smt. Kalsong Tsomo @ Maya Devi and there was no evidence on record from where it could be inferred that deceased Kalsong Tsomo was also known by the name of Maya Devi. On these bases, it was concluded by the learned trial Court that plaintiff No. 1 had miserably failed to prove that deceased Kalsong Tsomo was his legally wedded wife. Learned trial Court also held that even the factum of plaintiff No. 2 being the adopted son of plaintiff No. 1 and deceased Smt. Kalsong Tsomo was not established on record as there was no deed regarding his adoption and further not even an iota of evidence was produced on record by plaintiff No. 1 to substantiate that plaintiff No. 2 was ever adopted by deceased Kalsong Tsomo. Learned trial Court held that there was nothing on record to demonstrate that plaintiff No. 2 was actually being given or taken in adoption by his parents or guardian concerned or under their authority with an intent to transfer the child from the family of its birth to the family of its adoption. It further held that this fact was also not proved even if it was presumed that plaintiff No. 2 was an abandoned child and his parentage was not known. Similarly, it was held by the learned trial Court that as plaintiffs were not able to substantiate that deceased was the legally wedded wife of plaintiff No. 1 and that she had adopted plaintiff No. 2, therefore, they could not be permitted to be the natural heirs and successors of deceased Kalsong Tsomo. On these bases, it was held by the learned trial Court that as plaintiffs No. 1 and 2 were not natural heirs and successors of deceased Kalsong Tsomo, therefore, they had no right, title or interest over the suit property and they were not entitled to any relief of injunction against the defendants. It was further held by the learned trial Court that there was sufficient material placed on record by the defendants to prove that the Will in issue was not shrouded by any suspicious circumstance and that Will Ex. DW2/A dated 25.03.1995 was valid and genuine document and the same was duly executed by deceased Kalsong Tsomo in favour of defendant No. 1. Learned trial Court held that plaintiff No. 1 was one of the attesting witnesses to Will Ex. DW2/A. It further held that the Will was executed on 25.03.1995, i.e., in the month of March and it had come in the statement of PW-2 that his Holiness Dalai Lama has visited Delek Hospital in the month of May 2005, i.e., two months after the execution of the said Will. Learned trial Court also held that plaintiffs had failed to prove that the Will in issue was got executed from its testator by exercising undue influence, coercion or fraud. Learned trial Court also held that defendants had in fact successfully proved the execution of the Will and had also removed suspicious circumstances pointed out by the plaintiffs. Learned trial Court took in to account statement of DW-2 Sh. S.C. Pandit, the author of the document, who had categorically stated that the Will in issue was executed by Kalsong Tsomo of her own free volition and that the Will in issue was read over and explained to her and after admitting the contents thereof to be true, she appended her thumb impression on the same. Learned trial Court took note of the fact that testimony of DW-3 also substantiated the factum of the same having been executed by late Kalsong Tsomo of her own free volition. On these bases, the suit filed by the plaintiffs was dismissed by the learned trial Court.

9. In appeal, learned appellate Court while dismissing the appeal filed by the plaintiffs, upheld the judgment and decree passed by the learned trial Court. While upholding the findings returned by the learned trial Court, it was held by the learned appellate Court that the dispute

between the parties was qua the estate of deceased Kalsong Tsomo, who was owner of the suit property and case of the plaintiffs was that they were natural heirs of the deceased and on said basis, they were entitled to inherit the suit property. Learned appellate Court after taking into consideration order Ex. PY held that a perusal of the same demonstrated that marriage of Dorjee Gyaltson had taken place with Kalsong Chammo alias Maya Devi and there was no evidence led on record by the plaintiffs that Kalsong Chammo alias Maya Devi was the same lady who was also known as Kalsong Tsomo. Learned appellate Court also held that Ex. PX also demonstrated that the marriage was solemnized between Dorjee Gyaltson and Kalsong Chammo alias Maya Devi on 9.6.83. On these bases, it was held by the learned appellate Court that this meant that marriage of plaintiff No. 1 was solemnized with one Kalsong Chammo alias Maya Devi, whereas Kalsong Tosomo, daughter of Tsultrim Dakpa was altogether a different lady. Learned appellate Court held that had Kalsong Chammo alias Maya Devi been the same lady, i.e., Kalsong Tosomo, then plaintiffs would have had led evidence to substantiate this fact. Learned appellate Court thus held that in fact plaintiff No. 1 had failed to prove that deceased Kalsong Tsomo, daughter of Tsultrim Dakpa was his legally wedded wife. It was further held by the learned appellate Court that plaintiffs had also not been able to prove that plaintiff No. 2 was in fact adopted by deceased Kalsong Tsomo as was the case put forth by the plaintiffs. Learned appellate Court held that plaintiff No. 1 in his deposition had nowhere stated as to when plaintiff No. 2 was adopted by the deceased and who actually were the parents of plaintiff No. 2, who might have given plaintiff No. 2 in favour of the deceased. It was further held by the learned appellate Court that as both the plaintiff No. 1 and the deceased were foreign nationals, therefore, the adoption deed was required to be registered and in fact learned trial Court had rightly concluded that plaintiff No. 1 was neither husband of the deceased nor plaintiff No. 2 was her adopted son. It was further held by the learned appellate Court that as far as execution of Will Ex. DW2/A was concerned, the same stood duly proved on record on the basis of the testimony of DW-2, Shri S.C. Pandit, who had deposed on oath that on 25.03.1995, one Phurbu Dorji had come to him and had taken him to Delic hospital, where Kalsong Tsomo was admitted and she had told him that she wanted to bequeath her property in favour of defendant No. 1. Learned appellate Court held that the said witness further deposed that he had noted down all the contents which were told to him by the deceased and thereafter he prepared the Will in his office and thereafter he again went to the deceased in the hospital where plaintiff No. 1 was also present. Learned appellate Court also held that in fact said witness had deposed that he had read over the contents of the Will in vernacular to the deceased and the witnesses and part of the contents which the deceased could not understood in Hindi, the same were interpreted to her by Phurbu Dorji in Tibetian language. Learned appellate Court also held that this witness had categorically deposed that the deceased had admitted the Will to be correct and only thereafter she appended her thumb mark in the presence of the witnesses, who had subsequently signed the same in his presence and in presence of the deceased. Learned appellate Court also held that said witness had deposed that the deceased was understanding everything at that relevant time. It was further held by the learned appellate Court that there was nothing averse in the cross-examination of the said witness. It also held that the statement of Phurbu Dorji, Advocate, who entered into the witness box as DW-3 and who was also a marginal witness to Will Ex. DW2/A also substantiated that the Will in fact was executed by the testatrix in the mode and manner as was stated by DW-2. Learned appellate Court held that DW-3 had deposed in the Court that after the Will was scribed by Subhash Pandit, Advocate, he read over the contents of the same to the deceased in Hindi and part whereof was not understood by her, he (DW-3) interpreted the same in Tibetian language to her. Learned appellate Court also held that even DW-3 deposed that the deceased appended her thumb impression on the Will in his presence and in the presence of other marginal witnesses after understanding the contents of the same. On these bases, it was held by the learned appellate Court that it stood proved on record that there was no suspicious circumstance surrounding the Will and in fact the Will had been executed by its testatrix voluntarily at a time when she was of sound mind. Learned appellate Court further held that the contention of plaintiff No. 1 that he had spent money for the construction of K.T. International Guest House was also not worth believing, as the said witness had failed to depose as to what were the total expenses incurred in the course of the construction of the said building and from where the material of construction was procured by him and to whom

the payment etc. was made. Learned appellate Court also held that plaintiff No. 1 had failed to place on record the details of money allegedly spent by him. On these bases, while upholding the judgment and decree passed by the learned trial Court, the learned appellate Court dismissed the appeal so filed before it by the plaintiffs.

10. Feeling aggrieved, the plaintiffs have filed this Regular Second Appeal, which was admitted by this Court on 05.10.2010 on the following substantial questions of law:

> *"1. Whether the two Courts below have fallen in error in holding that marriage certificate Ex. PY does not stand connected with the testatrix?*
>
> *2. Whether the execution of Will, in question, is shrouded by suspicious circumstances and finding to the contrary given by the two Courts below is not sustainable?"*

11. I have heard the learned counsel for the parties and have also gone through the records of the case as well as the judgments and decrees passed by both the Courts below.

12. I will deal with both the substantial questions of law independently.

Substantial Question of Law No. 1:

> *1. Whether the two Courts below have fallen in error in holding that marriage certificate Ex. PY does not stand connected with the testatrix?*

13. The alleged marriage certificate of plaintiff No. 1 with deceased Kalsong Tsomo is on record as Ex. PY. A perusal of the same demonstrates that this marriage certificate pertains to one Dorjee Gyaltson, son of Arik and Kasong Chammo alias Maya Devi, daughter of Thapa Gultin. Now, as far as the deceased lady is concerned, who is owner of the property in issue known as K.T. International Guest House, which stands bequeathed to defendant No. 1 by way of Will Ex. DW2/A, her name is not Kalsong Chammo @ Maya Devi, but her name is Kalsang Tsomo. In fact, a perusal of the plaint itself demonstrates that the plaintiffs themselves have mentioned the name of the deceased lady as Kalsong Tsomo and not Kalsong Chammo. Besides this, a perusal of Will Ex. DW2/A demonstrates that name of the executor of the said Will is Kalsang Tsomo, daughter of Shri Tsultrim Dakpa, resident of Kalsang Tsomo International Guest House. Concurrent findings which have been returned by both the learned Courts below to the effect that plaintiff No. 1 has not been able to prove that the executor of Will Ex. DW2/A is the same lady whose name finds mention in marriage certificate Ex. PY, are based on the contents of Ex. PY. Both the learned Courts below have held against plaintiff No. 1 that the said plaintiff has not been able to prove that Kalsong Tsomo, i.e., owner of K.T. International Guest House and Kalsong Chammo whose name finds mention in marriage certificate Ex. PY is one and the same person. In my considered view, the findings so returned by both the learned Courts below in this regard are in fact correct findings. It is a matter of record that the name of lady which finds mention in the marriage certificate is "Kalsong Chammo @ Maya Devi", whereas name of the lady which finds mention in Will Ex. DW2/A is "Kalsang Tsomo". As there is no material on record from which it can be inferred that both these ladies are one and the same person, therefore, the findings which were returned to this effect by both the learned Courts below cannot be said to be perverse findings. In fact, it is evident from the evidence on record that plaintiff No. 1 was not able to connect Ex. PY with the testatrix. No close relative of the testatrix has been examined by the plaintiffs to prove that it was she whose name finds mention in the marriage certificate Ex. PY. Therefore, in this view of the matter, it cannot be said that both the learned Courts below had fallen in error in holding that marriage certificate Ex. PY was not connected with the testatrix. This substantial question of law is answered accordingly.

Substantial Question of Law No. 2:

> *2. Whether the execution of Will, in question, is shrouded by suspicious circumstances and finding to the contrary given by the two Courts below is not sustainable?*

14. In my considered view, once plaintiffs have failed to prove the factum of the testatrix being related to them, this substantial question of law even otherwise does not requires to be examined. However, as this is a substantial question of law on which the present appeal stands admitted, therefore, this Court is deciding the said substantial question of law also. There is on record the statement of Scribe of the Will, who has entered the witness box as DW-2. Besides this, one marginal witness in whose presence the said Will was signed by the testatrix has also entered the witness box as DW-3. In fact, both these witnesses in unison have narrated the sequence in which the said Will was executed by the testatrix. It has come in the statement of DW-2 that he went to the deceased on the asking of DW-3 Purbo Dorjee and DW-3 has also stated on oath that the deceased had asked him to bring a Scribe for the purpose of scribing the Will. Further, both these witnesses in unison proved on record that thereafter DW-2 Sh. S.C. Pandit visited the deceased in the hospital, where deceased had given instructions to DW-2, who thereafter scribed the Will as per the said instructions. Both these witnesses have also proved on record that the contents of the said Will were read over by its Scribe, i.e., DW-2 Sh. S.C. Pandit to deceased in Hindi and thereafter part thereof which was not understood by the deceased in Hindi was interpreted to her by DW-3 in Tibetian language. Further, both these witnesses have also deposed that after the entire Will was read over in Hindi and part of it interpreted in Tibetian language to the deceased, she put her thumb impression on the same after understanding the contents thereof in presence of Scribe and marginal witnesses and it was thereafter that marginal witnesses appended their signatures on the said Will. It has come in the statements of DW-2 and DW-3 that at the time when the said Will was executed by the testatrix, she was in sound disposing state of mind. Further, a perusal of the cross-examinations of both these witnesses demonstrates that their credibility could not be impeached by the plaintiffs. It is settled law that initial onus of removing suspicious circumstances, if any, surrounding a Will is upon the propounder, but once this initial onus is discharged by the propounder, then the onus shifts upon the other party.

15. Hon'ble Supreme Court in **Pentakota Satyanarayana and others** Vs. **Pentakota Seetharatnam and others**, (2005) 8 Supreme Court Cases 67 has held that though the initial onus to prove the 'Will' is on the propounder of the 'Will' but thereafter it shifts to the party alleging undue influence or coercion in execution of the 'Will'.

16. Hon'ble Supreme Court in **Mahesh Kumar (dead) by LRs** Vs. **Vinod Kumar and others** (2012) 4 Supreme Court Cases 387, has recapitulated the said legal position and relevant paras of the said judgment are quoted herein below:-

> "28. In one of the earliest judgments in H. Venkatachala Iyengar v. B. N. Thimmajamma, the three Judge Bench noticed the provisions of Sections 45, 47, 67 and 68 of the Indian Evidence Act, 1872 and Sections 59 and 63 of the 1925 Act and observed: (AIR pp. 451-52, paras 18-21) "
>
> 18..... Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will? Did he understand the nature and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by Section 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the

usual test of the satisfaction of the prudent mind in such matters. 19. However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated. 20. There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature, in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, courts would be reluctant to treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter. 21. Apart from the suspicious circumstances to which we have just referred, in some cases the wills propounded disclose another infirmity. Propounders themselves take a prominent part in the execution of the wills which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstance attending the execution of the will and the propounder is required to remove the said suspicion by clear and satisfactory evidence. It is in connection with wills that present such suspicious circumstances that decisions of English courts often mention the test of the satisfaction of judicial conscience. It may be that the

reference to judicial conscience in this connection is a heritage from similar observations made by ecclesiastical courts in England when they exercised jurisdiction with reference to wills; but any objection to the use of the word "conscience" in this context would, in our opinion, be purely technical and academic, if not pedantic. The test merely emphasizes that, in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive." (emphasis supplied) 29. The ratio of H. Venkatachala Iyengar's case was relied upon or referred to in Rani Purnima Devi v. Kumar Khagendra Narayan Deb , Shashi Kumar Banerjee v. Subodh Kumar Banerjee, Surendra Pal v. Saraswati Arora, Seth Beni Chand v. Kamla Kunwar, Uma Devi Nambiar v. T.C. Sidhan, Sridevi v. Jayaraja Shetty, Niranjan Umeshchandra Joshi v. Mrudula Jyoti Rao and S. R. Srinivasa v. S. Padmavathamma .

30. In Jaswant Kaur v. Amrit Kaur the Court analysed the ratio in H. Venkatachala Iyengar case and culled out the following propositions: (Jaswant Kaur case, SCC pp. 373-74, para 10)

"1. Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.

2. Since Section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by Section 68 of the Evidence Act, one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.

3. Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.

4. Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

5. It is in connection with wills, the execution of which is surrounded by suspicious circumstances that the test of satisfaction of the judicial conscience has been evolved. That test emphasizes that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.

6. If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter."

17. In the present case, propounder of the Will successfully discharged the said onus on the strength of the testimonies of DW-2 and DW-3, however, thereafter the onus which was shifted upon the plaintiffs to prove that the Will in fact was shrouded with suspicious circumstances could not be proved by the plaintiffs, as has been concurrently held by both the learned Courts below. In my considered view, the findings returned to this effect by both the learned Courts below are duly borne out from the records of the case and it is apparent and evident from the evidence that Will Ex. DW2/A was duly executed by deceased Kalsong Tsomo out of her own free volition and at the time when the said Will was executed by her, she was in sound disposing state of mind. This substantial question of law is answered accordingly.

18. In view of the discussion held above, as there is no merit in the present appeal, the same is dismissed, so also miscellaneous applications, if any. No order as to costs.

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

Himachal Pradesh State Electricity Board & others ...Petitioners

Versus

M/s Hemkunth Iron Steel Pvt. Ltd. & anr. ...Respondents

CWP No. 4452 of 2010
Reserved on : 12.4.2017
Decided on : 27.4.2017

Constitution of India, 1950- Article 226- Complainant had applied for the power availability certificate, which was issued for 11 KV power from Barowtiwala Sub Station- the certificate was extended by the Board – the complainant stated that supply voltage was varied to 66 KV instead of 11 KV, as originally agreed- the complaint was allowed and it was held that as per tariff order issued by Himachal Pradesh State Electricity Regulatory Commission, 11 KV voltage would be applicable – a review petition was filed, which was dismissed as not maintainable – aggrieved from the order, present writ petition has been filed- held that right to file an appeal or review is not a common law right but a statutory right – the Forum had rightly held that in absence of any power of review, this power cannot be exercised – the connected load of respondent No.1 is between 101 KW to 2000 KW – the recommendation was for release of additional load of 1119 KW with 550 KVA demand of 11 KV-there was no perversity or illegality in the findings recorded by the Forum – writ petition dismissed.(Para-9 to 13)

For the petitioners Mr. Satyen Vaidya, Senior Advocate with Mr. Vivek Sharma, Advocate.

For the respondents : Mr. Suneet Goel, Advocate, for respondent No. 1.

The following judgment of the Court was delivered:

Per Justice Ajay Mohan Goel, Judge

By way of this writ petition, the petitioner-Board i.e. Himachal Pradesh State Electricity Board has challenged order dated 19.10.2009, Annexure P-1, vide which respondent No.2-forum, allowed the consumer complaint filed before it by present respondent No. 1, as well as order dated 8.12.2009, Annexure P-3, passed by respondent No. 2-Forum dismissing the review petition field before it by the petitioner-Board as not maintainable.

2. Brief facts necessary for the adjudication of the present petition are that respondent No.1 filed complaint No. 1424209009 before respondent No. 2-forum, mentioning therein that respondent No. 1 (hereinafter referred to as "the complainant unit") was sanctioned a connected load of 462 KW with 450 KVA as contract demand at 11 KV supply voltage by Himachal Pradesh State Electricity Board, vide letter dated 9.8.1983. As per the complainant unit, with a view to upgrade its existing unit from alloy steel casting to alloy steel casting and rolling mill, it made an additional investment of Rs. 179 lacs by increasing the installed capacity of the unit from 2000 Metric tonnes to 3400 Metric tonnes. With the expansion of the unit, the existing connected load was also required to be upgraded/increased to 1575 KW and accordingly it applied to the Himachal Pradesh Electricity Board (hereinafter referred to as "Board") for the issuance of Power Availability Certificate. The requisite charges including non-refundable security and infrastructure development charges were deposited by it with the Board and thereafter, on 28.11.2005, the Board issued Power Availability Certificate to the Unit. As per the complainant unit, it was agreed by the Board to supply contracted power at 11 KV from Barotiwala Sub Station, as per Himachal Pradesh Electricity Regulatory Commission Regulations. Extension charges demanded by the Chief Engineer (Commercial) of the Board were also deposited by the complainant-Unit on 16.5.2008 and Power Availability Certificate was extended by the Board on 11.6.2008. It was further the case of the complainant-Unit that the Superintending Engineer (Operation Circle) HPSEB, Solan forwarded its load extension case to the Chief Engineer (OP) vide letter dated 1.9.2008. The case was recommended by the Chief Engineer (Commercial) to Chief Engineer (Operation), vide letter dated 4.12.2008 and finally letter dated 6.1.2009 sanctioning the case of the complainant-unit was issued by the Chief Engineer (Commercial). Thereafter, the terms of original Power Availability Certificate dated 28.12.2005 were changed and the supply voltage was now to be at 66 KV instead of 11 KV, as originally agreed to and provided in communication dated 28.11.2005. As per the complainant unit, the load which was sanctioned vide communication dated 6.1.2009, was purportedly as per the instruction No. 10 of H.P. State Electricity Board (HPSEB) Sales Manual, which provided that Chief Engineer was the competent authority to sanction load from 501 to 2000 KW at 11-22 KV voltage. As per the complainant-unit, said instruction stood revised by HP Electricity Regulatory Commission with the latest tariff order being the Multi Year Tariff Order 2009-2011, which provided for supply to large industrial units using load between 100 KW to 2000 KW to be supplied at 11 KV, 15 KV or 22 KV supply voltage. On these basis, it was contended by the complainant-unit that the terms and conditions incorporated vide letter dated 6.1.2009 by the Board were contrary to the terms of tariff order, as framed by the Himachal Pradesh Electricity Regulatory Commission, besides being arbitrary and illegal. On these basis, complaint was filed by the complainant-Unit before respondent No. 2-Forum alleging therein that the petitioner-Board was thrusting 66 KV supply voltage upon the complainant, which was not at all the requirement of the complainant-Unit and that the said act of the respondent was totally illegal, coercive and arbitrary. It was the further case of the complainant-Unit that the same would not only entail the changing of entire equipment and installation by the complainant-Unit, but also would lead to higher payments in terms of monthly bills, Minimum Consumption Guarantee (MCG) and other charges.

3. The complaint, so filed by the complainant-Unit was resisted by the Board on the

grounds that the Board had acted as per the provisions of tariff order and the instructions relied by complainant-Unit were guidelines and were not fully applicable upon the petitioner-Board. It was further the case of the Board that its Member (Operation) was competent authority of the Board, which was legally entitled to issue any direction in favour of the Board and directions issued by the said competent authority were in fact binding upon its officers. On these basis, the Board justified its act. It was denied that they were thrusting 66 KV supply voltage upon the complainant-Unit and as per the Board, the complainant-Unit in fact had agreed for the same. On these basis, the petitioner-Board denied the allegations made in the complaint.

4. Respondent No. 2-forum, vide its order dated 19.10.2009 allowed the complaint, so filed by the complainant-Unit. While allowing the complaint, it was held by the learned forum that at the time of issuance of impugned order dated 6.1.2009, the tariff order issued by the Himachal Pradesh Electricity Regulatory Commission on 30.5.2008 was applicable, wherein the standard Supply Voltage for Large Industrial Power Supply (LIP) for connected load between 101 KW to 2000 KW was specified as 11 KV or 15 KV or 22 KV. Learned Forum further held that Himachal Pradesh Electricity Supply Code 2009 notified by the Himachal Pradesh Electricity Regulatory Commission on 26th May, 2009 contained following provisions under clause 2.1.6 (Standard Supply Voltage):-

2.1.6.1 Depending upon the connected load (KW) of a consumer, the supply to the consumer shall be given at the following standard voltage (volts/kv) and phase as may exist on the relevant distribution system:

Sr. No.	**Connected Load**	**Standard Supply Voltage (AC)**
1.	<=50 KW	Single Phase 230 Volts or three phase 400 Volts or 2.2. KV
2.	51 KW upto 2000 KW	Three phase 6.6 KV, 11 KV, 15 KV or 22 KV
3.	2001 KW up to 10000 KW	Three phase 33 kv or 66 kv
4	>10000 KW	>=132 KV (three phase)

5. It was further held by the learned Forum that Large Industrial Power Supply schedule of tariff was applicable to the complainant-Unit as its total connected load is 1575 KW and therefore, the load was required to be sanctioned at 11 KV supply voltage. On these basis, learned Forum set aside the order, which was assailed by the complainant-unit. Learned Forum further directed that the amended load sanction be issued within one month in consonance with tariff order, issued by Himachal Pradesh Electricity Regulatory Commission on 30.5.2008 and Himachal Pradesh Electricity Supply Code 2009, notified by the Himachal Pradesh Electricity Regulatory Commission on 26.5.2009.

6. Feeling aggrieved by the aforesaid order passed by respondent No. 2-Forum, a review petition was filed by the petitioner-Board. The review petition was dismissed by the Forum, vide order dated 8.12.2009, Annexure P-3, by holding that the review petition, in fact, was not maintainable.

7. Feeling aggrieved, the petitioner-Board has filed the present writ petition challenging both orders i.e. dated 19.10.2009 and 8.12.2009, vide which respondent No. 2-forum had allowed the complaint and had dismissed the review petition by the petitioner-Board.

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

9. It is settled law that the right to file an appeal or review is not a common law right, but is a statutory right. In the absence of there being any legal provision, whereby the

power of review stood conferred upon respondent No. 2-Forum for the purpose of reviewing its own order, passed on a consumer complaint filed before it, the review petition filed by the petitioner-board was rightly dismissed vide Annexure P-3, dated 8.12.2009 by respondent No. 2-Forum on the ground that review was not maintainable. In fact this preposition was not very seriously disputed by the petitioner-Board.

10. As far as impugned order dated 19.10.2009 is concerned, perusal of the same demonstrates that while allowing the consumer complaint filed by respondent No. 1, it was held by learned Forum below that the act of the Board of issuing load to the complainant-unit at 66 KV supply voltage was contrary to the tariff order issued in this regard by the Himachal Pradesh Electricity Regulatory Commission, dated 30.5.2008, which was applicable at the time when order dated 6.1.2009 was passed by the Board, wherein standard supply voltage for Large Industrial Power Supply for connected load between 101 KW to 2000 KW was specified as 11 KV or 15 KV or 22 KV. Learned Forum further held that large supply tariff was applicable to the complainant-Unit, as its total connected load was 1575 KW, therefore, load was required to be sanctioned at 11 KV supply voltage.

11. The schedule pertaining to Large Industrial Power Supply, as is available at page 75 of the paper book, demonstrates that available connected load of 101 KW to 2000 KW Standard Supply Voltage (AC50 Hz) has to be 11 KV or 15 KV or 22 KV. It was not disputed by learned counsel for the petitioner-Board that the connected load of the respondent No. 1 is between 101 KW to 2000 KW. Communication dated 4.12.2008, Annexure P-11 addressed by the Chief Engineer (Commercial), HPSEB, Vidyut Bhawan, Shimla to the Chief Engineer (Operation) South, HPSEB-171004 on the subject " Load extension case of M/s Hem Kunt Iron and Steel (P) Barotiwala Disrict Lolan" also demonstrates that the recommendations of Chief Engineer (Operation) in favour of respondent No. 1 was for release of additional load of 1119 KW with 550 KVA Contract Demand of 11 KV. Similarly, Annexure P-6, is communication dated 16.5.2008 addressed by Chief Engineer (Commercial) to respondent No.1 on the subject, "Power Availability Certificate-Extension of Validity thereof". Vide this communication, respondent No.1 was called upon to deposit the amount mentioned therein for extension of validity charges of Power Availability Certificate for additional 1119 KW load at 11 KV supply voltage for expansion of existing unit. Annexure P-10, which again is a communication dated 1.9.2008, addressed by Superintending Engineer (Operation Circle), HPSEB, Solan to Chief Engineer (Operation) South, HPSEB, Shimla on the subject, " Load Sanction case/Extension case", also demonstrates that the load was to be supplied at 11 KV.

12 Therefore, it is evident and apparent from all these communications that when the case of respondent No. 1 was processed by petitioner-Board for grant of additional load, the same was processed on the premise that additional power supply be sanctioned at 11 KV supply voltage. Respondent No.2- Forum, which otherwise is a forum consisting of expert members, while allowing the complaint filed by the complainant-Unit, (as has also been taken note by me above) held that Large Industrial Power Supply schedule of tariff was applicable to the unit, as its total connected load was 1575 KW and the same was required to be sanctioned at 11KV supply voltage, especially in view of the fact that at the time of issuance of impugned order dated 6.1.2009, tariff order dated 30.5.2008, issued by Himachal Pradesh Electricity Regulatory Commission was applicable, wherein the Standard Voltage in Large Industrial Supply for connected load between 101 KW to 2000 KW stood specified as 11 KV or 15 KV or 22 KV.

13 During the course of arguments, learned counsel for the petitioners could not satisfy this Court as to what was the perversity or illegality with the findings so returned by learned Forum below. Nothing to the contrary was pointed out by learned counsel for the petitioner, from which it could be inferred that the findings, so returned by respondent No. 2-Forum, while allowing the complaint filed by respondent No. 1, were perverse findings or that the tariff order dated 30.5.2008, issued by the Himachal Pradesh Electricity Regulatory Commission, on the basis of which, the complaint was allowed by respondent No. 2-Forum.

14. Thus, as there is no merit in the present petition, the same is therefore,

dismissed, so also pending application(s), if any. No order as to costs.

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

Kartar Singh .... Appellant.

Versus

Satpal Singh & others .... Respondents.

RSA No. 93 of 2008
Date of Decision: 28.04.2017

Specific Relief Act, 1963- Section 34 and 38- Plaintiff filed a civil suit for declaration that suit land is jointly owned by plaintiff and defendant with exclusive possession of the plaintiff – entry showing suit land under mortgage with the defendant in the column of ownership is wrong, illegal, null and void – the suit was decreed by the Trial Court- an appeal was preferred, which was allowed and the case was remanded to the Trial Court – an appeal was preferred before High Court, which was allowed - the judgment passed by Appellate Court was set aside and the case was remanded to the Appellate Court for a fresh decision- the appeal was dismissed by the Appellate Court- held in second appeal that defendant categorically admitted that plaintiff is owner to the extent of half share – this admission was not explained before the Appellate Court and is presumed to be correct- the Courts had correctly appreciated the facts- appeal dismissed.(Para-17 to 25)

Cases referred:

Payal Vision Limited versus Radhika Choudhary, (2012)11 Supreme Court Cases 405
Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264
Payal Vision Limited versus Radhika Choudhary, 2012(11) S.C.C 405

For the Appellant : Ms. Megha Gautam, Advocate.
For the Respondent : Mr. Anup Rattan, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral)

Instant Regular Second Appeal filed under Section 100 of the Code of Civil Procedure, is directed against the judgment and decree dated 27.12.2007, passed by learned Additional District Judge, Una, District Una, H.P., in Civil Appeal No. 52 of 2002, affirming the judgment and decree dated 21.3.2002, passed by learned Sub Judge, 1st Class, Court No. II, Amb, District Una, H.P., in civil Suit No.34/1996, whereby suit filed by the plaintiff for declaration with permanent injunction came to be decreed.

2. Briefly stated facts, as emerged from the record are that the plaintiff namely Raghunath Singh filed a suit for declaration with permanent injunction, praying therein for decree of declaration to the effect that land measuring 0-17-73 hects, comprised of khewat No.108, khatauni No.232, khasra No.2127, situated in village Bebehar, Tehsil Amb, District Una, H.P.(***hereinafter referred to as the suit land)*** is jointly owned by the plaintiff and defendant with exclusive possession of the plaintiff and entry showing suit land under mortgage with defendant in the column of ownership is wrong, illegal, null and void. Plaintiff in the plaint also sought relief of permanent injunction restraining the defendant from interfering in any manner in the exclusive possession of plaintiff till partition of suit land. Plaintiff averred in the plaint that land measuring 4-15 kanals, comprised in khasra No.1196 as entered in the jamabandi for the

year, 1960-61 was owned and possessed by Sh. Haria etc., but in possession of Sh. Baldev Singh, who sold the same to the predecessors of plaintiff and defendant alongwith other land.

3. As per plaintiff, consolidation took place in the village and while preparing Missal Haquiat Ishetemal, aforesaid khasra No.1196 was converted into khasra No.1200 and land was shown under mortgage showing father of the plaintiff Sudama as mortgagor and Saun father of the defendant as mortgagee. Plaintiff further claimed that suit land was never mortgaged by the father of the plaintiff with the father of defendant and entry to the contrary is wrong and illegal and at the back of the plaintiff and his father and as such, required to be rectified in accordance with law. Plaintiff further claimed that during the settlement, area was converted into meters and new khasra number was carved out and suit land was found in possession of plaintiff and as such, his name was reflected in the column of possession. On the basis of wrong entries made in the revenue record in favour of the defendant, defendant started threatenening to interfere with the peaceful possession of the plaintiff. In view of the aforesaid background, plaintiff filed suit against the defendant.

4. Defendants by way of written statement resisted/ refuted the claim of the plaintiff by taking objections with regard to maintainability, estoppel, limitation and valuation etc. Defendants claimed that before consolidation father of the plaintiff was in need of some money and as such, he mortgaged his share in the suit land for an amount of Rs. 50/- and accordingly same was entered in the revenue paper in the presence of father of plaintiff. Defendant further claimed that since then father of defendant and thereafter he is coming in possession of the suit land. Apart from above, defendant also claimed that he has become owner qua the share of the plaintiff with the afflux of time. Defendant further claimed that in case he fails to prove his possession as mortgagee then otherwise, he is in exclusive Hissadari possession of the suit land and as such, he prayed for dismissal of the suit having been filed by the plaintiff.

5. By way of replication, plaintiff while denying the allegations/averments made in the written statement, reaffirmed and reasserted the stand taken in the plaint.

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

1. ***Whether the suit land is jointly owned by the plaintiff and defendant and the same is in exclusive possession of plaintiff as alleged? OPP.***
2. ***Whether the entry of mortgaged in respect of suit land with defendant is wrong, illegal, null and void as alleged? OPP.***
3. ***Whether the plaintiff is entitled to the relief of permanent injunction as alleged? OPP.***
4. ***Whether the suit is not maintainable? OPD.***
5. ***Whether the plaintiff is estopped by his act and conduct to file this suit ?OPD.***
6. ***Whether the suit is not properly valued? OPD.***
7. ***Relief:-***

7. Subsequently, learned trial Court on the basis of the material adduced on record by the respective parties, decreed the suit of the plaintiff vide judgment and decree dated 21.3.2002, whereby suit land was held to be jointly owned by the plaintiff and defendant with exclusive possession of the plaintiff. The learned trial Court also declared the entry of mortgage made in favour of the defendant in the revenue record as wrong, null and void.

8. Being, aggrieved and dissatisfied with the judgment and decree dated 21.3.2002, passed by the learned Sub Judge, 1st Class Court No.2, Amb, District Una, H.P., appellant/defendant preferred an appeal under Section 96 CPC in the Court of learned Additional District Judge, Una, which came to be registered as Civil Appeal No.52 of 2002. However, fact

remains that during the pendency of the appeal appellant/defendant moved an application under Order 6 Rule 17 read with Section 151 C.P.C for the amendment of pleadings in the grounds of appeal. Learned first appellate Court vide order dated 18th October, 2005 dismissed the said application. Thereafter, learned first appellate Court on 3.11.2005, accepted the appeal and remanded back the case to the learned trial Court after framing of following additional issues:-

6A. Whether the suit land has been orally mortgaged by the predecessor-in-interest of the plaintiff in favour of the predecessor-in-interest of the defendant and the entries in the revenue record showing the predecessor-in-interest of the plaintiff as mortgagor and the predecessor-in-interest of the defendant as mortgagee are correct and legal and binding upon the parties? OPP.

6B. If issue No.6A is proved whether the defendants have become owners of the suit land by afflux of time as alleged? OPD.

6C. Whether the suit of the plaintiff is within limitation ?OPP.

9. Plaintiff, being aggrieved and dissatisfied with the judgment and decree, dated 3.11.2005, passed by the learned first appellate Court, preferred an appeal bearing FAO No.505 of 2005 before this Court. This Court vide judgment dated 25th May, 2006, set-aside the judgment dated 3.11.2005, passed by the learned lower appellate court and remanded back the matter to it for deciding the same in accordance with law.

10. It may be noticed that this Court while allowing the aforesaid appeal (FAO No.505 of 2005) preferred by the plaintiff, set-aside the impugned judgment of learned lower appellate Court and remanded back the matter to it for deciding the same in accordance with law. It may also be noticed that after aforesaid remand order passed by this Court in FAO No.505/2005, appellant/ defendant moved an application under Order 41 Rule 27 read with Section 151 CPC for leading additional evidence, which was allowed without there being any objection from the plaintiff. Thereafter, learned Additional District Judge, vide judgment and decree dated 27.12.2007, dismissed the appeal having been preferred by the appellant/ defendant, as a result of which, judgment and decree dated 21.3.200, passed by the learned trial court came to be upheld. In the aforesaid background, appellant/defendant approached this court by way of instant proceedings, praying therein for quashing and setting aside the impugned judgment and decree passed by the learned courts below.

11. This Court vide order dated 16.7.2008, admitted the instant Regular Second Appeal, on the following substantial questions of law:-

1. Whether the Civil suit is maintainable against the allotment of the land during the consolidation proceedings?.

2. Whether the civil suit after 30 years of the preparation of the Missal Hakiat Consolidation is maintainable?.

3. Whether the statement/alleged admission got erroneously by the appellant against the law is binding on the appellant or not?

4. Whether the Civil Suit filed by the respondent should have been decreed in view of the allegations made by the respondent admitting the correctness of the consolidation proceedings and allotment of land?

12. Ms. Megha Gautam, learned counsel representing the appellant, vehemently argued that the impugned judgments passed by the Courts below are not based upon the correct appreciation of the evidence adduced on record by the respective parties and as such, same deserve to be quashed and set-aside. While referring to the impugned judgments passed by the learned courts below, Ms. Gautam, strenuously argued that bare perusal of the same suggest that learned courts below have miserably failed to appreciate the evidence in its right perspective, as a result of which, erroneous findings has come on record to the detriment of the appellant/defendant, who successfully proved on record by leading cogent and convincing

evidence that father of plaintiff had mortgaged his share in favour of the defendant and as such, there was no occasion, whatsoever, for the learned trial court to decree the suit filed by the plaintiff. Ms. Gautam, further contended that both the courts below wrongly placed reliance on the so called admission, if any, made by the defendant during the proceedings of the trial, especially in view of the overwhelming evidence adduced on record by the defendant during the pendency of the appeal. She specifically invited the attention of this Court to the jamabandi for the year 1960-61 Ex.A-1, copy of Khatauni Istemal Ex.A-2, copy Naksha Hakdarbar Ex.A-3, copy of Register Ghathbar Ex.A-4 and copy of Register Karbahi Istemal Ex.A-5.

13. Ms. Gautam, while concluding her arguments stated that though there is statement on behalf of the defendant that he is entitled to ½ share in the suit land but aforesaid documentary evidence adduced on record clearly proves on record that defendant became owner of remaining ½ share of suit land on account of mortgage made by plaintiff qua his share in the suit land. In the aforesaid background, she prayed that her appeal may be allowed after setting aside the impugned judgments and decree passed by the learned courts below.

14. Mr. Anup Rattan, learned counsel representing the respondents/defendants, supported the impugned judgments and decrees passed by both the Courts below. While inviting the attention of this Court to the impugned judgments, Mr. Rattan, strenuously argued that there is no illegality and infirmity in the impugned judgments passed by the learned Courts below and as such, same deserves to be upheld. While refuting the aforesaid contentions having been made by the learned counsel for the appellant/ defendant, Mr. Rattan, contended that bare perusal of the statement having been made by the appellant/defendant before the learned trial Court, wherein he stated that he has ½ share in the suit land and he has no objection if the suit of the plaintiff is decreed, suggest that learned court below rightly decreed the suit having been filed by the plaintiff. He also invited the attention of this Court to the judgment passed by this Court in FAO No.505 of 2005 filed by the plaintiff against the judgment/remand order dated 3.11.2005, passed by the learned District Judge, Una, to demonstrate that it was specifically held by this court that once defendant had categorically admitted plaintiff to be owner of ½ share in the land and he had no objection if the suit is decreed qua this half share, there was no occasion for lower appellate court to remand the case back to trial court after framing additional issues.

15. Mr. Rattan, learned counsel representing the respondent further contended that once there is specific finding qua the admission having been made by the appellant/defendant in the judgment passed by this Court in FAO No.505 of 2005, there is no occasion, whatsoever, for the learned counsel for the appellant/ defendant to raise this issue once again in the present proceedings. Otherwise also, it is well stated that when admission is made, same cannot be allowed to be withdrawn unless and until same is shown to be erroneous. In this regard, he placed reliance upon the judgment passed by the Hon'ble Apex Court in ***Payal Vision Limited versus Radhika Choudhary,*** (2012)11 Supreme Court Cases 405. Mr. Rattan, further contended that bare reading of the statement made by the defendant clearly suggests that there is clear cut admission on the part of the defendant and by no stretch of imagination, it could be termed to be made by mistake as claimed by the learned counsel for the appellant/defendant. While concluding his arguments Mr.Anup Rattan, further contended that no plea, whatsoever, was taken by the appellant/defendant with regard to delay, if any, in maintaining the suit filed by the plaintiff and as such same cannot be allowed to be raised at this stage. Mr. Rattan, further contended that issues, which were framed by the learned first appellate court while remanding the case back had no relevance once remand order passed by the learned trial Court was set-aside by this Court and as such, no plea at this stage with regard limitation can be raised by the appellant/defendant. Mr. Rattan, while praying for dismissal of the appeal, contended that there is no scope of interference of this Court, especially in view of the concurrent findings of facts and law recorded by the courts below. In this regard, to substantiate his aforesaid plea, she placed reliance upon the judgment passed by the Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,*** **(2015)4 SCC 264.**

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

17. After having carefully perused the evidence adduced on record by the respective parties as well as submissions having been made by the learned counsel representing the parties, especially judgment dated 25th May, 2006 passed by this Court in FAO No.505 of 2005, this Court sees no requirement for exploring answers, if any, to the substantial questions of law at this stage. Otherwise also, the evidence led on record by the respective parties, nowhere suggest that there was issue, if any, with regard to maintainability of suit on account of limitation as well as allotment of land during the consolidation proceedings.

18. True, it is that learned first appellate Court while remanding the case back to the learned trial Court vide its judgment dated 3.11.2005 had framed additional issues, wherein issue with regard to limitation was also framed but this Court is in agreement with the arguments having been made by the learned counsel for the respondents that aforesaid judgment was set-aside by this Court in FAO No.505 of 2005 and as such, learned first appellate court was left with no option but to have examined the matter in the light of the issues already framed by the learned trial court during the trial of the case. This court also finds from the record that no specific issue, if any, was framed with regard to the limitation, otherwise also, written statement filed by the defendant suggest that plea of limitation was not taken seriously, rather very vague statement was made that suit is time barred. Similarly, this Court was unable to find anything in the pleadings suggestive of the fact that there was serious challenge to the suit having been filed by the plaintiff on account of maintainability as well as limitation.

19. Leaving everything aside, this Court after having carefully examined the statement of defendant sees no reason to go further in the matter, wherein he has categorically admitted that plaintiff is owner in possession of the ½ share of the suit land and he is only interested in his share, which comes to half. Hence, this Court sees no illegally and infirmity in the findings returned by the learned trial Court, which was further upheld by the learned first appellate Court. Moreover, findings with regard to admission made by the defendant, returned by the learned trial court came to be upheld by this Court in FAO No.505 of 2005, wherein this Court categorically concluded that "***however while appearing in the witness box, the said defendant had clearly admitted that the plaintiff had half share in the land and he had no objection if the suit is decreed qua this half share and he only claimed to be the owner of half share. This aspect of the matter has not at all considered by the lower appellate court."*** This Court while taking note of aforesaid discrepancy further proceeded to hold that the learned trial Court had decreed the suit basically on the admission of the defendant, which fact has not been at all recorded by the learned lower appellate Court, whether this admission could have been withdrawn or could have been permitted to be withdrawn which the lower appellate court should decide. But most importantly, this court in the FAO No.505 of 2005 held that till the admission stands, the judgment of the learned trial Court cannot be said to be incorrect.

20. It is pertinent to take note at this stage that this Court while setting aside the remand order passed by the learned first appellate court held that defendant would be at liberty to argue that the admission was wrongly made by him but it is for the learned lower appellate court to decide whether the defendant can be permitted to get out of his admission or to withdraw the same. Accordingly, learned first appellate court on the basis of the material adduced on record concluded that defendant cannot be allowed to withdraw his admission because admittedly there is nothing on record suggestive of the fact that he made this statement inadvertently, rather appellant/defendant by way of placing evidence on record in the shape of documentary evidence made an attempt to prove that this land was mortgaged by the father of the plaintiff in favour of the defendant and no explanation, worth the name, is/was rendered before the learned first appellate Court to explain the circumstances under which he had made an admission before the learned court and as such, this court sees no illegality and infirmity in the judgments passed by the learned courts below.

21. There cannot be any quarrel with the proposition of law that admission, if any, made cannot be conclusive proof of facts admitted and may be explained or shown to be wrong but in that eventuality burden of proof shifts on the person making the admission. It is well settled principle that when a party himself make admission, it is presumed to be correct until presumption is rebutted and admission is best piece of evidence that an opposite can party rely upon. In the instant case, perusal of impugned judgment passed by the learned trial court, nowhere suggest that the defendant was able to discharge aforesaid onus by establishing on record that he had made admission erroneously.

22. At the cost of repetition, this Court once reiterates that it sees no occasion to explore answer, if any, to the substantial questions of law framed at the time of the admission in view of specific finding recorded by this Court in FAO No.505 of 2005.

23. The Hon'ble Apex Court ***in Payal Vision Limited versus Radhika Choudhary***, 2012(11) S.C.C 405, wherein it has been held as under:-

> "7 In a suit for recovery of possession from a tenant whose tenancy is not protected under the provisions of the Rent Control Act, all that is required to be established by the plaintiff landlord is the existence of the jural relationship of landlord and tenant between the parties and the termination of the tenancy either by lapse of time or by notice served by the landlord under Section 106 of the Transfer of Property Act. So, long as these two aspects are not in dispute the Court can pass a decree in terms of Order 12 Rule 6 CPC, with reads as under:-
>
> > "6. Judgment on admission-(1) Where admissions of fact have been made either in the pleadings 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 (1) a decree shall be drawn up in accordance with the judgment and decree shall bear the date on which the judgment was pronounced."
>
> 8. The above sufficiently empowers the court trying the suit to deliver judgment based on admissions whenever such admissions are sufficient for the grant of the relief prayed for. Whether or not there was an unequivocal and clear admission on either of the two aspects to which we have referred above and which are relevant to a suit for possession against a tenant is, therefore, the only question that falls for determination in this case and in every other case where the plaintiff seeks to invoke the powers of the court under Order 12 Rule 6 CPC and prays for passing of the decree on the basis of admission. Having said that we must add that whether or not there is a clear admission upon the two aspects noted above is a matter to be seen in the fact situation prevailing in each case. Admission made on the basis of pleadings in a given case cannot obviously be taken as an admission in a different fact situation. The precisely is the view taken by this Court in **Jeevan Diesels & Electricals Ltd (2010) 6SCC 601,** relied upon by the High Court where this Court has observed (SCCp.604, para 10)
>
> > 10....Whether or not there is a clear, unambiguous admission by one party of the case of the other party is essentially a question of fact and the decision of this question depends on the facts of the case. The question, namely, whether there is a clear admission or not cannot be decided on the basis of judicial precedent. Therefore, even through the principles in **Karam Kapahi vs. Lal Chand Public Charitable Trust (2010) 4 SCC 753** may be unexceptionable they cannot be applied in the instant case in view of totally different fact situation**."**

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

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

25. Consequently, in view of the detailed discussion made hereinabove, present appeal fails and same is dismissed.

Interim directions, if any, are vacated. All miscellaneous applications are disposed of.

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

The State of Himachal Pradesh and another .....Petitioners
Versus
Presiding Judge and another .....Respondents

CWP No. 10867 of 2011
Decided on : April 28, 2017

Industrial Disputes Act, 1947- Section 25- The workmen were engaged on daily wage basis in the petitioner's department- their services were disengaged on various dates without any notice or compensation, whereas, their juniors were retained – they filed a petition before the Labour Court, which was allowed qua workmen No.1, 7 and 9 – Tribunal ordered their reinstatement with seniority and continuity in service – aggrieved from the order, present writ petition has been filed- held that workmen No.1, 7 and 9 successfully proved that they had completed 240 days preceding their termination and the Tribunal had rightly held the termination to be illegal- the delay cannot be a ground to deny the claim – the Tribunal had denied the back wages keeping in view the delay –Writ Court cannot re-appreciate the facts- writ petition dismissed.(Para-10 to 19)

Cases referred:

Ishwar Bhai C. Patel vs. Harihar Bohara & another, 1999(2) Current Civil Cases, 171 (SC)
Mukand Ltd. v. Mukand Staff & Officers' Assn.. (2004) 10 SCC 460
M/s Ritu Marbals Vs. Prabhakant Shukla, 2010)1) SLJ SC 70

Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd. 2014 AIR SCW 3157.

For the petitioners : Mr. Ramesh Thakur, Deputy Advocate General.
For the respondents : Mr. Anil Kumar God, Advocate, for respondent No.1.
Mr. O.P. Sharma, Advocate, for respondents No. 2, 7, 8 and 9.
None for the remaining respondents.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

This petition under Articles 226/227 of the Constitution of India, is directed against Award dated 8.9.2010 passed by the Presiding Judge, Industrial Tribunal-cum-Labour Court, Shimla in Ref. No. 97 of 2007, whereby the learned Tribunal below allowed the reference made to it by the appropriate Government and held respondents No. 1, 7 and 9 entitled to reinstatement in service with seniority and continuity in service without backwages

2. Briefly stated facts, as emerge from the record are that the respondents-workmen (hereafter, 'workman') were engaged on daily wage basis in the petitioners' Department (hereinafter, 'employer') on different dates. Workmen further claimed that they had completed 240 days in each calendar year but their services were disengaged on various dates, in violation of the provisions of the Industrial Disputes Act (hereinafter, 'Act'), without any notice or compensation. It is further case of the workmen that their juniors were retained in service and their services were disengaged, again in violation of the provisions of the Act. Accordingly they raised industrial dispute, and on failure to reach any amicable settlement, matter was referred under Section 10 of the Act to the Tribunal below by the appropriate Government, for adjudication of following term of reference:

> "क्या श्री रमेष चन्द तथा आठ अन्य श्रमिक (संलग्न सूची अनुसार) दैनिक वैतनिक बेलदारों को न्योजक अधिषासी अभियन्ता, सिंचाई एवं जन स्वास्थ्य मण्डल, नाहन, जिला सिरमौर द्वारा नौकरी से निकाला जाना उचित एवं न्यायसंगत है? यदि नहीं तो उक्त श्रमिक किन सेवा लाभों व क्षतिपूर्ति का पात्र है?"

3. Workmen, by way of filing statement of claim before the Tribunal below stated that they were engaged on daily wages in the Irrigation and Public Health Division, Nahan and they completed 240 days in a calendar year. Yet their services were illegally terminated by the employer on various dates, in contravention of Section 25-F of the Act. Applicants further stated that they were neither given notice nor compensation and their juniors were retained in service. It is further alleged in the claim petition by the workmen that many persons were engaged after their retrenchment, which is in contravention of Section 25-H of the Act. It is further case of the workmen that at the time of engaging new hands, preferential right was of the workmen. Workmen further claimed that they were not gainfully employed during the period of their retrenchment.

4. Employer, while filing reply to the claim petition, took preliminary objections that the workmen abandoned job on 9/19886, 4/1987, 12/1987, 2/1988, 5/1988, 8/1988, 11/1988, 12/1995 and 4/1993, respectively and did not raise industrial dispute before the appropriate forum within limitation and it was only after 14-21 years as such matter was clearly covered by award dated 25.2.2006 passed by the learned Tribunal below in Reference No. 215/02 titled Yashwant Singh vs. Executive Engineer, I&PH Division Sundernagar. Employer further claimed that the petition of the workmen was not maintainable in view of the judgment of this Court in case titled Nagar Parishad Bilaspur vs. Bone Ram and another, reported in 2005 (1) SLC-29, wherein it has been laid down that where a workman remained absent from work for more than two years without leave or any communication to employer and there is no representation or protest against termination or retrenchment, conduct of workman speaks that he abandoned his job and as such his services stood automatically terminated. Employer further claimed that since the workmen had abandoned their jobs on various dates, as given in the reply itself, the petition

was liable to be dismissed. On merits, the employer stated that the workmen worked as per their sweet will intermittently and left job on their own. Employer also appended muster rolls of the workmen in support of their claim. Employer further claimed that since the workmen abandoned their jobs at their own, there was no need to put them to notice or to pay compensation. Employer further claimed that the workmen never turned up after abandonment of their jobs and as such their petition was liable to be dismissed.

5. Learned Tribunal below, on the basis of pleadings, framed following issues:

"1. Whether the termination of the petitioners by the Executive Engineer I&PH Nahan, is improper and unjustified without complying the provisions of ID Act, 1947 as alleged? OPP

2. If issue no. 1 is proved in afirmative , to what relief, the petitioners are entitled to and since when? . OPP

3. Whether the claim petition is not maintainable as alleged? OPR

4. Relief."

6. However, subsequently, vide award dated 8.9.2010, learned Tribunal below accepted the claim petition of the workmen and answered the reference in the affirmative qua respondents No. 1, 7 and 9 only and dismissed the petition qua other workmen. Vide aforesaid award, learned Tribunal below ordered reinstatement of respondents No. 1, 7 and 9 in service forthwith, with seniority and continuity in service, however, workmen were not held entitled for back-wages. In the aforesaid background employer approached this Court, by way of instant petition.

7. Mr. Ramesh Thakur, learned Deputy Advocate General, vehemently argued that the award passed by the learned Tribunal below is illegal, perverse and against the facts of the case and same was based upon misreading and misconstruction of evidence on record. Mr. Thakur, further stated that the workmen have miserably failed to prove their case and learned Tribunal below did not appreciate this aspect of the matter and further the reply filed by the employer was also not considered by the learned Tribunal below, hence, the award is liable to be set aside. It is further argued by Mr. Thakur that in view of the law laid down by the Hon'ble Apex Court as well as this Court that in case, where there is considerable delay in raising dispute, without explaining such delay, no dispute exists and in this case workmen have raised dispute after 19-20 years hence, the claim petition is liable to be dismissed. It is further contended by Mr. Thakur that since the workmen had abandoned their jobs on their own, as such there was no violation of any of the provisions of the Act and workmen have no case at all. It is also argued by Mr. Thakur that no seniority or continuity in service could have been allowed in favour of the workmen, since they have abandoned their jobs at their own. In the aforesaid background, Mr. Thakur, prayed for setting aside the award of the learned Tribunal below.

8. Mr. O.P. Sharma and Mr. Anil Kumar God, Advocates, have supported the award passed by the learned Tribunal below. Mr. O.P. Sharma, vehemently argued that that the impugned award was based upon correct appreciation of evidence adduced on record by the respective parties as such liable to be upheld. While advancing his arguments, Mr. Sharma stated that the employer has admitted the fact that juniors of the workmen have been retained in service. Mr. Sharma, further contended that the appropriate Government, after considering all the aspects, had made reference to the learned Tribunal below, which in turn, after appreciating all the facts, allowed the same. In this background, Mr. Sharma prayed that the writ petition be dismissed and award passed by learned Tribunal below be upheld.

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

10. In the instant case, since all the workmen, save and except workmen No. 1, 7 and 9, failed to appear in the witness box, in support, of their respective claims, learned Tribunal

below, while placing reliance upon judgment passed by Hon'ble Apex Court in 1999(2) Current Civil Cases, 171 (SC), Ishwar Bhai C. Patel vs. Harihar Bohara & another, dismissed their claim.

11. Perusal of impugned award passed by learned Tribunal below clearly suggests that workmen No. 1, 7 and 9, successfully proved on record that they had completed 240 days preceding their alleged termination and learned Tribunal below rightly held their termination to be illegal, unjustified and in contravention of provisions of Section 25-F and 25-G of the Act.

12. True it is, that record nowhere reveals that aforesaid workmen led on record documentary evidence in support of their claims that they had completed 240 days prior to their alleged termination, but, interestingly, employer, while refuting claim of the aforesaid workmen, placed man days charts, Exts. RE-I, RE-VI and RE-IX, perusal whereof clearly suggests that all the aforesaid workmen had completed 240 days, in the preceding twelve months, prior to their alleged termination, as such, learned Tribunal below rightly held their termination in contravention of the provisions of the Act. Hence, this Court sees no force in the arguments of Mr. Thakur, that there was no evidence before the learned Tribunal below, which could enable it to uphold the claim of the aforesaid workmen.

13. As far as another contention raised by Mr. Thakur is concerned, that since there was considerable delay in raising demand by the workmen, learned Tribunal below ought to have dismissed their claim, on the ground of delay and laches, has no substance. Though, it clearly emerges from the pleadings as well as impugned award that aforesaid workmen had raised dispute after a considerable time, but that can not be a ground for learned Tribunal below to reject the claim, specifically in view of the fact that it was bound to answer the specific term of reference, made to it by the appropriate Government, under Section 10(2) of the Act. Objections, if any, with regard to raising demand after considerable delay, could be taken by the employer before framing of term of reference. Term of reference framed in the instant case for adjudication nowhere suggests that the learned Tribunal below was required to decide with regard to delay in raising demand. Rather, learned Tribunal below was called upon to answer reference that whether removal of the workmen by the employer was legal and justified.

14. In **Mukand Ltd.** v. **Mukand Staff & Officers' Assn.**. reported in (2004) 10 SCC 460, the Hon'ble Apex Court has held as under:

> "22. We shall now analyse the submissions made by the learned senior counsel appearing on either side with reference to the pleadings, documents, records and also with reference to the judgments cited. The Reference is limited to the dispute between the Appellant-Company and the `workmen' employed by it.
>
> 23. We have already referred to the order of Reference dated 17.2.1993 in paragraph supra. The dispute referred to by the order of Reference is only in respect of workmen employed by the appellant-Company. It is, therefore, clear that the Tribunal, being a creature of the Reference, cannot adjudicate matters not within the purview of the dispute actually referred to it by the order of Reference. In the facts and circumstance of the present case, the Tribunal could not have adjudicated the issues of the salaries of the employees who are not workmen under the Act nor could it have covered such employees by its award. Even assuming, without admitting, that the Reference covered the non-workmen, the Tribunal, acting within its jurisdiction under the Act, could not have adjudicated the dispute insofar as it related to the `non- workmen'.
>
> 95. The Industrial Tribunal did not have jurisdiction to adjudicate the present dispute inasmuch as it pertains to the conditions of service of non-workmen. The learned single Judge and the Division Bench of the High Court failed to appreciate that parties cannot by their conduct create or confer jurisdiction on an adjudicating authority when no such jurisdiction exists. We have already noticed that the Division Bench has erred in holding that there is

community of interest between the workmen and the non-workmen and holding further that the workmen could raise a dispute regarding the service conditions of non-workmen."

15. Otherwise also, learned Tribunal below, taking note of the fact that dispute was raised after considerable time, has denied back wages to the aforesaid workmen, while placing reliance upon judgment passed in 2010)1) SLJ SC 70, **M/s Ritu Marbals Vs. Prabhakant Shukla**.

16. Hence, this Court after carefully perusing impugned award, which is based upon correct appreciation of evidence adduced on record by the respective parties, has no hesitation to conclude that there is no illegality or infirmity in the same.

17. This Court, is in agreement with the arguments having been made by the learned counsel representing the workmen that this Court has very limited jurisdiction to re-appreciate findings of fact returned by the learned Tribunal below, while exercising writ jurisdiction under Article 226 of the Constitution of India and it has a limited scope of appreciating findings of fact. In this regard, reliance is placed upon judgment passed in case ***Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd. 2014 AIR SCW 3157.***

18. As far as judgment passed by the Hon'ble Apex Court in case ***Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd.*** is concerned, there can not be any quarrel with the settled proposition of law that the Courts while examining correctness and genuineness of the Award passed by Tribunal has very limited powers to appreciate the evidence adduced before the Tribunal below, especially the findings of fact recorded by the Tribunal below and same can not be questioned in writ proceedings and writ court can not act as an appellate Court. Careful perusal of aforesaid judgment having been relied upon by the learned counsel representing the workmen, clearly suggests that error of law, which is apparent on the face of record, can be corrected by writ Court but not an error of fact, however, grave it may appear to be. Hon'ble Apex Court has further held in the aforesaid judgment that if finding of fact is based upon no evidence that would be recorded as error of law, which can be corrected by a writ of certiorari. Hon'ble Apex Court has further held that in regard to findings of fact recorded by Tribunal, writ of certiorari can be issued, if it is shown that in recording said findings, tribunal erroneously refused to admit admissible evidence or erroneously admitted inadmissible evidence, which influenced impugned findings. It would be profitable to reproduce following paras of the judgment:

"16. .....The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior Courts or tribunals: these are cases where orders are passed by inferior Courts or Tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is no entitled to act as an Appellate Court. This limitation necessarily means that findings of fact reached by the inferior court or Tribunal as result of the appreciation of evidence cannot be reopened for questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or

had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the interference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ Court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised.

19. In the instant case, learned counsel representing the employer was unable to point out any error of law committed by the Tribunal while allowing claim of the workmen. Similarly, learned counsel representing the employer was unable to point out any illegality committed by the learned Tribunal below, while recording findings of fact, as such, this Court sees no perversity or illegality in the award passed by the learned Tribunal below.

20. Accordingly, the writ petition is dismissed. Impugned award passed by the learned Tribunal below is upheld. Pending applications are disposed of.

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

Baldev Singh & others .....Petitioners

Versus

State of H.P. .....Respondent

Criminal Revision No. : 190 of 2008
Judgment reserved on : 05.09.2016
Date of decision : 29.04.2017

Indian Forest Act, 1927- Section 42- Accused were found transporting the timber without any permit – they were tried and convicted by the Trial Court- an appeal was preferred, which was dismissed- held in revision that merely because independent witnesses have turned hostile is no ground to acquit the accused – non-examination of a single person will not make the prosecution case suspect –the minor contradictions are also not sufficient to create doubt in the prosecution version- admittedly, the trees were cut from the land of accused B- there was long gap between the date of incident and date of deposition due to which the contradictions are bound to come – transportation of timber was duly proved – the accused failed to produce any permit – they were rightly convicted by the Trial Court- Revision dismissed. (Para-7 to 41)

Cases referred:

Raja and others Vs. State of Karnataka (2016) 10 SCC 506
Yakub Abdul Razak Memon Vs. State of Maharashtra 2013 (13) SCC 1
Kulwinder Singh and another Vs. State of Punjab, (2015) 6 SCC 674
Kartik Malhar Vs. State of Bihar, (1996) 1 SCC 614
Rajesh Singh and others Vs. State of Uttar Pradesh (2011) 11 SCC 444
Laxmibai and another Vs. Bhagwantbuva and others (2013) 4 SCC 97
Yanob Sheikh Allias Gagu Vs. State of West Bengal, (2013) 6 SCC 428
Gulam Sarbar Vs. State of Bihar (2014) 3 SCC 401
Dehal Singh Vs. State of Himachal Pradesh (2010) 9 SCC 85

Manu Sao Vs. State of Bihar, (2010) 12 SCC 310
Dharam Deo Yadav Vs. State of Uttar Pradesh, (2014) 5 SCC 509
Pawan Kumar Alias Monu Mittal Vs. State of Uttar Pradesh and another with other connected (2015) 7 SCC 48
Bhagwan Jagannath Markad and others Vs. State of Maharashtra (2016) 10 SCC 537
Karamjit Singh Vs. State of Punjab, AIR (2000) SC 1002
State of Punjab Vs. Harbans Singh, AIR (2003) SC 2268
Aslam Parwez Vs. Government of NCT of Delhi, AIR (2003) 9 SCC 141
Pratap Singh Vs. State of Madya Pradesh, AIR (2006) SC 514
Dilip Vs. State of M.P., AIR (2007) SC 369

For the Petitioners : Mr. Y.P.S. Dhaulta, Advocate
For the respondent : Mr. Ramesh Thakur and Mr. Pankaj Negi Deputy Advocate Generals

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

Petitioners were convicted under Sections 41 and 42 of Indian Forest Act by learned Judicial Magistrate First Class, Court No.1, Amb, District Una, H.P. in Criminal Case No.17-III-2000 vide judgment dated 22.11.2006 for transporting forest produce (timber) in violation of Rules 5 and 11 of H.P. Forest Produce Transit (Land Routs) Rules, 1978 (here-in-after referred to as 'Transit Rules') after sunset and before sunrise in truck No. HP-19-6311 without any hammer mark or permit to transport the same. Petitioners were sentenced to undergo rigorous imprisonment for one year and to pay fine of Rs.1000/- each and in default of payment of fine to further undergo simple imprisonment for one month.

2. In appeal preferred by petitioners, learned Additional Sessions Judge, Fast Track Court, Una vide judgment dated 5.9.2008 passed in Criminal Appeal No. 12 of 2006 and Criminal Appeal No. 13 of 2006 upheld conviction but modified sentence to fine only and sentenced them with fine of Rs.2000/- each for violation of Rules 5 and 11 of Transit Rules and in default of payment of fine to undergo simple imprisonment for two months. Hence, present revision petition.

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

4. Learned counsel for petitioners contended that lower courts below have failed to take notice of material contradictions and major discrepancies in statements of PW-2 Balbir Singh, PW-4 Gurdev Singh, PW-8 Gian Chand, PW-9 Harpal Singh and PW-13 Onkar Singh adversely affecting genesis of prosecution story raising doubt about presence of these witnesses at the place and time as claimed by prosecution rendering search and seizure suspicious. He argued that there are contradictions about manner of arrival of police and forest officials on the spot, timing of arrival, setting up Naka, return to Police Post and number of logs seized. He further contended that an independent witness i.e. driver of Jeep used by forest officials to reach on the spot was neither cited as witness nor examined in the Court for which adverse inference against prosecution in inevitable and also that independent witnesses cited and examined by prosecution have not supported the case of prosecution which renders veracity of official witnesses doubtful.

5. Learned counsel for petitioners submitted that as per PW-2, he was summoned by Deputy Ranger from Saloh Beri whereas PW-4 denied the said fact and according to PW-4 forest officials reached on the spot before police whereas other witnesses deposed that they reached together at the spot. He also pointed out contradictions in timing about reaching and leaving the spot and police post and also regarding presence of officials in police post. He further contended that during cross-examination by Public Prosecutor hostile independent witnesses

PW-1 and PW-3 were suggested that 66 logs were recovered by police from truck in question whereas as per recovery Memo. Ex. PW-4/A recovery of 73 logs was shown. According to him for want of support and corroboration by independent witnesses examined by prosecution and also for withholding examination an independent witness i.e. Jeep driver who was present on spot, testimony of official witnesses ought to have not been relied by courts below, particularly when there are material contradictions and major discrepancies in their statements rendering whole prosecution story a farce. He submitted that learned Courts below despite raising specific contention on aforesaid points, have not answered the same warranting interference of this Court.

6. On the contrary, learned Deputy Advocate General supported impugned judgment for reasons based by courts below for conviction of petitioners. He submitted that PW-3 Parkash Chand and PW-7 Vikram Singh were related to petitioners and therefore their refrain from supporting prosecution case cannot be considered fatal to prosecution. It is further contended that other contradictions and discrepancies pointed out by learned counsel for petitioners are insignificant in nature and are not having any effect on genesis of prosecution story as there is sufficient material, proved on record, to hold petitioners guilty.

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

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

8. It is settled law that evidence of official witnesses is not to be disbelieved or discarded merely for reason that they are official witnesses. Presumption is that every witness is impartial and independent unless proved contrary. There is no presumption for doubting credibility of official witnesses in principle. Statements of official witnesses can be basis for conviction of accused. However, before basing conviction on evidence of official witnesses, strict scrutiny with care and caution is required particularly when independent witnesses have turned hostile. In case evidence of official witnesses is found cogent, reliable and credible, conviction can be based on evidence of official witnesses only.

9. InYakub Abdul Razak Memon Vs. State of Maharashtra***2013 (13) SCC 1***, reiterating the principle laid down in judgment reported in ***(1995) 4 SCC 255,*** theApex Court has held as under:-

> ***"360.*** *In Pradeep Narayan Madgaonkar and Ors. vs. State of Maharashtrathis court upheld that:-*
>
> *"11.....the evidence of the official (police) witnesses cannot be discarded merely on the ground that they belong to the police force and are either interested in the investigating or the prosecuting agency. But prudence dictates that their evidence needs to be subjected to strict scrutiny and as far as possible a corroboration of their evidence in material particulars should be sought. Their desire to see the*

success of the case based on their investigation and requires greater care to appreciate their testimony".

10. Hon'ble Supreme Court, in Kulwinder Singh and another Vs. State of Punjab, ***(2015) 6 SCC 674*** has held as under:-

> *"**23.** .....When the evidence of the official witnesses is trustworthy and credible, there is no reason not to rest the conviction on the basis of their evidence".*

11. It is quality of evidence not quantity which matters for proving a case. Each and every witness is not necessary to be examined. Therefore, non-examination of a single person will not have adverse effect of prosecution case unless statements of witnesses examined are not found cogent and reliable or prejudice caused to accused for non-examination of the said witness is established and also accused is found incapable to examine that witness in defence for reasons beyond his control.

12. Hon'ble Supreme Court in case Kartik Malhar Vs. State of Bihar, reported in ***(1996) 1 SCC 614,*** after considering difference in English Law and Indian Law, has observed as under:-

> *"3. This section marks a departure from the English law where a number of statutes still prohibit convictions for certain categories of offences on the testimony of a single witness. This-difference was noticed by the Privy Council in Mahamed Sugal Esa Mamasah Rer Alalah v. The King, A.I.R. (1946) P.C, 3 wherein it was laid down as under :*
>
> *"It was also submitted on behalf of the appellant that assuming the unsworned evidence was admissible the court could not act upon it unless it was corroborated. In England, where provision has been made for the reception of unsworned evidence from a child, it has always been provided that the evidence must be corroborated in some material particularly implicating the accused. But in the Indian Act there is no such provision and the evidence is made admissible whether corroborated or not. Once there is admissible evidence a court can act upon it; corroboration unless required by statute goes only to the weight and value of the evidence. It is a sound rule in practice not to act on the uncorroborated evidence of a child, whether sworn or unsworned but, this is a rule of prudence and not of law."*
>
> *4. The Privy Council decision was considered by this Court in Vadivelu Thevar v. The State of Madras, A.I.R. (1957) S.C. 614 in which it was observed as under : -*
>
> *"On a consideration of the relevant authorities and the provisions of the Evidence Act. the following propositions may be safely stated as firmly established :*
>
> *(1) As a general rule, a court can and may act on the testimony of a single witness though uncorroborated. One credible witness outways the testimony of a number of other witnesses of indifferent character.*
>
> *(2) Unless corroboration is insisted upon by statute, courts should not insist on corroboration except in cases where the nature of the testimony of the single witness itself requires as a rule of prudence, that corroboration should be insisted upon for example, in the case of a child witness, or of a witness whose evidence is that of an accomplice or of an analogues character.*
>
> *(3) Whether corroboration of the testimony of a single witness is Or is not necessary, must depend upon facts and circumstances of each case and no general rule can be laid down in a matter like this a much depends upon the judicial discretion of the Judge before whom the case comes.*
>
> *In view of these considerations, we have no hesitation in holding that the contention that in a murder case, the Court should insist upon plurality of witnesses, is much loo broadly stated. Section 134 of the Indian Evidence Act, has*

categorically laid it down that no particular number of witnesses shall, in any case, be required for the proof of any fact'. The Legislature determined, as long ago as 1872 presumably after due consideration of the pros and cons. that, it shall not be necessary for proof or disproof of a fact, to call any particular number of witnesses."

This Court further observed as under :

"It is not seldom that a crime has been committed in the presence of only one witness, leaving aside those cases which are not of uncommon occurrence where determination of guilty depends entirely on circumstantial evidence. If the Legislature were to insist upon plurality of witnesses, cases where the testimony of a single witness only could be available in proof of the crime, would go unpunished. It is here that the discretion of the presiding judge comes into play. The matter thus must depend upon the circumstances of each cases and the quality of the evidence of the single witness whose testimony has to be either accepted or rejected. If such a testimony is found by the court to be entirely reliable, there is no legal impediment to the conviction of the accused person on such proof. Even as the guilt of an accused may be proved by the testimony of a single witness, the innocence of the accused person may be established on the testimony of the single witness, even though a considerable number of witnesses may be forth coming to testify to the truth of the case for the prosecution. Hence, in our opinion, it is a sound and well-established rule of law that the Court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact, Generally speaking, oral testimony in this context may be classified into three categories.

namely :

(1) wholly reliable :

(2) wholly unreliable:

(3) neither wholly reliable nor wholly unreliable.

In the first category of proof, the Court should have no difficulty in coming to its conclusion either way - it may convict or may acquit on the testimony of a single witness, if it is found to be above approach of suspicion of interestedness, incompetence of subordination. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subordination of witnesses. Situations may arise and do arise where only a single person is available to give evidence in support of a disputed fact. The court naturally has to weigh carefully such a testimony and if it is satisfied that the evidence is fasiable and free from all taints which tend to render oral testimony open to the suspicion, it becomes its duty to act upon such testimony. The law reports contain many precedents where the court had to depend and act upon the testimony of a single witness in support of the prosecution."

7. On a conspectus of these decisions, it clearly comes out that there has been no departure from the principles laid down in Vadivelyu Thevar's case (supra) and, therefore, conviction can be recorded on the basis of the statement of single eye witness provided his credibility is not shaken by any adverse circumstances appearing on the record against him and the Court, at the same lime, is convinced that he is a truthful witness. The Court will not then insist on corroboration by any other eye witness particularly as the incident might have occurred at a time or

place when there was no possibility of any other eye witness being present Indeed, the Courts insist on the quality, and, not on the quantity of evidence.

14. We have already discussed above that it is open to the Courts to record a conviction on the basis of the statement of a single witness provided the evidence of that witness is reliable, unshaken and consistent with the case of the prosecution. The case of the prosecution cannot be discarded merely on the ground that it was sought to be proved by only one eye witness, nor can it be insisted that the corroboration of the statement of that witness was necessary by other eye-witnesses. The instant case, it may be pointed out, does not strictly fall within the category of those cases where only one witness is present and the case of the prosecution is sought to be proved by the statement of that witness alone. Here, three of the witnesses were produced but two of them turned hostile leaving the third alone and, therefore, on the principles already discussed, if the remaining eye witness is found to be trustworthy, it becomes the duty of the Court to convict the accused as observed by this Court in Vadivelu Thevar's quoted below;

"But, where there are no such exceptional reasons operating, it becomes the duty of the court to convict, if it is satisfied that the testimony of a single witness is entirely reliable. We have, therefore, no reasons to refuse to act upon the testimony of the first witness, which is the only reliable evidence in support of the prosecution."

13. Similar view, that it is not quantity but quality of the evidence which matters, has been taken by the Apex Court in case Rajesh Singh and others Vs. State of Uttar Pradesh reported in ***(2011) 11 SCC,*** *it was reclaimed that* ***(see Para-25).***

14. Hon'ble Supreme Court in case Laxmibai and another Vs. Bhagwantbuva and others reported in ***(2013) 4 SCC 97*** has held as under:-

"39. In the matter of appreciation of evidence of witnesses, it is not the number of witnesses but quality of their evidence which is important, as there is no requirement in law of evidence that any particular number of witnesses is to be examined to prove/disprove a fact. It is a time- honoured principle, that evidence must be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise.

The legal system has laid emphasis on value provided by each witness, rather than the multiplicity or plurality of witnesses. It is quality and not quantity, which determines the adequacy of evidence as has been provided by Section 134 of the Evidence Act. Where the law requires the examination of at least one attesting witness, it has been held that the number of witnesses produced, do not carry any weight. (Vide: Vadivelu Thevar v. State of Madras; AIR 1957 SC 614; Jagdish Prasad v. State of M.P. AIR 1994 SC 1251; Sunil Kumar v. State Govt. of NCT of Delhi AIR 2004 SC 552; Namdeo v. State of Maharashtra AIR 2007 SC (Supp) 100; Kunju @ Balachandran v. State of Tamil Nadu, AIR 2008 SC 1381; Bipin Kumar Mondal v. State of West Bengal AIR201O SC 3638; Mahesh & Anr. v. State of Madhya Pradesh (2011) 9 SCC 626; Kishan Chand v. State of Haryana).

15. Hon'ble Supreme Court in case Yanob Sheikh Allias Gagu Vs. State of West Bengal, reported in ***(2013) 6 SCC 428*** has observed that in order to prove its case beyond reasonable doubt, the evidence produced by the prosecution has to be qualitative and may not be quantitative' ***(see paras 20 and 21).***

16. Hon'ble Supreme Court in recent judgment in case Gulam Sarbar Vs. State of Bihar reported in ***(2014) 3 SCC 401*** has observed as under:-

"19 In the matter of appreciation of evidence of witnesses, it is not the number of witnesses but quality of their evidence which is important, as there is no requirement under the Law of Evidence that any particular number of witnesses is to be examined to prove/disprove a fact. It is a time-honoured principle that

evidence must be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. The legal system has laid emphasis on value provided by each witness, rather than the multiplicity or plurality of witnesses. It is quality and not quantity, which determines the adequacy of evidence as has been provided by Section 134 of the Evidence Act. Even in Probate cases, where the law requires the examination of at least one attesting witness, it has been held that production of more witnesses does not carry any weight. Thus, conviction can even be based on the testimony of a sole eye witness, if the same inspires confidence. (Vide: Vadivelu Thevar & Anr. v. State of Madras; AIR 1957 SC 614; Kunju @ Balachandran v. State of Tamil Nadu, AIR 2008 SC 1381; Bipin Kumar Mondal v. State of West Bengal AIR 2010 SC 3638; Mahesh & Anr. v. State of Madhya Pradesh (2011) 9 SCC 626; Prithipal Singh & Ors. v. State of Punjab & Anr., (2012) 1 SCC 10; and Kishan Chand v. State of Haryana JT 2013(1) SC 222).

20. If the prosecution had not examined the Panchnama witnesses and witnesses to the arrest memos of the appellants, the appellants could have examined them in their defence".

17. Statement under Section 313 CrPC is not a substantive piece of evidence and it is not equivalent to confession of accused. Conviction cannot be based solely on the basis of statement made under Section 313 CrPC where prosecution failed to discharge its onus to prove its case as onus to prove certain facts is on the party who asserts. Similarly, in case where prosecution discharges its burden to prove certain facts leading to some presumption or indicating guilt of accused, resulting shift of onus upon accused to rebut the same, then onus to prove facts contrary to prosecution case cannot be said to be discharged by accused only on the basis of statement given under Section 313 CrPC. In such a situation accused has also to lead substantive evidence either under Section 315 CrPC or to bring some substantive evidence on record during evidence of prosecution, in statements of witnesses as statement under Section 313 CrPC can only be considered and referred to corroborate substantive evidence led by either party. Statement under Section 313 CrPC has corroborative value and it can also be taken into consideration to complete the chain of missing link. False or impossible plea in statement under Section 313 CrPC may also be taken as adverse circumstance against accused. Accused has a right to remain silent but at the same time when onus is upon him to explain certain facts and circumstances which are only in his exclusive knowledge (say under Section 106 of Evidence Act), silence can be fatal for him.

18. Hon'ble Supreme Court in case Dehal Singh Vs. State of Himachal Pradesh reported in ***(2010) 9 SCC 85*** has held as under:-

"23" Statement under Section 313 of the Code of Criminal Procedure is taken into consideration to appreciate the truthfullness or otherwise of the case of prosecution and it is not an evidence. Statement of an accused under Section 313 of the Code of Criminal Procedure is recorded without administering oath and, therefore, said statement cannot be treated as evidence within the meaning of Section 3 of the Evidence Act..... There is reason not to treat the statement under Section 313 of the Code of Criminal Procedure as evidence as the accused cannot be cross-examined, with reference to those statements.....".

19. In another case Manu Sao Vs. State of Bihar, reported in ***(2010) 12 SCC 310***, the Apex Court has elaborated evidentiary value of statement of accused under Section 313 CrPC as under:-

"12 Let us examine the essential features of this Section 313 Cr.P.C. and the principles of law as enunciated by judgments, which are the guiding factors for proper application and consequences which shall flow from the provisions of Section 313 of the Code.

13. As already noticed, the object of recording the statement of the accused under Section 313 of the Code is to put all incriminating evidence against the accused so as to provide him an opportunity to explain such incriminating circumstances appearing against him in the evidence of the prosecution. At the same time, also to permit him to put forward his own version or reasons, if he so chooses, in relation to his involvement or otherwise in the crime. The Court has been empowered to examine the accused but only after the prosecution evidence has been concluded. It is a mandatory obligation upon the Court and besides ensuring the compliance thereof the Court has to keep in mind that the accused gets a fair chance to explain his conduct. The option lies with the accused to maintain silence coupled with simplicitor denial or in the alternative to explain his version and reasons, for his alleged involvement in the commission of crime. This is the statement which the accused makes without fear or right of the other party to cross- examine him. However, if the statements made are false, the Court is entitled to draw adverse inferences and pass consequential orders, as may be called for, in accordance with law. The primary purpose is to establish a direct dialogue between the Court and the accused and to put to the accused every important incriminating piece of evidence and grant him an opportunity to answer and explain. Once such a statement is recorded, the next question that has to be considered by the Court is to what extent and consequences such statement can be used during the enquiry and the trial. Over the period of time, the Courts have explained this concept and now it has attained, more or less, certainty in the field of criminal jurisprudence.

14. The statement of the accused can be used to test the veracity of the exculpatory of the admission, if any, made by the accused. It can be taken into consideration in any enquiry or trial but still it is not strictly evidence in the case. The provisions of Section 313 (4) explicitly provides that the answers given by the accused may be taken into consideration in such enquiry or trial and put as evidence against the accused in any other enquiry or trial for any other offence for which such answers may tempt to show he has committed. In other words, the use is permissible as per the provisions of the Code but has its own limitations. The Courts may rely on a portion of the statement of the accused and find him guilty in consideration of the other evidence against him led by the prosecution, however, such statements made under this Section should not be considered in isolation but in conjunction with evidence adduced by the prosecution".

20. Hon'ble Supreme Court in case Dharam Deo Yadav Vs. State of Uttar Pradesh, reported in ***(2014) 5 SCC 509*** has held as under:-

"37. Often, false answers given by the accused in Section 313 CrPC statement may offer an additional link in the chain of circumstances to complete the chain. See Anthony D'Souza V. State of Karnataka".

21. Every contradiction discrepancy or improvement is not fatal for prosecution, but it is only major contradiction, discrepancy or improvement on material facts shaking very genesis of prosecution case which matters for creating doubt on prosecution case. Hon'ble Apex Court in case Pawan Kumar Alias Monu Mittal Vs. State of Uttar Pradesh and another with other connected matters reported in ***(2015) 7 SCC 48*** has held as under :-

"35. As regards the allegation of contradictions in the statements of prosecution witnesses, we do not find any major contradictions which require out attention and consideration. When a witness is examined at length it is quite possible for him to make some discrepancies. No true witness can possibly escape from making some discrepant details. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility

of his version that the court is justified in jettisoning his evidence (see Rammi V. State of M.P)……".

22. Hon'ble Apex Court in case Bhagwan Jagannath Markad and others Vs. State of Maharashtra reported in ***(2016) 10 SCC 537*** has observed as under :-

"19. While appreciating the evidence of a witness, the court has to assess whether read as a whole, it is truthful. In doing so, the court has to keep in mind the deficiencies, drawbacks and infirmities to find out whether such discrepancies shake the truthfulness. Some discrepancies not touching the core of the case are not enough to reject the evidence as a whole. No true witness can escape from giving some discrepant details. Only when discrepancies are so incompatible as to affect the credibility of the version of a witness, the court may reject the evidence. Section 155 of the Evidence Act enables the doubt to impeach the credibility of the witness by proof of former inconsistent statement. Section 145 of the Evidence Act lays down the procedure for contradicting a witness by drawing his attention to the part of the previous statement which is to be used for contradiction. The former statement should have the effect of discrediting the present statement but merely because the latter statement is at variance to the former to some extent, it is not enough to be treated as a contradiction. It is not every discrepancy which affects creditworthiness and trustworthiness of a witness. There may at times be exaggeration or embellishment not affecting credibility. The court has to sift the chaff from the grain and find out the truth. A statement may be partly rejected or partly accepted. Want of independent witnesses or unusual behavior of witnesses of a crime is not enough to reject evidence. A witness being a close relative is not enough to reject his testimony if it is otherwise credible. A relation may not conceal the actual culprit. The evidence may be closely scrutinized to assess whether an innocent person is falsely implicated. Mechanical rejection of evidence even of a 'partisan' or 'interested' witness may lead to failure of justice. It is well known that principle " falsus in uno, falsus in omnibus" has no general acceptability. On the same evidence, some accused persons may be acquitted while others may be convicted, depending upon the nature of the offence. The court can differentiate the accused who is acquitted from those who are convicted. A witness may be untruthful in some aspects but the other part of the evidence may be worthy of acceptance. Discrepancies may arise due to error of observations, loss of memory due to lapse of time, mental disposition such as shock at the time of occurrence and as such the normal discrepancy does not affect the credibility of a witness.

20. Exaggerated to the rule of benefit of doubt can result in miscarriage of justice. Letting the guilty escape is not doing justice. A Judge presides over the trial not only to ensure that no innocent is punished but also to see that guilty does not escape".

23. It is admitted case of prosecution that logs of timber in question were prepared from pine trees, felled from land of petitioner Baldev Singh and the said fact has been proved by prosecution through PW-10 Arvind Kumar, Forest Guard, and for that reason only during investigation, as also deposed by I.O. PW-13 Onkar Singh, challan was presented in the Court after removing Section 379 IPC which was initially incorporated at the time of registering case which also has corroboration from copy of FIR Ex. PW-12/A. In statements under Section 313 CrPC, petitioners admitted ownership of seized timber with petitioner Baldev Singh. Therefore only question to decide in present case is as to whether respondents were transporting timber in question in violation of provisions of Transit Rules, 1978 particularly Rules 5 and 11 of these Rules.

24. Prosecution has examined 13 witnesses to prove its case. PW-2 Balbir Singh, PW-4 Gurdev Singh, PW-8 Gian Chand, PW-9 Harpal Singh and PW-13 Onkar Singh, official

witnesses of the spot, in their deposition in court, reiterated prosecution story. Non-official witnesses PW-1 Roshan Deen, PW-3 Parkash Chand and PW-7 Vikram Singh, for desisting from supporting prosecution story, were declared hostile leading to their cross-examination by Public Prosecutor. PW-3 Parkash Chand is real brother of petitioner Baldev Singh and PW-7 Vikram Singh, owner of truck involved, is uncle of driver of the said truck i.e. petitioner Madan Lal. Therefore, there is force in contention of prosecution that both of them had reason to resile from their earlier statements recorded by police under Section 161 CrPC so as to favour petitioners. However reading of their statements with other evidence on record and also with statements of petitioners under Section 313 CrPC substantiates material part of prosecution story. PW-3 stated that timber was taken in possession by police during day time from the land owned by them on the pretext that it was extracted from Government Forest. PW-1 also stated that police had brought timber from land of PW-3 Parkash Chand at about 2.30 PM which were being claimed extracted by Parkash Chand from his land, and Baldev Singh and Madan Lal were not on the spot. In his statement under Section 313 CrPC, in answer to question No. 16, petitioner Baldev Singh had explained in the similar manner. However to the contrary, in his statement under Section 313 CrPC, petitioner Madan Lal, in answer to the same question, had explained that Parkash Chand and Baldev Singh had requisitioned his truck to their house and during day time, at 2.30 PM, while loading timber in the truck, police seized timber on the pretext that it belonged to Government Forest. PW-3 Parkash Chand and petitioner Baldev Singh did not admit requisition of truck loading of timber in it rather claimed that police had picked up the same from their land and PW-7 Vikram Singh owner of truck also denied use of his truck for transportation of timber in question at any time and he also disowned petitioner No. 2 Madan Lal as his driver with further claim that during night of 16.06.2000, truck in question was parked at his residence and he had engaged one Rachhpal as driver. Petitioner No. 2, in answer to question No. 4 in statement under Section 313 CrPC, has refused that Madan Lal was driver of the truck and he was sitting with driver in said truck, whereas in answer to the same question, in his statement under Section 313 CrPC petitioner Madan Lal admitted it to be correct but qualified that they were not transporting timber during night time. In answer to question No. 5, petitioner Baldev Singh claimed that they were not transporting timber at all whereas petitioner Madan Lal, in answer to the same question, stated that they were transporting timber during day time.

25. PW-2, though, in his examination-in-chief, stated that 66 logs of pinewood were recovered vide memo Ex. PW-4/A but in cross-examination, he specifically stated that there were 70-72 logs in the truck. In Memo Ex. PW-4/A there is specific mention of 73 logs. Therefore, apparently, mention of 66 logs in examination-in-chief was a mistake to which this witness was never confronted but the said mistake stands clarified by this witness in his cross-examination.

26. It is true that in cross-examination of PW-1 and PW-3, Public Prosecutor has suggested recovery of 66 logs of pine trees being transported without permit which was denied by these witnesses. These suggestions of Public Prosecutor appears to be because of lack of vigilance on his part as it is evident from record that vide Ex. PW-4/A 73 logs were recovered by PW-11 Gurdayal Singh. This memo is prepared by writing both sides of paper and details of logs from serial No. 61 to 73 is on back side of this memo. At first glance this memo creates illusion of total 66 logs as there are two columns in this memo, written so tightly so as to give impression of one column only ending at serial No. 66 whereas logs No. 67 to 73 are mentioned in second column which can be noticed only on careful perusal. Therefore, these suggestions by learned Public Prosecutor are nothing but result of mistake on his part. It is also pertinent that prosecution witnesses have quoted number of logs as 73 not 66. Hence, this contradiction or discrepancy in statement of PW-2 and also in questions put to hostile witnesses by learned Public Prosecutor is not fatal to prosecution.

27. Contradiction pointed out in statement of PW-2 Balbir Singh and PW-4 Gurdev Singh with respect to calling PW-2 by PW-4 is not contradiction but is only expressing the same fact in different words. PW-2 stated that Deputy Ranger had come in Jeep to call him in

the evening. PW-4 stated that he himself had not gone to call PW-2 but had called PW-2. Deposition of both of them is to the effect that was called by PW-4. PW-2 never stated that PW-4 had come to him personally to call him but stated that he had come in Jeep. Similarly PW-4 had endorsed it in different manner.

28. It is also incorrect to allege that PW-3 in contrast to PW-4, stated that they went to spot at 2.00 AM. Statement of PW-2 is to be appreciated as a whole and not by picking a single sentence in isolation. In any case he did not say that they went on naka at 2.00 AM. In examination-in-chief PW-2 stated that during 'Naka' at 2.00 AM, truck in question carrying logs of pinewood came from Surangdwari side. Time of going on spot was stated by him in cross-examination where he categorically stated that they started from Daulatpur to spot of 'Naka' at 12.00 AM in the night.

29. As per PW-4, time of reaching on the spot, is 12.30 AM. According to PW-8 Gian Chand they started for 'Naka' at 12.10 AM. PW-9 stated that they were on the spot at 12.45 PM. PW-13 also claimed their presence on the spot at 12.45 AM. All these witnesses including PW-2 stated that truck loaded with timber occupied by petitioners was stopped and checked at about 2.00 AM during 'Naka' and was found transporting logs of pinewood. Therefore, there is no material discrepancy in the timing of reaching on the spot and apprehending petitioners transporting timber during night without hammer and/or permit.

30. Discrepancy about arrival of police officials and forest officials on the spot is also not significant as it is again divergence in manner of explaining one and the same fact by prosecution witnesses. PW-4 stated that they went on 'Naka' first and police reached thereafter however in later part of his statement he stated that police reached first at 'Naka'. PW-8 stated that they started from police post at 12.10 AM and they met forest officials coming from Surangdwari side. PW-13 also stated that at about 12.45 AM, police officials met forest officials who were coming from Surangdwari side. There is a minor difference with regard to time of reaching on the spot but the fact remains that all theses witnesses stated that between 12.15 AM to 12.45 AM police officials as well as forest officials had reached at Naka point.

31. Contentions of petitioner regarding contradiction about time in statements of prosecution witnesses about time of returning from spot to police post is also not tenable for the reason that there are only minor difference instatement of prosecution witnesses. According to PW-2 they reached back at about 3.30 AM, PW-4 and PW-9 stated that they remained on spot about one and half hour after apprehending petitioners. PW-8 stated that they reached back in police post at about 3.00 AM and PW-13 stated that they remained on the spot till 5.00 AM and came back at 5.30 AM. The difference of time in the statement of PW-13 is immaterial as there is sufficient evidence on record which otherwise corroborated the prosecution story. A single omission in remembering correct time of returning by a witness cannot be taken a ground to disbelieve entire prosecution case particularly when there is corroboration of other material facts in statements of prosecution witnesses.

32. There is no discrepancy or contradiction with regard to presence of witnesses in police post. PW-2 stated that they remained on the spot for about two hours. PW-2 has not claimed his presence in proceedings in police post which is corroborated PW-4 Gurdev Singh who stated that Updesh was with him in police post and PW-2 was in his residence. Presence of PW-4 is also admitted by PW-8, PW-9 and PW-13 with slight difference of timing of his presence.

33. The incident is of 17.06.2000 whereas PW-2 was examined in June 2002, PW-4 was examined in October 2002, PW-8 was examined in October 2003, PW-9 was examined in August 2004 and PW-13 was examined in September 2005. There is a considerable long gap between the date of incident and date of deposition of these witnesses in the Court. Therefore by passage of time these minor discrepancies or contradictions were bound to occur as power to observe, grasp, retain, remember and narrate always differs from person to person. Way and manner of expression explaining one and the same incident also differs from person to person. Contradictions and discrepancies pointed out by counsel for petitioners are either non existent

or trivial in nature having no effect on credibility and veracity of prosecution witnesses. On the other hand contradictory explanation of incident by petitioners has itself proved falsehood of the defence taken by them.

34. Transportation of timber, atleast, during day time stands admitted by petitioners. The said timber, whether during night or day time, was being transported without valid permit and hammer mark or imprint of registration mark. Rule 5 of Transit Rules provides that no person shall transport forest produce without imprint of registration mark. Rule 11 prohibits transpiration of any timber without hammer mark. In absence of permit or mark on timber, petitioners had to explain and establish authority and right to transport the said timber. There is nothing on record to show that petitioners were having valid transport permit with respect to timber seized by police and it is also not defence of petitioners that there was no requirement of permit and the case was covered under Rule 6.

35. Learned counsel for petitioners in support of his contentions has relied upon judgments passed by the Apex Court in cases Karamjit Singh Vs. State of Punjab, AIR (2000) SC 1002, State of Punjab Vs. Harbans Singh, AIR (2003) SC 2268, Aslam Parwez Vs. Government of NCT of Delhi, AIR (2003) 9 SCC 141, Pratap Singh Vs. State of Madya Pradesh, AIR (2006) SC 514 and Dilip Vs. State of M.P., AIR (2007) SC 369.

36. In Kamaljit Singh's case, eye witnesses were not found to be reliable by the Court to convict accused for murder whereas in present case witnesses present on spot are reliable for duly corroborating prosecution case in their statements on material particulars.

37. Harbans Singh's case has been referred for doubting presence of witnesses on the spot. In that case prosecution witnesses were found to be stock witnesses and their presence on spot was doubtful and in absence of independent witnesses their evidence was rejected. In present case witnesses are official witnesses and case of prosecution is not only corroborated in their statements but also found to be trustworthy on scrutiny of statements of witnesses including hostile witnesses as well as explanation offered by petitioners in their statements under Section 313 CrPC.

38. In Aslam Parwez's case, testimonies of police personnel were not found inspiring confidence and were considered highly unsafe to be relied upon to convict accused specially when the public and independent witnesses did not at all support prosecution case on any material particular whereas in present case there is sufficient material corroborating statements of official witnesses.

39. In Partap Singh's case, the Apex Court had acquitted accused not only for non-examination of seizure witness but also for other facts and circumstances of that case and it was also found that the High Court on one hand made adverse comments against the conduct of Investigating Officer but on the other hand placed strong reliance story relying on his evidence for the purpose of believing that several material objects including the weapons of offence were recovered in accordance with law. This judgment is not applicable in the facts and circumstances of the present case.

40. By referring paras 15 and 16 of judgment in Dilip's case, it is contended that for non-association of independent witnesses during search and seizure proceeding, prosecution case must fail as such search and seizure would have a bearing on credibility of the evidence of official witnesses. The judgment in reference was passed in a case pertaining to NDPS Act dealing with mandatory provisions and requirement of Sections 42 and 50 of NDPS Act to be complied with and the said judgment is not applicable in facts and circumstances of the present case.

41. Overall assessment of material on record, it cannot be said that courts below have failed to appreciate evidence on record completely and correctly or the impugned judgments are perverse in nature causing mis-carriage of justice. There is no illegality, or irregularity in impugned judgment in arriving at conclusion that petitioners are guilty for committing offence charged. Hence, the judgment of the trial Court with modified sentence by learned Additional

Sessions Judge is upheld. Accordingly present petition fails and as such is dismissed. Records of the Court below be sent back immediately.

****

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

Lekh Ram & others .....Appellants.

Versus

Pal Singh & others .....Respondents.

RSA No. 279 of 2008

Reserved on: 25.04.2017

Date of Decision:29.4.2017

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit for declaration that suit land is ancestral property – the gift deed executed by defendant No.3 in favour of defendant No.1 and 2 is null and void and has no effect on the rights of the plaintiff- the suit was dismissed by the Trial Court- an appeal was filed, which was dismissed- held in second appeal that Appellate Court concluded that out of 27.10.03 bighas about 19 ½ bighas of land is mixture of ancestral and non-ancestral land while the remaining land was not proved to be ancestral – the evidence has not proved the ancestral nature of the property – the Courts had rightly appreciated the evidence- appeal dismissed.(Para-14 to 31)

Cases referred:

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

Laliteshwar Prasad Singh versus S.P. Srivastava reported in (2017) 2SCC 415

For the Appellants : Mr. Neeraj Gupta, Advocate.

For the Respondent : Ms. Shilpa Sood, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge

Instant Regular Second Appeal filed under Section 100 of the Code of Civil Procedure, is directed against the judgment and decree dated 18.1.2008, passed by learned Presiding Officer, Fast Track Court, Mandi, District Mandi, H.P., in Civil Appeal No. 42/2005,144/2005, affirming the judgment and decree dated 2.12.2002, passed by learned Senior Sub Judge, Mandi, District Mandi, H.P., in civil Suit No.41/93,134/93, whereby suit for declaration and joint possession as a consequential relief, having been filed by the appellants/plaintiff came to be dismissed.

2. Briefly stated facts, as emerged from the record are that appellants ***(hereinafter referred to as the plaintiff***) filed suit for declaration and joint possession as a consequential relief, averring therein that land comprising in Khewat No.83, Khatauni No.88, Khasra Nos. 2249, 2251, 2253, 2254, 2256, 2303, 2314, 2315, 2320, 2322, 2325, 2326, 2327, 2329, 2332, 2335, 2348, 2350, 2380, 2402, 2432, 2436, 2440, 2442,2446, 2458, 2459, 2473, 2475, 2477, 2478, 2487, 2516, 2531, 2543, 2551,2555, 2557, 2563, 2568, 2585, 2589 and 2602, measuring 27-10-3 bighas, situated in village Leda, Illaqua Bagra, Tehsil Sadar, District Mandi, H.P ***(hereinafter referred to as the suit land***) is Joint Hindu Family Coparcenary and ancestral property and plaintiff alongwith defendants being coparceners of this property have right in the entire property as coparceners. Plaintiff further averred that defendant No.3 has gifted the suit land in favour of defendants No.1 and 2 by registered gift deed, dated 21.11.1992, which was registered on

22.1.1993 solely with a view to deprive him from his right to the suit land. Plaintiff further claimed that defendant No. 3 has no right to make any gift of the suit land as the suit land is ancestral and the plaintiff is member of the Joint Hindu Family Coparcenary and ancestral property. In the aforesaid background, plaintiff sought declaration that the gift deed, executed by defendant No.3 in favour of defendants No. 1 and 2, is null and void and has no effect on the rights of the plaintiff. Plaintiff also sought consequential relief in the shape of decree of joint possession.

3. Defendants No. 1 and 3 by way of written statements refuted the claim of the plaintiff taking therein objections of maintainability, cause of action and valuation etc. Defendants averred in the written statement that the suit property is self acquired property of defendant No.3 and is not a Joint Hindu Family Coparcenary and ancestral property. Defendants further contended that defendant No.3 has every right to gift the suit land in favour of defendants No. 1 and 2. Defendants further claimed that plaintiff is residing in the house of his in-laws for the last 30-35 years and he has already got about 35-40 bighas of land from his father-in-law. Defendants further claimed that plaintiff never tendered his services towards his father, defendant No.3 and he has no affection towards him. Defendants further claimed that plaintiff misbehaved and gave beatings to defendant No.3, as a result of which, defendant No.3 lodged the complaint against him at Police Station, Balh. In the facts and circumstances, as narrated above, defendants prayed for dismissal of the suit filed by the plaintiff.

4. Defendant No.2 also contested the suit of the plaintiff by way of filing separate written statement, stating therein that gift made by defendant No.3 in favour of defendants No.1 and 2 is valid and legal and plaintiff has no right to file the present suit and as such, prayed for dismissal of the suit.

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

1. *Whether the gift deed dated 21.11.1992 executed by defendant No.3 in favour of the defendant No.1 and 2 is illegal and void as alleged? OPP.*
2. *Whether the suit is not maintainable? OPD.*
3. *Whether suit is not properly valued for the purpose of court fee and jurisdiction? OPD.*
4. *Whether the plaintiff has no cause of action to file the present suit? OPD.*
5. *Relief.*

6. Subsequently, learned trial Court on the basis of the material adduced on record by the respective parties, dismissed the suit of the plaintiff vide judgment and decree dated 2.12.2002.

7. Being, aggrieved and dissatisfied with the judgment and decree dated 2.12.2002, passed by the learned Senior Sub Judge, Mandi, District Mandi, H.P., plaintiff preferred an appeal under Section 96 CPC in the Court of learned Presiding Officer, Fast Track Court, Mandi, which came to be registered as Civil Appeal No.42/2005, 144/2005, however fact remains that aforesaid appeal having been filed by the plaintiff was also dismissed, as a result of which, judgment and decree passed by the learned trial Court came to be upheld. In the aforesaid back ground, appellants/plaintiff approached this Court by way of instant appeal, praying therein for decreeing his suit after setting aside the judgments and decrees passed by the learned Courts below.

8. This Court vide order dated 12.3.2009, admitted the instant Regular Second Appeal, on the following substantial questions of law:-

1. ***Whether both the Courts below have acted in erroneous and perverse manner is not recording separate findings as to which of the properties which was subject matter of the gift were non ancestral, especially when it was sufficiently established that the properties of Shri Nanak Chand were Joint Hindu Family, Coparcenary and ancestral property?***

2. ***Whether both the Courts below have misread the oral and documentary evidence and misapplied the ratio of the judgments of Apex Court to non suit the plaintiff on the ground that the suit properties during settlement operation have been mixed up and thereby in an erroneous and perverse manner upheld the validity of the gift which was otherwise illegal, null and void?***

9. Mr. Neeraj Gupta, learned counsel representing the appellants/plaintiff, vehemently argued that the impugned judgments passed by the Courts below are highly unjust, illegal, arbitrary, against the facts and law as such deserves to be quashed and set-aside. Mr. Gupta, further contended that both the Courts below have committed grave error in not framing issues arising out of the pleadings of the parties because no specific issue regarding ancestral nature of the property was framed, as a result of which, appellants/plaintiff was unable to lead specific evidence to prove on record the nature of the property in dispute, as a result of which, grave prejudice has been caused to the appellants/plaintiff. While inviting the attention of this Court to the findings returned by the Courts below, Mr. Gupta, contended that both the Courts below have fallen in grave error while holding that the ancestral and non-ancestral portion of the property have been mixed up and as such, it is difficult to identify the ancestral and non-ancestral portion of the suit land.

10. Mr. Gupta, further contended that impugned judgments passed by both the Courts are result of sheer misreading of oral as well as documentary evidence adduced on record by the respective parties, as a result of which, erroneous findings have come on record to the detriment of the plaintiff, who successfully proved on record by leading cogent and convincing evidence that such property is/was Joint Hindu Family Coparcenary and ancestral property and could not be gifted by defendant No.3 in favour of defendant No.1. While specifically inviting the attention of this Court to the impugned judgment passed by the learned First Appellate Court, Mr. Gupta, contended that it has committed grave procedural error in not properly formulating the point for the disposal of the appeal. He further contended that being last fact finding Court, learned First Appellate Court ought to have addressed itself to all the issues and decide the same by arriving specific reasons in support of such findings, but careful perusal of the impugned judgment passed by the learned first appellate Court clearly suggests that it has failed to take note of the evidence led on record by the defendants in the shape of Ex.D-1 to Ex.D-20 and as such, same deserve to be quashed and set-aside.

11. Mr. Gupta, further contended that both the Courts below travelled beyond the scope of the pleadings while arriving at a conclusion that no relief can be granted to the appellants/plaintiff on account of mixing up of ancestral and non-ancestral property, especially when the nature of the property was duly established to be Joint Hindu Family Coparcenary and ancestral property. In the aforesaid background, appellants/plaintiff prayed that his suit may be decreed after setting aside the impugned judgments and decrees passed by learned Courts below.

12. Ms. Shilpa Sood, learned counsel representing the respondents/defendants, supported the impugned judgments and decree passed by both the Courts below. While inviting the attention of this Court to the impugned judgments passed by both the Courts below, Ms. Sood, strenuously argued that there is no illegality and infirmity in the impugned judgments passed by the learned Courts below and as such, same deserves to be upheld. While refuting the aforesaid contentions having been raised by the learned counsel for the appellants/defendants, Ms. Sood, invited the attention of this Court to the impugned judgments passed by the learned Courts below to demonstrate that plaintiff was not able to prove on record that suit property was Joint Hindu Family Coparcenary and ancestral property and as such, there is no illegality and

infirmity in the impugned judgments passed by the learned courts below. Ms. Sood, further contended that since suit for declaration and joint possession as consequential relief was filed by the plaintiff, onus was heavily upon him to prove on record that no gift deed could be executed by defendant No.3 in favour of defendants No.1 and 2 of the land, which was alleged to be Joint Hindu Family Coparcenary and ancestral property. While referring to the evidence led on record by the plaintiff, Ms. Sood, contended that bare perusal of the same nowhere suggest that suit land is Joint Hindu Family Coparcenary and ancestral property and as such, Courts below have rightly concluded that it is difficult to identify the ancestral and non-ancestral portion of the suit land. Ms. Sood, while praying for dismissal of the appeal, contended that there is no scope of interference of this Court, especially in view of the concurrent findings of facts and law recorded by the courts below. In this regard, to substantiate her aforesaid plea, she placed reliance upon the judgment passed by the Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,* (2015)4 SCC 264.**

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

Substantial questions of law No.1 and 2.

14. This Court, solely with a view to ascertain the genuineness and correctness of the impugned judgments passed by the learned Courts below as well as submissions having been made by the learned counsel for the parties, carefully perused the pleadings as well as evidence adduced on record by the respective parties, perusal whereof, definitely not suggest that courts below while rejecting the claim of the plaintiff misread the oral as well as documentary evidence available on record, rather this Court is of the view that both the Courts below have dealt with each and every aspect of the matter very meticulously.

15. Undisputedly, first appeal is a valuable right of the parties and parties are required to be heard by learned first appellate Court both on questions of law as also on facts. Similarly, while examining the correctness of the judgment passed by the learned trial Court, learned first appellate Court is required to address itself to all issues and decide the same by giving reasons in support of such findings. In the instant case, perusal of the impugned judgment passed by the learned First Appellate Court suggests that it has taken into consideration oral as well as documentary evidence led on record by the respective parties while affirming the impugned judgment passed by the learned First Appellate Court. Mr. Neeraj Gupta, learned counsel representing the appellants/plaintiff argued that the documents having been relied upon by the respondents/ defendants were not taken into consideration by the learned First Appellate Court while deciding the appeal having been preferred by the plaintiff. But, perusal of para-13 of the impugned judgment passed by the learned First Appellate Court clearly suggest that learned First Appellate Court while arriving at the conclusion that the suit land is not in the hands of the plaintiff, his father (defendant No.3) and defendant No.1 as a Joint Hindu Family Coparcenary and ancestral property, specifically took into consideration Ex.D-6, Ex.D-10, Ex.D-11, Ex.D-18 and Ex.D-19 i.e. documents relied upon by the defendants.

16. After carefully perusing the aforesaid documents relied upon by the defendants, learned first appellate Court came to the conclusion that out of total suit land i.e. 27.10.03 bighas, about 19 ½ bighas is mixture of ancestral and non-ancestral land of Nanak Chand and plaintiff has failed to prove on record that remaining land of 8 or 8 ½ bighas in the suit land is /was ancestral.

17. Otherwise also, suit for declaration and joint possession as consequential relief was filed by the plaintiff and as such, initial burden to prove that the suit property is Joint Hindu Family Coparcenary and ancestral property is/ was on the plaintiff. But in the instant case, perusal of the evidence led on record by the plaintiff, nowhere proves on record that the suit land is/was Joint Hindu Family Coparcenary and ancestral property.

18. PW-1, Sh. Hirda Ram stated that the suit land is ancestral and has not been partitioned. He further stated that the gift deed executed by defendant No.3 in favour of defendants No.1 and 2 is wrong and defendant No.3 has no right to gift the suit land.

19. PW-2, Sh. Hem Singh also corroborated the version put forth by PW-1 that the suit land is ancestral and is not self acquired property of the defendants. He also stated that the suit land is yet to be partitioned. However, in cross-examination, he denied that the suit land has been partitioned and plaintiff has left his share.

20. PW-3, Sh. Dhani Ram also stated that the suit land is ancestral and has not been partitioned.

21. DW-1, Sh. Pal Singh deposed before the Court that his father late Sh. Nanak Chand had expired on 10.12.1997. It has also come in his evidence that the plaintiff is his brother and he has not visited the house for the last 35-40 years and since then he is living separately. It has also come in his statement that he is coming in possession of the suit land from the time of his father and a will has also been executed in his favour. DW-1 further stated that he was also present on 21.12.1992 at the time of the execution of the gift deed , which was accepted by him and report was also made in the Rapat Rojnamcha dated 12.12.1991 Ex.D-1. In the cross-examination, he specifically denied the question put to him that his father had partitioned the land during his life time and possession was given to him by the Patwari and Kanungo on the spot.

22. DW-2, Sh. Lekh Ram and DW-3, Sh. Hem Singh, also supported the version put forth by DW-1 that Sh. Nanak Chand had executed gift deed Ex.PB in favour of the defendant. Aforesaid witnesses also stated that the plaintiff had been residing in the house of his in laws and he never cultivated the suit land

23. If, oral evidence led on record by the plaintiff, as discussed above, is carefully examined, it can be safely inferred that the plaintiff was not able to prove on record that the suit land is/was Joint Hindu Family Coparcenary and ancestral property. Similarly, perusal of documentary evidence adduced on record by the plaintiff nowhere proves that the suit land was Joint Hindu Family Coparcenary and ancestral property.

24. Perusal of copy of Missal Haquiat Ex.PA, copy of mutation Ex.PC, copy of pedigree table Ex.PD, copy of jamabandi for the year, 1945-46 Ex.PE, copy of jamabandi for the year, 1954-55 Ex.PF and copy of jamabandi for the year, 1954-55 Ex.PG shows that Sh. Nanak Chand and his father Bhund were recorded in the ownership and possession of the suit property. Though, perusal of copy of mutation for the year, 1945-46(Ex.P1/A) suggests that the suit land had been shown in the ownership and possession of Saju son of Sh. Manohar and mutation was sanctioned in favour of Bhund, the father of the present plaintiff, but perusal of copy of mutation Ex.P2/A also proves ownership of Bhund, on the basis of which, mutation was sanctioned in favour of Sh. Nanak Chand i.e. father of the plaintiff. Whereas, perusal jamabandi for the year, 1973-74 Ex.P3/A suggests that Manohar was shown to be owner in possession of the suit land.

25. After having carefully examined the evidence led on record by the plaintiff, which has been discussed hereinabove, this Court sees no reasons to differ with the findings returned by the courts below that plaintiff was not able to prove on record that the suit property is Joint Hindu Family Coparcenary and ancestral property. Since, plaintiff failed to prove on record that the suit land is Joint Hindu Family Coparcenary and ancestral property, learned courts below rightly accepted the plea of the defendant that the whole of the suit property is not Joint Hindu Family Coparcenary and ancestral property but some of the property is also self acquired property.

26. At the cost of repetition, it may be stated/ observed that onus, if any, was upon the plaintiff to prove his claim with regard to the nature of the property but since he failed to discharge that onus by leading cogent and convincing evidence on record, there was no occasion as such for the learned first appellate court to refer documents relied upon by the defendants in

support of their claim, while deciding the appeal having been filed by the appellants/plaintiff. There cannot be any quarrel with the proposition of law that court of appeal must cover all important questions involved in the case and it is expected to record in clear terms specifically stating reasons therein to differ with the findings returned by the learned trial Court. It is also well settled that Appellate Court has jurisdiction to reverse or affirm the findings recorded by the learned trial Court and first appeal is a valuable right of the parties.

27. True, it is that the judgment of the appellate Court must reflect its conscious application of mind and it must record findings supported by reasons, on all the issues arising alongwith the contentions put forth and pressed by the parties for the decision of appellate court. Moreover, when first appellate court reverses findings of trial Court, it is expected to record findings in clear terms specifically stating therein, in what manner, reasoning of trial court is erroneous. But when appellate court agrees with the views of the trial court on evidence, it need not restate effect of evidence or reiterate reasons given by the trial Court; expression of general agreement with reasons given by the trial Court would ordinarily suffice.

28. In the instant case, learned first appellate court while agreeing with the findings returned by the learned trial Court has dealt with all the issues and as such there appears to be no force in the arguments having been advanced by the learned counsel for the plaintiff that learned first appellate court has failed to address itself to all issues and decide the case by giving reasons in support of such findings. In this regard reliance is placed upon the judgment passed by the Hon'ble Apex Court ***in Laliteshwar Prasad Singh versus S.P. Srivastava*** reported in (2017) 2SCC 415, wherein, it has been held as under:-

> "13. An appellate court is the final court of facts. The judgment of the appellate court must therefore reflect court's application of mind and record its findings supported by reasons. The law relating to powers and duties of the first appellate court is well fortified by the legal provisions and judicial pronouncements. Considering the nature and scope of duty of first appellate court, in Vinod Kumar v. Gangadhar (2015) 1 SCC 391, it was held as under:-
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> > "12. In Santosh Hazari v. Purushottam Tiwari (2001) 3 SCC 179, this Court held as under: (SCC pp. 188- 89, para 15)
> >
> > > "15. ... The appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. ... while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it."
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> The above view has been followed by a three-Judge Bench decision of this Court in Madhukar v. Sangram (2001) 4 SCC 756, wherein it was reiterated that sitting as a court of first appeal, it is the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings.
>
> 13. In H.K.N. Swami v. Irshad Basith (2005) 10 SCC 243, this Court stated as under: (SCC p. 244, para 3) "3. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard both on questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. Unfortunately, the High Court, in the present case has not recorded any finding either on facts or on law. Sitting as the

first appellate court it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording the finding regarding title."

14. Again in Jagannath v. Arulappa (2005) 12 SCC 303, while considering the scope of Section 96 of the Code of Civil Procedure, 1908, this Court observed as follows: (SCC p. 303, para 2)

15. Again in B.V. Nagesh v. H.V. Sreenivasa Murthy (2010) 13 SCC 530, this Court taking note of all the earlier judgments of this Court reiterated the aforementioned principle with these words: (SCC pp. 530-31, paras 3-5)

"3. How the regular first appeal is to be disposed of by the appellate court/High Court has been considered by this Court in various decisions. Order 41 CPC deals with appeals from original decrees. Among the various rules, Rule 31 mandates that the judgment of the appellate court shall state:

(a) the points for determination;

(b) the decision thereon;

(c) the reasons for the decision; and

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.

4. The appellate court has jurisdiction to reverse or affirm the findings of the trial court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. Sitting as a court of first appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. (Vide Santosh Hazari v. Purushottam Tiwari (2001) 3 SCC 179, SCC p. 188, para 15 and Madhukar v. Sangram (2001) 4 SCC 756 SCC p. 758, para 5.)

5. In view of the above salutary principles, on going through the impugned judgment, we feel that the High Court has failed to discharge the obligation placed on it as a first appellate court. In our view, the judgment under appeal is cryptic and none of the relevant aspects have even been noticed. The appeal has been decided in an unsatisfactory manner. Our careful perusal of the judgment in the regular first appeal shows that it falls short of considerations which are expected from the court of first appeal. Accordingly, without going into the merits of the claim of both parties, we set aside the impugned judgment and decree of the High Court and remand the regular first appeal to the High Court for its fresh disposal in accordance with law."

14. The points which arise for determination by a court of first appeal must cover all important questions involved in the case and they should not be general and vague. Even though the appellate court would be justified in taking a different view on question of fact that should be done after adverting to the reasons given by the trial judge in arriving at the finding in question. ***When appellate court agrees with the views of the trial court on evidence, it need not restate effect of evidence or reiterate reasons given by trial court; expression of general agreement with reasons given by trial court would ordinarily suffice. However, when the first appellate court reverses the findings of the trial court, it must record the findings in clear terms explaining how the reasoning of the trial court is erroneous."*** **(Emphasized supplied)**

29. Careful examination of the evidence, as discussed above, nowhere suggest that court below misread the oral as well as documentary evidence adduced on record by the

respective parties and arrived at wrong conclusion that the suit property is mixed up during settlement operation and as such it is difficult to identify the ancestral and non-ancestral portion of the suit land. This Court, after carefully examining the material available on record, is not persuaded to agree with the contention having been made by the learned counsel representing the plaintiff that the findings returned by the courts below are erroneous and perverse and same deserve to be quashed and set-aside. Rather, this Court has no hesitation to conclude that the plaintiff failed to discharge onus, which was heavily upon him to prove the nature of the property, especially in view of the prayer having been made by him in the suit. The substantial questions of law are answered accordingly.

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

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

31. Consequently, in view of the detailed discussion made hereinabove, present appeal fails and same is dismissed.

Interim directions, if any, are vacated. All miscellaneous applications are disposed of.

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

Piar Chand & others ....Appellants

Versus

Sandhya Devi and others ....Respondents

Regular Second Appeal No. 287 of 2007
Judgment reserved on 25th April, 2017
Date of Decision 29th April, 2017

Specific Relief Act, 1963- Section 38- Parties are joint owners of the suit land – plaintiff pleaded that defendants were raising construction over the best portion of the suit land without getting it partitioned- he prayed for permanent prohibitory injunction for restraining them from raising

construction and for mandatory injunction for directing the defendants to restore the suit land to its original condition by demolishing the construction raised on the same – suit was dismissed by the Trial Court- an appeal was filed, which was allowed and the suit was decreed – held in second appeal that the parties have constructed houses over some portion of the land and the rest of the portion is lying vacant – a Local Commissioner was appointed during the pendency of the suit who found the construction material lying upon the land –it was not proved that construction was being raised on the best portion of the land – when construction is being raised on the suit land, the co-sharer seeking injunction has to establish a prejudice to his rights – it was not proved that proposed construction will diminish the value and utility of the property or would be detrimental to the interest of other co-owners – Learned District Judge had decreed the suit on the ground that defendants had failed to mention the collection of construction material in their written statement – however, the suit can be decreed on the strength of the plea raised by the plaintiff and not on the weakness of the plea of the defendants – plaintiff has failed to establish any adverse impact upon his right and the suit could not have been decreed- appeal allowed- judgment and decree passed by Learned District Judge set aside and that of the Trial Court is restored. (Para-5 to 29)

Cases referred:

Anvar P.V. vs. P.K. Basheer and others (2014)10 SCC 473
Manager, Reserve Bank of India, Bangalore vs. S.Mani and others (2005)5 SCC 100
Siddik Mahomed Shah vs. Mt. Saran and others, AIR 1930 Privy Council 57 (1))
Janak Dulari Devi and another vs. Kapildeo Rai and another (2011)6 SCC 555
Ashok Kapoor vs. Murtu Devi (2016)1 Shim.L.C.207

For the Appellants: Shri G.D. Verma, Sr. Advocate with Ms. Soma Thakur, Advocate.
For the Respondents: Mr.S.D. Gill, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

Predecessor of the respondents in present appeal, late Shri Bakshi Ram (hereinafter referred to as the plaintiff) had filed a suit against appellants (hereinafter referred to as defendants) seeking permanent prohibitory injunction restraining them, their agents, servants and assignees from raising construction in suit land, jointly owned and possessed by plaintiff and defendants along with other co-sharers, on the ground that defendants were bent upon to cover best portion of suit land forcibly by raising construction over it without consent of plaintiff and without getting the suit land partitioned. Alternatively, in case of raising construction by defendants over suit land, mandatory injunction, directing defendants to restore the suit land into its original condition by demolishing such construction, was also sought for.

2. Suit was dismissed by the trial Court. However, in appeal, learned District Judge decreed the suit for perpetual prohibitory injunction in favour of plaintiff restraining defendants personally or through their family members, assignees, agents and servants from raising construction or changing nature of suit land in any manner till its partition in accordance with law.

3. In present appeal, defendants have assailed judgment and decree passed by learned District Judge in favour of plaintiff which has been admitted on following substantial question of law:-

> *1. Whether respondents/plaintiffs having themselves admitted that they have raised construction of their house over suit land, therefore, they are estopped by their own act and conduct to claim decree of injunction against present appellants?*

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

5. As per plaint, parties have constructed houses over some portion of suit land and rest of land is vacant, which is a very valuable piece of land for extension of Abadi and defednants, being strong headed person, are bent upon covering best portion of the suit land forcibly and have started digging the suit land and collecting construction material for raising construction over suit land forcibly without having any right to do so. It is also pleaded in plaint that in case, defendants succeed in raising forcible construction over suit land, then plaintiff is entitled for relief for mandatory injunction, as prayed for.

6. In written statement, defendants have contested the claim of plaintiff stating therein that possession of parties over suit land is separate on the spot on the basis of arrangement made since the time of their ancestors and they are not doing anything over suit land and plaintiffs' house consisting of two room is already on said land and it is plaintiff, who himself, is threatening to raise construction of one room over said land and defendants have constructed boundary wall over the suit land about four years back to which no objection was raised at that time. It is further stated that house of defendants is situated in adjoining Khasra numbers and only Sehan (courtyard) of defendants falls over the suit land.

7. In replication, it was stated that suit land is joint between the parties and there is no separate possession of parties on the spot and defendants want to cover best portion of suit land by raising construction over it and house of defendants is also over the suit land.

8. During the pendency of suit, Local Commissioner, appointed under Order 39 Rule 7 of Code of Civil Procedure, after visiting the spot, had submitted his report, along with photographs taken and statements recorded by him on the spot, stating therein that defendants had collected construction material i.e. two heaps of stones and one heap of bazari in front of their house, quantum of which was found about five trucks loads, but no new construction was found on the spot. As per statement recorded by him, wife of defendant No. 1 Piar Chand stated that construction material was collected by them for flooring of their house.

9. Be that as it may, the question to be decided herein this appeal is whether after constructing house upon land jointly owned and possessed by parties, one can seek injunction against others restraining them from raising construction over the same land.

10. It is admitted fact that plaintiff(s) and defendants are co-sharers in suit land. In plaint, plaintiff admitted construction of houses of parties on suit land whereas defendants admitted house of plaintiff in suit land but denied location of their house on the suit land. There is no evidence on record to establish the fact that house of defendants is also on the suit land except oral statement of plaintiff as PW1.

11. Respective claim set by parties in pleadings, is to be proved by leading cogent and reliable evidence. In absence of evidence in support of disputed pleadings, such pleadings cannot be considered for deciding the case. Similarly, the evidence led beyond pleadings can also not be considered.

12. It is settled law that pleadings in absence of proof cannot be made basis for deciding an issue in favour of a party. Hon'ble Supreme Court in ***Anvar P.V. vs. P.K. Basheer and others (2014)10 SCC 473*** has held as under:-

> *"1. Construction by plaintiff, destruction by defendant. Construction by pleadings, proof by evidence, proof only by relevant and admissible evidence. Genuineness, veracity or reliability of the evidence is seen by the Court only after the stage of relevancy and admissibility. These are some of the first principles of evidence. What is the nature and manner of admission of electronic records is one of the principal issues arising for consideration in this appeal."*

13. In ***Manager, Reserve Bank of India, Bangalore vs. S.Mani and others (2005)5 SCC 100,*** the Apex Court has held as under:-

> ***"19. Pleadings are no substitute for proof.*** *No workman, thus, took an oath to state that they had worked for 240 days. No document in support of the said plea was produced. It is, therefore, not correct to contend that the plea raised by the respondents herein that they had worked continuously for 240 days was deemed to have been admitted by applying the doctrine of non-traverse.* ***In any event the contention of the respondents having been denied and disputed, it was obligatory on the part of the respondents to add new evidence.*** *The contents raised in the letters of the union dated 30.5.1988 and 11.4.1990 containing statements to the effect that the workmen had been working continuously for 240 days might not have been replied to, but the same is of no effect as by reason thereof,* ***the allegations made therein cannot be said to have been proved, particularly in view of the fact that the contents thereof were not proved by any witness.*** *Only by reason of non-response to such letters, the contents thereof would not stand admitted. The Evidence Act does not say so."*

14. It is also settled principle of law that evidence led by parties must be in consonance with their pleadings and evidence led contrary to pleadings cannot be considered. Applying rule of divergence between pleading and evidence, any evidence contrary to pleading is to be ignored. No evidence can be looked into upon a plea which was never put forward. ***(See Siddik Mahomed Shah vs. Mt. Saran and others, AIR 1930 Privy Council 57 (1)).*** Considering this issue, the Apex Court in ***Janak Dulari Devi and another vs. Kapildeo Rai and another (2011)6 SCC 555*** has held as under:-

> *"9. .....When what is pleaded is not proved, or what is stated in the evidence is contrary to the pleadings, the dictum that no amount of evidence, contrary to the pleadings, howsoever cogent, can be relied on, would apply....."*

15. Pleading of plaintiff is that houses of parties are on suit land and defendants are bent upon to raise construction to cover the best portion of suit land without getting it partitioned and without consent of plaintiff. Plaintiff as PW1 is only witness examined in support of his claim. As per his deposition in court, share of defendants in suit land is 19 marlas and defendants were going to raise construction in front of door of his house on land more than their share in the suit land. He has conspicuously silent about raising of construction by defendants on the best portion of land. He has not led any oral or documentary evidence in support of his pleadings to establish that the suit land upon which defendants have proposed construction is the best portion of suit land. Plaintiff also has not placed on record any evidence establishing that defendants are already in possession of 19 marlas and proposed construction in said land was beyond their share i.e. 19 marlas.

16. Defendants have examined two witnesses. Defendant No. 1 appeared as DW1 and deposed that suit land was partitioned in *Khangi* proceedings and partied are in their respective possession, according to said partition and plaintiff has constructed his house on suit land consisting of two rooms along with *varamdah* and is intending to construct another room, whereas land in question is courtyard of defendants and defendants have raised boundary wall on spot and constructed toilet inside the boundary wall about 10-11 years ago and building material collected by him, has been stacked for repair of another house. In cross examination, no where it has been suggested to him that portion of suit land, intended by defendants to be used for construction, is the best or valuable portion of suit land. It is suggested to defendant No.1 that he has raised construction covering land more than his share, which is denied by him.

17. In present case, in plaint plaintiff has not pleaded that defendants are raising construction in suit land beyond the limits of their share. Rather, only objection against construction is that defendants are bent upon covering best portion of suit land without consent or partition. Whereas, in his deposition in the Court, he has not uttered even a single word about different nature and/or value of the suit land much less about the best portion of suit land being

covered by defendants. He introduces a new ground, but never pleaded, claiming that defendants are intending to raise construction in suit land covering area beyond their entitlement. There is no evidence on record in support of claim set in plaint and there are no pleadings with regard to allegations levelled in statement of plaintiff as PW1. Moreover, there is no evidence on record to identify, quantify and qualify the respective area in possession of parties and also the area intended to be used by defendants for further construction.

18. It is settled law that in a land owned and possessed jointly by co-sharers, none of co-sharer can raise construction over the same to the deterimental to right of others without mutual consent or without having joint land partitioned. But in case like present one, where parties have already constructed houses upon joint land, it is not sufficient for the plaintiff to prove only that suit land is owned and possessed jointly by parties and proposed construction is without consent or without partition of suit land. Once some construction is raised on joint land, the co-sharer, who has already constructed house upon the said land, has to place on record something more establishing that how the construction of another co-sharer is adversely affecting his valuable legal right over suit land.

19. In present case, plaintiff has already raised construction over suit land and is seeking injunction against defendants alleging that defendants are going to utilise/cover the best portion of suit land, but he has not produced any evidence on record for determining the value of suit land already utilized by him or defendants or the land upon which defendants are allegdly bent upon to raise construction. Plaintiff has also not led any evidence to establish the area utilized for construction of his house and also that of defendants.

20. Plaintiff claims that houses of parties are situated on suit land but defendants disputes the location of their house by stating that their house is situated in another Khasra number. Plaintiff has not led any evidence to prove his claim that house of defendants is also on the suit land nor to prove that defendants are in possession of 19 marlas of land and proposed construction upon the suit land is beyond their entitlement in suit land.

21. In cases, where parties have already raised construction on the land owned and possessed jointly by them, the co-sharer seeking injunction against other co-sharer for restraining him from raising any construction thereupon, has also to plead and prove something more than that suit land is in joint ownership and possession and any co-sharer is raising construction upon the same without partition or without consent, establishing like explaining facts and circumstances in which previous construction was permitted to be raised without partition and also how proposed construction is affecting his legal rights or enjoyment of the suit land.

22. I also find support to my view from judgment relied upon by defendants, passed by Coordinate Bench of this Court in case reported in ***Ashok Kapoor vs. Murtu Devi (2016)1 Shim.L.C.207*** wherein, after considering numerous judgments of various High Courts and the Hon'ble Apex Court, it is observed as under:-

> *"46. On consideration of the various judicial pronouncements and on the basis of the dominant view taken in these decisions on the rights and liabilities of the co-sharers and their rights to raise construction to the exclusion of others, the following principles can conveniently be laid down:-*
>
> *i) a co-owner is not entitled to an injunction restraining another co-owner from exceeding his rights in the common property absolutely and simply because he is a co-owner unless any act of the person in possession of the property amounts to ouster prejudicial or adverse to the interest of the co-owner out of possession.*
>
> *ii) Mere making of construction or improvement of, in, the common property does not amount to ouster.*

(iii) If by the act of the co-owner in possession the value or utility of the property is diminished, then a co-owner out of possession can certainly seek an injunction to prevent the diminution of the value and utility of the property.

(iv) If the acts of the co-owner in possession are detrimental to the interest of other co-owners, a co-owner out of possession can seek an injunction to prevent such act which is detrimental to his interest.

(v) before an injunction is issued, the plaintiff has to establish that he would sustain, by the act he complains of some injury which materially would affect his position or his enjoyment or an accustomed user of the joint property would be inconvenienced or interfered with.

(vi) the question as to what relief should be granted is left to the discretion of the Court in the attending circumstances on the balance of convenience and in exercise of its discretion the Court will be guided by consideration of justice, equity and good conscience."

23. Plaintiff has also failed to lead evidence to prove that alleged proposed construction of defendants will diminish the value or utility of property or the same is deterimental to the interest of other co-owners including plaintiff. What is claimed in plaint is not substantiated by leading evidence and what is led in evidence has not been pleaded in plaint.

24. Plaintiff has though pleaded that defendants are bent upon raising construction without partition, but has chosen to remain conspicuously silent about pendency of partition proceedings preferred by him or any other co-sharers. Pendency of partition proceedings can also be a reason to restrain a co-sharer from raising construction and enjoying the nature of the land in given facts and circumstances of the case. But in present case, it is also not the case of plaintiff. In my opinion, it is another point that without preferring or intending to prefer partition proceedings, petitioner may not be entitled to perpetual injunction as it is also not case of plaintiff that defendants are hampering partition proceedings preferred by him or someone else. There is no pleading or evidence with respect to partition proceedings on record.

25. Learned District Judge has decreed the suit by discussing the evidence of defendants by stating that defendants have failed to establish their case and referring report of Local Commissioner and also statement of DW1 Piar Chand, about collection of construction material by defendants in their courtyard, has considered the failure to mention the fact of collection of material in written statement as a circumstance against the defendants and has held collection of construction material by defendants in suit land sufficient to pass impugned decree against them. Learned District Judge has ignored the fundamental principle of law that facts are to be proved by party who asserts and has also failed to consider that plaintiff has already raised construction upon the suit land and now opposing construction of defendants on the ground that best portion of land will be utilized by defendants but has not led any evidence in support of his claim identifying the best portion of land and to prove his claim that house of defendants is also situated in the suit land. Substantial question of law is answered accordingly.

26. Onus to prove its claim is upon plaintiff, who has failed to discharge his onus and in such a situation suit cannot be decreed. Learned District Judge has committed mistake by passing a decree in favour of plaintiff restraining defendants from raising constrcution over suit land only on the ground that defendants have collected material upon suit land and suit land is in joint ownership and possession of parties by ignoring the fact that plaintiff has already constructed house thereupon but has not established on record prejudice caused to him by proposed construction of defendants.

27. As discussed above, in case where one co-sharer himself has raised construction over the suit land, he will not have right to seek injunction unless he proves that construction by another co-sharer upon the land is in excess to share and/or prejudice or deterimental to legal rights of others and/or prejudice to co-sharers' right of lawful enjoyment of the suit land or will diminish the value or utility of property in question having adverse affect on right of co-sharer(s).

28. In present case plaintiff, though co-owner but has failed to establish adverse affect upon his rights in the suit land on raising construction by defendants, which was necessary for the reason that plaintiff himself has already raised construction over the suit land.Therefore, impugned judgment and decree warrants interference.

29. In view of above discussion, appeal is allowed and judgment and decree dated 26.2.2007 passed by learned District Judge Hamirpur, in civil appeal No. 96 of 2005 titled as Bakshi Ram vs. Piar Chand is set aside and civil suit No. 232 of 1998 filed by plaintiff is dismissed. Record of learned Courts below be sent back forthwith. Appeal stands allowed. Pending miscellaneous application(s), if any, are also disposed of in above terms.

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

Himachal Pensioners Kalyan Sangh .....Petitioner
Versus
Principal Secretary (Coop.) and others .....Respondents

CWP No. 7722 of 2011
Decided on: May 1, 2017

Constitution of India, 1950- Article 226- Respondent No.4 was registered under Societies Registration Act in the name and style of Pensioners Welfare Association – subsequently, another society was registered in the name and style of Himachal Pensioners Kalyan Sangh- respondent No.4 applied for cancellation on the ground that there cannot be resemblance in the name of two or more societies- the petition was rejected – an appeal was preferredand the order passed by the Registrar was set aside– held that there was no authority with the Additional District Magistrate to register the petitioner as Himachal Pensioners Kalyan Sangh in 1999 as the respondent No.4 was already registered in the year 1989- there cannot be any resemblance in the name of two societies registered under the Societies Registration Act –the order was correctly passed – writ petition dismissed.(Para-10 to16)

For the petitioner Mr. N.D. Sharma, Advocate.
For the respondents Mr.M.L. Chauhan, Additional Advocate General, for the respondent-State.
Mr. H.K. Paul, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (Oral):

By way of instant petition under Section 226 of the Constitution of India, petitioner i.e. Himachal Pensioners Kalyan Sangh (in short, 'petitioner-Sangh') has laid challenge to order dated 30.7.2011 passed by Principal Secretary (Coop.) to the Government of Himachal Pradesh, whereby appeal having been filed by respondent No.4, was accepted and petitioner-Sangh was directed to send amendment proposal to the Registrar Cooperative Societies, within one month from the date of passing of order.

2. Briefly stated, the facts, as emerge from record, are that respondent No.4 i.e. Pensioners Welfare Association, was registered under the Societies Registration Act, 1860 on 24.5.1989 by the Registrar of Societies, District Shimla. Subsequently, on 17.5.1999, Registrar-cum-Additional District Magistrate, Hamirpur registered another society in the name and style of Himachal Pensioners Kalyan Sangh i.e. petitioner-Sangh. Respondent No.4, being aggrieved with the aforesaid registration, preferred petition before District Magistrate-cum-Registrar, Hamirpur,

on the ground that there can not be resemblance in the names of two or more societies/associations functioning in the State, as such, registration certificate issued by Additional District Magistrate, Hamirpur, was invalid and *void ab initio*. However, the fact remains that the District Magistrate-cum-Registrar, vide order dated 14.2.2008 rejected the aforesaid petition.

3. Respondent No. 4, further being aggrieved with the rejection of their petition, preferred an appeal before the Registrar Cooperative Societies, who, vide order dated 30.12.2008, set aside and quashed order passed by District Magistrate, Hamirpur.

4. Perusal of order dated 30.12.2008, suggests that registration of petitioner-Sangh i.e. Himachal Pensioners Kalyan Sangh was held to be *void ab initio*, for the reason that it was registered in the year 1999 i.e. ten years after the registration of respondent No.4 i.e. 1989. Further perusal of aforesaid order passed by Registrar Cooperative Societies, suggests that petitioner-Sangh was directed to submit amendment, if any, in its bye-laws to change its name so that it may not be identical to the name of respondent No.4 society. Registrar Cooperative Societies further directed the petitioner-Sangh to apply to the District Magistrate-cum-Registrar, Hamirpur in due course of time, for its registration as District level society under the provisions of Societies Registration Act, 2006 because, admittedly, it was registered as District level association, whereas, respondent No. 4 was registered as State level association. However, the fact remains that petitioner-Sangh being aggrieved with the order of Registrar Cooperative Societies, preferred an appeal before Secretary (Cooperation), who, vide order dated 28.8.2009, held registration of petitioner-Sangh as invalid, on the ground that it was *void ab initio* since action of Additional District Magistrate, in registering society was without authority and jurisdiction. Secretary (Cooperation) to the Government of Himachal Pradesh, while passing order dated 28.8.2009, further concluded that there is no need to decide the issue whether names petitioner-Sangh and respondent N.4 are identical or not, because Additional District Magistrate was not competent to register the petitioner-Sangh. It also appears from order dated 28.8.2009 passed by Secretary (Cooperation) that while declaring registration of petitioner-Sangh as invalid, it also held that addition of word, 'State', in the name of respondent No.4 Association was contrary to the provisions of Section 5(2)(b)(i) of the Act.

5. At this stage, it may be noticed that subsequent to passing of order dated 28.8.2009 by Secretary (Cooperation), respondent No.4 approached Registrar Cooperative Societies on 11.9.2009 that since it has deleted word, "State", from its name, in compliance of order of Secretary (Cooperation), necessary rectification in the record may be incorporated by deleting word, "State". While making aforesaid prayer, respondent No.4 also requested the Registrar Cooperative Societies not to allow the petitioner-Sangh to register its society in the name of Himachal Pensioners Kalyan Sangh, as its earlier registration in the same name has been declared *void ab initio* by the authority concerned.

6. It emerges from the record that Registrar Cooperative Societies issued certificate of registration vide registration No. 303/2009, registering therein petitioner-Sangh in the name of Himachal Pensioners Kalyan Sangh. Subsequent to aforesaid fresh registration having been made by the Registrar Cooperative Societies, respondent No.4 filed objection on 8.12.2009, laying therein challenge to the fresh registration of the petitioner-Sangh. Registrar disposed of the same on 8.7.2010 with the observations that Himachal Pensioners Kalyan Sangh has been registered by him in accordance with the provisions of Himachal Pradesh Societies Registration Act, 2006 and if the association was aggrieved by his action, it was at liberty to challenge the same as per Act. In the aforesaid background, respondent No.4 filed an appeal before Principal Secretary (Cooperation) to the Government of Himachal Pradesh, laying challenge to order dated 8.7.2010 passed by Registrar Cooperative Societies. Principal Secretary (Cooperation), vide order dated 30.7.2011, set aside order passed by Registrar Cooperative Societies and held that name of new society i.e. petitioner-Sangh resembles with the name of respondent No.4 society and as such it needs to be changed to ensure that it does not resemble or is identical to the name of respondent No.4. Principal Secretary (Cooperation) also directed petitioner-Sangh to submit an amendment

proposal to the Registrar within one month from the date of passing of order, which was further directed to approve the society's proposal within one month from the date of submission of such proposal after ensuring that the proposal is in conformity with Section 5(2) of the Act. Hence, this petition by the petitioner-Sangh, praying therein for following main reliefs:

> "(i) That the impugned order Annexure P-9 dated 30.7.2011 passed by the Respondent No.1 against the petitioner may kindly be quashed and set-aside by issuing the writ of certiorari and further directions to the respondents no. 1 to 3 for functioning the petitioner society by issuance of writ of mandamus.
>
> (ii) That the respondent no. 4 be restrained from using the name of the petitioner society in any manner.
>
> (iii) That the whole record pertaining to the case of the petitioner may kindly be called for kind perusal of this Hon'ble Court."

7. Mr. N.D. Sharma, learned counsel representing the petitioner-Sangh, while inviting attention of this Court to order dated 30.7.2011, vehemently argued that same is not sustainable in the eyes of law as the same is not in accordance with provisions as contained in HP Societies Registration Act. Mr. Sharma, further contended that bare perusal of order dated 8.7.2010 passed by Registrar Cooperative Societies suggests that same is strictly in accordance with the Rules as such there was no scope for the Principal Secretary (Cooperation) to interfere in the matter, especially when petitioner-Sangh was registered afresh in terms of order passed by Secretary (Cooperation). While concluding his arguments, Mr. Sharma, further contended that once it stood proved on record that petitioner-Sangh was a District level association, by no stretch of imagination, it could be stated that there is resemblance in its name with that of respondent No.4, which is admittedly a State level association.

8. Mr. H.K. Paul, learned counsel representing respondent No.4 supported the order passed by the Principal Secretary (Cooperation). Mr. Paul further contended that bare perusal of impugned order passed by the respondent No.1 suggests that he has taken into consideration the Rules in vogue, while deciding controversy at hand and as such there is no illegality or infirmity in the impugned order passed by him, as such, same deserves to be upheld. Mr. Paul specifically invited attention of this Court to Section 5 (2) of the HP Societies Registration Act, 2006, to suggest that there should not be any resemblance in the names of two societies registered by Registrar under this Act. Mr. Paul further contended that it is undisputed that respondent No. 4 was registered prior in time i.e. in 1989, whereas, petitioner-Sangh was registered in 1999, as such, action of Additional District Magistrate, in registering petitioner-Sangh in the name and style of Himachal Pensioners Kalyan Sangh, was rightly held to be invalid by the Registrar Cooperative Societies. Mr. Paul prayed that the petition be dismissed being devoid of merit.

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

10. During the proceedings of the case, this Court, was made to travel through the impugned order passed by respondent No.1, as well as other orders passed by the authorities below, while deciding the controversy at hand, perusal whereof nowhere suggests that respondent No.1 committed any illegality or irregularity while passing order dated 30.7.2011, rather, this Court, after having carefully perused impugned order dated 30.7.2011, has no hesitation to conclude that there was no authority vested in Additional District Magistrate to register the petitioner-Sangh as Himachal Pensioners Kalyan Sangh, that too in 1999, because it stands duly proved on record that respondent No.4 was registered as Pensioners Welfare Association in the year 1989. At this stage, it may be profitable to reproduce sub-section (2) of Section 5 of the Societies Registration Act, 2006, as under:

> "Chapter-III
>
> Registration
>
> 4. .....

5(1) …

(i) ..

(ii) …

(iii) …

(iv) …

(2) No name shall be proposed in the memorandum of association --

(a) as is identical with or too nearly resembles the name by which a Society in existence has been previously registered anywhere in the State; or

(b) which has its component –

(i) such words as may suggest or may be calculated to suggest the patronage of the Government of India or the Government of a State; or

(ii) such words of National, International or universal importance or such other words as the State Government may, from time to time, by notification specify; or

(iii) such words as is, in the opinion of Registrar, likely to mislead the public."

11. Perusal of aforesaid provisions of law, clearly suggests that there can not be any resemblance in the names of two societies registered under the Societies Registration Act, 2006.

12. In the instant case, respondent No.2, while passing order dated 28.8.2009, had specifically held that registration of Himachal Pensioners Kalyan Sangh is invalid on the ground that it was *void ab initio*, since, Additional District Magistrate was not competent to register petitioner-Sangh in violation of Section 5(2) of the Act ibid.

13. It also emerges from the record that order dated 28.8.2009, passed by respondent No.2, whereby registration of petitioner-Sangh as Himachal Pensioners Kalyan Sangh, was held to be invalid, was never laid challenge to by the petitioner-Sangh, meaning thereby that the order passed by respondent No.2 on 28.8.2009, had attained finality. Similarly, this Court sees substantial force in the arguments of Mr. Paul, that there was no occasion for Registrar Cooperative Societies to register Himachal Pensioners Kalyan Sangh after passing of order dated 28.8.2009, by the respondent No.2, rather, it was incumbent upon him to register petitioner-Sangh strictly in accordance with order dated 28.8.2009, whereby registration done by Additional District Magistrate was held to be illegal.

14. This Court finds that Registrar Societies, while considering fresh prayer of petitioner-Sangh, for registration as well as deciding objections dated 8.12.2009, exceeded his jurisdiction, while again registering petitioner-Sangh as Himachal Pensioners Kalyan Sangh, because, admittedly, at that time, controversy with regard to resemblance of names of petitioner-Sangh and respondent No.4 stood decided vide order dated 28.8.2009 by respondent No. 2, which had attained finality for all purposes.

15. Consequently, this Court, after having perused various orders passed by authorities concerned as well as provisions of sub-section (2) of Section 5 of the HP Societies Registration Act, 2006, sees no illegality or infirmity in order dated 30.7.2011 passed by respondent No.1, which appears to be in conformity with law, as such deserves to be upheld.

16. In view of the above, present petition is dismissed. Petitioner-Sangh is directed to approach authority concerned for changing its name, within two months, and authority concerned shall decide the same strictly in accordance with law.

Pending applications, if any, are also disposed of.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACTING CHIEF JUSTICE AND HON'BLE MR. JUSTICE, VIVEK SINGH THAKUR, J.

Naresh Bahadur Sahi ...Appellant
Versus
State of Himachal Pradesh ...Respondent

Criminal Appeal No. 441 of 2016
Judgment reserved on : 19.04.2017.
Date of Decision : May 1, 2017

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 1.6 kg. charas – he was tried and convicted by the Trial Court- held in appeal that setting of naka and presence of accused were not disputed- testimonies of police officials corroborated each other– contradictions in their testimonies are not material- statement of police officer cannot be doubted on the ground that he is a police officer and interested in the success of his case – police official was sent to call an independent witness but none could be found as it was a night time – difference of 0.62 grams or 1% is not material as the contraband was wrapped with poly wrappers, when it was weighed at the spot and poly wrappers were removed when the contraband was weighed in the FSL, which explains the difference in the weight – link evidence was established – failure to produce seal in the Court will not be fatal – the Court had rightly appreciated the evidence – appeal dismissed.(Para-6 to 28)

Cases referred:
Lal Mandi v. State of W.B., (1995) 3 SCC 603
Govindaraju alias Govinda v. State by Srirampuram Police Station and another, (2012) 4 SCC 722
Tika Ram v. State of Madhya Pradesh, (2007) 15 SCC 760
Girja Prasad v. State of M.P., (2007) 7 SCC 625
Aher Raja Khima v. State of Saurashtra, AIR 1956
Tahir v. State (Delhi), (1996) 3 SCC 338
Customs Preventive Station of Customs Department vs. Bahadur Singh, Latest HLJ 2014 (HP) 804
State of Himachal Pradesh vs. Sunder Singh, Latest HLJ 2014 (HP) 1293
State of Himachal Pradesh vs. Deen Mohammad, Latest HLJ 2010 (HP) 1386
State of Himachal Pradesh vs. Shri Fred Robinson, Latest HLJ 2001 (HP) 843 (DB)
Mohinder vs. State of Haryana, (2014) 15 SCC 641

For the appellant : Mr. G. R. Palsra, Advocate, for the appellant.
For the respondent : Mr. V. S. Chauhan, Additional Advocate General for the respondent/State.

The following judgment of the Court was delivered:

Sanjay Karol, A.C.J.

The contradictions in the testimonies of police officials HC Nand Lal (PW-1) and Inspector Chet Singh (PW-8), who carried out the search and seizure operations and the discrepancies in the testimonies of HHC Lalit Kumar (PW-2) and HHC Rakesh Kumar (PW-6) proving link evidence are the main grounds urged before us, in assailing the judgment of conviction of the appellant under the provisions of Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act). Non association of independent witnesses is yet another ground urged by the appellant.

2. It is a matter of record that no independent witness was either associated by the police during the investigation nor examined by the prosecution during trial. From the testimonies of eight police officials, trial Court found the prosecution to have established its case of recovery of 1 k.g. 600 grams charas (a psychotropic substance) from the conscious and exclusive possession of the accused.

3. The only defence taken by the accused is of innocence and false implication. Undisputedly, no evidence in rebuttal, stands led by him.

4. In short, it is the case of the prosecution that on 8.2.2015, pursuant to orders passed by the superior authorities, a naaka came to be led by Inspector Chet Singh (PW-8), S.H.O. of Police Station, Balh, at a place known as Nagchala, where at about 2.00 a.m., accused was noticed under suspicious circumstances. He was stopped and on suspicion searched. The bag carried by him contained fourteen packets of contraband substance which appeared to be charas. When weighed it was 1 k.g. and 600 grams. The recovered stuff was repacked and sealed. NCB form (Ext. PW-8/A), in triplicate, was filled up on the spot and ruka (Ext. PW-8/B) sent to the police station through HC Nand Lal (PW-1). With the registration of F.I.R. (Ext. PW-3/A), accused came to be arrested. The contraband substance was entrusted to HHC Lalit Kumar (PW-2) who deposited it in the maalkhana and through HHC Rakesh Kumar (PW-6) sent it for chemical analysis, report whereof (Ext. PW-8/D), upon receipt, was taken on record. Also special report (Ext. PW-7/B) was sent to the superior authority. Since report of the chemical analyst established the contraband substance to be charas, challan came to be presented in the Court for trial. The accused was charged for having committed an offence punishable under the provisions of Section 20 of the Act, to which he pleaded not guilty and claimed trial.

5. In terms of the impugned judgment, he stands convicted and sentenced to serve imprisonment as also pay fine.

6. The apex Court in *Lal Mandi v. State of W.B.,* (1995) 3 SCC 603, has held that, though the powers of an appellate court, while dealing with an appeal against acquittal and an appeal against conviction are equally wide but the consideration which would weigh in dealing with an appeal against an order of acquittal and that of conviction are distinct and separate. The presumption of innocence of an accused which gets strengthened on acquittal is not available on conviction. An appellate court may give every reasonable weight to the conclusions arrived at by the trial court but it must be remembered that an appellate court is duty-bound, in the same way as the trial court, to test the evidence extrinsically as well as intrinsically and to consider as thoroughly as the trial court, all the circumstances available on record so as to arrive at an independent finding regarding guilt or innocence of the convict. An appellate court would fail in the discharge of one of its essential duties, if it fails to itself appreciate the evidence on record and arrive at an independent finding based on the appraisal of such evidence.

7. We now proceed to examine the testimonies of the prosecution witnesses. In Court, Inspector Chet Singh (PW-8) categorically states that pursuant to the directions issued by the Superintendent of Police, Mandi (Ext. PW-5/A) for setting up check posts at different places, on 8.2.2015 he laid a naaka at a place known at Nagchala. He was accompanied by police officials including HC Nand Lal (PW-1), Constable Bhanu and Constable Narender. The place was secluded. At about 2.00 a.m., accused was seen, walking on foot, carrying a bag on his left shoulder. Seeing the police party, he tried to flee away but on suspicion that he may be carrying some stolen articles, apprehended only after accused had covered a distance of 25 – 30 meters. Suspecting that he may have kept some stolen articles in his bag, HC Nand Lal was sent to search for some independent witnesses. However, since it was night time and none was available, after associating HC Nand Lal and Constable Bhanu Sharma, he opened the bag (Ext. P-6) of the accused. Inside the said bag, amongst other articles, there was one light blue coloured bag which contained fourteen small packets wrapped in a transparent polythene. These packets contained substance in the shape of *papad* which appeared to be charas. The recovered stuff was weighed with the help of electronic balance and found to be 1 k.g. and 600 grams. The stuff was repacked in the same manner as it was opened, whereafter it was kept in a cloth parcel and sealed at nine

places with seal impression-D, impression whereof was also taken on a piece of cloth (Ext. PW-1/A). NCB form (Ext. PW-8/A) was filled and seal embossed thereupon. Seals were handed over to HC Nand Lal. The stuff was recovered vide memo (Ext. PW-1/B). Ruka (Ext.PW-8/B), so scribed by him, was sent through HC Nand Lal to the police station where F.I.R. No. 37 of 2015 (Ext. PW-3/A), dated 8.2.2015, came to be registered against the accused under the provisions of Section 20 of the Act. The accused was arrested and with the party returning to the police station, case property entrusted to HHC Lalit Kumar (PW-2), maalkhana incharge, who after making entries in the maalkhana register, vide road certificate (Ext. PW-2/B) sent the same for chemical analysis. This witness also sent special report (Ext. PW-7/B) to the superior officer and upon receipt of report of the chemical analyst (Ext. PW-8/D), prepared and presented the challan in Court for trial. This witness has categorically identified the case property so produced in the Court to be the one which was recovered by him from the conscious and exclusive possession of the accused. Bag, polythene wrapper and charas so recovered stand proven by him on record. Now significantly this witness has clearly withstood the test of cross examination. His testimony, on all material fact(s) in issue, is clear, cogent and consistent. The only contradiction is with regard to the colour of the bag. Yes, in Court, bag so produced was found to be of light green colour. But then the witness, unrebutted, categorically and unequivocally clarified that it was due to night that such colour came to be recorded erroneously, as light blue and not light green.

8. The fact that he had set up naaka is not disputed. The fact that accused was present on the spot, there is not much dispute, for it is evident from the line of his cross examination. In fact, accused does admit his presence on the spot, for it is his suggested case that he was sitting on seat No. 16 alongwith one foreigner in a bus owned by State Transport (Haryana Roadways) and upon checking, police asked him to get down, only whereafter he was falsely implicated. Now significantly, at no point in time, prior to such suggestion having been put to this witness, accused ever protested against his illegal detention or put forward such defence. Undisputedly, he was produced before the Magistrate, in accordance with law. He was always represented by a Counsel. Hence his defence remains improbablized.

9. Further, we find the testimony of HC Nand Lal (PW-1) to be corroborative in nature on all material aspects. Yes, on first brush, contradictions so pointed in his testimony appear to be material, but on close scrutiny, we find it not to be so. He states the bag carried by the accused to be a *pithoo bag,* which fact is not so stated by Inspector Chet Singh (PW-8). Also bag produced in Court is not a *pithoo*. But then he has explained the bag to be the same only as he understood, purely on account of its shape and design, for it had two small strings which made him believe it to be so. Though initially this witness does state the other bag from which charas was recovered to be blue in colour, but then we do not find this contradiction to be material, rendering the genesis of the prosecution case to be false, entitling the accused for acquittal. Credence of this witness cannot be said to have been impeached only on this count. Otherwise, it is not that his version is not worthy of credence or that he is not a truthful witness. Variation with regard to the colour of the bag is also not so significant. The colour green can easily be mistaken for blue or vice-versa. Similarly description of the bag pails into insignificance in view of the fact that both the police officials have described it to be with the strings.

10. With vehemence, it is argued that prosecution case stands vitiated on account of non association of independent witnesses. Undoubtedly, no independent witnesses were associated by the police, in carrying out search and seizure operations. The issue as to whether in every case, and under all circumstances, police must associate independent witnesses, while carrying out search and seizure operations, is no longer res integra.

11. It is a settled proposition of law that sole testimony of police official, which if otherwise is reliable, trustworthy, cogent and duly corroborated by other admissible evidence, cannot be discarded only on the ground that he is a police official and may be interested in the success of the case. It cannot be stated as a rule that a police officer can or cannot be a sole eye-witness in a criminal case. It will always depend upon the facts of a given case. If the testimony of such a witness is reliable, trustworthy, cogent and if required duly corroborated by other

witnesses or admissible evidences, then the statement of such witness cannot be discarded only on the ground that he is a police officer and may have some interest in success of the case. It is only when his interest in the success of the case is motivated by overzealousness to an extent of his involving innocent people, in that event, no credibility can be attached to the statement of such witness.

12. It is not the law that Police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence. The presumption applies as much in favour of a police officer as any other person. There is also no rule of law which lays down that no conviction can be recorded on the testimony of a police officer even if such evidence is otherwise reliable and trustworthy. Rule of prudence may require more careful scrutiny of their evidence. If such a presumption is raised against the police officers without exception, it will be an attitude which could neither do credit to the magistracy nor good to the public, it can only bring down the prestige of police administration.

13. Wherever, evidence of a police officer, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, can form basis of conviction and absence of some independent witness of the locality does not in any way affect the creditworthiness of the prosecution case. No infirmity attaches to the testimony of the police officers merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. Such reliable and trustworthy statement can form the basis of conviction. [*Govindaraju alias Govinda v. State by Srirampuram Police Station and another,* (2012) 4 SCC 722; *Tika Ram v. State of Madhya Pradesh,* (2007) 15 SCC 760; *Girja Prasad v. State of M.P.,* (2007) 7 SCC 625); and *Aher Raja Khima v. State of Saurashtra,* AIR 1956].

14. Apex Court in *Tahir v. State (Delhi)*, (1996) 3 SCC 338, dealing with a similar question, held as under:-

> "6. ... .In our opinion no infirmity attaches to the testimony of the police officials, merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. The Rule of Prudence, however, only requires a more careful scrutiny of their evidence, since they can be said to be interested in the result of the case projected by them. Where the evidence of the police officials, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and the absence of some independent witness of the locality to lend corroboration to their evidence, does not in any way affect the creditworthiness of the prosecution case."

15. We find even such fact not to have any bearing on the outcome of the case. From the conjoint reading of testimonies of Inspector Chet Singh (PW-8) and HC Nand Lal (PW-1) it is evident that the former had asked the latter to fetch for some independent witnesses and as is so disclosed by the latter, none could be associated for the reason that it was night time. One cannot forget that the accused was apprehended at 2.00 a.m. in the middle of night. It has come on record that certain vehicles did pass by, but then, it is not the case of either of the witnesses that any vehicle had crossed at the relevant time. Though it has emerged from the record that there are certain shops and establishments close-by, but then it is not that they were open. In fact, as is so suggested by the accused, the place was secluded and inhabited by wild life, thus confining people indoors. Even otherwise, we have found the testimonies of the witnesses to be inspiring in confidence and we see no reason for it to be corroborated by any independent witness.

16. This takes us to yet another contradiction, pointed out in favour of the convict and that being the shape of the contraband substance. One witness states it to be *chapatti*, whereas, the other states it was *papad.* Well, this contradiction would also not make any

difference, for it is not that the shapes are distinctly separate. The variation is only with regard to the thickness.

17. Next, it is pointed out that there is difference in the weight of the contraband substance allegedly recovered from the accused and the one analyzed in the laboratory. Well it is only of 0.62 grams which is almost 1%. In our considered view, even this difference is explainable, for what was weighed by the police on the spot was the contraband substance wrapped in fourteen poly wrappers and as is evident from the report of the laboratory (Ext. PW-8/D), they analyzed the sample as under:

"Total weight of parcel	**=**	**1.620Kg**
Weight of carry bag & parcel cloth	=	0.046Kg
Weight of exhibit with zip poly packets & poly sheets	**=**	**1.574Kg**
Weight of zip poly packets & poly sheets	=	0.136Kg
Actual weight of exhibit	**=**	**1.438Kg"**

The cumulative weight of the zip poly packets & poly sheets and the contraband substance is matching with the case property, weighed by the police on the spot.

18. It is next argued that on the specimen of the seal (Ext. PW-1/A) there are no signatures of the accused. But then, it is a mere irregularity and not illegality, which would vitiate trial. In any event, this lapse on the part of the Investigating Officer cannot be said to be a ground to totally disbelieve their ocular version or the documentary evidence, establishing the factum of recovery of the contraband substance from the conscious possession of the accused. Significantly other documents i.e. recovery memo (Ext. PW-1/B), arrest information memo (Ext. PW-1/C) and personal search memo (Ext. PW-1/D), so prepared on the spot are bearing his signatures.

19. Even by way of link evidence, we find the prosecution to have established its case. Inspector Chet Singh(PW-8) deposited the case property with HC Nand Lal (PW-2), who sent it for chemical analysis through HHC Rakesh Kumar (PW-6). It is not the suggested case of the accused that the property came to be tampered with. In any event they are categorical that till and so long the case property remained with them, it was not tampered with. HC Nand Lal does not remember the nature of the seal with which impression was embossed or the weight of the parcel. But then he was not supposed to remember such fact, for the case property never came to be sealed or weighed in his presence. In any event he was under no obligation to state such fact particularly when entry with regard thereto, came to be recorded in the maalkhana register (Ext. PW-2/A), as is evident from the testimony of Inspector Chet Singh and the Road Certificate (Ext. PW-2/C) so sent alongwith the case property to the laboratory. Significantly, such facts remain undisputed and uncontroverted.

20. We also find the SHO (PW-8) to have taken all precautions of informing his superior authority, which fact is evident not only from his testimony but also that of HC Balam Ram (PW-7) who was posted as Reader to the Assistant Superintendent of Police, Mandi, the area in question.

21. While contending that non production of seal is fatal to the prosecution case, learned counsel for the appellant invites attention to the decisions rendered by a Coordinate Bench of this Court in *Customs Preventive Station of Customs Department vs. Bahadur Singh,* Latest HLJ 2014 (HP) 804; *State of Himachal Pradesh vs. Sunder Singh,* Latest HLJ 2014 (HP) 1293; and *State of Himachal Pradesh vs. Deen Mohammad,* Latest HLJ 2010 (HP) 1386. Again the decisions are based on the attending facts and circumstances. There the genesis of the prosecution story of recovery of the contraband substance from the conscious possession of the accused, itself was in doubt. It is in this backdrop that the Court additionally found the circumstance of non production of the seal to be fatal. In any event, this Court in Criminal

Appeal No. 305 of 2014, titled as *Sohan Lal vs. State of Himachal Pradesh,* decided on 2nd November, 2016, has subsequently clarified the issue as under:

> "52. Non-production of original seal in the Court also cannot be said to be fatal, for the police officials have fully established their case of having sealed the case property, both on the spot and at the Police Station. There is no discrepancy about the number and nature of the seals. Also, there is no iota of evidence that they were either broken or tampered with. Report of the FSL (Ex.PW-13/C) is also evidently clear to such effect.
>
> 53. On this issue much reliance is placed on a decision rendered us in *Kurban Khan (supra)* [2015 Cr.LJ 183] and *Anil Kumar (supra)* [Latest HLJ 2015(HP) 341], wherein it is held that non-production of original seals does render the prosecution case to be fatal. As authors of the said decisions, we ourselves clarify them to have been rendered in the given facts and circumstances, which fact, also subsequently stands clarified by another Coordinate Bench of this Court, by relying upon a judgment rendered by the apex Court in *State represented by Inspector of Police, Chennai v. N.S. Gnaneswaran,* (2013) 3 SCC 594, in *Kishori Lal (supra)* (Criminal Appeal No.201 of 2016), that the said decisions were rendered in the given facts and circumstances. Not only that, they further clarified that it was incumbent upon the accused to have established prejudice caused to him on account of non-production of the original seal(s) in the Court, particularly when otherwise there was sufficient evidence, linking the seal affixed on the sample and embossed on the documents to be the same and the case property to be the one so recovered from the conscious possession of the accused. The Court observed that "availability of other sufficient evidence renders non-production of originals seal as a technical defect, which does not vitiate trial unless prejudice is caused……". "Purpose of production of original seal in the Court is to compare it with seal affixed on parcels of contraband and sample in the Court so as to prove that the parcels produced in the Court are the same which were prepared and sealed on the spot at the time of recovery from the accused and also to ensure that parcel sent for chemical examination and received back were the same which were seized and sealed on the spot.""

22. In *State of Himachal Pradesh vs. Shri Fred Robinson,* Latest HLJ 2001 (HP) 843 (DB), in the given facts and circumstances, Court found prosecution not to have proven, affirmatively, the fact that the report of the chemical examiner pertained to the very same material which was seized from the accused. However, in the instant case, as already discussed, such is not the position in hand

23. Also the apex Court in *Mohinder vs. State of Haryana,* (2014) 15 SCC 641 has observed as under:

> "11. Regarding the delay in sending the contraband for examination by the FSL, it was PW 2, who carried the samples from the police station to FSL at Madhuban but he was not asked any question in the cross-examination, though opportunity was given to the defence. Even otherwise, the FSL report, Ext. P1 would show that the sample was received at the FSL intact with the seal which tallied with the specimen seals forwarded. Accordingly, the said objection is liable to be rejected."

24. Hence cumulatively examined, it cannot be said that the Court below erred in completely and correctly appreciating the testimonies of the prosecution witnesses and holding the accused guilty of the charged offence.

25. Even on the question of sentence, also it cannot be said that Court below erred or that it failed to judiciously exercise the discretion so vested in it.

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

27. Hence, in our considered view, prosecution has been able to discharge the burden of proving the recovery of the contraband substance from the conscious possession of the accused, beyond reasonable doubt. It cannot be said that the trial Court erred in correctly and completely appreciating the testimonies of the prosecution witnesses.

28. For all the aforesaid reasons, we find no reason to interfere with the judgment passed by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and complete appreciation of the material so placed on record by the parties. Findings cannot be said to be erroneous in any manner. Hence, the appeal is dismissed.

Records of the Court below be immediately sent back.

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

Ranjit Kumar ...Petitioner.
Versus
State of H.P. & another ...Respondents.

CWP No. 858 of 2017
Date of Decision: May 1, 2017

Constitution of India, 1950- Article 226- A cafeteria in State War Memorial, Dharmshala was allowed to be managed by the petitioner for a period of 11 months commencing from 1.8.19991- the petitioner managed to retain possession despite the order of eviction– held that the authorities had jurisdiction to pass the order- no extraneous circumstances/factors were taken into consideration while passing the order- petitioner is not the owner of the premises nor has he become the owner by adverse possession- his possession is unauthorized and he was rightly ordered to be ejected- petition dismissed. (Para-2 to 17)

Cases referred:

T.C. Basappa Vs. T. Nagappa & Anr., (1955) 1 SCR 250

NagendraNath Bora & Anr. Vs. Commissioner of Hills Division and Appeals, Assam &Ors.,(1958) SCR 1240

Satyanarayan Laxminarayan Hegde and Ors. Vs. Mallikarjun Bhavanappa Tirumale, (1960) 1 SCR 890

The Custodian of Evacuee Property Bangalore Vs. Khan Saheb Abdul Shukoor etc. (1961) 3 SCR 855

Rupa Ashok Hurra Vs. Ashok Hurra and Anr., (2002) 4 SCC 388

Bhuvnesh Kumar Dwivedi v. Hindalco Industries Ltd., 2014(11)SCC 85

For the Petitioner: Mr. Naveen Awasthi, Advocate, for the petitioner.

For the Respondent: Mr. Shrawan Dogra, Advocate General, with M/s Romesh Verma, & Anup Rattan, Additional Advocate Generals & J.K. Verma, Deputy Advocate General, for the respondents-State.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice (oral).

At some stage, all litigation must come to an end, more so, in a case of present nature where issues of management of the properties of the defence forces are concerned. Unhesitantly, considering the attending facts and circumstances, we dismiss the present petition in limine.

2. At the State War Memorial, Dharamshala, there is a Cafeteria, which authorizedly was allowed to be managed by the petitioner for a period of eleven months commencing from 01.08.1991. We find on account of protracted litigation, by abusing and evading the process of law, on one count or the other, with success, rather unauthorizedly, petitioner managedto retain possession thereof.

3. One need not dilate upon the chequered history of litigation, save and except that most recently in the year, 2013, petitioner was directed to handover possession of the Cafeteria to the Martyrs Memorial Services and Development Society, Dharamshala. Not only was he irregular in payment of rent/occupation charges, but otherwise also his services were found to be of sub-standard quality.

4. Eventually with the initiation of the proceedings under the provisions of the Himachal Pradesh Public Premises and Land (Eviction and Rent Recovery) Act, 1971 (hereinafter referred to as the Act), an order of ejectment came to be passed by Collector, Sub Division, Dharamshala, District Kangra, H.P., in Case No.04/2015, titled as *Deputy Director Sainik Welfare Kangra at Dharamshala Versus Ranjeet Singh,* on 09.01.2017. Despite the same, possession of the premises was never handed and petitioner indulged in a futile litigation, which vide order dated 17.04.2017, in CWP No. 286 of 2017, titled as *Ranjit Kumar Versus State of H.P. and another,* was disposed off, giving two weeks' time to the petitioner to exhaust all remedies.

5. Undisputedly petitioner's appeal stands rejected with the passing of the impugned orders dated 09.01.2017 (Annexure P-10) and dated 11.04.2017, passed by Divisional Commissioner Kangra at Dharamshala, in *Case No.03/2017, titled as Ranjit Singh Versus Deputy Director, Sainik Welfare, Kangra at Dharamshala, District Kangra, H.P.* (Annexure P-12) and save and except for the present petition no *lis* is pending anywhere.

6. The scope of interference in a writ jurisdiction under Article 226 of the Constitution of India, is now well settled. The principles on which the writ of certiorari is issued are also well-settled.

7. The Constitution Bench in *T.C. Basappa Vs. T. Nagappa & Anr.,*(1955) 1 SCR 250, held that certiorari may be and is generally granted when a court has acted (i) without jurisdiction, or (ii) in excess of its jurisdiction. The want of jurisdiction may arise from the nature of the subject-matter of the proceedings or from the absence of some preliminary proceedings or the court itself may not have been legally constituted or suffering from certain disability by reason of extraneous circumstances. Certiorari may also issue if the court or tribunal though competent has acted in flagrant disregard of the rules or procedure or in violation of the principles of natural justice where no particular procedure is prescribed. An error in the decision or determination itself may also be amenable to a writ of certiorari subject to the following factors being available if the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or disregard of the provisions of law but a mere wrong decision is not amenable to a writ of certiorari.

8. In the exercise of certiorari jurisdiction the High Court proceeds on an assumption that a Court which has jurisdiction over a subject- matter has the jurisdiction to decide wrongly as well as rightly. The High Court would not, therefore, for the purpose of certiorari assign to itself the role of an Appellate Court and step into re-appreciating or evaluating the evidence and substitute its own findings in place of those arrived at by the inferior court.

9. Now in the instant case, authorities below did have jurisdiction to pass order. There are no extraneous circumstances or factors present in the passing of the impugned orders. It is not a case of malice in law or fact or bias. Question of prejudice caused to the petitioner does not arise and public interest is in favour of the respondents. Entire material so placed on record stands fully considered and appreciated while passing the impugned orders.

10. The Constitution Bench in *NagendraNath Bora & Anr. Vs. Commissioner of Hills Division and Appeals, Assam &Ors.*,(1958) SCR 1240, the parameters for the exercise of jurisdiction, calling upon the issuance of writ of certiorari where so set out by:

> "*The Common law writ, now called the order of certiorari, which has also been adopted by our Constitution, is not meant to take the place of an appeal where the Statute does not confer a right of appeal. Its purpose is only to determine, on an examination of the record, whether the inferior tribunal has exceeded its jurisdiction or has not proceeded in accordance with the essential requirements of the law which it was meant to administer. Mere formal or technical errors, even though of law, will not be sufficient to attract this extra-ordinary jurisdiction. Where the errors cannot be said to be errors of law apparent on the face of the record, but they are merely errors in appreciation of documentary evidence or affidavits, errors in drawing inferences or omission to draw inference or in other words errors which a court sitting as a court of appeal only, could have examined and, if necessary, corrected and the appellate authority under a statute in question has unlimited jurisdiction to examine and appreciate the evidence in the exercise of its appellate or revisional jurisdiction and it has not been shown that in exercising its powers the appellate authority disregarded any mandatory provisions of the law but what can be said at the most was that it had disregarded certain executive instructions not having the force of law, there is not case for the exercise of the jurisdiction under Article 226*."

11. That an error apparent on face of record can be corrected by certiorari. The broad working rule for determining what is a patent error or an error apparent on the face of the record was well set out in *Satyanarayan Laxminarayan Hegde and Ors. Vs. Mallikarjun Bhavanappa Tirumale***,** (1960) 1 SCR 890**.** It was held that the alleged error should be self-evident. An error which needs to be established by lengthy and complicated arguments or an error in a long-drawn process of reasoning on points where there may conceivably be two opinions cannot be called a patent error. In a writ of certiorari the High Court may quash the proceedings of the tribunal, authority or court but may not substitute its own findings or directions in lieu of one given in the proceedings forming the subject-matter of certiorari.

12. The Constitution Bench in *The Custodian of Evacuee Property Bangalore Vs. Khan Saheb Abdul Shukoor etc.* (1961) 3 SCR 855 stated :-

> " The limit of the jurisdiction of the High Court in issuing writs of certiorari was considered by this Court in a 7-Judge Bench decision of this Court in *Hari Vishnu Kamath Vs. Ahmad Ishaque 1955-I S 1104* **:** ((s) AIR 1955 SC 233) and the following four propositions were laid down :-
>
> > *"(1) Certiorari will be issued for correcting errors of jurisdiction;*
> >
> > *(2) Certiorari will also be issued when the Court or Tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard, or violates the principles of natural justice;*
> >
> > *(3) The court issuing a writ of certiorari acts in exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the court will not review findings of fact reached by the inferior court or tribunal, even if they be erroneous.*

(4) An error in the decision or determination itself may also be amenable to a writ of certiorari if it is a manifest error apparent on the face of the proceedings, e.g., when it is based on clear ignorance or disregard of the provisions of law. In other words, it is a patent error which can be corrected by certiorari but not a mere wrong decision."'

13. A Constitution Bench of Hon'ble Supreme Court in *Rupa Ashok Hurra Vs. Ashok Hurra and Anr.,* (2002) 4 SCC 388, has held as under:-

"109. Certiorari lies to bring decisions of an inferior court, tribunal, public authority or any other body of persons before the High Court for review so that the court may determine whether they should be quashed, or to quash such decisions. The order of prohibition is an order issuing out of the High Court and directed to an inferior court or tribunal or public authority which forbids that court or tribunal or authority to act in excess of its jurisdiction or contrary to law. Both certiorari and prohibition are employed for the control of inferior courts, tribunals and public authorities."

14. Hon'ble Apex Court in *Bhuvnesh Kumar Dwivedi v. Hindalco Industries* Ltd., 2014(11)SCC 85, has held as under;

'....

"60. The power of judicial review is neither unqualified nor unlimited. It has its own limitations. The scope and extent of the power that is so very often invoked has been the subject-matter of several judicial pronouncements within and outside the country. When one talks of 'judicial review' one is instantly reminded of the classic and often quoted passage from Council of Civil Service Unions (CCSU) v. Minister for the Civil Service, [1984] 3 All ER 935*, where Lord Diplock summed up the permissible grounds of judicial review thus:*

Judicial Review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'.

By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the State is exercisable.

By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness'. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer or else there would be something badly wrong with our judicial system... ...

I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

15. It cannot be the petitioner's case that he is the owner of the premises. He does not claim to have perfected his title by way of adverse possession, which in any case, he cannot

be permitted to do so, in view of the unabated and protracted litigation with respect thereto, *inter se* the parties. Though unsuccessfully, he contested his claim of being a tenant in perpetuity before the Civil Court, by filing a civil suit and before this Court by assailing the order passed under the provisions of the Act. Also he continued to default in abiding by the terms of the lease. In fact, he had no right to retain the premises beyond the original lease period.

16. Be that as it may, today petitioner's occupation is totally unauthorized. In detail the Appellate Authority has dealt with the contentions, so raised by the petitioner. It is a reasoned order. Material in its entirety stands considered by the authorities below. Despite repeated queries, learned counsel, failed in pointing out the illegality, impropriety, irregularity or perversity, in the orders, so passed by the authorities below. Our reasons based on the factual matrix already stand reflected in the earlier part of the judgment.

17. Indulgently, though undeservingly, we had suggested that petitioner take time to vacate the premises by filing an undertaking before this Court. But obstinately, such suggestion fell on deaf ears.

18. As such, we find no merits in the present petition and the same is dismissed, so also pending application(s), if any.

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

State of Himachal Pradesh .....Appellant.
Versus
Satish Saraswati .....Respondent.

Cr. Appeal No.386 of 2008.
Reserved on : 17.04.2017.
Decided on : 1st May, 2017.

Indian Penal Code, 1860- Section 279 and 337- **Motor Vehicles Act, 1988-** Section 185- Accused was driving a Maruti car under the influence of liquor in a rash and negligent manner- he could not control the vehicle and hit a bus- he was tried and acquitted by the Trial Court- held in appeal that prosecution witnesses contradicted each other and made material improvements in their testimonies – Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-7 to 13)

Cases referred:
K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258
T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401

For the appellant Mr. Pushpinder Singh Jaswal, Dy. Advocate General with Mr. Rajat Chauhan, Law Officer.
For the respondent Mr. Sandeep Dutta, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal is maintained by the appellant-State of Himachal Pradesh against the judgment of acquittal of accused in a case under Sections 279 and 338 of the Indian Penal Code and Section 185 of the Motor Vehicles Act, passed by the learned Judicial Magistrate 1st Class, Court No.I, Shimla (H.P) dated 7.12.2007, in Criminal Case No.29/2 of 2005.

2. Briefly stating facts giving rise to the present appeal are that on 7.1.2005, Ravinder Kumar (PW-2) was driving a bus bearing registration No.HP-07-3932 from Bus Stand Shimla to Mehli, whereas Ashok Kumar (PW-3) was conductor in the said bus. Around 8:40 PM, when the bus reached at Talland, Maruti Car coming from Khalini side in a high speed and collided with the aforesaid bus. The Maruti car in question was being driven by the accused in a rash and negligent manner so as to endanger human life and personal safety of others. As a result of which, he could not control the same and collided the same with the aforesaid bus. Accused was driving the car under the influence of liquor. Thereafter, the matter was reported to the police, where Investigating Officer recorded the statement of Ravi Kumar Ex.PW2/A, under Section 154 of the Code of Criminal Procedure, which was sent to Police Station, vide FIR Ex.PW10/A was registered. Statement of the witnesses was also recorded and site plan was prepared. The vehicle in question was taken into possession by the police and photographs were taken.

3. The prosecution, in order to prove its case, examined as many as ten witnesses. Statement of the accused was recorded under Section 313 of the Code of Criminal Procedure, wherein he has denied the prosecution case and claimed innocence. No defence evidence was led by the accused.

4. Learned Deputy Advocate General appearing on behalf of the appellant has argued that the prosecution has proved the guilt of accused beyond the shadow of reasonable doubt, but the learned Court below on the basis of surmises and conjectures has acquitted the accused and the present is a fit case, where the accused is liable to be convicted after setting aside the judgment of acquittal.

5. On the other hand, learned counsel appearing on behalf of the accused has argued that the prosecution has failed to prove the guilt of the accused beyond all reasonable doubt and there is no occasion to interfere with the well reasoned judgment passed by the learned trial Court.

6. To appreciate the arguments of learned Deputy Advocate General and learned counsel for the accused, this Court has gone through the record in detail and minutely scrutinized the statements of the witnesses.

7. PW-1 Gopal Sharma, is a witness of memo Ex.PW1/A. PW-2 Ravinder Kumar, has deposed that he had not seen, which Maruti car collided with his bus. He had not noticed the registration number of Maruti Car and he could know about the registration number only at Police Station, Chhota Shimla. He has further deposed that he has not uttered a single word that driver of car was driving the said car in a state of intoxication. As per PW-2, he has neither noticed the registration number of Maruti Car nor he could identify the person, who was driving the Maruti Car. Similarly, as per PW-3, he has nowhere stated that accused was driving the Maruti car in a state of intoxication. From these statements, it is clear that accused was not driving the Maruti Car in a state of intoxication. Further, as per PW-2, PW-3 and PW-4, they specifically deposed that no injury was caused to any person. There is no iota of evidence on record as per the statements of PW-2 and PW-3 that Maruti car bearing registration No.HP-62-0299 was being driven by the accused. The statement of PW-2 does not inspire confidence, as he had not seen the registration number of Maruti car nor he was able to identify the accused. PW-5 Dharam Dutt, who had mechanically examined the accidental bus and Maruti Car and his reports are Ex.PW5/A and Ex.PW5/B. As per his report, there was no mechanical defect in both the vehicles. PW-6 Gian Chand, in whose presence, photographs of the bus and car were taken. The bus alongwith its documents and key was taken into possession vide memo Ex.PW2/B. PW-7 Dr. Ramesh Chand, medically examined the accused and issued MLC Ex.PW7/A. The injuries were simple in nature and were possible due to road side accident. PW-8 Constable Jitender Kumar produced copy of rapat Ex.PW8/D. PW-9 Constable Bhagat Ram is a witness of recovery memo Ex.PW9/A. PW-10 Head Constable Tulsi Dass, has deposed that he alongwith other police officials visited the spot and recorded the statement of complainant Ex.PW2/A, on the basis of

which, FIR Ex.PW10/A was registered. He visited the spot, prepared site plan and both the vehicles were taken into possession vide recovery memo in the presence of witnesses. Accused was medically examined at I.G.M.C Shimla and statements of witnesses were recorded, as per their versions.

8. As far as PW-4 Dev Raj, is concerned, he has shown his ignorance about the speed of Maruti Car driven by the accused. He has stated that both the vehicles were damaged, but no one has received injuries. He could not recognize the person who was driving the Maruti Car. PW-2 Ravinder Kumar/complainant has stated that he was driving the bus bearing No.HP-07-3932 from Bus Stand towards Mehli side, when he reached at Talland from downward, Maruti car came with high speed and collided with the bus. The Maruti Car was being driven by the accused. The accident has taken place due to the rash and negligent driving of the accused. Police visited the spot. During investigation, documents of the bus alongwith its key and driving licence were taken into possession vide memo Ex.PW2/B in the presence of witnesses. Photographs of the spot were also taken. In his cross-examination, he has admitted that when he was driving the bus, he had not seen which vehicle collided with his bus. He has also admitted that he had not seen the number of Maruti Car and he had seen the said number at Police Station, Chota Shimla. At the time of accident, no witness was present on the spot. If the statement of this witness, as a whole is perused, he has nowhere stated that what was the registration number of the Maruti Car, which collided against his bus. As per his statement recorded by the police under Section 154 of the Code of Criminal Procedure, he has not mentioned the registration number of Maruti Car nor he has noticed the registration number of Maruti Car. The statement of this witness is totally contradictory to other. He has not noticed the number of the Maruti Car nor he has seen the accused, but on the other hand, when his statement was recorded by the police, he had got down from the bus and asked the name of the accused.

9. Statement of PW-2 is a major improvements and in contradiction to his earlier statement recorded under Section 154 of the Code of Criminal Procedure, as nothing has come in the evidence to prove that accused was driving the Maruti Car under intoxication or he was driving the car as even the PW-2 could not notice the registration number of the Maruti Car nor he identify the accused, so this Court finds that the prosecution has failed to prove the guilt of the accused beyond the shadow of reasonable doubt.

10. It has been held in **K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258,** that when two views are possible, appellate Court should not reverse the judgment of acquittal merely because the other view was possible. When judgment of trial Court was neither perverse, nor suffered from any legal infirmity or non consideration/misappreciation of evidence on record, reversal thereof by High Court was not justified.

11. The Hon'ble Supreme Court in **T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401,** has held that where two views are reasonably possible from the very same evidence, prosecution cannot be said to have proved its case beyond reasonable doubt.

12. The net result of the above discussion is that the prosecution has failed to prove the guilt of the accused conclusively and beyond reasonable doubt. There is no illegality and infirmity in the findings, so recorded by the learned trial Court.

13. In view of the aforesaid decisions of the Hon'ble Supreme Court and discussion made hereinabove, I find no merit in this appeal and the same is accordingly dismissed. Record of the learned trial Court be sent back forthwith.

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

Vineet Verma .....Petitioner
Versus
State of H.P. & others .....Respondents

Cr.MMO No. 25 of 2017
Reserved on: 18.04.2017
Decided on: 01.05.2017

Code of Criminal Procedure, 1973- Section 482- Petition for quashing the FIR filed on the ground that the matter has been compromised between the parties, wherein they have agreed to settle the dispute amicably and to live life happily – held that in view of the compromise, no useful purpose would be served by keeping the proceedings alive- the petition allowed and the FIR/challan ordered to be cancelled.(Para-8 to 12)

Cases referred:
B.S. Joshi and others vs. State of Haryana and another, (2003) 4 SCC 675
Preeti Gupta and another vs. State of Jharkhand and another, (2010) 7 SCC 667
Jitendra Raghuvanshi and others vs. Babita Raghuvanshi and another, (2013) 4 SCC 58

For the petitioner: Mr. Sushil Chauhan, Advocate.
For the respondent: Mr. Pushpinder Jaswal, Dy. AG with Mr. Rajat Chauhan, Law Officer, for respondents No. 1 to 3.
Mr. L.S. Mehta, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present petition is maintained by the petitioner, under Section 482 of the Code of Criminal Procedure (hereinafter to be called as "the Code") read with Article 227 of the Constitution of India for quashing of FIR No. 154 of 2016, dated 28.06.2016, under Sections 498-A, 406, 506, 352 of the Indian Penal Code and Section 179 of the Motor Vehicles Act, registered at Police station Dhalli, District Shimla, H.P. alongwith all consequential proceedings arising out of the above mentioned F.I.R.

2. Briefly stating the facts, giving rise to the present petition are that the marriage between the petitioner and respondent No. 4/complainant (hereinafter to be called as "the complainant") was solemnized on 03.11.2009 at Sanatan Dharam Mandir, Chandigarh and out of the said wedlock, two male children were born. On 27.06.2016, the complainant, without informing anyone, visited her parental house at Shimla. When the petitioner came to know that the complainant has left her matrimonial house alongwith both the children, the petitioner, in order to bring her back visited Shimla, but the complainant refused to accompany the petitioner, as a result of which, an altercation between the family members of the petitioner and the complainant took place. The petitioner in resentment took away his five years old son Hardik in his vehicle from the parental house of the complainant to his house at Chandigarh, consequently, the complainant went to the Police station Dhalli and lodged FIR against the petitioner. On the basis of FIR, the petitioner was arrested on 04.07.2016, however during the course of investigation, the matter was amicably settled between the petitioner/husband and the complainant/wife, vide Compromise Deed (**Annexure P-2)**, wherein the parties have agreed to live peaceful life and do not want to pursue the case against each other. Hence the present petition.

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

4. Learned counsel for the petitioner has argued that the dispute between the parties pertains to matrimonial dispute, which has now been resolved vide Compromise Deed **(Annexure P-2)** and no purpose will be served by keeping the proceedings against the petitioner and the FIR/Challan pending before the learned Court below may be quashed and set aside.

5. On the other hand, learned Deputy Advocate General has argued that the gravity of offence demands that no leniency should be shown to the petitioner by allowing the present petition and the petition deserves dismissal.

6. Learned counsel for respondent No. 4/complainant has argued that as now the complainant is not having any grudge against the petitioner and the parties have entered into a compromise so, the proceedings pending before the learned Court below be quashed.

7. To appreciate the arguments of learned counsel appearing on behalf of the parties, I have gone through the entire record in detail.

8. Their Lordships of the Hon'ble Supreme Court ***B.S. Joshi and others*** vs. ***State of Haryana and another***, (2003) 4 SCC 675, have held that if for the purpose of securing the ends of justice, quashing of FIR becomes necessary, section 320 would not be a bar to the exercise of power of quashing. It is well settled that the powers under section 482 have no limits. Of course, where there is more power, it becomes necessary to exercise utmost care and caution while invoking such powers. Their Lordships have held as under:

> [6] In Pepsi Food Ltd. and another v. Special Judicial Magistrate and others ((1998) 5 SCC 749), this Court with reference to Bhajan Lal's case observed that the guidelines laid therein as to where the Court will exercise jurisdiction under Section 482 of the Code could not be inflexible or laying rigid formulae to be followed by the Courts. Exercise of such power would depend upon the facts and circumstances of each case but with the sole purpose to prevent abuse of the process of any Court or otherwise to secure the ends of justice. It is well settled that these powers have no limits. Of course, where there is more power, it becomes necessary to exercise utmost care and caution while invoking such powers.
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> [8] It is, thus, clear that Madhu Limaye's case does not lay down any general proposition limiting power of quashing the criminal proceedings or FIR or complaint as vested in Section 482 of the Code or extraordinary power under Article 226 of the Constitution of India. We are, therefore, of the view that if for the purpose of securing the ends of justice, quashing of FIR becomesnecessary, Section 320 would not be a bar to the exercise of power of quashing. It is, however, a different matter depending upon the facts and circumstances of each case whether to exercise or not such a power.
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> [15] In view of the above discussion, we hold that the High Court in exercise of its inherent powers can quash criminal proceedings or FIR or complaint and Section 320 of the Code does not limit or affect the powers under Section 482 of the Code.

9. Their Lordships of the Hon'ble Supreme Court ***in Preeti Gupta and another*** vs. ***State of Jharkhand and another***, (2010) 7 SCC 667, have held that the ultimate object of justice is to find out the truth and punish the guilty and protect the innocent. The tendency of implicating the husband and all his immediate relations is also not uncommon. At times, even after the conclusion of the criminal trial, it is difficult to ascertain the real truth. Experience reveals that long and protracted criminal trials lead to rancour, acrimony and bitterness in the relationship amongst the parties. The criminal trials lead to immense sufferings for all concerned. Their Lordships have further held that permitting complainant to pursue complaint would be abuse of process of law and the complaint against the appellants was quashed. Their Lordships have held as under:

[27] A three-Judge Bench (of which one of us, Bhandari, J. was the author of the judgment) of this Court in Inder Mohan Goswami and Another v. State of Uttaranchal & Others, 2007 12 SCC 1 comprehensively examined the legal position. The court came to a definite conclusion and the relevant observations of the court are reproduced in para 24 of the said judgment as under:-

"Inherent powers under section 482 Cr.P.C. though wide have to be exercised sparingly, carefully and with great caution and only when such exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the Court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the Statute."

[28] We have very carefully considered the averments of the complaint and the statements of all the witnesses recorded at the time of the filing of the complaint. There are no specific allegations against the appellants in the complaint and none of the witnesses have alleged any role of both the appellants.

[35] The ultimate object of justice is to find out the truth and punish the guilty and protect the innocent. To find out the truth is a herculean task in majority of these complaints. The tendency of implicating husband and all his immediate relations is also not uncommon. At times, even after the conclusion of criminal trial, it is difficult to ascertain the real truth. The courts have to be extremely careful and cautious in dealing with these complaints and must take pragmatic realities into consideration while dealing with matrimonial cases. The allegations of harassment of husband's close relations who had been living in different cities and never visited or rarely visited the place where the complainant resided would have an entirely different complexion. The allegations of the complaint are required to be scrutinized with great care and circumspection.

36. Experience reveals that long and protracted criminal trials lead to rancour, acrimony and bitterness in the relationship amongst the parties. It is also a matter of common knowledge that in cases filed by the complainant if the husband or the husband's relations had to remain in jail even for a few days, it would ruin the chances of amicable settlement altogether. The process of suffering is extremely long and painful.

[38] The criminal trials lead to immense sufferings for all concerned. Even ultimate acquittal in the trial may also not be able to wipe out the deep scars of suffering of ignominy. Unfortunately a large number of these complaints have not only flooded the courts but also have led to enormous social unrest affecting peace, harmony and happiness of the society. It is high time that the legislature must take into consideration the pragmatic realities and make suitable changes in the existing law. It is imperative for the legislature to take into consideration the informed public opinion and the pragmatic realities in consideration and make necessary changes in the relevant provisions of law. We direct the Registry to send a copy of this judgment to the Law Commission and to the Union Law Secretary, Government of India who may place it before the Hon'ble Minister for Law & Justice to take appropriate steps in the larger interest of the society.

10. Their Lordships of the Hon'ble Supreme Court in ***Jitendra Raghuvanshi and others*** vs. ***Babita Raghuvanshi and another,*** (2013) 4 SCC 58, have held that criminal proceedings or FIR or complaint can be quashed under section 482 Cr.P.C. in appropriate cases in order to meet ends of justice. Even in non-compoundable offences pertaining to matrimonial disputes, if court is satisfied that parties have settled the disputes amicably and without any

pressure, then for purpose of securing ends of justice, FIR or complaint or subsequent criminal proceedings in respect of offences can be quashed. Their Lordships have held as under:

> [13] As stated earlier, it is not in dispute that after filing of a complaint in respect of the offences punishable under Sections 498A and 406 of IPC, the parties, in the instant case, arrived at a mutual settlement and the complainant also has sworn an affidavit supporting the stand of the appellants. That was the position before the trial Court as well as before the High Court in a petition filed under Section 482 of the Code. A perusal of the impugned order of the High Court shows that because the mutual settlement arrived at between the parties relate to non-compoundable offence, the court proceeded on a wrong premise that it cannot be compounded and dismissed the petition filed under Section 482. A perusal of the petition before the High Court shows that the application filed by the appellants was not for compounding of non-compoundable offences but for the purpose of quashing the criminal proceedings.
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> [14] The inherent powers of the High Court under Section 482 of the Code are wide and unfettered. In B.S. Joshi , this Court has upheld the powers of the High Court under Section 482 to quash criminal proceedings where dispute is of a private nature and a compromise is entered into between the parties who are willing to settle their differences amicably. We are satisfied that the said decision is directly applicable to the case on hand and the High Court ought to have quashed the criminal proceedings by accepting the settlement arrived at.
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> [15] In our view, it is the duty of the courts to encourage genuine settlements of matrimonial disputes, particularly, when the same are on considerable increase. Even if the offences are non-compoundable, if they relate to matrimonial disputes and the court is satisfied that the parties have settled the same amicably and without any pressure, we hold that for the purpose of securing ends of justice, Section 320 of the Code would not be a bar to the exercise of power of quashing of FIR, complaint or the subsequent criminal proceedings.
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> [16] There has been an outburst of matrimonial disputes in recent times. The institution of marriage occupies an important place and it has an important role to play in the society. Therefore, every effort should be made in the interest of the individuals in order to enable them to settle down in life and live peacefully. If the parties ponder over their defaults and terminate their disputes amicably by mutual agreement instead of fighting it out in a court of law, in order to do complete justice in the matrimonial matters, the courts should be less hesitant in exercising its extraordinary jurisdiction. It is trite to state that the power under Section 482 should be exercised sparingly and with circumspection only when the court is convinced, on the basis of material on record, that allowing the proceedings to continue would be an abuse of the process of the court or that the ends of justice require that the proceedings ought to be quashed. We also make it clear that exercise of such power would depend upon the facts and circumstances of each case and it has to be exercised in appropriate cases in order to do real and substantial justice for the administration of which alone the courts exist. It is the duty of the courts to encourage genuine settlements of matrimonial disputes and Section 482 of the Code enables the High Court and Article 142 of the Constitution enables this Court to pass such orders.
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> [17] In the light of the above discussion, we hold that the High Court in exercise of its inherent powers can quash the criminal proceedings or FIR or complaint in appropriate cases in order to meet the ends of justice and Section 320 of the Code does not limit or affect the powers of the High Court under Section 482 of the Code. Under these circumstances, we set aside the impugned

judgment of the High Court dated 04.07.2012 passed in M.C.R.C. No. 2877 of 2012 and quash the proceedings in Criminal Case No. 4166 of 2011 pending on the file of Judicial Magistrate Class-I, Indore."

11. In view of the law, as discussed hereinabove, I find that the interest of justice will be met, in case, the proceedings are quashed, as the parties have already compromised the matter, as per Compromise Deed ***(Annexure P-2)***, placed on record.

12. Therefore, I find this case to be a fit case to exercise powers under Section 482 of the Code and accordingly FIR No. 154 of 2016, dated 28.06.2016, under Sections 498-A, 406, 506, 352 of the Indian Penal Code and Section 179 of the Motor Vehicles Act, registered at Police station Dhalli, District Shimla, H.P., is ordered to be quashed. Since FIR No. 154 of 2016, dated 28.06.2016, under Sections 498-A, 406, 506, 352 of the Indian Penal Code and Section 179 of the Motor Vehicles Act, registered at Police station Dhalli, District Shimla, H.P., has been quashed, consequent proceedings/Challan pending before the learned Judicial Magistrate 1st Class, Court No. 3, Shimla, District Shimla, H.P., against thepetitioner, is thereby rendered infructuous. However, the same are expressly quashed so as to obviate any confusion.

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

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

Anil Kumar .....Petitioner

Versus

Shashi Bala and others .....Respondents

Cr.MMO No. 30 of 2011
Decided on: May 2, 2017

Protection of Women from Domestic Violence Act, 2005- Section 12- A complaint was filed alleging that the complainant was married to the appellant – she was turned out of her matrimonial home by her in-laws- she remained in her parental home for 8 months and when she returned, she was not allowed to enter into the house- she went to her parents' house and when she returned, shewas not allowed to enter her matrimonial home – she sought protection under Domestic Violence Act – the Trial Court dismissed the application- an appeal was filed, which was partly allowed- aggrieved from the order, present petition has been filed- held that no specific allegation of beatings was made in the complaint – the evidence on record shows that complainant had herself left the matrimonial home- petition allowed- order of Appellate Court set aside- however, compensation of Rs.10,000/- awarded to the complainant.(Para-13 to 16)

For the petitioner: Mr. Ajay Sharma, Advocate.
For the respondents: Mr. Adarsh K. Vashishta, Advocate, for respondent No.1
Mr. Parveen Chandel, Advocate, for respondents No.2 and 3.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral)

Delinked from FAO(HMA) No. 205 of 2011.

2. Instant petition filed under Section 482 CrPC is directed against judgment dated 4.12.2010 passed by Additional Sessions Judge, Fast Track Court, Hamirpur in Criminal Appeal No. 30 of 2009, reversing judgment dated 24.3.2009 passed by Judicial Magistrate 1st Class, Court No. III, Hamirpur in Domestic Violence Complaint No. 2-1 of 2009, whereby application

under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter, 'Act'), having been filed by respondent No.1-complainant ('complainant', hereafter), came to be dismissed.

3. Briefly stated the facts as emerge from the record are that the complainant preferred an application under Section 12 of the Act alleging therein that she was married to appellant-Anil Kumar as per Hindu rites and customary ceremonies on 17.6.2003 and two children were born out of said wedlock. Complainant further averred that she was turned out by her in-laws. Complainant further claimed that after being ousted from the house, she remained in her parents' house for eight months and came back on 22.11.2008, when her father-in-law did not allow her to enter the house. After two days, she went back to her parents' house. On 14.12.2008, when she again came back, she was taken out of the room and was not allowed to meet her children. Complainant further alleged that false allegations have been leveled against her. She further complained that on 23.12.2008, all of her family members had left the house by locking it and since then she had been residing in her courtyard and bathroom respectively. Her husband had also gone away with other family members. In the aforesaid background, Complainant prayed for providing protection under Sections 18, 19, 20 and 21 of the Act.

4. Petitioner alongwith proforma respondents No.2 and 3, by way of reply, refuted the aforesaid claim of the complainant and stated that false and frivolous application has been moved by the complainant to put undue pressure as well as to cause harassment to them. However, petitioner admitted the complainant to be his legally wedded wife but specifically stated that she developed illicit relations, as a result of which, divorce petition has been filed. As per petitioner, despite repeated requests, complainant failed to mend her ways and, on 23.6.2008, was caught red-handed. Petitioner specifically denied allegations of maltreatment and claimed that all the basic necessities of life were provided to the complainant when she remained with him. With the aforesaid submissions, petitioner claimed that the complainant is not entitled to the reliefs as claimed in the application.

5. Complainant, by way of rejoinder, reasserted her claim as put forth in the complaint and specifically denied the allegations as contained in the reply having been filed by the respondents.

6. Learned trial Court, on the basis of pleadings adduced on record by the respective parties, framed following questions, for determination:

> "1. Whether the applicant is entitled for protection and relief as claimed in the application? If so, to what extent?
>
> 2. Final Order."

7. However, the fact remains that learned trial Court, on the basis of evidence adduced on record by the respective parties, came to the conclusion that there is no merit in the application having been filed by the complainant and accordingly, rejected the same.

8. Being aggrieved by and dissatisfied with the rejection of aforesaid application, complainant preferred an appeal under Section 29 of the Act before Additional Sessions Judge, Fast Track Court, Hamirpur, which came to be registered as Criminal Appeal No. 30 of 2009. Learned appellate court below, while partly accepting the appeal filed by the complainant, quashed and set aside order dated 24.3.2009 and held complainant entitled to maintenance allowance of Rs.1,000/- per month, from the date of order. At this stage, it may be noticed that while passing aforesaid judgment, learned appellate court specifically concluded that no evidence has been led on record by the complainant to prove serious allegations as leveled against the respondents in the complainant. The court below further concluded that no evidence has been brought on record to demonstrate violence, if any, by the respondents and accordingly, held her not entitled to protection, residence and custody order in her favour. Learned appellate court below, while partly allowing appeal, held that since complainant has to live and maintain herself and she has no independent source of income, she is entitled to monetary relief under Section 20 of the Act.

9. Mr. Ajay Sharma, learned counsel representing the petitioner, while referring to the impugned judgment passed by court below, vehemently argued that same is not sustainable in the eyes of law, as such, same deserves to be quashed and set aside. While inviting attention of this Court to impugned order passed by court below, Mr. Sharma, strenuously argued that once learned Court below had come to the conclusion that no evidence worth the name has been led on record by the complainant, to prove violence, if any, against her by the petitioner and his family members, there was no occasion, whatsoever, to provide maintenance of Rs.1,000/- per month. Mr. Sharma, also invited attention of this Court to the evidence led on record by the complainant in support of her complaint filed before learned trial Court, to demonstrate that there is no illegality or infirmity in the order of learned trial Court, whereby it has rightly come to the conclusion that complainant has not been able to prove contents of application, so as to make herself entitled to reliefs under Sections 18, 19, 20 and 21 of the Act. Mr. Sharma, further contended that earlier, complainant had filed divorce petition against petitioner leveling serious allegations of sexual harassment against his father but same was later on withdrawn. Mr. Sharma also invited attention of this Court to the decree of dissolution of marriage passed by matrimonial court in the petition having been filed by the petitioner, wherein allegations with regard to illicit relations of complainant with one Jeet Ram, stood duly proved. In the aforesaid background, Mr. Sharma, prayed that impugned order passed by learned appellate Court below may be set aside and that of learned trial Court be restored.

10. Mr. Adarsh K. Vashishta, learned counsel representing the complainant, supported the impugned judgment passed by learned appellate Court below. Mr. Vashishta while refuting aforesaid contentions having been made by the learned counsel representing the petitioner, stated that there is no illegality or infirmity in the judgment passed by learned Court below, wherein he has specifically come to the conclusion that since complainant has to live and maintain herself, and she is having no independent source of income, she is entitled for monetary relief under Section 20 of the Act.

11. He also contended that a very meager sum of Rs.1,000/- per month has been awarded by the learned Court below as such, there is no scope of interference, specifically in view of the fact that it stands duly proved on record that respondent-complainant is legally wedded wife of petitioner and it is/was his bounden duty to maintain her during subsistence of their marriage. Mr. Vashishta also made this Court to travel through evidence led on record by the complainant before learned trial Court, to suggest that learned trial Court miserably failed to appreciate evidence in its right perspective, as a result of which, erroneous findings have come on record, which were later on rectified in accordance with law, by the learned appellate Court below, in the appeal having been filed by the complainant. In the aforesaid background, Mr. Vashishta, prayed for dismissal of petition.

12. I have heard the learned counsel representing the parties and also gone through the record very carefully.

13. Before adverting to the genuineness and correctness of the impugned order passed by appellate court below as well as submissions of learned counsel representing the parties, it may be noticed that marriage of petitioner with complainant stands dissolved on the ground of cruelty, as is evident from decree passed by learned District Judge in HMA No. 18 of 2008, on 3.3.2011, whereby matrimonial court, while accepting petition filed by the petitioner has dissolved marriage on the ground of cruelty. It may also be stated at this stage that aforesaid judgment having been passed by matrimonial court was laid challenge before this Court by way of FAO No. **205 of 2011**, which came to be decided by this Court on **2.5.2017.** This Court, vide aforesaid judgment, while dismissing appeal having been preferred by the complainant, has upheld the decree of dissolution of marriage passed by matrimonial court.

14. This Court, solely with a view to ascertain the perversity, if any, in the impugned judgment passed by appellate court, carefully perused pleadings as well as evidence adduced on record by the respective parties, perusal whereof certainly compels this Court to agree with the contentions raised by learned counsel representing petitioner that learned appellate Court below

has failed to appreciate evidence adduced on record by respective parties in its right perspective, as a result of which, erroneous findings have come on record. Bare perusal of impugned judgment passed by learned appellate Court below itself suggests that even appellate court was not convinced of evidence led on record, which could make complainant entitled for protection as claimed by way of application under Section 12 of the Act. Learned appellate Court below, in para 16 of the impugned judgment has categorically stated that from the record, it appears that serious allegations had been leveled against complainant and no evidence had been brought for providing maintenance and as such she was not held entitled to protection, residence and custody order in her favour. It has also come in the judgment passed by learned Court below that no violence, if any, on the part of petitioner was proved. While granting compensation of Rs.1,000/- per month, in favour of the complainant, learned appellate Court below took into consideration status of complainant, who admittedly had to live and maintain herself and she had no independent source of income. But, if evidence led on record by the complainant before learned trial Court, to prove contents of her application under Section 12 of the Act, is seen and perused carefully, it nowhere suggests that maltreatment and violence as defined under the Act was ever meted to the complainant. There is no specific allegation, if any, of beatings given by husband or family members, rather there is bald statement of complainant (AW-1) that she was maltreated but no specific instance as such has been reported with regard to violence, if any, done on her by the respondents. Father of the complainant (AW-3) namely Bihari Lal has also not stated anywhere anything specific with regard to violence, if any, committed by petitioner or his family members. Apart from above, no independent witness, if any, from locality was associated to prove allegations of maltreatment and violence in terms of provisions contained in the Act. As far as allegations with regard to throwing complainant from the house are concerned, there is evidence led on record by the petitioner, that complainant left the house at her own, after being caught red handed with one Jeet Ram, with whom, she had illicit relations (as stood proved in the divorce petition). All the witnesses of the respondent have stated that complainant left the house to answer call of nature and never turned up thereafter.

15. This Court, after having bestowed its thoughtful consideration to the pleadings available on record, has no hesitation to conclude that appellate court below, while granting maintenance of Rs.1,000/- to the complainant got swayed by emotions and completely ignored overwhelming evidence available on record suggestive of the fact that complainant herself had left the house. Since there was no evidence with regard to maltreatment or violence, learned appellate Court below ought not have granted any amount on account of maintenance. Moreover, as has been noticed above, marriage between the parties has been dissolved vide judgment dated 3.3.2011, which has been further upheld by his Court and as such, this Court sees no force, much less substantial, in the complaint of the complainant, which was rightly rejected by the learned trial Court.

16. Consequently, in view of above, judgment dated 4.12.2010 passed by Additional Sessions Judge, Fast Track Court, Hamirpur in Criminal Appeal No. 30 of 2009 is set aside and judgment dated 24.3.2009 passed by Judicial Magistrate 1st Class, Court No. III, Hamirpur in Domestic Violence Complaint No. 2-1 of 2009 is upheld. However, keeping in view the fact that instant petition under Section 12 of the Act remained pending adjudication till passing of decree of dissolution of marriage i.e. wherein allegations with regard to illicit relationship of complainant stood proved, this court deems it fit to grant/award of Rs.10,000/- to the complainant, to be paid by the petitioner, within a period of eight weeks from today, as maintenance under Section 12 of the Act.

17. The petition stands disposed of accordingly. Pending applications, if any are also disposed of. Interim directions, if any, are also vacated.

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

Balku and others .....Petitioners
Versus
Mani Ram (deceased) through LR's .....Respondent

CR No. 118 of 2011
Decided on: May 2, 2017

Code of Civil Procedure, 1908- Order 21 Rule 32- A decree for permanent prohibitory injunction was passed, which was put to execution – the execution petition was allowed and judgment debtors were ordered to be detained in civil imprisonment for a period of one month- held in revision that judgment debtors had admitted in the reply the disobedience of the judgment and decree passed by the Court- oral evidence also proved that judgment debtors had removed the fencing of the decree holder – the Executing Court rightly held that the judgment debtors had violated the judgment and decree – however, keeping in view the time elapsed from the incident, the sentence of imprisonment set aside and judgment debtors directed to pay sum of Rs.5,000/- to the decree holder. (Para- 9 to 16)

Case referred:
Payal Vision Limited versus Radhika Choudhary, 2012(11) S.C.C 405

For the petitioners: Mr. Sanjeev Kuthiala, Advocate.
For the respondent: Mr. Rajnish K. Lal, Proxy Counsel.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral)

Delinked from RSA No. 422 of 2011.

2. Instant civil revision under Section 115 CPC is directed against judgment dated 9.8.2011 passed by Civil Judge (Senior Division), Court No.1, Sundernagar, District Mandi, Himachal Pradesh in Execution Petition No. 32 of 2000, whereby executing court while allowing application having been filed by the Decree Holder-respondent (hereinafter, 'decree holder'), held petitioners-judgment debtors (hereinafter, 'judgment debtors) guilty of willful disobedience of orders of the Court and ordered them to be detained in civil imprisonment for one month.

3. Briefly stated the facts as emerge from the record are that Decree Holder preferred an application under Order 21 Rule 32 CPC in the court of Civil Judge (Senior Division), Court No.1, Sundernagar, District Mandi, Himachal Pradesh, which came to be registered as Execution Petition No. 32 of 2000, averring therein that the Decree Holder had filed suit for permanent prohibitory injunction, against the judgment debtors, with regard to suit land, comprised in Khata Khatauni No.103 min/ 10 min, Khasra Nos. 700 and 706, kita 2 measuring 13-10-06 Bigha, situate at Muhal Bhour, Tehsil Sundernagar, District Mandi, Himachal Pradesh and vide judgment dated 20.11.1999, civil court decreed his suit bearing No. 117/97. Decree Holder, further averred that on 12.7.2000, judgment debtors, in willful disobedience of judgment and decree removed fencing and caused unlawful interference over the suit land despite requests of the Decree Holder and have willfully disobeyed the judgment and decree of the court and as such Decree Holder was compelled to file execution petition.

4. Judgment debtors filed written statement to the aforesaid petition having been filed by Decree Holder, admitting therein passing of decree dated 29.11.1999 in civil suit No. 117/97. They further admitted that vide civil decree, they were restrained from interfering in the peaceful possession of Decree Holder. Perusal of reply having been filed by judgment debtors

suggests that they admitted having disobeyed judgment and decree on 12.7.2000. It also emerges from record that during the pendency of the aforesaid execution petition, judgment debtors, preferred an application seeking therein permission to amend written statement, wherein they had virtually admitted disobedience on their part. But perusal of order dated 26.6.2007 passed by executing court, during the pendency of execution petition suggests that aforesaid prayer for amendment was dismissed. Learned executing court, on the basis of pleadings adduced on record by the parties, framed following issues:

> "1. Whether the respondents have willfully disobeyed the decree of the court as alleged? OPA
>
> 2. Relief."

5. Subsequently, vide judgment dated 9.8.2011, executing court held judgment debtors guilty of willful disobedience of judgment and decree and directed them to be detained in civil imprisonment for one month. In the aforesaid background, judgment debtors approached this Court, in the instant proceedings, for setting aside judgment of civil detention passed by executing court.

6. Mr. Sanjeev Kuthiala, learned counsel representing the judgment debtors vehemently argued that impugned judgment dated 9.8.2011, passed by executing court is not sustainable in the eyes of law as the same is not based upon correct appreciation of evidence adduced on record by the respective parties, as such, deserves to be set aside. While specifically inviting attention of this Court to the impugned judgment, Mr. Kuthiala contended that since no specific evidence with regard to alleged disobedience was led on record by the Decree Holder, coupled with the fact that judgment debtors had specifically denied the allegations of disobedience, if any, it was incumbent upon the court below to ascertain the factum with regard to disobedience of judgment and decree passed by court by calling report of some independent agency. Mr. Kuthiala, further contended that bare perusal of evidence led on record by Decree Holder nowhere suggests that Decree Holder was able to prove that judgment debtors disobeyed judgment and decree passed by civil court. Mr. Kuthiala, further contended that when there were rival contentions available on record, best option for the court below was to ascertain genuineness and correctness of the claim of Decree Holder by appointing local commissioner. While concluding his arguments, Mr. Kuthiala, contended that no civil detention could be ordered by the court below, in the absence of independent evidence especially in view of rival contentions of the parties. Mr. Kuthiala further contended that otherwise also, impugned judgment passed by executing court is not sustainable in the eyes of law as the same was passed in favour of a dead person. Mr. Kuthiala, with a view to substantiate aforesaid contentions, made this court to go through order dated 29.2.2012 passed by this court in the instant petition to demonstrate that though Decree Holder Mani Ram had expired on 11.4.2003 but, his legal representatives were brought on record, for the first time on 29.2.2012, whereas impugned order was passed on 9.8.2011 i.e. admittedly after his death. With aforesaid submissions Mr. Kuthiala prayed that impugned judgment dated 9.8.2011 deserves to be set aside being invalid in the eyes of law.

7. Mr. Rajnish K. Lal, learned counsel representing the Decree Holder supported the impugned judgment passed by executing court. With a view to refute aforesaid contentions having been made by the learned counsel representing the judgment debtors, he invited attention of this Court to the application having been filed by legal representatives of Decree Holder, during the pendency of the execution petition, to demonstrate that legal representatives of deceased Mani Ram had moved application on 13.11.2003 before the executing Court for bringing on record LR's of deceased Mani Ram, who had expired on 11.4.2003. Mr. Lal, further contended that otherwise also, original applicant/ Decree Holder Mani Ram was being represented through his General Power of Attorney Shri Paras Ram son of Shri Mani Ram, resident of Bhatti, Tehsil Sundernagar, meaning thereby that after death of original applicant/ Decree Holder, his estate was sufficiently represented. Mr. Lal also invited attention of this Court to order dated 13.11.2003 passed by executing court below, to establish factum with regard to filing of application for bringing on record legal representatives of deceased Decree Holder. Apart from

above, Mr. Lal invited attention of this Court to the original written statement filed by judgment debtors to suggests that there was no requirement as such for Decree Holder to lead evidence to prove disobedience on the part of judgment debtors, because, in the reply filed by judgment debtors, factum with regard to disobedience on their part has been duly admitted. In the aforesaid background, Mr. Lal prayed that instant petition may be dismissed being devoid of merits.

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

9. Perusal of application available on record at page 36 of the record of court below clearly suggest that original Decree Holder Mani Ram had expired on 11.4.2003, whereafter his legal representatives had moved appropriate application. It also emerges from the order dated 13.11.2003, passed by trial court below that time for filing reply was given to the judgment debtors. True it is, that perusal of order passed by court below after 13.11.2003 nowhere suggests that legal representatives, if any, of the deceased Mani Ram were brought on record till the time of passing of impugned judgment. Legal representatives of deceased Mani Ram were brought on record during the pendency of the instant petition, vide order dated 29.2.2012 but careful perusal of memo of parties in the execution petition having been filed by late Mani Ram itself suggests that same was filed through his General Power of Attorney Paras Ram, who happened to be son of Mani Ram as such this Court sees substantial force in the arguments of Mr. Lal, learned counsel representing the Decree Holder that after death of original Decree Holder, his estate was sufficiently represented through legal representative, who was prosecuting case before executing court being General Power of Attorney of late Mani Ram. Otherwise also, it is apparent from the record that all necessary steps were taken by legal representatives of deceased Mani Ram well within time and court below taking cognizance of same had issued notice to the respondents. Since trial court failed to pass order on the application having been filed by legal representatives of Mani Ram, Decree Holder can not be allowed to suffer for the fault of court. Otherwise also, as has been noticed above, legal representative namely Paras Ram, who happened to be legal representative of Mani Ram, was already on record and as such this Court sees no force in the contention of Shri Kuthiala that decree passed in favour of Mani Ram, could not be enforced at this stage, especially when his legal representatives were already on record.

10. There can not be any quarrel that no decree could be passed in favour of a dead person, but, in the instant case, as is evident from the record, steps for bringing on record legal representatives were taken within time and even court below taking cognizance of the same, had called for reply hence, in the peculiar facts and circumstances of the case, where necessary steps were taken by legal representatives of deceased Decree Holder, well within time, mandate given by executing court in the execution petition filed by the deceased Mani Ram, can not be allowed to be defeated on this ground.

11. This Court after having carefully perused reply having been filed by judgment debtors to the execution petition filed by Decree Holder, found that there is clear cut admission on the part of judgment debtors that they had disobeyed judgment and decree passed by civil court in civil suit No. 117/97. Though, by way of moving application for amendment filed under Section 153 read with Section 151 CPC, judgment debtors prayed for amendment of reply, but perusal of order dated 26.6.2007, suggests that aforesaid prayer of judgment debtors was rejected. Executing court while rejecting aforesaid plea categorically concluded that judgment debtors can not be allowed to misuse provisions of Section 153 CPC to retract or withdraw from admission. It may also be noticed that aforesaid order dated 26.6.2007 was nowhere laid challenge by judgment debtors, before any competent court of law, as such attained finality.

12. Hence, this Court, after having carefully perused original/un-amended reply having been filed by judgment debtors, sees no occasion to refer to oral evidence led on record by respective parties, because there is clear cut admission on the part of judgment debtors in the reply that they disobeyed judgment and decree passed by the Court.

13. The Hon'ble Apex Court *in* ***Payal Vision Limited versus Radhika Choudhary***, 2012(11) S.C.C 405, has held as under:-

> "7 In a suit for recovery of possession from a tenant whose tenancy is not protected under the provisions of the Rent Control Act, all that is required to be established by the plaintiff landlord is the existence of the jural relationship of landlord and tenant between the parties and the termination of the tenancy either by lapse of time or by notice served by the landlord under Section 106 of the Transfer of Property Act. So, long as these two aspects are not in dispute the Court can pass a decree in terms of Order 12 Rule 6 CPC, with reads as under:-
>
> > "6. Judgment on admission-(1) Where admissions of fact have been made either in the pleadings 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 (1) a decree shall be drawn up in accordance with the judgment and decree shall bear the date on which the judgment was pronounced."

14. Even if, oral evidence led on record by the Decree Holders is perused, they have categorically stated that despite there being judgment and decree in civil suit, judgment debtors have removed fencing of Decree Holder. Judgment debtors while refuting aforesaid claim have only examined one of the judgment debtors, who has refuted aforesaid claim in his statement. Apart from his own evidence, no independent witness has been examined by him to falsify the stand taken by Decree Holder.

15. This Court, after having carefully perused the record, specifically the un-amended written statement filed before the Court, sees no reason to interfere with the impugned judgment passed by executing court below, which appears to be based upon correct appreciation of evidence adduced on record by the respective parties and as such same is upheld.

16. However, keeping in view the fact that more than six years have passed after the impugned judgment was passed, this Court, while rejecting present petition, deems it fit to modify judgment of civil detention passed by executing court and instead, judgment debtors are directed to pay Rs.5,000/- to the Decree Holder.

17. The petition is disposed of in view of above observations. Pending applications, if any, are disposed of. Interim directions, if any, are vacated.

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

Smt. Mangla Devi (deceased) through L.Rs. and others .....Appellants
Versus
Rattan Chand and others .....Respondents

RSA No. 96 of 2005
Decided on: May 2, 2017

Specific Relief Act, 1963- Section 38- Plaintiffs filed a civil suit for permanent prohibitory injunction and possession pleading that they are owners in possession of the suit land – the defendants are interfering with the suit land without any right to do so- they had encroached upon a portion of suit land, which fact was verified during demarcation- the suit was decreed by the Trial Court- an appeal was filed, which was allowed- held in second appeal that the plea of

adverse possession taken by the defendants was not proved – consequently, plaintiffs are to be declared the owners of the suit land – the Trial Court had rightly decreed the suit and Appellate Court had wrongly set aside the decree- appeal allowed – judgment of Appellate Court set aside and that of Trial Court restored.(Para-10 to 22)

For the appellants Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate.
For the respondents: Mr. Bhuvnesh Sharma and Mr. Ramakant Sharma, Advocates.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

Instant Regular Second Appeal under Section 100 of the Civil Procedure Code has been filed against Judgment and decree dated 1.12.2004 passed by District Judge, Hamirpur, HP in Civil Appeal No. 43 of 2002, whereby judgment and decree dated 28.2.2002 passed by Sub Judge 1st Class (I), Hamirpur, HP, in Civil Suit No. 264 of 1994 have been set aside, whereby suit of the plaintiffs for permanent prohibitory injunction and, in the alternative, for possession by way of demolition, was decreed.

2. Briefly stated facts as emerge from record are that the appellants-plaintiffs ('plaintiffs' hereafter) filed a suit for permanent prohibitory injunction and, in the alternative, for possession, in the court of learned Sub Judge 1st Class, Hamirpur averring therein that suit land comprised in Khata No. 39, Khatauni No. 42, Khasra No. 2 measuring 1Kanal 5 Marla as entered in the Jamabandi for the year 1986-87, situated in Tika Ruttain, Mauza Bara, Tehsil Nadaun, District Hamirpur (H.P.) ('suit land', hereafter) is in their ownership and possession. Plaintiffs further averred in the plaint that defendants are strangers to the suit land and are owner of adjoining land as such have no lawful right to interfere in the peaceful possession of the plaintiffs. Plaintiffs further averred in the plaint that in the year 1993, defendants started damaging old boundaries by digging the land and despite there being objections, they kept on doing so. Plaintiffs further stated that defendants claimed that they were raising construction in their own land. Plaintiffs applied for demarcation, which was conducted on 10.8.1993, wherein, defendants were found to have encroached upon some portion of suit land shown as Khasra No. 2/1 measuring 1 Marla as per *Tatima* attached with the plaint. On the basis of aforesaid demarcation report, plaintiffs requested defendants to vacate the possession of suit land, but in vain. Defendants did not accept the request of plaintiffs to vacate the premises or to part with the encroached portion of suit land, as such, cause of action accrued in favour of the plaintiffs in the year 1993, when defendants allegedly started interference and demolished boundaries of suit land. In the aforesaid background, plaintiffs filed suit as mentioned above, praying therein for decree of permanent prohibitory injunction and, in the alternative, for possession, in case, defendants are found in possession of suit land.

3. Defendants, by way of filing written statement, refuted aforesaid claim of the plaintiffs by raising preliminary objections qua estoppel, non-joinder of necessary parties and proper valuation. Defendants also claimed that one kitchen over the land comprising of Khasra No. 3 min and new Khasra No. 175/3, measuring 2 Marla situated in Tika Ruttain, Mauza Bara, Tehsil Nadaun, is owned and possessed by the defendants. Defendants further claimed that aforesaid structure is in existence at the spot for the last 100 years and plaintiffs have shown this built up kitchen room in the suit land wrongly, in connivance with the settlement staff at the back of the defendants. Defendants further contended that plaintiffs have purchased suit land from Bakshi Ram son of Shri Jalam, resident of Tikka Ruttain, Mauza Bara, Tehsil Nadaun, District Hamirpur, HP in 1974-75 and at that time, aforesaid kitchen of the defendants was existing at the spot also. Defendants further contended that during his life time, Bakshi Ram as well as plaintiffs got suit land demarcated several times. As per the defendant, kitchen of the defendants over the land in Khasra No. 175/3 was part of old Khasra No.3 min and PWD authorities also found this portion of the land measuring 2 Marla in Khasra No. 3 min in the

process of acquisition of this land vide notification dated 28.1.74. Further, the defendants in the written statement claimed that if aforesaid facts are not proved on record, even then, defendants have become owners by way of adverse possession of suit land measuring 2 Marla as defendants are coming in possession of suit land, for the last 100 years and there possession over the same is open, hostile, continuous, interrupted and to the knowledge of the real owners. In the aforesaid background, defendants prayed that the suit may be dismissed.

4. Plaintiffs, by way of replication, reasserted the contents of the plant and denied that of the written statement.

5. Learned trial Court, on the basis of pleadings of the parties, framed following issues:

"1. Whether the plaintiff is entitled to the relief of permanent prohibitory injunction as prayed? OPP.

2. Whether the plaintiffs in the alternative are entitled to the relief of possession as prayed? OPP.

3. Whether the defendants have become owners of the suit land by way of adverse possession as alleged in para No. 2 of the written statement? OPD

4. Whether the plaintiffs are estopped by their acts and conduct from filing the suit? OPD

5. Whether the suit is bad for non-joinder of necessary parties? OPD

6. Whether the suit is not properly valued for the purpose of court fee and jurisdiction? OPD

7. Relief."

6. Subsequently vide judgment and decree dated 28.2.2002, learned trial Court decreed the suit of the plaintiffs and passed decree of permanent prohibitory injunction in their favour and against the defendants, restraining them from interfering/raising any construction over the suit land comprised of Khata No. 39, Khatauni No. 42, Khasra No. 2, measuring 1 Kanal 5 Marla, as per Jamabandi for the year 1986-87, situated in Tika Ruttain, Tappa Bara, Tehsil Nadaun, District Hamirpur, HP. Defendants were further directed to handover vacant possession of encroached portion of suit land compromised in Khasra No. 2/1 measuring 0-1 Marla (6 Sarsahi), within a period of three months.

7. Defendant, feeling aggrieved by the aforesaid judgment and decree, preferred an appeal under Section 96 CPC before the District Judge, Hamirpur, which came to be registered as Civil Appeal No. 43 of 2002, who, vide judgment and decree dated 1.12.2004, while accepting the appeal preferred by the defendants, set aside the judgment and decree passed by trial Court. Hence, this Regular Second Appeal.

8. Instant Regular Second Appeal was admitted by this Court on 16.3.2005, on the following substantial questions of law:

"1. Whether the respondents having raised plea of adverse possession over the suit land and they having failed to established the same therefore, the appellants are entitled to the relief as claimed in the suit.

2. Whether the demarcation report Exhibit PW-2/A spot map Exhibit PW2/B prepared by PW-3 Shri Jagar Nath Kanungo having not being challenged by the respondent, therefore suit was rightly decreed by the Trial Court.

3. Whether their being variation in the demarcation report Exhibit PW2/A as given by the Field Kanungo and in the demarcation report Exhibit PW-4/A as given by the Local Commissioner therefore fresh orders were require to be passed for appointment of fresh Local Commissioner as per the law reported in AIR 2003 HP 87.

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

10. After having carefully perused impugned judgment and decree passed by first appellate Court as well as submissions having been made by the learned counsel representing the parties, this Court intends to take up substantial question of law No.1, at the first instance.

11. During the proceedings of the case, this Court had an occasion to peruse pleadings as well as evidence adduced on record by respective parties. Careful perusal of judgment and decree passed by learned trial Court dated 28.2.2002, suggests that specific issue i.e. issue No. 3, which is reproduced below, which was framed on the basis of pleadings of parties:

> "3. Whether the defendants have become owners of the suit land by way of adverse possession as alleged in para No. 2 of the written statement? OPD"

12. Learned trial Court, on the basis of evidence adduced on record by the respective parties, decided aforesaid issue against the defendants. Perusal of findings returned by trial Court qua aforesaid issue clearly suggests that there was no evidence led on record by the defendants with regard to their claim of having become owners by way of adverse possession. None of the defendants' witnesses including defendant No.1, stated anything specific with regard to manner and time, in which they came into adverse possession of suit land. Rather, a careful perusal of written statement having been filed by the defendants suggests that plea of adverse possession was taken in the alternative solely with a view to defeat the claim of the plaintiffs, whom, defendants admitted to be owner of the suit land bearing Khasra No. 2. Defendants, in their written statement, in para-2 of written statement on merits, stated as under:

> "It is submitted that if the aforesaid facts are not proved on record then the defendants have become owners by way of adverse possession of the said portion of 2 marla of land as the defendants are coming in possession by way of construction of kitchen room for the last 100 year and the possession of the defendant is open, hostile, continuous, uninterrupted and to the knowledge of the rightful owners."

13. But, interestingly, aforesaid submissions as contained in the written statement were not proved in accordance with law by the defendants by leading cogent and convincing evidence, rather, defendant No1. himself, while appearing in the witness box admitted that the factum with regard to ownership of the plaintiffs qua suit land came in their knowledge during the pendency of the trial. Apart from above, defendants in their written statement in para 2, have stated as under:

> "2. ....It may be submitted that the plaintiffs have purchased the suit land from Shri Bakshi Ram son of Jalam resident of Ruttain, Mouza Bara, Tehsil Nadaun District Hamirpur (H.P) in the year 1974-75 and the aforesaid kitchen of the replying defendants was situated on the spot at that time as stated above....

14. It may be noticed that the dispute is with regard to kitchen, which, as per plaintiffs exists over the land owned and possessed by them, in Khasra No. 2. This Court, having carefully perused the averment contained in the written statement as well as evidence led on record by the defendants, sees no illegality or infirmity in the findings returned by the learned trial Court that defendants were not able to prove on record that they have become owners of the suit land by way of adverse possession.

15. Interestingly, defendants, who had suffered decree, preferred appeal before the District Judge, which is the subject matter of the present appeal, failed to lay challenge, if any, to the findings, returned by the learned trial Court, with regard to their claim that they have become owners by way of adverse possession qua suit land. Otherwise also, careful perusal of impugned judgment passed by first appellate Court nowhere reveals that findings returned by learned trial Court with regard to claim of defendants having become owners by way of adverse possession,

were set aside by the learned first appellate Court, rather, the first appellate Court set aside the judgment of trial Court taking into consideration demarcation report submitted by PW-4 Laxmi Dutt, Court Commissioner.

16. Hence, this Court, after careful perusal of judgments passed by both the learned Courts below, sees no illegality or infirmity in the judgment and decree passed by learned trial Court, specifically with regard to findings qua issue of adverse possession.

17. Substantial question of law No.1 is answered accordingly.

18. Mr. G.D. Verma, learned Senior Advocate duly assisted by Mr. B.C. Verma, Advocate, on behalf of the plaintiffs stated that since findings returned on the issue of adverse possession have attained finality, natural consequence is that the plaintiffs are bound to be declared owners of suit land. To substantiate his aforesaid claim, Mr. Verma, also invited attention of this Court to the submissions having been made by the defendants in the written statement, which have been already taken note of by this Court, while deciding substantial question of law No.1, to demonstrate that once defendants had admitted plaintiffs to be owner of the suit land, nothing was left to be adjudicated by the courts below, as far as ownership, as was claimed by way of suit having been filed by plaintiffs is concerned. As per Mr. Verma, in view of specific findings returned qua issue of adverse possession, as claimed by the defendants, no reliance, if any, could be placed by the courts below upon the demarcation reports placed on record by respective parties.

19. Mr. Bhuvnesh Sharma, learned counsel representing the defendants, while refuting aforesaid contentions having been made by Mr. G.D. Verma, learned Senior Advocate, strenuously argued that plea of adverse possession was taken in the alternative and it was to be only applied in case of plaintiffs not succeeding in establishing their claim with regard to ownership of the suit land. He further stated that defendants never admitted plaintiffs to be owner-in-possession of the spot, over which disputed kitchen existed, rather, it is admitted case of the defendants that the plaintiffs are owner-in-possession of Khasra No. 2. Mr. Sharma, fairly conceded that no reliance could be placed by the courts below on the demarcation reports placed on record by the respective parties, because, same were not in accordance with law. But, Mr. Sharma, stated that since plaintiffs failed to establish on record that they are owner-in-possession of the land, over which kitchen existed, learned District Judge, rightly set aside the judgment and decree passed by trial Court.

20. After having carefully perused the material adduced on record, especially specific findings returned by the courts below with regard to claim of the defendants that they have become owners by way of adverse possession, I am afraid that contentions having been raised by Mr. Sharma, can be accepted. Once, defendants were not held to be in adverse possession of the suit land by the trial Court, plaintiffs were rightly declared owners of the suit land, as such, there was no occasion for the first appellate court to take into consideration, other evidence, be it ocular or documentary, adduced on record by the respective parties. It stands duly proved on record, which has not been otherwise controverted by the defendants that the plaintiffs are owners of the suit land comprised in Khasra No. 2. As far as issue with regard to existence of kitchen over suit land is concerned, defendants themselves have admitted in the written statement that at the time of purchase of suit land by the plaintiffs from Shri Bakshi Ram, kitchen was existing at the spot. Similarly, DW-1 has admitted in the cross-examination that factum with regard to ownership of the plaintiffs qua suit land came in their knowledge after filing of the suit.

21. After bestowing my thoughtful consideration to the material adduced on record by the parties as well as aforesaid submissions having been made by the learned counsel representing the parties, I have no hesitation to conclude that learned first appellate Court, while deciding controversy at hand, has gone astray and has wrongly based its findings on demarcation report given by Laxmi Dutt, Court Commissioner, which was, admittedly, not relevant in view of specific findings returned by the trial Court on the plea of adverse possession having been raised

by the defendants. Otherwise also, it appears that there is no dispute as such between the parties, because, it is admitted case of the defendants that the plaintiffs are owners of the suit land bearing Khasra No. 2, which is the subject matter of the instant proceedings.

22. Remaining substantial questions of law are also answered accordingly.

23. Accordingly, the instant appeal is allowed. Judgment and decree dated 1.12.2004 passed by District Judge, Hamirpur, HP in Civil Appeal No. 43 of 2002 are set aside and judgment and decree dated 28.2.2002 passed by Sub Judge 1st Class (I), Hamirpur, HP, in Civil Suit No. 264 of 1994 are restored.

24. Pending applications, if any, are disposed of. Interim directions, if any, are also vacated. No order as to costs.

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

Regular Second Appeal Nos.631 of 2007 and 632 of 2007.
Judgment Reserved on: 07.04.2017
Date of decision: 02.05.2017

RSA No.631 of 2007

Smt.Prito Devi & Another ....Appellants-Plaintiffs

Versus

Prem Singh & Others ....Respondents-Defendants

RSA No.632 of 2007

Smt.Prito Devi & Another ....Appellants-Plaintiffs

Versus

Prem Singh & Others ....Respondents-Defendants

Specific Relief Act, 1963- Section 34 and 38- Plaintiffs filed a civil suit pleading that the thumb impression and signatures of plaintiff No.1 were obtained by defendant No.1 on numerous papers by informing her that she was executing a power of attorney – she subsequently came to know that sale deeds were got executed from her – the defendants pleaded that the sale deeds were executed by plaintiff No.1 voluntarily after the receipt of sale consideration- they also filed a civil suit for seeking the injunction pleading that they are the owners by virtue of sale deeds – the suit filed by plaintiffs was decreed while suit filed by the defendants was dismissed – separate appeals were filed, which were allowed and plaintiffs were restrained from interfering with the ownership and possession of the defendants – held in second appeal that onus to prove fraud, misrepresentation and undue influence was upon the plaintiffs- no satisfactory evidence was led to prove these allegations- the plaintiff No.1 had also executed sale deeds in favour of other persons – the Appellate Court had correctly appreciated the evidence – appeal dismissed.

(Para- 15 to 48)

Cases referred:

Rattan Dev vs. Pasam Devi, (2002)7 SCC 441

Iswar Bhai C.Patel vs. Harihar Behera, (1999)3 SCC 457

Bhop Ram vs. Dharam Das, Latest HLJ 2009 (HP) 560

Kripa Ram and others vs. Smt.Maina, 2002(2) Shim.L.C. 213

Sennimalai Goundan and another vs. Sellappa Goundan and others, AIR 1929 Privy Council 81

Tokha vs. Smt.Biru and Others, 2002(3) Shim.L.C. 101

Pandurang Jivaji Apte vs. Ramchandra Gangadhar Ashtekar (dead) by LRs. And others, AIR 1981 SC 2235

For the Appellants: Mr.Bhupender Gupta, Senior Advocate with Mr.Ajeet Jaswal, Advocate.
For the Respondents: Mr.R.P. Singh, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

Both these appeals have been filed by appellants-plaintiffs against the common judgment and decree dated 26.09.2007 passed by learned Additional District Judge, Fast Track Court, Una, District Una, H.P. in Civil Appeal Nos.63/2K RBT 222/04/2000 and 65/2K RBT 223/04/2000, reversing the common judgment and decree dated 29.2.2000, passed by learned Senior Sub Judge, Una, H.P. in two Civil Suits No.107 of 1992 and 169 of 1992, whereby the suit filed by the appellants-plaintiffs was decreed and that of the respondents-defendants was dismissed.

2. The main dispute between the parties relates to the land measuring 149 Kanals 4 Marlas and *Abadi* situated in Tikka Ghugan Kakrana, Tappa Thara, Tehsil Bangana, District Una, detail of which has been mentioned in the head note of the plaint *(hereinafter referred to as the 'suit land').*

3. Briefly stated facts, as emerged from the record, are that the appellants-plaintiffs *(hereinafter referred to as the `plaintiffs')* are joint owners in possession of the suit land. It is averred by the plaintiffs that the suit property was earlier owned and possessed by Milkhi Ram, the husband of plaintiff No.1 and father of plaintiffs No.2 and 3, who succeeded him after his death. It is further averred that plaintiff No.1 is residing in the village, whereas the plaintiffs No.2 and 3 are residing at the places where they are married. It is further averred by the plaintiffs that defendant No.1 is married in the brotherhood of plaintiff No.1 with the daughter of one Dhanna in the same village due to which he is known to the plaintiffs and he used to visit the house of plaintiff No.1, whenever he occasionally visited to the house of his in-laws. It is further alleged by the plaintiffs that after the death of husband of plaintiff No.1, defendant No.1 started visiting her house oftenly to show sympathy and to help her in the management of her property and few days before the execution of the disputed documents, he prevailed upon and induced plaintiff No.1 by showing sympathy to her to execute a power of attorney in his favour on her behalf as well as on behalf of her daughters. It is further alleged by the plaintiffs that on that day, plaintiffs No.2 and 3 had come to the house of plaintiff No.1 to inquire about her health, as she was suffering from fever. It is further alleged that plaintiff No.1 is a widow and other plaintiffs are rustic and illiterate ladies and they, without seeking any independent advice of their relatives, agreed to execute the general power of attorney in favour of defendant No.1, who brought them to Bangana and got their thumb impressions and signatures on numerous papers without showing and explaining the contents thereof to them and they were only told by defendant No.1 and the Deed Writer that a general power of attorney for managing the property has been written. It is further alleged that the Tehsildar also did not explain the contents of the writings to them as the Deed Writer, the officials of Sub Registrar, as well as the Sub Registrar, all were connived and colluded to get the execution and attestation of documents and after about 9 or 10 months of this incident i.e. during the month of March, 1992, the defendants started interfering with a view to take forcible possession of the suit property to which the plaintiffs objected and then defendant No.1 disclosed that there are sale deeds qua suit land and agreement to sell qua *Abadi* in their favour on behalf of the plaintiffs. Thereafter, the plaintiffs inquired the matter from the Patwari Halqua, who disclosed them that three different sale deeds and one agreement to sell had been got executed from the plaintiffs in favour of the defendants. It is alleged by the plaintiffs that they neither executed any sale deed or agreement to sell in favour of defendants nor they executed any power of attorney in favour of defendant No.5 and nor they ever received any consideration from the defendants. So the alleged sale deeds and agreement to sell in favour of defendants No.1 to 4 by the plaintiffs as well as power of attorney in favour of defendant No.5, are the result of fraud, mis-representation, undue influence and same are without consent of the plaintiffs. In this

background, the plaintiffs filed the suit for declaration as well as for permanent injunction restraining the defendants from interfering with the suit land in any manner.

4. Defendants by way of filing written statement contested the suit on the grounds of maintainability, mis-joinder, cause of action and *locus standi*. On merits, it is alleged by the defendants that the suit land and *Abadi* in suit have been sold by the plaintiffs to defendants No. 1 to 4 vide registered sale deeds dated 31.5.1991. The sale consideration of Rs.49,000/- for land measuring 149 Kanals 4 Marlas and Rs.40,000/- for *Abadi,* vide registered sale deed and agreement, has already been paid to the plaintiffs. Since the plaintiffs are residing in village Pandoga, which is at a distance of 30 kilometers from village Chugan, the mutation on the basis of sale deeds could not be sanctioned due to which the entries in the revenue record have not been changed. However, after the execution of sale deeds in question, the plaintiffs have no right, title or interest in the suit land. The sale deeds and the agreement in question were voluntarily executed by the plaintiffs after receipt of sale consideration and the story of the plaintiffs that defendant No.1 prevailed upon and induced the plaintiffs by showing sympathy towards them is concocted and wrong. It is also denied that the aforesaid documents are result of connivance or collusion of defendants with the Deed Writer and the Sub Registrar etc. In this background, the defendants prayed for dismissal of the suit filed by the plaintiffs.

5. The aforesaid suit i.e. ***Civil Suit No.107 of 1992*** was filed by the plaintiffs on 28.5.1992 and during the pendency of this suit i.e. on 2.7.1992, the defendants filed ***Civil Suit No.169 of 1992*** against the plaintiffs for issuance of permanent prohibitory injunction on the grounds that they are owners in possession of the suit land on the basis of sale deeds and agreement dated 31.5.1991.

6. This suit i.e. ***Civil Suit No.169 of 1992*** was contested by the plaintiffs on the same grounds which were taken by them in their suit i.e. *Civil Suit No.107 of* 1992. In nutshell, the plaintiffs contested the suit alleging therein that the sale deeds and agreement in question are the result of fraud, undue influence, mis-representation and collusion and they are still owners in possession of the suit land.

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

In Civil Suit No.107 of 1992

"1. Whether the plaintiffs are entitled for relief of declaration that they are in possession of the suit land as alleged? OPP.

2. Whether the sale deed dated 31.5.91 regarding land measuring 138 Kanals for consideration of Rs.48,000/- in favour of defendants No.1 to 4 by the plaintiffs as described in item No.A(i) of the head note of the plaint is null and void as alleged? OPP.

3. Whether the sale deed dated 31.5.1991 by Prito Devi plaintiff No.1 in favour of defendant Nos.2 and 4 for consideration of Rs.2000/- regarding land measuring 7 Kanals 6 Marlas and sale deed dated 31.5.91 regarding land measuring 3 kanals 18 marlas for consideration of Rs.1000/- by the plaintiff No.1 in favour of defendants No.2 and 4 is null and void as alleged? OPP.

4. Whether the agreement to sell regarding Aehata Abadi referred in column (B) in the head note of the plaint for consideration of Rs.4000/- dated 31.5.91 by the plaintiff in favour of defendant No.1 and 3 is null and void as alleged? OPP.

5. Whether the power of attorney dated 31.5.91 by the plaintiffs in favour of defendant No.5 is illegal and void? OPD.

6. Whether the plaintiffs are entitled for the relief of permanent injunction as alleged? OPP.

7. Whether the suit is not properly valued for the purposes of court fee and jurisdiction? OPD.

8. *Whether the suit is not maintainable as alleged? OPD.*

9. *Whether the suit is bad for mis-joinder and causes of action? OPD.*

10. *Whether the plaintiffs have got no locus standi? OPD.*

11. *Relief.*

In Civil Suit No.169 of 1992

"1. Whether the plaintiffs are entitled for the relief of permanent prohibitory injunction as alleged? OPP.

2. *Whether the plaintiffs are owners in possession of the suit land ? OPP.*

3. *Whether the suit is not maintainable as alleged in preliminary objection No.1? OPD.*

4. *Whether the suit has not been properly valued for the purposes of court fee and jurisdiction? OPD.*

5. *Relief"*

8. Subsequently, learned trial Court, on the basis of pleadings as well as evidence adduced on record by respective parties, decreed the suit of the plaintiffs and dismissed the suit of the defendants.

9. Defendants Prem Singh and Others, being aggrieved and dis-satisfied with judgment and decree passed by the learned trial Court in favour of the plaintiffs in a suit filed by them and dismissal of the suit of the defendants, preferred two separate appeals under Section 96 of the Code of Civil Procedure in the Court of learned Additional District Judge, Fast Track Court, Una, which came to be registered **as Civil Appeal Nos.63/2K RBT 222/04/2000** and **65/2K RBT 223/04/2000.** Learned Additional District Judge accepted both the appeals having been filed by the defendants and held them entitled to relief of permanent prohibitory injunction restraining the plaintiffs permanently from interfering with the ownership as well as possession of defendants Prem Singh etc. in the suit land in any manner.

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

11. This Court admitted the instant appeals on the following substantial questions of law:-

"1. Whether the Lower Appellate Court has acted in erroneous and perverse manner in not drawing adverse inference against respondent No.1 for not stepping into the witness box as his own witness to prove due execution, attestation and registration of the documents relied upon by the respondents and also the passing of the sale consideration? Has not the Lower Appellate Court committed grave error of law and jurisdiction in failing to properly appreciate the provisions of Evidence Act and principles of law enunciated by the Apex Court in this regard?

2. *Whether the impugned judgment and decree passed by Lower Appellate Court is vitiated on account of not determining all the questions dealt by the Trial Court especially with respect to the due execution etc. of the Sale Deeds and also obtaining the power of Attorney by fraudulent means? Was not it incumbent for Lower Appellate Court to have assigned good, cogent and sufficient reasons for not agreeing with the Trial Courts findings by making reference to them in the impugned judgment and decree?*

3. *Whether the Lower Appellate Court has exceeded its jurisdiction in granting the decree for injunction against the appellants without determining the factum of actual physical possession, especially when the Trial Court granted the decree of injunction against the appellants by holding the appellants to be in possession of the suit property?"*

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

Substantial Question No.2:

13. This Court, after going through the grounds of appeal as well as statements having been made by learned counsel representing the appellants-plaintiffs, deems it fit to take substantial question No.2 for consideration at first instance because, while exploring answer to the instant question, Court may have to peruse the pleadings as well as evidence on record and in this process Court may also find answer, if any, to other substantial questions of law.

14. This Court with a view to ascertain genuineness and correctness of arguments having been made by Mr.Bhupender Gupta, learned Senior Counsel representing the appellants-plaintiffs, that learned lower appellate Court has failed to formulate the points for determination of the disposal of the appeal, carefully perused the impugned judgment and decree passed by learned first appellate Court vis-à-vis issues framed by learned trial Court in suits having been filed by both the parties.

15. However, if judgment passed by learned first appellate Court is perused and read in its entirety, it certainly suggests that learned first appellate Court has touched almost every issue formulated by the learned trial Court for its adjudication. Similarly, this Court finds that learned first appellate Court, while disagreeing with the findings returned by learned trial Court qua issues involved in the matter, has dealt with each and every evidence, be it ocular or documentary, led on record by respective parties. It also emerge from the impugned judgment passed by learned first appellate Court that though issues, as framed by trial Court, have not been taken specifically by learned first appellate Court for determination, but, each and every aspect of the matter has been dealt with carefully by learned first appellate Court, while examining the correctness of judgment passed by learned trial Court. Careful perusal of pleadings available on record suggests that in nutshell case of the plaintiff was that they are owners in possession of the suit land as per Jamabandi for the year 1983-84, situated in village Ghugan Kakrana, Tehsil Bangana, District Una, H.P.

16. Keeping in view the pleadings, as referred hereinabove, burden to prove fraud, mis-representation and undue influence, allegedly exercised by defendants on plaintiffs at the time of execution of sale deeds dated 31.5.1991, was upon the plaintiffs. But this Court, after carefully examining the evidence led on record, sees substantial force in the arguments, having been made by Mr.R.P. Singh, learned counsel representing the defendants, that there is no direct evidence of fraud as alleged by plaintiff Smt.Bhambo Devi.

17. In the instant appeal, the case of the plaintiffs is that plaintiff No.1 is an old, illiterate widow having no son and residing alone in the village as both of her daughters were already married and residing in their in-laws houses and defendant No.1, taking advantage of position of plaintiff No.1, induced her as well as her daughters to execute general power of attorney to manage her land, but this Court was unable to lay its hand to evidence, be it ocular or documentary, led on record by the plaintiffs, suggestive of the fact that in what manner plaintiffs were induced by defendant No.1 to execute sale deeds Ex.PW-3/A to Ex.PW-3/C and agreement Ex.DW-1/D.

18. Smt.Bhambo Devi, while appearing as PW-1, has stated that her husband died seven years back and during his life time there was a case about ceiling of land at Una, which was in progress even after his death. PW-1 further stated that defendant No.1 induced her to give power of attorney to him in order to look after the property. But, if plaint, as having been filed by the plaintiffs, is carefully perused, there is no mention of aforesaid fact as disclosed by the plaintiffs during her examination-in-chief. Plaintiffs in para-4 of the plaint stated that defendants induced them to execute a general power of attorney for management of their properties and they, being rustic, illiterate ladies, agreed to execute the general power of attorney in favour of defendant No.1 without seeking any independent advice from their relatives. Similarly, PW-1 in her statement before Court stated that defendant No.1 by alluring all of them brought to Bangana in the house of someone and lateron they came to know that it was the house of the Tehsildar,

wherein his family used to reside. Plaintiffs further stated that Tehsildar, Bangana took their thumb impression on some papers in his house, but if averments contained in plaint are perused, that are totally contrary to the aforesaid statement. Plaintiffs in their plaint have stated that defendant No.1 brought them to Bangana and got their thumb impression and signatures respectively on numerous papers, without showing the contents and explaining the same to the plaintiffs. Plaintiffs further stated in the plaint that they were made to sit away from the place of sitting of the deed writer and they were told by defendant No.1 and the deed writer that a general power of attorney for managing the property has been written. Careful perusal of averments contained in plaint totally belies the aforesaid stand adopted by the plaintiffs before the Court that Tehsildar, Bangana took their thumb impression on some papers in his house.

19. In view of above, this Court is in agreement with the contention having been made by Mr.R.P. Singh, learned counsel representing the defendants that how the plaintiffs could omit to mention aforesaid material facts in the pleadings. Similarly, apart from bald statement in the plaint that defendant No.1 used to visit the house of plaintiff No.1, there is no evidence led on record by the plaintiffs suggestive of the fact that the plaintiffs were induced by defendant No.1 to execute documents Ex.PW-3/A to Ex.PW-3/C. Similarly, perusal of pleadings adduced on record by the plaintiffs itself suggests that at the time of execution of documents in question, plaintiffs No.2 and 3 had come to village to enquire about the health of their mother, but it is not understood that in what manner and at what time they were persuaded/induced by the defendant No.1 to execute power of attorney in his favour. As has been observed above, there is no direct evidence available on record to support the contention with regard to inducement, if any, by defendant No.1. Similarly, this Court finds averments in the plaint with regard to connivance of defendant No.1 with the deed writer, official of the Sub Registrar and the Sub Registrar, who allegedly connived to get the execution and attestation etc. of the sale deed as well as agreement to sell, but, there is no evidence, as such, on record to prove the aforesaid allegation. Since there is/was a specific allegation of fraud, undue influence and connivance of aforesaid defendant No.1 with aforesaid officials, plaintiff was expected to lead on record cogent and convincing evidence suggestive of the fact that sale deeds Ex.PW-3/A to Ex.PW-3/C and agreement to sell Ex.DW-1/D were result of fraud, mis-representation and undue influence.

20. Plaintiff No.1, apart from herself, also examined PW-2 Kewal Krishan i.e. the official of Sub Treasury, Bangana, to prove that stamp papers worth Rs.5760/- were purchased from the Treasury on 31.5.1991 by Sh.Roshan Lal, Stamp Vendor, Bangana. PW-3 Kamal Raj, who happened to be Registration Clerk in the office of Sub Registrar, Bangana, proved the certified copies of the sale deeds Ex.tPW-3/A to Ex.PW-3/C. PW-4 Roshan Lal is the stamp vender, Bangana. PW-5 is the Record Keeper, who produced the case file titled State vs. Amar Chand etc. in the Court to prove the documents Ex.PW-6/A and Ex.PW-6/B i.e. the statements of Prem Chand and Roshan Lal recorded in that case. PW-6 is the then Civil Ahlmad in the Court of Senior Sub Judge, Una, who identified the signatures of the then Presiding Officer on the statements Ex.PW-6/A and Ex.PW-6/B. But, interestingly plaintiffs No.2 and 3, who could be a material evidence to prove allegation of inducement, if any, by defendant No.1 chose not to enter the witness box and as such allegation made in the plaint by plaintiffs that they were induced by defendant No.1 cannot be said to be proved. Had plaintiffs No.2 and 3 entered witness box and corroborated the version put forth by PW-1 Smt.Bhambo Devi thatthey were induced to sign on the alleged papers by defendant No.1 to execute a general power of attorney for management of properties, reliance, if any, could be placed on the statement of PW-1.

21. Similarly, though as per averments contained in the plaint, plaintiffs No.2 and 3 were present when defendant No.1 got their thumb impressions and signatures on numerous papers without showing contents and explaining the same to the plaintiffs, but there is no corroboration as such by plaintiffs No.2 and 3, since they have failed to enter witness box. Plaintiffs also claimed themselves to be rustic, illiterate villagers, but unfortunately there is no evidence led on record by them to substantiate their aforesaid claim. Similarly, no evidence

worth the name has been led on record by plaintiffs suggestive of the fact that complaint, if any, was lodged by them to the police with regard toaforesaid incident.

22. PW-2 Kewal Krishan i.e.Clerk in the office of Sub Treasury, Bangana, stated that on 31.5.1991 stamp paper amounting to Rs.5760/- has been purchased by Roshan Lal, Stamp Vendor, Bangana. He has stated that Roshan Lal had signed in the register as well as the forms, but there was no authority letter from Prito Devi etc. Similarly, PW-3 Kamal Raj i.e. Registration Clerk in the office of Sub Registrar, Bangana stated that Ex.PW-3/A to Ex.PW-3/C are the certified copies of the original register which have been issued by the office. PW-4 Roshan Lal, Stamp Vendor, stated that challan form dated 31.5.1991 bears his signatures and he got issued stamp papers worth Rs.5760/- from the treasury for the purpose of getting sale deed executed from Smt.Prito Devi. He admitted that he had no power of attorney to withdraw the stamp paper on her behalf. However, he specifically denied the suggestion put to him that he got the stamp papers from the treasury at the instance of Mr.Nanda, Tehsildar-cum-Sub Registrar, Bangana and the defendants. Rather, he stated that he had entered the stamp papers at Sr.No.148, dated 31.5.1991 of Rs.3/- in the name of Prito Devi and similarly at Sr.No.149, on the same date the entry of stamp paper of Rs.3/- in favour of Prito Devi has been made and both the stamp papers were purchased for the purpose of special power of attorney. He admitted that the name of the vendor has not been written against the thumb impression. He also admitted that there is also an entry at Sr.No.161 dated 31.5.1991 for purchase of stamp paper of Rs.3/- for special power of attorney of Bhambo Devi. He had not written the name of the person, against the thumb impression, who had purchased the stamps. However, he specifically denied that he had scribed the sale deed in dispute in connivance with the Sub Registrar and had also sold the papers which were purchased by him from the treasury, at their instance.

23. Plaintiffs by way of citing PW-2 to PW-6 made an attempt to prove on record that stamp papers were not drawn from the treasury by PW-4 Roshan Lal on the instructions of plaintiffs, rather those were procured in their names by defendant No.1, while conniving with the Sub Registrar and his officials.

24. DW-1 Sansar Chand i.e. Scribe of documents Ex.DW-1/A to DW-1/C and agreement Ex.DW-1/D specifically stated before the Court that he had written aforesaid documents at the instance of the plaintiff. He further stated that after writing these documents he had read over the contents of the same to the plaintiffs, who, after admitting the contents of the same to be correct, put their thumb impression/signatures on these documents. It has also come in his statement that vendors had agreed to have received Rs.51,000/- at home, whereas amount of agreement i.e. Rs.40,000/- was paid in his presence. This Court also perused cross-examination conducted on this witness by plaintiffs, but perusal of same suggests that the plaintiffs were not able to extract anything contrary what he has stated in his examination-in-chief.

25. DW-2 Chottu Ram also stated that parties are known to him and about six years back plaintiffs Bhambo etc. had sold the land to the defendants. He stated that at the time of this deal, he was ploughing his field, from where he was called by plaintiffs Bhambo Devi etc. and in his presence defendant No.1 Prem Chand had given Rs.51,000/- to Bhambo and her daughters Prito and Vijay Kumari. He also stated that at the time of aforesaid transaction, sons-in-law of Bhambo; namely; Sarwan and Bhajana were also present. In his cross-examination though he admitted that he is not a Pradhan, Panch or Lamberdar of the village, but admittedly, there is nothing in his cross-examination, from where it can be inferred that defendants and the plaintiffs were able to extract anything contrary what he stated in his examination-in-chief.

26. DW-3 Roshan Lal also stated that he is an attesting witness to documents Ex.DW-1/A to Ex.DW-1/D and Ex.DW-3/A. He further stated that documents, referred hereinabove, were written by Sansar Chand, Deed Writer at the instance of Prito Devi etc. in favour of defendants Prem Chand and others. He also stated that after writing the documents, the same were read over to Prito Devi etc., who appended their signatures and thumb

impressions on the same after ascertaining the correctness and genuineness of the documents in his presence. He has also stated that thereafter he signed the documents. It has also come in his statement that Prito Devi etc. had already received the sale consideration and the payment was not made in his presence. But, if the statement of aforesaid witness is read carefully, it has come in his statement that Rs.40,000/- qua sale consideration of the agreement was paid in his presence. Similarly, careful perusal of cross-examination conducted on this witness, nowhere suggests that defendants were able to shatter the stand taken by him in the examination-in-chief.If the statements of defendants witnesses, as have been discussed above, are read conjectively, this Court sees no reason to differ with the findings returned by the first appellate Court.

27. Now, this Court would be adverting to the another factor, which weighed heavily with the leaned trial Court that defendant No.1 succeeded in inducing the plaintiffs to execute general power of attorney in his favour taking advantage of their being illiterate and rustic villagers, this Court finds from the recordthat defendants have successfullyproved on record that prior to transaction in question, plaintiffs hadalso sold land to persons like Sarwan, Pritam and Bantu etc. It has come in the statement of DW-2 Chhotu Ram, who happened to be resident of same village, that Smt.Bhambo Devi and her daughters sold 600 Kanals of land for a consideration of Rs.6000/- to the above named person about 2-3 years prior to this sale. It has also come in his statement that the plaintiffs were owners ofabout 1100-1150 Kanals of land and they have sold the entire land. This Court, after perusing the aforesaid statement of DW-2, which certainly remained un-rebutted in his cross-examination, finds force in the submissions having been made by Shri R.P. Singh, learned counsel representing the defendants, that it stands duly established on record that since plaintiff No.1 had no male issue and her two daughters were also residing in some other village and as such they were making sale of landprior to the sale deed in question. Hence, without there being any convincing evidence led on record by the plaintiffs, it is difficult to accept that defendants, taking advantage of plaintiffsbeing rustic and illiterate villagers, induced them to sign on thedocuments in question. Similarly, perusal of sale deed in question clearly suggests that there is recital with regard to the payment of sale consideration made by defendant No.2 to the plaintiffs at home, which fact stands duly corroborated by the statement of DW-2 Chhotu Ram. This Court also sees no infirmity and illegality in the findings returned by first appellate Court that there is nothing unusual in purchasing of stamp papers by the deed writer in the name of plaintiff Prito Devi etc.

28. Leaving everything aside, it is own case of the plaintiffs that they were taken to Bangana by the defendants for the purpose of executing general power of attorney, meaning thereby that they had agreed to execute general power of attorney in favour of defendant No.1 and for which purpose stamp papers of same value were required to be purchased. When plaintiffs claimed themselves to be illiterate, it can be inferred that they must have authorized defendants to purchase stamp papers on their behalf for executing general power of attorney. Otherwise, also it has come in the statement of stamp vender Roshan Lal that he had withdrawn the stamp papers from the treasury, as he was asked to do to so by the vendee. As far as purchase of three stamp papers worth Rs.3/- each is concerned, explanation has been rendered by PW-4 that those were purchased for the purpose of executing general power of attorney to get the mutation attested in the name of vendees as the vendors were residing outside.

29. Shri Bhupender Gupta, learned Senior Counsel representing the appellants-plaintiffs, also invited the attention of this Court to the suggestion made to PW-1 by the defendants during her cross-examination that she had received Rs.1,50,000/- from defendant No.1, to demonstrate that this suggestion was totally in contradiction with the statement made by DW-2 Chhotu Ram, who had stated that payment of Rs.51,000/- was made to the plaintiffs in his presence. True, it is, that suggestion has beenmade to plaintiff that she had received Rs.1,50,000/- from defendant No.1, but same may not be sufficient to falsify the statement of DW-2 Chhotu Ram, whocategorically stated that payment of Rs.51,000/- was made to the plaintiffs in his presence. Even case of defendants before the Court is/was that they had made

payment of Rs.51,000/- to the plaintiffs at their house in the presence of DW-2 Chhotu Ram and as such learned first appellate Court rightly concluded after carefully examining the documents available on record that suggestion appears to have been made either due to mistake of counsel or same has been recorded wronglyon the part of the person recording the evidence in the Court at the relevant time.

30. This Court, after havingcarefully examined the impugned judgment passed by the learned first appellate Court vis-à-vis issues framed by the learned trial Court, sees no force much less substantial in the arguments having been made by Shri Bhupender Gupta, learned Senior Counsel representing the appellants-plaintiffs, that learned first appellate Court failed to decide various issues framed in the suit, which were ultimately disposed of by a common judgment. Rather, perusal of impugned judgment passed by first appellate Court clearlysuggests that it has dealt with every issue meticulously taking in to considerationevidence led on record by respective parties in detail and has appreciated the same in its right perspective and as such this Court is not persuaded to conclude that there has been mis-appreciation, mis-reading and mis-interpretation of evidence adduced on record by the respective parties.

31. Otherwise also perusal of impugned judgment suggests that thelearned first appellate Court, after taking note of the arguments having been made by learned counsel representing the parties before him as well as pleadings and evidence on record, proceeded to examine the controversy at hand with the clear thought that burden to prove fraud, mis-representation and undue influence etc., if any, by defendant No.1 is/was upon the plaintiffs and after havingcarefully appreciated the evidence on record,rightly came to conclusion that plaintiffs have not been able to discharge the burden placed upon them; meaning thereby that the learned first appellate Court, while disagreeing with the findings returned by the learned trial Court, has carefullyanalyzed/examined and re-appreciated the evidence to arrive at theconclusion that the judgment and decree passed by learned trial Court are not sustainable.

32. Similarly, plaintiffs themselves claimed that they were taken to the house of Tehsildar, who took their thumb impression on some papers in his house. But, as has been observed above, no positive evidence worth name has been led on record to prove factum, if any, of inducement by the defendants, rather, evidence available on record proves that the plaintiffs executed documents sale deeds Ex.DW-3/A to Ex/DW-3/C in favour of defendants. Though plaintiffs have leveled allegations of connivance and collusion of defendants with scribe, Tehsildar, Sub Registrar, but there is no evidence, as such, on record, which could persuade this Court to accept aforesaid stand adopted by the plaintiffs. The endorsement made by the Sub Registrar on all the sale deeds that no payment has been made in his presence weighed heavily with the trial Court to conclude that no payment was made to the plaintiffs by the defendants. But, perusal of evidence adduced on record by the defendants proves beyond doubt that consideration was paid to the plaintiffs. Moreover, it is not understood what was the basis for trial Court to conclude that there was no intention to sell the land on behalf of the plaintiffs and whole of the transaction was manipulated by the defendants in collusion with the stamp vendor, Sub Registrar and marginal witnesses because no evidence is available on record to prove aforesaid findings returned by the trial Court. Similarly, it is not understood that when it has specifically come on record that contents of the sale deed were read over and explained to the plaintiffs in the presence of Sub Registrar and plaintiffs, after admitting the same to be correct, appended thumb impression as well as signatures and as such there was no scope for the trial Court to conclude that Sub Registrar should have conducted proper inquiry about the payment and proper opportunity should have been afforded to the plaintiffs. Substantial question No.2 is answered accordingly.

Substantial Question No.1:

33. Now, this Court would be adverting to substantial question No.1. Shri Bhupender Gupta, learned Senior Counsel, stated that in the facts and circumstances of the case, learned lower appellate Court ought to have drawn adverse inference against respondent No.1 for not stepping into witness box. As per Mr.Gupta, respondent No1 should have examined

himself to prove due execution, attestation and registration of documents relied upon by defendants and especially passing of the sale consideration. Mr.Gupta, contended that learned appellate Court, while ignoring the aforesaid materialdiscrepancy, whereby defendant No.1 omitted to appear in witness box, has committed error of law and jurisdiction, especially, in view of provisions of Indian Evidence Act and principles of law laid down by Hon'ble Apex Court in this regard.

34. At the cost of repetition, it may be stated that since allegation of fraud, mis-representation and undue influence etc. exercised on plaintiffs was made by plaintiffs, initial burden to prove the same was upon the plaintiffs, which, apparently, in view of discussion made hereinabove, the plaintiffs have failed to discharge. There is ample material availableon record suggestive of the fact that defendants successfully proved on record that the documents Ex.PW-3/A to Ex.PW-3/C were executed by plaintiffs in the office of Sub Registrar and they had received consideration i.e. Rs.51,000/- before scribing of documents and Rs.41,000/- at the time of scribing/registration of sale deed.

35. In the instant case, though the plaintiffs made an endeavour to prove on record by way of leading evidence, as has been discussed above, that no sale consideration was paid to them, as mentioned in the documents in question, but it clearly emerge from the recital of the documents in question that an amount of Rs.51,000/- was paid at home and Rs.41,000/- were paid at the time of scribe/registration of sale deed. Otherwise also, as has been rightly held by first appellate Court while placing reliance upon the judgment passed by this Court as well as Supreme Court that payment of price at the time of execution of the sale deeds is not sine-qua-non to complete the sale. Adverse inference, if any, on account of abstention of defendant No.1 to appear in Court could only be drawn by first appellate Court, had defendants failed to prove on record execution of sale deed Ex.PW-3/A to Ex.PW-3/C and agreement Ex.DW-1/D by plaintiffs, more particularly, passing of consideration. But, in the instant case, when thedefendants, by way of leading cogent and convincing evidence, havesuccessfully proved on record that sale deeds Ex.DW-3/A to Ex/DW-3/C were executed by the plaintiffs of their own free will after receiving consideration, absence/omission, if any, of defendant No.1, from entering witness box could notbe a factor sufficient to persuade the Court below to draw adverse inference against him.

36. Learned trial Court, while drawing adverse inference against defendant No.1 Prem Singh, has concluded that since defendant No.1 Prem Singh has not stepped into witness box to claim that he had made payment and the plaintiffs have got the sale deeds executed at their own free will, adverse inference ought to have been drawn against him. Aforesaid finding returned by the learned trial Court does not appear to be sustainable, especially, in view of the positive evidence led on record by the defendants to prove that consideration was made to the plaintiffs and they got the sale deeds executed of their own will. All the defendants witnesses, whose testimony has remained un-shattered, have categorically proved on record that payment was made in their presence to the plaintiffs and they had appended their thumb impression and signatures on sale deeds as well as agreement to sell in their presence.

37. As per settled law, adverse inference, if any, can be drawn against a party for not appearing in the Court when there is no other evidence available on record to prove issue in question. In the instant case, onus was upon the plaintiffs to prove that sale deeds Ex.PW-3/A to Ex.PW-3/C are the result of fraud, mis-representation and no consideration was passed to them and as such omission on the part of defendant No.1 to enter into witness box to prove his claim, which he otherwise proved beyond reasonable doubt by way of other evidence, was not a circumstance, which could compel Court below to draw adverse inference against him.

38. Shri Bhupender Gupta, learned Senior Counsel representing the appellants, placed reliance upon the judgment passed by the Hon'ble Apex Court in ***Rattan Dev vs. Pasam Devi, (2002)7 SCC 441,*** to suggest that the appellate Court was bound to apply its mind to all the evidence available on record and then test the legality of the findings arrived at by the trial Court. While referring to the instant judgment, learned counsel also concluded that withholding

of party/ defendant himself from the witness box and thereby denying the plaintiff an opportunity for cross-examination of himself results in an adverse inference to be drawn against the defendant. There cannot be any quarrel with the proposition of law that withholding of plaintiff/defendant himself/herself from the witness box and thereby denying the plaintiff/defendant an opportunity of cross-examination of himself/herself, an adverse inference is required to bedrawn against the plaintiff or defendant but in the above citedcase Hon'ble Apex Court while taking note of its own judgment passed by it in ***Iswar Bhai C.Patel vs. Harihar Behera, (1999)3 SCC 457,*** wherein it has been held that *"withholding of the plaintiff himself from the witness box and thereby denying the defendant an opportunity for cross-examination of himself results into an adverse inference being drawn against the plaintiff. That proposition of law is undoubtable. However, as we have already said, that is a fact to be kept in view and taken in to consideration by the Appellate Court while appreciating other oral and documentary evidence available on record. May be, that from other evidence - oral and documentary - produced by plaintiff, or otherwise brought on record, the plaintiff has been able to discharge the onus which lay on him, and, subject to the court forming that opinion, a mere abstention of plaintiff himself from the witness box may pale into insignificance."* Relevant paras of judgment passed by the Hon'ble Apex Court in ***Rattan Dev's*** case *supra* are as under:-

> *"3. A perusal of the judgment of the First Appellate Court shows that the plaintiff-appellant did not appear in the witness box although his special power of attorney and other witnesses were examined by the plaintiff. The First Appellate Court influenced by the non-examination of the plaintiff drew an adverse inference against him and directed the suit to be dismissed solely on the ground of non-examination of the plaintiff. The judgment of the First Appellate Court shows that other evidence, though available on record, did not receive the attention of the First Appellate Court at all.*
>
> *4. In our opinion, the First Appellate Court was bound to apply its mind to all the evidence available on record and then test the legality of the findings arrived at by the Trial Court. While doing so, the First Appellate Court could have taken the factum of the non-examination of the plaintiff also into consideration. The manner in which the appeal has been disposed of by the First Appellate Court cannot be said to be satisfactory. Non- application of mind by the Appellate Court to other material, though available, and consequent failure of the Appellate Court to discharge its judicial obligation, did raise a question of law having a substantial impact on the rights of the parties, and therefore, the second appeal deserved to be heard on merits.*
>
> *5. Learned counsel for the respondent has placed reliance on Ishwar Bhai. C. Patel v. Harihar Behera & Anr., (1999) 3 SCC, 457 wherein this Court has emphasised that withholding of the plaintiff himself from the witness box and thereby denying the defendant an opportunity for cross- examination of himself results into an adverse inference being drawn against the plaintiff. That proposition of law is undoubtable. However, as we have already said, that is a fact to be kept in view and taken in to consideration by the Appellate Court while appreciating other oral and documentary evidence available on record. May be, that from other evidence - oral and documentary - produced by plaintiff, or otherwise brought on record, the plaintiff has been able to discharge the onus which lay on him, and, subject to the court forming that opinion, a mere abstention of plaintiff himself from the witness box may pale into insignificance." (pp.442-443)*

39. Careful perusal of aforesaid judgments passed by Hon'ble Apex Court clearly suggests that whether withholding of plaintiff/defendant himself from the witness box would result into an adverse inference against party or not would be decided by the Court taking into consideration other oral and documentary evidence adduced on record by the respective parties.

40. In the present case, as has been discussed above, defendants have successfully proved from the evidence on record, be it ocular or documentary, that sale deeds Ex.PW-3/A to Exs.PW-3/C and agreement to sell Ex.DW-1/A were duly executed in accordance with law by the plaintiffs of their own free will and consideration was also passed and as such there was no occasion for the first appellate Court to draw adverse inference against the defendants merely on the ground that he failed to enter witness box.

41. Learned counsel representing the plaintiffs-appellants also placed reliance upon the judgment passed by this Court in ***Bhop Ram vs. Dharam Das, Latest HLJ 2009 (HP) 560,*** to suggest that old age, illiteracy and backwardness were required to be taken into consideration by the Court below, especially, in view of evidence adduced on record by the plaintiffs suggestive of the fact that they had not understood the nature of transaction proposed to be made by those documents on which they appended their thumb impressions and signatures respectively. In the case, referred hereinabove, this Court, while placing reliance upon the decision in ***Shri Kripa Ram and others vs. Smt.Maina, 2002(2) Shim.L.C. 213,*** though reiterated that where a person admits execution of an instrument before the Registrar after the document has been explained to him, he cannot subsequently plead that hewas ignorant to the nature of the transaction. But, in view of facts and circumstances involved in the case, which was being decided by this Court, this Court came to the conclusion that plaintiff has been duped in that case. It would be relevant to reproduce para-12 of the judgment, wherein the Hon'ble Apex Court has held:-

> *"12. Reliance is placed on decision of this Court in Shri Kripa Ram and Others vs.Smt.Maina, 2002(2) Shim.L.C. 213. In that case, this Court relying upon the decision of the Privy Council in Sennimalai Goundan and another vs. Sellappa Goundan and others, AIR 1929 Privy Council 81, interpreting the provisions of Section 60(2) of the Registration Act read with Section 115 of the Evidence Act held that where a person admits execution of an instrument before the Registrar after the document has been explained to him, he cannot subsequently plead that he was ignorant to the nature of the transaction. The decision relied upon also follows the judgment of this Court in Kanwarani Madna Vati and another vs. Raghunath Singh and others, AIR 1976 HP 41. Prima facie, this argument seems attractive but on consideration of the facts on record, this submission cannot be accepted. The evidence on record and proved facts are consistent only with one conclusion and that is that the plaintiff has been duped. The cumulative effect of the established facts, namely, illiteracy of the plaintiff, non-payment of the consideration money and material contradictions in the statements of the witnesses of the defendant are all sufficient to rebut the presumption so invoked by the defendant. No sale consideration was either paid by the defendant or received by him before the Registrar. In the decision relied upon by the learned counsel appearing for the appellant, the Court had held that the endorsement was clear not only regarding the presentation of the deed before the Registrar but the fact that payment of the consideration had been admitted and that the document had infact been read over and explained to the executant. Moreover, the presumption under Section 60 ibid is not irrebutable. Old age, illiteracy and backwardness, were facts which placed a special cloak of protection around the plaintiff. There is nothing on the record to suggest or show that the plaintiff had infact understood the nature of the transaction or that he was ad-idem with what he was transferring. The conduct of the plaintiff revoking the transaction vide Ex.PW-3/A within a period of five days and in the absence of evidence that during this time he had been prevailed upon by any other person for extraneous consideration*
>
> *to revoke the transaction, the findings of both the Courts below that in-fact no consideration had passed, were all factors which would render the presumption attached to Ex.DA as having been negatived. All these facts were consistent with only one conclusion that is, that the mind of the plaintiff was not ad-idem with the purported transaction."(pp.567-568)*

42. Perusal of aforesaid judgment clearly suggests that learned Court, while concluding that plaintiff in that case had been duped, reiterated the law laid down by Privy Council in ***Sennimalai Goundan and another vs. Sellappa Goundan and others, AIR 1929 Privy Council 81,*** wherein it has been held that provisions of Section 60(2) of the Registration Act read with Section 115 of the Evidence Act providesthat where a person admits execution of an instrument before the Registrar after the document has been explained to him, he cannot subsequently plead that he was ignorant to the nature of the transaction. Facts as well as evidence, in the case which came to be decided by coordinate Bench of this Court in ***Bhop Ram's*** case *supra*arealtogether different, cumulative effect of which, as per wisdom of that Court, was that the plaintiff has been duped. Aforesaid judgment, as relied upon by learned counsel representing the appellant, cannot be made applicable in the instant case, rather in aforesaid judgments ithas laid down that provisions of Order 6 Rule 4 of the Code of Civil Procedure mandate that the particulars necessary for establishing fraud must be clearly stated in the pleadings and general allegations of fraud are not sufficient compliance of this requirement.

43. Mr.Bhupender Gupta, learned Senior Counsel for the appellants, also placed reliance upon the judgment of this Court in ***Tokha vs. Smt.Biru and Others, 2002(3) Shim.L.C. 101,*** in support of his contention that the learned first appellate Court has failed todraw adverse inference onaccount of failure of defendants in stepping into the witness box. The Court held as under:

> *"25. In Rattan Dev v. Pasam Devi, (2002)7 SCC 441, the Supreme Court has held that the proposition of law laid down in Ishwar Bhai C.Patel v. Harihar Behera and another, is undoubtable wherein it has been emphasized that withholding of the plaintiff himself from the witness box and thereby denying the defendant an opportunity for cross-examination of himself results in an adverse inference being drawn against the plaintiff.*
>
> *26. Since the plaintiff has failed to step in the witness box, an adverse inference has to be drawn against her and as such she cannot be said to be entitled for relief sought for in the suit. The other evidence adduced by the plaintiff does not support the case of the plaintiff that she was not at all maintained by the defendants. The finding of the first appellate Court which is to the contrary is liable to be set aside."(p.108)*

44. Lastly, reliance has also been placed upon the judgment of the Hon'ble Apex Court in ***Pandurang Jivaji Apte vs. Ramchandra Gangadhar Ashtekar (dead) by LRs. And others, AIR 1981 SC 2235,*** wherein the Hon'ble Apex Court has held:

> *"13. In the agreement dated December 29, 1958 between the decree-holder and the judgment debtor, Ext 58, there is a clear reference to the amounts due to Apte from the judgment-debtor and the decree-holder had full knowledge of the dues of Apte. Apart from the dues of Apte there were other dues also to be paid by the judgment-debtor. If according to the judgment-debtor himself the amount of Rs. 46,000 which was due to Apte, had not been cleared off even by the sale of the property to Bavdekar the decree-holder could not proceed against the property in the hands of Bavdekar. The attachment of the property at the instance of the decree-holder was only subject to the lien of Apte and unless the entire amount due to Apte was cleared off the decree-holder could not proceed against the property in the hands of the purchaser, Bavdekar. Therefore, the conclusion drawn by the two courts below that the amount of Rs. 46,000 and odd was due to Apte from the judgment debtor and the same had not been cleared off even by the sale of the property under attachment, was based on the materials on the record viz., the admission of the decree-holder, the admission of the judgment-debtor and from various letters and receipts Ext. 47/1 to Ext. 47/13. All these documents have been lost sight of by the High Court which has indeed exceeded its jurisdiction in reversing the finding on the assumption that the courts below had approached the case with a wrong view*

of law in not drawing an adverse inference against Apte and Bavdekar on their failure to appear in court when the question of loan due to Apte from the judgment-debtor and the sale of the properties for Rs. 46,000 has been amply proved by the evidence on the record. The question of drawing an adverse inference against a party for his failure to appear in court would arise only when there is no evidence on the record."(p.2238)

45. In all the aforesaid judgments having been relied upon by the learned counsel for the plaintiffs, facts brought altogether are different, where plaintiffs themselves had failed to enter into the witness box to prove their case. But Hon'ble Apex Court in ***Rattan Dev's*** case *supra*, as has been reproduced above, has held that whether adverse inference can be drawn against the plaintiff/defendant would be decided by the Court while appreciating other oral or documentary evidence available on record because, may be from other evidence produced by the party or otherwise brought on record, he/she may be able to discharge the onus, which may lay upon him/her and merely his/her absence from the witness box may not be the sole criteria to draw adverse inference.

46. Hon'ble Apex Court in ***Panduranga Jivaji Apte's*** case *supra* has also held that the question of drawing an adverse inference against a party for its failure to appear in court would arise only when there is no evidence on the record.

47. But, in the instant case, as has been discussed in detail hereinabove, defendants by way of leading cogent and convincing evidence discharged onus upon them with regard to valid execution of sale deeds as well as passing of consideration and as such learned first appellate Court, while placing reliance upon aforesaid judgment of Hon'ble Apex Court, rightly came to conclusion that initial burden to prove the factum of fraud was upon the plaintiffs, which they have failed to discharge and as such no adverse inference can be drawn against the defendants. Substantial question of law is answered accordingly.

Substantial Question of Law No.3:

48. Careful perusal of evidence led on record by the plaintiffs, especially pleadings as well as statement of PW-1 Smt.Bhambo Devi, nowhere reveals/discloses anything with regard to their possession over the suit land. Learned trial Court, while decreeing the suit of the plaintiffs, came to the conclusion that no transfer of land by way of sale deed has taken place in favour of defendants and as suchdefendants have not become owners nor they are in possession of the suit land. This Court was unable to lay its hand on any evidence adduced on record by the plaintiffs, particularly with regard to establishment of fact of plea for possession over the suit land. Learned trial Court while holding the plaintiff to be in possession has only taken note of the fact that the defendants had tried to take possession of the land in dispute and a criminal case was registered, wherein, admittedly, defendants were acquitted. If judgment of trial Court is seen in its entirety, it can be safely inferred that learned trial Court has concluded that three sale deeds Ex.PW-3/A to Ex.PW-3/C have not been proved to be executed by the plaintiffs in favour of the defendants and as such they have been held to be in possession of the suit land and accordingly they were held to be entitled to relief of injunction. Once it stood duly proved on record that documents are not the result of fraud, undue influence and mis-representation and same were duly executed in accordance with law by the plaintiffs on passing consideration, learned first appellate Court rightly came to the conclusion that defendants are owners in possession of the suit land on the basis of the sale deed in question and after execution of sale deeds in their favour, plaintiffs have no right, title or interest over the same and being so, defendants are entitled to relief of injunction as prayed for by them in the suit bearing No.169/2012. Substantial question of law is answered accordingly.

49. In view of the detailed discussion made hereinabove, both the appeals fail and are dismissed accordingly. The judgment passed by the learned first appellate Court below is upheld.There shall be no order as to costs. Interim order, if any, stands vacated. All miscellaneous applications are disposed of.

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

Reliance General Insurance Company Limited .....Appellant.

Versus

Shakuntla and others. ...Respondents.

FAO No.: 487 of 2016
Date of Decision : 02/05/2017

Employees Compensation Act, 1923- Section 4- A claim petition was allowed by the Employees Compensation Commissioner and the compensation of Rs.5,21,290/- was awarded along with interest- Commissioner had taken themonthly income of the deceased as Rs.5,500/- aggrieved from the award, present appeal was filed – held that the income of the deceased has to be taken as Rs.4,000/- only, even if it exceeds the same in view of explanation-II to Section 4 of Employees Compensation Act- the daily allowance is part of wages and has to be added to the same- it cannot be considered as an addition to the ceiling of monthly wages – 50% of the wages have to be considered for determining the compensation - applying the factor of 189.56, the total compensation would be Rs.3,79,120/- - Insurance Company is liable to indemnify the owner – appeal partly allowed and compensation of Rs.3,79,120/- awarded with interest @ 12% per annum.(Para-3 to7)

For the Appellant: Mr. Jagdish Thakur, Advocate.

For the respondents: Mr. Devender K. Sharma, Advocate, for respondents No. 1,2 and 3.
Mr. Ashwani K. Sharma, Advocate, for respondent No.5.

The following judgment of the Court was delivered:

Sureshwar Thakur, *Judge (oral)*

The instant appeal is directed against the judgement recorded by the learned Commissioner, Court No.1, Sarkaghat, District Mandi, while his exercising powers under the Employee's Compensation Act.

2. In the impugned pronouncement, the learned Commissioner, had assessed compensation upon the claimants, who are evidently the successors-in-interest of deceased Pawan Kumar, compensation whereof is comprised in a sum of Rs.5,21,290/- alongwith interest with effect from 06.09.2009 i.e. the date of accident involving the ill-fated vehicle till its realization. The apposite liability with respect to its defrayment vis-à-vis the claimants, stood fastened upon the insurer. This Court admitted the appeal on the hereinafter extracted substantial questions of law:-

1. Whether the learned Commissioner below is right in taking monthly wages of the deceased as Rs.5500/- instead of Rs.4000/- per month when the accident has taken place prior to the amendment dated 31.5.2010 vide notification dated S.O. 1258(E).

2. Whether the deceased was having valid and effective driving licence to drive vehicle in question and further the commissioner below is right in holding that the vehicle in question is Light Motor Vehicle by taking the unladen weight of the vehicle?

3. The solitary submission made by the counsel for the insurer for his concerting to beget reversal of the impugned pronouncement, is with respect to the learned Commissioner in stark discordance with the mandate of the relevant statutory principles mis-assessing compensation amount upon the claimants, infractions whereof stand espoused, to be comprised, in (a) the learned Commissioner though not falling in error while taking Rs.5500/- per mensem

as wages/salary drawn by the deceased from his employment under respondent No.5, yet his falling into error, in applying upon the aforesaid figure of salary/wages per mensem, the relevant statutory principles, 'whereas' in face of prevalence, at the relevant time of occurrence of the ill-fated mishap, 'of' the mandate of explanation II to Section 4 of the Workmen's Compensation Act, 1923, (hereinafter referred to as the Act), explanation whereof stood subsequent thereto deleted from the statute book, hence enjoined the Commissioner, to mete reverence to the mandate occurring in explanation II to Section 4 of the Act, contents whereof stand extracted hereinafter, irreverence whereof by him, hence stains the impugned pronouncement.

> "Where the monthly wages of a workman exceed (four thousand rupees) his monthly wages for the purposes of clause (a) and clause (b) shall be deemed to be (four thousand rupees) only"

4. The counsel for the appellant/insurer submits that the deceased workman was drawing wages/salary comprised in a sum of Rs.4000/- per mensem, to figure whereof another sum of Rs.50/- per day, is to be added, its comprising the daily allowance received by the deceased workman from his relevant employment, hence the total sum of wages per mensem received by the workman from his employer, while hence being comprised in a sum of Rs.5,500/-, in sequel thereof with the apposite explanation holding force at the relevant time of occurrence of the ill-fated mishap, enjoined the commissioner to mete reverence thereto significantly with a statutory contemplation occurring therein, that with the wages of a workman evidently exceeding Rs.4000/-, as wages whereof, of the deceased in the instant case exceed Rs.4000/-, thereupon his monthly wages for the purposes of application thereon of the relevant statutory principles, hence attracting the mandate of clause (a) of sub section (1) of Section 4 of the Act wherein his wages were enjoined to be restricted in a sum of Rs.4000/- per mensem only. He submits that the aforesaid mandate of explanation II of the Act, has been irrevered by the learned commissioner. The aforesaid submission addressed before this Court garners immense strength from the evident fact, of applicability at the relevant time, of the mandate of the aforesaid explanation II of the Act besides also obviously the explanation aforesaid holding prevalence also clout at the time when the ill-fated mishap involving the offending vehicle occurred, in vehicle whereof, the deceased was manning its driver's seat, his standing engaged as a driver thereon by respondent No.5. In aftermath, the learned Commissioner, 'was', given the existence of formidable evidence qua the deceased workman drawing from his relevant employment per mensem salary/wages constituted in a sum of Rs.5,500/- hence 'enjoined' by the mandate of explanation II of the Act, to restrict the monthly wages of the deceased workman in a sum of Rs.4000/- besides was enjoined to apply thereon, the mandate of clause (a) of sub section (1) of Section 4 of the Act However, he has omitted to do so. Consequently, the award of the learned Commissioner warrants interference. In aftermath while applying the principle(s) embedded in clause (a) of sub section (1) of Section 4 of the Act, provisions whereof stood extracted hereinafter:-

> 4. Amount of compensation.-(1) Subject to the provisions of this Act, the amount of compensation shall be as follows, namely:-

(a) where death results from the injury	An amount equal to fifty per cent of the monthly wages of the deceased workman multiplied by the relevant factor; Or An amount of eighty thousand rupees whichever is more:

whereby only with respect to 50% of the statutory wage(s) of the deceased employee, the enjoined statutory principle(s) warrant their application, thereon, consequently this Court concludes that the wages per mensem of the deceased workman by applying the relevant statutory principle(s) hence being comprised in a sum of Rs.2000/- hence by applying the relevant statutory factor

thereon i.e. 189.56 the compensation amount defrayable to the claimants is quantified in a sum of Rs.3,79,120/-.

5. The learned counsel for the respondent submits that the sum of Rs.50/- paid by the employer to the deceased workman as "daily allowance" being excludable from the definition of 'wages', occurring in Section 2(m) of the Act, provisions whereof stand extracted hereinafter,

> "wages includes any privilege or benefit which is capable of being estimated in money or other than a travelling allowance or the value of any travelling concession or a contribution paid by the employer of a workman towards any pension or provident fund or a sum paid to a workman to cover any special expenses entailed on him by the nature of his employment."

he hence proceeds to contend that with the play of apposite explanation II of the Act with respect to the facts at hand 'erupting' only on the deceased workman evidently drawing wages exceeding Rs.4000/- per mensem whereas after exclusion of Rs.50/- per day from the aforesaid figure of wages per mensem received by the deceased workman from his employer, the wages/salary per mensem drawn by the workman from his relevant employer being comprised in a sum of Rs.4000/-, hence with the principle held in the apposite explanation II of the Act, holding its play only when the wages per mensem of a deceased workman exceed Rs.4000/- whereas hence with the wages of the deceased workman standing comprised in a sum of Rs.4,000/-, in sequel, the award of the learned Commissioner warrants no interference. However, the aforesaid submission, is, unacceptable to this Court, significantly though the definition of 'wages' occurring in 'M' of Section 2 of the Act, provisions whereof stand extracted hereinafter:-

> "(m) 'wages' includes any privilege or benefit which is capable of being estimated in money, other than a travelling allowance or the value of any travelling concession or a contribution paid by the employer of a workman towards any pension or provident fund or a sum paid to a workman to cover any special expenses entailed on him by the nature of his employment."

does includes with the purview of 'wages' any privilege or benefit which is capable of being estimated in money, yet it excludes from its ambit a travelling allowance or the value of any travelling concession or a contribution paid by the employer of a workman towards any pension or provident fund or "a sum paid to a workman to cover any special expenses entailed on him by the nature of his employment". However, no evidence has surfaced, comprised in apposite suggestions in respect thereto being put by the counsel for the insurer while holding the claimants or the owner to a rigorous cross-examination, personificatory of Rs.50/- per day, paid to the deceased, falling within the ambit of 'special expenses' entailed upon him by the nature of his employment. In absence of the aforesaid apposite suggestion(s) with respect to the aforesaid facet also with a minimal sum of Rs.50/- per day standing regularly paid to the deceased workman, by his employer, for his performing his duties, 'cannot' per se render them to fall within the ambit of 'special expenses' especially when the signification borne by the coinage 'special expenses' is qua theirs being defrayable to the workman concerned only for his performing special/emergent tasks. However, the signification borne by the aforesaid phraseology 'special expenses' occurring in Section 2(m) of the Act, cannot, cover any regularly paid daily allowance by the employer to the workman during the course of his performing the callings of his avocation, especially when in performance thereof it remains undemonstrated that he was performing any special task hence warranting its concomitantly for its performance by him standing defrayed to him. Consequently, there is no merit in this submission which is also rejected.

Substantial question No.2.

6. During the course of arguments the learned counsel for the insurer does not press for an answer being rendered thereon. Hence, it is answered as not pressed.

7. The learned counsel for the claimants has submitted that the insurance cover issued with respect to offending vehicle 'not' specifically excluding the liability of the insurer, to

defray to the claimants the interest borne on the compensation amount assessed upon them by the learned Commissioner, in sequel with a catena of judicial verdicts pronouncing that only with occurrence of a specific exclusionary clause in the relevant contract of insurance hence empowering the insurer to submit that the liability of interest levied on compensation amount, assessed upon the claimants, being not fastenable upon it. Consequently, in absence of occurrence of a special relevant exclusionary clause, in the relevant contract of insurance, does disempower the counsel for the insurer, to contend that the liability of interest levied on the compensation amount, being not fastenable upon it. The substantial questions of law are answered accordingly. Appeal modified to the extent aforesaid. The claimants are held entitled to compensation of Rs.3,79,120/- from insurance company, compensation amount whereof shall carry thereon interest @ 12% per annum since the elapsing of one month from the accident till its realization/deposit and also to funeral charges comprised in a sum of Rs.2500/- from the insurance company. No costs.

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

Shashi Bala .....Appellant
Versus
Anil Kumar and Anr. .....Respondents.

FAO No. 205 of 2011
Date of Decision: 02.05.2017

Hindu Marriage Act, 1955- Section 13- Husband filed a petition for dissolution of the marriage pleading that the wife had developed illicit relation with respondent No. 2 – wife and respondent No.2 were caught red handed in the room, which was locked by the villagers – respondent No.2 was found inside the bed box during the search – the petition was decreed by the Trial Court and dissolution of marriage was ordered- held in appeal that it was duly proved that wife was caught red handed in her bedroom with respondent No.2 – Trial Court had rightly allowed the petition- appeal dismissed.(Para-8 to 12)

For the Appellant: Mr. Adarsh K. Vashishta, Advocate.
For the respondents: Mr. Ajay Sharma, Advocate, for respondent No.1.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant appeal filed under Section 28 of the Hindu Marriage Act, 1955, is directed against the judgment and decree dated 3.3.2011, passed by the learned Additional District Judge, Fast Track Court, Hamirpur, in HMA petition No. 18 of 2008, whereby the petition under Section 13 of the Hindu Marriage Act, 1955 (25 of 1955) for the dissolution of marriage by a decree of divorce having been filed by the petitioner namely Anil Kumar (respondent No.1 herein) came to be decreed.

2. Briefly stated facts as emerge from the record are that petitioner (herein after referred to as respondent No.1/petitioner) preferred a petition under Section 13 of the Hindu Marriage Act, 1955 in the Court of learned Additional District Judge, Fast Track Court, Hamirpur (H.P.), averring therein that his marriage with the appellant (Shashi Bala) (herein after referred to as the appellant/respondent No.1) was solemnized on 17.6.2003 at village Nanawin, P.O. Malangar, Tehsil Bangana, District Una, H.P., as per Hindu rites and ceremonies. Out of their wedlock, two children (Ankit and Muskan) were born. The petitioner/respondent No.1 further

claimed before the Matrimonial Court that after marriage, appellant/respondent No.1, remained with him for about 4 years and during this period, she developed illicit relationship with respondent No.2 namely Jeet Kumar. He further stated before the Court below that despite repeated requests, the appellant/respondent No.1 failed to mend herself and continued her illicit relations with respondent No.2. On 6.4.2008, at about 11 pm, appellant/respondent No.1 and respondent No.2 were caught red handed in the room of the appellant by the family members of respondent No.1/petitioner and room was locked by the villagers. Respondent No.1/petitioner (i.e. husband of the appellant) further stated before the Court below that on the pretext that she has to answer the nature's call, the appellant/respondent No.1 ran away from the house and on search of the room, respondent No. 2 was found inside the bed box. It is also alleged in the petition that after the aforesaid incident, appellant/respondent No.1 remained with respondent No.2 for 6-7 days. In the aforesaid background, the respondent No.1/petitioner alleged that cruelty was practiced by the appellant/respondent No.1 on him and that is why, he preferred aforesaid petition, praying therein for dissolution of marriage on the ground of cruelty.

3. The appellant herein, by way of filing reply to the petition refuted the aforesaid claim of the respondent No.1/petitioner) and specifically denied the allegation of her illicit relations with respondent No.2. She further submitted that her mother-in-law is suffering from paralytic disease and at one occasion, her father-in-law tried to fulfill his sexual desire with her and thereafter, she was compelled to file petition, which was subsequently compromised and the respondent No.1/petitioner had agreed to provide separate rented accommodation to her. With the aforesaid contentions/submissions, the respondents (i.e. the appellant as respondent No.1 before the Court below and respondent No. 2 Jeet Kumar), sought dismissal of the petition filed by respondent No.1/petitioner, for dissolution of the marriage on the ground of cruelty. Learned court below on the basis of pleadings adduced on record by the parties, framed following issues:-

> "1.Whether respondent No.1 being wife of the petitioner, has been living in adultery with respondent No.2, i.e. Jeet Ram, as alleged?OPP.
>
> 2. Whether the petition is not maintainable, as alleged?OPR
>
> 3.Relief."

4. Subsequently, learned Additional District Judge, vide judgment dated 3.3.2011, decreed the petition having been filed by the respondent No.1/petitioner and ordered dissolution of his marriage with respondent No. 1 (appellant herein) on the ground of cruelty. In the aforesaid background, the present appellant approached this Court praying therein for quashment and setting aside the judgment dated 3.3.2011, passed by the learned court below.

5. Mr. Adarsh K. Vashishta, Advocate, representing the appellant vehemently argued that the judgment passed by the court below is not sustainable in the eye of law, as the same is not based upon the correct appreciation of evidence adduced on record by the respective parties and as such, same deserves to be quashed and set-aside. While inviting attention of this Court to the impugned judgment passed by the learned court below, Mr. Vashishta, strenuously argued that bare perusal of the same suggests that evidence led on record by the respective parties, was not read in its right perspective, as a result of which, erroneous findings have come on record to the detriment of the appellant, who successfully proved on record that she had not developed any illicit relation with respondent No.2 namely Jeet Kumar. Mr. Adarsh, during arguments having been made by him, made this Court to travel through the evidence led on record by the petitioner (respondent No.1 herein) to suggest that he was unable to prove beyond reasonable doubt that the appellant had developed illicit relation with respondent No.2. Mr. Adarsh, further stated that if the statement having been made by PW1 Anil Kumar is read in its entirety, it nowhere suggests that he had an occasion to see Jeet Kumar i.e. respondent No.2 in the room as alleged by other family members, rather, his own case is that at the time of alleged incident, he was away in connection with his service and he was informed by the family members and as such, no reliance could have been placed upon her version, whereby an attempt has been made to prove illicit relationship of the appellant with respondent No.2 . In the aforesaid

background, Mr. Vashista, prayed that impugned judgment passed by the learned court below may be quashed and set-aside.

6. Per contra, Mr. Ajay Sharma, Advocate representing respondent No.1, supported the impugned judgment passed by the learned court below. While refuting the aforesaid submissions having been made by Mr. Vashishta, Mr. Sharma, invited attention of this Court to the impugned judgment passed by the court below to suggest that each and every aspect of the matter has been dealt with very carefully and meticulously and there is no mis-appreciation of evidence as has been alleged by the learned counsel for the petitioner. Mr. Sharma, while specifically inviting attention of this Court to the evidence led on record by respondent No.1/petitioner stated that factum with regard to the illicit relations of respondent No.2 with the appellant stands duly prove and as such, there is no scope of interference whatsoever, of this Court, especially, in view of the fact that there is overwhelming evidence adduced on record by the petitioner. Mr. Sharma, further contended that otherwise also bare perusal of the reply having been filed by the appellant nowhere suggests that any serious opposition to the allegation having been made by the respondent No.1/petitioner, was made, rather an attempt was made to make altogether a new case by leveling allegation against her father-in-law, which was not otherwise proved in accordance with law. With the aforesaid statement, Mr. Sharma, stated that there is no illegality and infirmity in the judgment passed by the court below and as such, same deserves to be upheld.

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

8. While ascertaining the genuineness and correctness of the impugned judgment passed by the court below as well as submissions having been made by the learned counsel for the parties, this Court had an occasion to peruse the pleadings as well as evidence adduced on record by the respective parties, perusal whereof, certainly not suggest that there is mis-appreciation , misconstruction and misreading of the evidence led on record by the respondent No.1/petitioner, rather this Court has no hesitation to conclude that the appellant, while defending her case, has made an attempt to level baseless allegations against her father-in-law, which has not been supported by any corroborative evidence.

9. This Court after having carefully perused the reply filed by the appellant-respondent No.1 sees substantial force in the arguments of Mr. Sharma, that there is no denial, if any, to the averments contained in the petition as far as her illicit relationship with respondent No. 2 is concerned. Rather, appellant/respondent No. 1 by leveling serious allegations against the father of the petitioner, made an endeavor to change the entire complexion of the case as far as allegation of adultery is concerned. It stands duly proved with overwhelming evidence available on record that the appellant was caught read handed in her bed room with respondent No.2. Apart from the statements of PW1 and PW2, who may be termed as interested witnesses, there is independent witness i.e. PW3 namely Lekh Raj Sharma, Member of Gram Panchayat. It has specifically come in his statement that Jeet Kumar (respondent No.2) was caught in the house of the petitioner and appellant/ respondent No. 1 had already left the place. He also stated that later on Jeet Kumar was handed over to the police. If the testimony of this witness, who is admittedly an interested witness, is read in conjunction with the statement having been made by PWs 1 and 2, it leaves no scope for this Court to agree with the contention raised by the Mr. Vashishta, that petitioner was unable to prove cruelty, if any against appellant/respondent No.1.

10. This Court carefully perused the statement having been made by the appellant/respondent No.1 before the Court, perusal whereof further compels this Court to reiterate that there is no serious opposition, if any, to the allegation having been made by the petitioner against the respondent, rather entire attempt has been made to malign the father-in-law of the appellant. It has come in her statement that at one point of time, her father-in-law tried to fulfill his sexual desire with her but she resisted. But interestingly, there is no mention, if any, of such allegation in the divorce petition (Mark Y), which was filed by her immediately after

the alleged occurrence and as such, learned court below rightly ignored the same being devoid of any merit.

11. Apart from above, this Court also carefully perused the documentary evidence i.e. Ext.PW4/A which further corroborates the version put forth by the respondent No.1/petitioner as well as other petitioner witnesses that on 5.4.2008, respondent No. 2 Jeet Kumar, was found in the room of appellant/respondent No.1 because PW4 Arjun Kumar, from SDM office, categorically deposed before the court below that he has brought copy of the proceedings i.e. Ext.PW4/A pending against respondent No.2. It has come in his statement that there was apprehension of breach of peace in the area as respondent No. 2 was found in the room of the appellant/respondent No.1 during the odd hours. Cross examination conducted on the petitioner witnesses nowhere suggests that respondent was able to shatter their testimony with regard to the specific allegation of illicit relationship of respondent No.1/appellant with respondent No.2.

12. This Court after having carefully perused the material made available on record, more particularly, the evidence led on record by respondent No.1/petitioner sees no illegality and infirmity in the judgment passed by the Court below, rather this Court is of the view that same is based upon the correct appreciation of evidence and there is no scope of interference, whatsoever, of this Court and accordingly, the present appeal is dismissed being devoid of any merit.

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

Union of India & others ...Petitioners.

Versus

Jitender Singh & others ...Respondents.

CWP No.4793 of 2013
Date of Decision: May 2, 2017

Constitution of India, 1950- Article 226- Petitioners filed the present writ petition seeking the patient care allowance- it is pleaded that the employees of the hospital and other institution were granted such benefits – however, this benefit was not extended to the petitioners- the petitioners filed an application before Central Administrative Tribunal, which issued a direction to decide the claim of the petitioner in accordance with law – the competent authority rejected the claim of the petitioners- another application was filed before the Tribunal, which quashed the order and petitioners were held entitled to patient care allowance – aggrieved from the order, present writ petition has been filed – held that Tribunal had considered the nature of the duties performed by the employees as well as the recommendations made by the Director of the institution- the object of the grant of allowance was to compensate the person likely to come in contact with infected machinery and equipment – the petitioners are discharging their duties as laboratory Attendants, Supervisors, Assistants, Safai Karamcharis, Animal Attendants etc. and thus are exposed to infectious materials – the Tribunal had rightly granted the allowance to the petitioner – petition dismissed. (Para-7 to 15)

Cases referred:

Syed Yakoob v. K.S. Radhakrishnan, AIR 1964 SC 477
Radhey Shyam & another v. Chhabi Nath & others, (2015) 5 SCC 423
Surya Dev Rai v. Ram Chander Rai, (2003) 6 SCC 675

For the Petitioners : Mr. Ashok Sharma, Assistant Solicitor General of India, with Ms Sukarma, Advocate.

For the Respondents : Mr. B.C. Negi, Senior Advocate, with Mr. Surinder Sharma, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, A.C.J.

322 employees (respondents herein and referred to as employees) of Central Research Institute, Kasauli, Himachal Pradesh, belonging to Group 'C' & 'D', have been litigating for more than a decade, claiming a sum of `700/695.00 per month, as a Patient Care Allowance (hereinafter referred to as the allowance). The claim is laid for the period from the year 1987 upto March, 2009.

2. It is a matter of record that on 5.3.1990, benefit of Patient Care Allowance came to be accorded to Group 'C' & 'D' (Non-Ministerial) employees of the Hospital (Annexure A-3, Page 105). Employees of the Central Research Institute (hereinafter referred to as the Institution) continued to agitate their grievance with the relevant authorities, for the reason that vide communication dated 2.1.1999 (Page-112), such benefit also came to be accorded to institutions other than the hospitals, w.e.f. 29.12.1998. And they being NMEP, NICD, RAK College of Nursing, LRHS, RHTC – Najafragh and Port Health Organizations and Port/Airport Health Organizations. Relevant portion of such communication is extracted as under:

> "To
>
> The Director General of Health Services,
> Nirman Bhavan,
> NEW DELHI – 110011
>
> Subject: Extension of Patient Care Allowance to Group 'C' & 'D' (Non-Ministerial) employees working in NMEP, NICD, RAK College of Nursing, LRHS, RHTC– Najafgarh and Port Health Organisation and Port/Airport Health Organisation.
>
> Sir,
>
> I am directed to convey the sanctionof the President to the extension of Patient Care Allowance (PCA) to Group 'C' & 'D' (Non-Ministerial) employees working in NMEP, NICD, RAK College of Nursing, LRHS, RHTC– Najafgarh and Port Health Organisation and Port/Airport Health Organisation @ Rs.690/- per month with effect from 29th December, 1998.
>
> ....."

3. Crucially all employees, such as Laboratory Assistants, Insect Collector, Technicians (BCG), Laboratory Attendant, etc. and even Draftsmen were held entitled for such benefit.

4. On 4.2.2004 (Page 123-127), Government of India issued yet another communication, covering other institutions, namely National Malaria Eradication Programme and National Institute of Communicable Diseases, entitling their employees to the benefit of the Scheme. In fact, it laid down criteria entitling the employees of the institution for monetary benefit. Relevant portion thereof is reproduced as under:

> "ii) Eligibility for Patient Care Allowance:
>
> The Patient Care Allowance is admissible to the Group C & D (Non-Ministerial) employees excluding nursing personnel @ Rs.690/- per month working in the health care delivery institutions/establishments (other than hospitals) having less than 30 beds, subject to the condition that no Night Weightage Allowance and Risk Allowance, if sanctioned by the Central Government, will be admissible to thse employees. (Copies of this Ministry's

Orders No.Z.28015/26/98-MH(II), dated 28.9.1998 and Z.28015/41/98-H(i), dated 2.1.1999 are enclosed)."

"(iv) The condition which an organization must satisfy before its employees can be considered for grant of Patient Care Allowance.

The persons (Group C & D, Non-Ministerial) employees whose regular duties involve continuous routine contact with patients affected with communicable diseases or are handling infected materials, instruments and equipments which can spread infection as their primary duty working in health care delivery institutions other than Hospital (30 beds for General Hospital, 10 beds for Super Speciality Hospital) may be considered for grant of Patient Care Allowance. PCA shall not be allowed to any Group 'C' & 'D' (Non-Ministerial) employees whose contact with patients or exposure to infected materials is of occasional nature." (Emphasis supplied)

5. Finding the authorities not to have accorded similar benefits, the employees were constrained to approach the Central Administrative Tribunal and vide order dated 25.11.2008, a direction came to be issued to the petitioners herein for deciding the claim of the employees, in accordance with law. It be only observed that considering the nature of duties being performed by the employees, the Tribunal emphasized the need for according the benefits. The fact of the matter being that the issue never came to be decided, forcing the employees to initiate proceedings of contempt, which came to be disposed of vide order dated 10.2.2010 (Page-176). It is only pursuant thereto, that the petitioners considered the entitlement of the employees. The competent authority vide order dated 21.5.2010 (Page 96), rejected the claim holding that employees of the organizations, more specifically the respondents herein, never came in contact with human patients and also did not fall within the prescribed scope of guidelines, so issued by the Ministry.

6. It is this order, which the employees assailed and now stands quashed by the Central Administrative Tribunal, in terms of impugned order dated 17.8.2012 (Page 263), with the following directions:

"A conjunctive perusal of Annexure A-5 and the communication dated 26.6.2009 addressed by the Director CRI Kasauli to the D.G. Health Services (appearing at page 140-141 of the OA, appreciated in the light of the fact that the observations recorded by a learned Coordinate Bench of this Tribunal in the course of order dated 21/4/2010 (Annexure A-17) have attained finality for want of a challenge in judicial review jurisdiction, would leave no manner of doubt that the impugned order deserves to be invalidated and we so hold accordingly.

In the light of the aforementioned discussion, we are of the considered view that the d3enial of the patient care allowance to the applicants and likes of them is indefensible. They are held entitled to patient care allowance for the duration it was in vogue."

7. Having heard learned counsel for the parties, as also perused the record so made available, we are of the considered view that the order passed by the Tribunal is based on correct and complete appreciation of facts as also the principles of law. It cannot be said that the order is illegal, perverse, based on extraneous factors or that the Tribunal has not considered the material in its entirety. Definitely, it has not exceeded its jurisdiction. It is a speaking order. What weighed with the Tribunal was the nature of duties, performed by the employees, as also the recommendation so made by the Director of the Institution in question. As such, we see no reason to interfere with the same.

8. We take this view, also considering the fact that the benefit of the Scheme is not confined to the hospitals and nursing institutions. The object and purpose, as is evident from the bare reading of the communication is that all such persons, who are likely to come in contact

with infected materials, instruments and equipments, which can spread infection, are entitled to benefit thereof.

9. The fact that the employees in the course of discharge of various duties/functions, in different capacities, are likely to come in contact, directly or indirectly, with infected machinery and equipment, in the laboratory and dispensary of the institute, was not only considered affirmatively by the Director of the Institution, who in fact recommended the employees' case for according such benefit, vide communication dated 26.6.2009 (Page 173), but also stands not denied in response to the Original Application, so filed before the Tribunal, in the following terms, "The possibility of contact with seed strains and challenge strains, during the production of the vaccine and sera and Quality Control testing as well as contact with samples materials received from the field under surveillance programme are minimized by observing universal precautions of prevention and specific protection by vaccination of the individual employees with specific vaccine and observing safe laboratory practices".

10. At this juncture, we may only observe that the observations made by the Tribunal that no reasons, much less justifiable, came to be assigned by the authorities, for either differing with the stand taken by the Head of the Institution or rejecting the claims are legally tenable and justifiable.

11. A Five-Judge Bench of the apex Court in *Syed Yakoob v. K.S. Radhakrishnan,* AIR 1964 SC 477:

> "….In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised."

12. More recently, in *Radhey Shyam & another v. Chhabi Nath & others,* (2015) 5 SCC 423,a three-Judge Bench of the apex Court, while overruling its earlier view taken by a two-Judge Bench in *Surya Dev Rai v. Ram Chander Rai,* (2003) 6 SCC 675, has elaborately discussed the scope of jurisdiction under Articles 227 and 226 of the Constitution of India, as also the statutory appellate and revisional powers of the Constitutional Court.

13. One finds that employees are discharging their duties, in Group C & D, as Laboratory Attendants, Supervisors, Assistants, Safai Karamcharis, Animal Attendant, etc. and the fact that they are directly exposed to all sorts of infectious material, infected equipments and instruments, infected laboratory animals and large animals, infected effluents and are in contact with human patients for collection of various infected pathological specimen and that they come in contact with most pathogenic bacteria, viruses, fungi, Toxins, etc., could not be disputed before us, nor was it so done before the Tribunal.

14. Hence, we see no reason as to why employees, who are directly exposed to such infectious material, be not accorded the benefit of the Scheme, particularly when such benefits stand accorded to the employees of National Malaria Eradication Programme and National Institute of Communicable Diseases.

15. We also notice that the Scheme does not restrict according benefits to the employees, working in organizations such as hospitals, where they directly come in contact with the patients. It is not the case of the Government that only such of those employees, who work in hospitals and come in direct contact with the patients, alone are entitled to such benefits. The object, intent and purpose is somewhat different. It is to accord benefit, monetary in nature, to all those employees, who are exposed to all sorts of infectious material, articles or objects, during the course of discharge of their duties.

16. Hence, for all the aforesaid reasons, we find no reason to interfere with the impugned order dated 17.8.2012, passed by the Central Administrative Tribunal, Chandigarh Bench, Chandigarh, in OA No.147-HP-2012, titled as *Jitender Singh & others v. Union of India & others*. Hence, the present petition is dismissed. Pending application(s), if any, also stand disposed of.

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

Sh. Khyalu Ram .....Petitioner
Versus
Sh. Mangla Nand .....Respondent

Civil Revision No. 165 of 2016
Decided on: 3rd May, 2017

Limitation Act, 1963- Section 5- An application for condonation of delay was dismissed by the Trial Court – aggrieved from the order, present revision has been filed – held that the order dismissing the application for condonation of delay can be assailed by filing an appeal and no revision lies in respect of the same - the revision dismissed with liberty to file an appeal in accordance with law– the time spent in pursuing the revision ordered to be excluded.

(Para-2 and 3)

Case referred:
Shyam Sundar Sarma V. Pannalal Jaiswal (2005) 1 SCC 436

For the petitioner: Mr. Sanjay Jaswal, Advocate.
For the respondent: Mr. Dheeraj K. Vashisth, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

In this petition, order passed in an application under Section 5 of the Limitation Act for condonation of delay occurred in filing the application under Order 9 Rule 13 of the Code of Civil Procedure by learned Civil Judge (Junior Division), Anni, District Kullu has been challenged on the grounds *inter-alia* that learned trial Court has not appreciated the given facts and circumstances and also the evidence produced by the parties on both sides in its right perspective and as a result thereof, wrong findings came be recorded.

2. It is seen that suit filed by the respondent herein has been decreed ex-parte against the petitioner vide judgment and decree dated 30.07.2014. Instead of filing appeal against the ex-parte judgment and decree, the petitioner-defendant had opted for filing an application under Order 9 Rule 13 CPC and a separate application under Section 5 of the Limitation Act, which was registered as CMA No. 14-6/2015. It is the application under Section 5 of the Limitation Act which has been dismissed vide impugned order, as in the opinion of learned trial Judge, the petitioner-defendant has failed to show sufficient cause for condonation of delay

as occurred in filing the application for setting aside the ex-parte decree. As a matter of fact, instead of invoking the revisional jurisdiction of this Court, the petitioner-defendant should have filed appeal against the order in the lower appellate Court. This petition, as such, is not maintainable. The law is no more *res-integra*, as a Co-ordinate Bench of this Court while placing reliance on the judgment of the Apex Court in ***Shyam Sundar Sarma*** V. ***Pannalal Jaiswal (2005) 1 SCC 436*** has held in CMPMO No. 271/2015 decided on 8.1.2017 that an order of this nature can only be assailed in an appeal, which in the case in hand would have been preferred in the lower appellate Court.

3. Therefore, this petition though is dismissed, however, with liberty reserved to the petitioner-defendant to resort to remedy available to him against the impugned order in accordance with law and in the light of the observations made hereinabove. He shall also be at liberty to seek benefit of provisions contained under Section 14 of the Limitation Act in the matter of condonation of delay, if so advised because he had been bonafidely pursuing the remedy by filing the present petition in this Court.

4. The petition stands disposed of. Pending application(s), if any, shall also stand disposed of.

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

Rajinder Singh … Petitioner
Versus
State of Himachal Pradesh and others …Respondents

CWP No. 2341 of 2015-E
Date of Decision : May 3, 2017

Constitution of India, 1950- Article 226- The land was allotted in favour of respondent No.5 to run a school in the name of DAV Public School- however, the school is being run in the name of Sri Aurobindo Public School- the Court had taken cognizance of this fact in a public interest litigation and had issued the directions - the petitioner had filed an earlier writ petition, which was disposed of with a direction to decide the representation made by the petitioner with a speaking order- the representation was rejected by a detailed order– the allotment was not in violation of the Rules – the sanction for the change of the name of the School was granted by Financial Secretary (Revenue) – petition dismissed. (Para-5 to 11)

For the petitioner : Mr. Anuj Nag, Advocate, for the petitioner.
For the respondent : Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan & Mr. Romesh Verma, Addl. Advocate Generals and Mr. J. K. Verma, Dy. A.G. for respondents No. 1 to 4.
Mr. Ramakant Sharma, Senior Advocate, with Ms. Soma Thakur, Advocate, for respondent No. 5.

The following judgment of the Court was delivered:

Sanjay Karol, ACJ. (Oral)

Waking up from a deep slumber, petitioner tried to disturb the happiness and peace of respondent No. 5 – Trust. But only after a pointed query from the Court, did it dawn upon the petitioner, the problem, in which he had landed himself by his misadventure. Challenge to the lease extended in the year 1993 was laid in a petition filed in the year 2015, notice in

which came to be issued on 21.4.2015. Sensing the mood of the Court, in the petition being dismissed, to the credit of Mr. Anuj Nag, learned counsel, we stand persuaded in not to do so, with costs.

2. At this juncture we highly appreciate his fairness in informing that dismissal of the petition would only embarrass, if not prejudice, the cause of petitioner's children, who incidentally are studying in the very same school, so run by the respondent – Trust, subject matter of the *lis.*

3. Vide lease deed dated 26.10.1993, land was allotted by the State in favour of Oswal Public Charitable Trust (respondent No. 5). Original lease stipulated the school to be run in the name of D.A.V. Public School, but however, though the leased land is being utilized for the specified purpose, but the school is run in another name i.e. Sri Aurobindo Public School.

4. The lessor makes no grievance of violation of any one of terms of the lease.

5. It is a matter of record that even earlier, this Court on the basis of newspaper reports, with regard to illegal allotment of the land, had taken cognizance and issued following directions in CWP No. 1798 of 2007, titled as *Ajeet Singh Dhiman vs. State of H.P. & others,* decided on 1.5.2013:

> "This petition has been filed as public interest litigation. We are informed by the counsel for the petitioner that sole petitioner has since expired. Since it is public interest litigation, the matter can proceed as *suo motu* proceedings.
>
> 2. The issue raised in this petition is about the terms of allotment of land admeasuring 15 bighas and 19 biswas to respondent No.3-Trust, on lease basis by the Authorities. The said lease was granted in favour of respondent No.3 in the year 1993 on perpetual basis on payment of rupee one as token lease rent. The State Authorities have now changed the terms and conditions of the said lease and have demanded market rent from respondent No.3 to continue to enjoy the leased property. We are informed by the learned counsel for respondent No.3 that respondent No.3 has agreed to abide by the said changed terms and conditions and in fact has deposited the amount, as demanded by the State Authorities. Respondent No.3 is in the process of executing the formal lease deed very shortly. Since the relief claimed in the petition is essentially about the improper allotment of the plot in question, to respondent No.3 on the premise that it has been allotted on token lease rent basis and is not being used for the purpose for which it has been let out. That grievance can be considered by the Secretary, Revenue Department to the Government of Himachal Pradesh. It will be open to the persons similarly placed, as the petitioner before this Court, to pursue that option, if so advised. If such representation is received from any quarter by the Secretary, Revenue Department, we have no manner of doubt that all aspects will be considered by the said authority including to issue direction for payment of additional market lease rent even for the period from the date of initial allotment or to cancel the lease on account of breach of or non compliance of the terms and conditions of the lease. All those questions will have to be decided by the said Authority on its own merits and in accordance with law. We may not be understood to have expressed any opinion either way on that matter. All questions are left open.
>
> 3. At this stage, counsel for respondent No.3 has brought to our notice that respondent No.3 has paid market lease rent as demanded, which includes arrears from the date of allotment and the plot is being used for school purpose. It is not necessary for us to examine the correctness of this submission, which will have to be considered by the Secretary, Revenue Department, Government of Himachal Pradesh, as abovesaid.

4. Accordingly, the petition is disposed of, so also the pending application(s), if any."

6. It is a matter of record that the issue came to be agitated by the petitioner for the first time with the filing of CWP No. 596 of 2015, titled as *Rajinder Singh vs. State of H.P. & others,* which came to be disposed of on 13.01.2015 with the following directions:

"In the interest of justice, Secretary (Revenue) is directed to decide the representation (Annexure P-5) made by the petitioner by a speaking/detailed order within a period of eight weeks, from today. Till then the parties are directed to maintain status quo with regard to the nature and possession of the suit property."

7. It is a matter of record that such directions stand complied, with the Addl. Chief Secretary (Revenue) to the Government of Himachal Pradesh passing a detailed order dated 24.3.2015 (Annexure –A), rejecting the petitioner's representation.

8. We do not find the petitioner's contention of allotment of land (approximately 15 bighas) to be in violation of the Himachal Pradesh Lease Rules, 1993, so framed under the Himachal Pradesh Village Common Lands Vesting and Utilization Act, 1974. Noticeably, the Rules do prescribe maximum limit of the land which can be sanctioned for lease (Rule 5), but then they stood notified and published only w.e.f. 5.11.1993, after the date of execution of lease in favour of private respondent.

9. Save and except some newspaper cuttings, nothing is suggestive of the fact that any one of the terms of the lease came to be violated prior to the filing of the instant petition. In our considered view, petitioner ought to have done some homework as also acted with caution and promptitude.

10. Even with regard to the change of name of the school, that from D.A.V. Public School to Sri Aurobindo Public School, necessary sanction came to be accorded by the Financial Secretary (Revenue) to the Government of Himachal Pradesh vide letter dated 22.7.2002, as is evident from the response filed by the State.

11. Noticeably rates of lease are being enhanced from time to time. Significantly in the execution of the lease, petitioner does not allege any bias. It is not that for extraneous reasons, as undue favour, land came to be allotted in favour of the private respondent.

No action for interference is called for. Impugned action cannot be said to be illegal. Hence for all the aforesaid reasons, present petition devoid of any merit is dismissed. Pending application(s), if any, also stands disposed of accordingly.

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

Sanjeev Gupta ...Appellant.

Versus

Karam Dass ...Respondent.

Cr. Appeal No.: 95 of 2009
Date of Decision: 03/05/2017

Code of Criminal Procedure, 1973- Section 256- The complaint was dismissed by the Magistrate under Section 256 of Cr.P.C –held that the complaint can be dismissed under this Section only if the Magistrate is satisfied that it is not possible to adjourn the complaint to a future date – the complainant had engaged a counsel, who had a reasonable cause for non-

appearance on the date of hearing – the Magistrate had wrongly dismissed the complaint in these circumstances – appeal allowed- order of the Magistrate set aside. (Para-3)

For the appellant: Mr. B.S.Chauhan, Sr. Advocate with Mr. Munish Datwalia, Advocate.
For the respondent: Mr. Harish Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge(Oral)

The instant appeal stands directed against the orders recorded on 6.3.2007 by the learned trial Magistrate whereby he for want of appearance thereat of the complainant or his counsel hence for want of its prosecution, dismissed the apposite complaint.

2. The learned trial Magistrate in making the impugned pronouncement, appears to anvil it upon the mandate held in Section 256 of the Cr.P.C, provisions whereof stand extracted hereinafter:-

> "256. Non- appearance or death of complainant.
>
> (1) If the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day: Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.
>
> (2) The provisions of sub- section (1) shall, so far as may be, apply also to cases where the non- appearance of the complainant is due to his death."

3. The power vested in sub-section (1) thereof upon the Magistrate concerned, gets awakened, on the complainant despite his standing served for a particular date for his recording his appearance, his not thereat recording his appearance whereupon the Magistrate concerned holds the jurisdiction to acquit the accused, unless for a good reason, the Magistrate concerned in his wisdom deems it fit to adjourn the case to some other day. However, the aforesaid provisions appear to not availed by the Magistrate concerned, significantly when a reading of the grounds of appeal instituted herebefore unravel qua the complainant engaging a counsel for prosecuting the apposite complaint before the learned Magistrate whereupon the mandate held in the proviso to Section 256 stands rejuvenated, arising from the demonstrable factum of the complainant hereat engaging a counsel to prosecute the apposite complaint whereupon it was incumbent upon the counsel concerned, to record his appearance before the learned trial Magistrate also when it stands not underscored in the impugned order qua his holding a perception qua the personal appearance therebefore of the complainant being unnecessary, hence, it stood also enjoined upon the counsel engaged by the complainant, to, for obviating the apposite legal mischief/ensuals arising from his non appearance therebefore, to hence ensure his presence therebefore. However, the counsel for the complainant failed, to, on the relevant date record his appearance on behalf of the complainant before the learned Magistrate. Consequently, the Magistrate concerned was thereupon empowered to hence acquit the accused yet he failed to exercise the apposite statutory powers vested in him whereupon it was apt for him to adjourn the case rather than without any jurisdictional empowerment hence dismiss it. In aftermath the Magistrate, concerned has with a critical jurisdictional vice hence rendered a legally stained order. Moreover, in the grounds of appeal, their occurs a narrative qua the good reason which deterred the counsel for the complainant, to, on the relevant day, record his appearance on behalf of the complainant before the Magistrate concerned, reason whereof propounded in the grounds

of appeal, when stands supported by an affidavit sworn by the complainant, thereupon it is befitting to impute credence thereto. In sequel, with a good reason standing propounded therein whereupon the counsel for the complainant stood deterred to record his appearance on behalf of the complainant on the relevant date before the learned trial Magistrate, thereupon this Court does conclude qua the relevant omission(s) of the learned counsel of the complainant to record his appearance on the relevant day before the learned Magistrate not arising from any deliberateness rather his relevant non appearance therebefore, being unintentional besides also standing engendered by a good reason. Consequently, the impugned order is quashed and set-aside. The appeal is disposed of accordingly, so also the pending application(s) if any. The parties are directed to appear before the learned trial Court on 14th June, 2017.

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

State of Himachal Pradesh ....Appellant.
Versus
Prakash Chand ....Respondent.

Cr. Appeal No.: 352 of 2015.
Reserved On : 17.04.2017.
Decided on: 03.05.2017.

Indian Penal Code, 1860- Section 376(2)(n) and 506- Prosecutrix was suffering from unknown disease – she was told that accused was treating the ailment – the prosecutrix went to the accused who told her that there was something in the house, which was to be removed – the accused visited the house of the prosecutrix and removed one mouli from her bed – he gave her some water to drink in the night and raped her – she was also raped subsequently – she was given some water and was shifted in a vehicle in a state of intoxication – she was left in the house of her parents on the next day- the accused was tried and acquitted by the Trial Court- held in appeal that the prosecutrix had made a statement in the police station that she had voluntarily gone with the accused and had returned on her own volition – there are contradictions in the testimony of the prosecutrix – her version is inherently improbable – prosecutrix had not disclosed to her husband about the commission of rape – Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.(Para-8 to 30)

For the appellant : Mr. V.S. Chauhan, Addl. AG with Mr. Vikram Thakur, Dy. AG.
For the respondent : Mr. Karan Singh Kanwar, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this appeal, the State has challenged the judgment passed by the Court of learned Additional Sessions Judge (II), Mandi, Camp at Sarkaghat, in Trial Reg. No. 503 of 2013, dated 25.02.2015, vide which, learned Trial Court acquitted the present respondent for commission of offences punishable under Section 376 (2) N and 506 of Indian Penal Code (in short 'IPC').

2. The case of the prosecution in brief was that on 17.06.2013, prosecutrix (PW1), filed an application to SHO Police Station Sarkaghat to the effect that she was wife of PW3 Ramesh Kumar and their marriage was solemnized six years ago and they have a male child about four years old. As per prosecutrix, she was suffering from some unknown disease and she

was taking treatment at Gutkar, however, despite said treatment, she was not able to get any relief. Further as per prosecutrix, her sister PW6 Reenu and her mother-in-law came to their house to inquire about her well being and they informed her that one '*Chela*', namely, Prakash Chand, used to treat ailments like the one prosecutrix was suffering from. On the recommendation of her sister and her mother-in-law, she (prosecutrix) alongwith her in-laws went to house of Prakash '*Chela*', where said '*Chela*' (hereinafter referred to as 'accused') gave her some water to drink and after consuming the same, the prosecutrix started vomiting. Further as per the prosecutrix, accused disclosed to her that she was having '*big beer*' inside her and advised her to come empty stomach for the purpose of 'Chowki' and not to consume oily food and also not to visit her relatives. As per prosecutrix, she attended 'Chowki' as per advice of the accused, who thereafter disclosed to her that there was something in their house which had to be removed. On said pretext, accused came to house of the prosecutrix and removed one '*mouli*' from her bed. Further as per prosecutrix, during night time, he gave her some water to drink and committed sexual intercourse with her against her wish and also threatened her with dire consequences if she disclosed this fact to anyone. As per the prosecutrix, accused and her husband were sleeping in one room, however, after her husband went to sleep, accused came to her. Further as per prosecutrix, on 11.06.2013, accused again came to her in-laws' house and during night, he again gave her some water to drink and during that night, he again raped her against her wish. Thereafter on 12.06.2013, accused again came to her in-laws house and gave her some water to drink and at about 12 'O' Clock midnight, he shifted her under intoxication and took her in his vehicle. When the vehicle reached near Kandror bridge, prosecutrix gained consciousness and asked accused that she wanted to meet her son. Accused threatened her and forcibly took her to Chandigarh. Entire day, he kept her inside the vehicle and on next day, at about 1:00 a.m., he left her near the house of her parents at village Pantehara, Tehsil Ghumarwin, District Bilaspur.

3. On the basis of said application by the prosecutrix, FIR Ext. PW15/A was registered in Police Station Sarkaghat on 17.06.2013. Investigation was assigned by Superintendent of Police, Mandi to PW11 Inspector Kamla Ghai, who moved an application for the medical examination of the prosecutrix. Thereafter, statement of prosecutrix was recorded under Section 164 of Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C.'). During the course of investigation, places where accused had sexually molested the prosecutrix were got identified by her and site plan was accordingly prepared on the disclosure of prosecutrix. Thereafter file for further investigation was handed over to SHO, PS Sarkaghat as per the order of Superintendent of Police, Mandi. Matter was further investigated by PW12 ASI Jagdish Kumar, Incharge, Police Post Hatli. The Investigating Officer prepared site plan Ext. PW12/B with regard to the occurrence at place Kandrour. Vehicle in issue bearing registration No. HP-24-2075 was taken into possession and the accused was also got medically examined.

4. After the completion of the investigation, challan was filed in the Court and as a prima-facie case was found against the accused, he was charged for commission of offences punishable under Sections 376 and 506 of IPC, to which he pleaded not guilty and claimed trial.

5. Learned trial Court vide its judgment under challenge acquitted the accused by holding that prosecution had failed to bring home the guilt of the accused beyond reasonable doubt. While arriving at the said conclusion, it was held by the learned trial Court that statement of prosecutrix demonstrated that there was inconsistency in the same. Learned trial Court held that prosecutrix in her application Ext. PW1/A had mentioned that she was suffering from some unknown disease and it was her sister PW6 Reenu who introduced her to accused, who thereafter in the guise of her treatment, raped her, however, the prosecutrix had not disclosed the first date on which the accused came to her in-laws house. Learned trial Court held that as per prosecutrix accused forcibly established physical relations with her for the first time on 11.06.2013 and thereafter on 12.06.2013, accused again committed rape with her in a vehicle after making her consume something. Learned trial Court further held that prosecutrix had also deposed that she gained consciousness at Kandrour and thereafter, accused took her to Chandigarh and accused committed rape with her at Chandigarh also against her wish. Learned trial Court further held that in Ext. PW1/A, prosecutrix had nowhere disclosed that accused raped her at Kandrour or

that accused was planning to sell her in Rajasthan for a consideration of Rs. 3,00,000/- nor was there any whisper in Ext. PW1/A that accused received telephonic call from her mother-in-law, his wife and the police of Police Post Baldwara. Learned trial Court held that all these facts were disclosed by the prosecutrix in her statement Ext. PW1/C given before learned ACJM, Sarkaghat under Section 164 of Cr.P.C. Learned trial Court further held that on 04.08.2013, prosecutrix had introduced another story to the effect that she was raped at a place near Kandrour bridge inside the vehicle whereas this was not disclosed by her to PW11 Inspector Kamla Ghai but was disclosed later to PW12 ASI Jagdish. Learned trial Court also held that a perusal of the site plan Ext. PW11/A which pertained to the house of in-laws of the prosecutrix demonstrated that there were four rooms alongwith a verandah and the place of occurrence was shown as mark A. Learned trial Court held that site plan demonstrated that in fact all the rooms of the house were inter-connected and in case the statement of prosecutrix was to be taken as a gospel truth that she was forcibly raped by accused 15-16 days prior to 11.06.2013, then the whisper of the accused and prosecutrix would have been heard by her husband and other family members who were sleeping in adjoining rooms, however, nothing was deposed to this effect by her husband PW3 Ramesh Kumar. Learned trial Court also held that PW17 HHC Ranbir Singh in his cross examination deposed that on 14.06.2013, prosecutrix had come to PP Hatli alongwith Up Pradhan PW5 Prakash Chand, her husband PW3 Ramesh Kumar, her father-in-law PW2 Mansha Ram and her mother-in-law and rapat No. 18 dated 14.06.2013 was entered in rojnamcha to this effect and prosecutrix had given statement that she had voluntarily gone after the accused and she was not abducted by the accused. Learned trial Court further held that this witness further stated that prosecutrix deposed that accused had not done anything wrong with her. Learned trial Court held that this rapat No. 18 had been intentionally withheld by the prosecution. Learned trial Court also held that as per PW17, prosecutrix had not blamed accused for any wrong act. Learned trial Court also took note of the fact that prosecutrix had deposed in the Court that on 13.06.2013, police made a call to the accused on his mobile and the accused had asked her to inform the police that she had married him (accused). Learned trial Court held that prosecutrix had also deposed that wife of accused had made a telephonic call and accused disclosed that he had not abducted any woman. Learned trial Court also took note of the fact that mother of the prosecutrix PW7 Jamna Devi had a totally different story to narrate and she had deposed that in-laws of prosecutrix disclosed to her that prosecutrix had run away with one Baba, however, missing report was lodged at Police Post Hatli on 13.06.2013. Learned trial Court also held that PW7 in her statement recorded under Section 161 of Cr.P.C deposed that prosecutrix came to her house at 1:00 a.m. in the intervening night of 13/14.06.2013 and disclosed that she was abducted by the accused, however, in her cross examination, she disowned her statement by saying that prosecutrix never disclosed to her that she (prosecutrix) was abducted by accused. On these bases, it was held by learned trial Court that testimony of the prosecutrix was totally unbelievable and rather it emerged that there was no cogent and reliable evidence to show that prosecutrix was ever found inside the vehicle of accused either at Kandrour or at Chandigarh. Learned trial Court also held that even on the basis of medical evidence, it could not be concluded that prosecutrix had been raped by the accused especially when there was nothing on record to demonstrate that prosecutrix was not having physical relations with her husband in between 14.06.2013 to 19.06.2013. Learned trial Court also held that as far as factum of extending threat to prosecutrix was concerned, there was no cogent and reliable evidence to this effect and said facts were neither disclosed by prosecutrix to PW7 Jamna Devi, whom she (prosecutrix) met after her alleged abduction nor to Up Pradhan PW5 Prakash Chand, whom she met on 14.06.2013 and she did not disclose such facts in PP Hatli where rapat No. 18 was recorded on the same day. On these bases, it was held by the learned trial Court that statement of prosecutrix was not inspiring confidence to bring home the guilt of the accused beyond reasonable doubt.

6. Feeling aggrieved by the judgment so passed by learned trial Court, the State has filed this appeal.

7. We have heard the learned Additional Advocate General as well as Mr. Karan Singh Kanwar, learned counsel appearing for the respondent. We have also gone through the records of the case as well as the judgment passed by learned trial Court.

8. It is settled law that for the purpose of conviction of accused charged with committing the offence punishable under Section 376 of IPC, sole testimony of prosecutrix is sufficient provided the testimony of the prosecutrix is cogent, reliable and trustworthy and the same inspires confidence in the Court. A perusal of the judgment passed by learned trial Court demonstrates that it has been mentioned therein that the testimony of the prosecutrix in the present case is not worth inspiring confidence as there were contradictions in her statement and some corroborative evidence to lend credence to the same was lacking in the case. Therefore, we have now to ascertain as to whether the findings so returned by learned trial Court are borne out from the records of the case or same are perverse.

9. Complaint filed by the prosecutrix to the police at Police Station Sarkaghat is on record as PW1/A on which no date is mentioned. However, an endorsement is mentioned on the same in which it is mentioned that FIR No. 163/13 has been registered on 17.06.2013, under Section 376 (2) N of IPC on the basis of said complaint. A perusal of the complaint demonstrates that it was mentioned therein that prosecutrix was married to Ramesh Kumar and was residing at village Barot since her marriage which took place six years back and that she was having a son. It was further mentioned in the said complaint that prosecutrix was having some medical problem and despite taking treatment from various doctors, the problem was not being successfully treated. It was further mentioned therein that on the advice of her sister, she met the accused who used to perform work of a '*Chela',* in connection with her medical problem. It was further mentioned in the complaint that she (prosecutrix) met the accused as advised by her sister who told her that there was a "*bada beer*" inside her and asked her to follow the procedure prescribed by him to get rid of her problem. It is further mentioned in the complaint that accused advised her not to eat oily food and also not to consume food in the house of relatives etc. As per prosecutrix, accused also told that there was something in her house which the accused had to remove after visiting their house. It is further mentioned that thereafter accused came to their house and removed the bed of prosecutrix from the room and removed one '*mouli*' from the same. Thereafter he gave her some water to drink and during night time, he sexually assaulted her against her wish and also threatened her not to disclose the same to her relatives. It was further mentioned in the complaint that initially, the accused was sleeping in a room where her husband was sleeping but after her husband had gone to sleep, accused had came to her and forcibly sexually molested her. It was further mentioned in the complaint that even on 11.06.2013, accused stayed in their house and in the night hours, he gave her something to drink and after she became unconscious he molested her and thereafter in the night of 12.06.2013, he again gave her some water to drink and after all had gone to sleep he abducted her in his Jeep. When she gained conscious at a place near Kandrour Bridge she requested him to take her to her son but the accused took her to Chandigarh and kept her in the vehicle during day time and night of Wednesday and thereafter on the night of Thursday, at around 1:00 a.m., he left her on a road near the house of her parents. It is mentioned in the complaint that accused had also established physical relations with her at Chandigarh after making her unconscious. It was on the basis of said complaint that FIR No. 163 of 2013 was registered at Police Station Sarkaghat on 17.06.2013 itself at 6:15 hours.

10. There is also on record Ext. PW1/C, another statement of prosecutrix recorded under Section 164 of Cr.P.C before learned Judicial Magistrate 1st Class, Sarkaghat, dated 20.06.2013, in which, it was stated by the prosecutrix that she on the advice of her sister, in relation to her medical condition, met the accused who after advising her to follow particular procedure to get rid of her problem from which she was suffering, came to her house and removed one '*mouli*' from her bed and during night hours, he gave her something to consume and thereafter she became unconscious and accused sexually molested her. It is mentioned in the said statement that prosecutrix and her son used to sleep in separate room and accused used to sleep alongwith her husband in the adjoining room. It is mentioned therein that accused used to

threaten her again and again that he will do away with her life and life of her son. It is also mentioned that accused came to their house 2-3 times and thereafter, both she and her husband started having fits. On this, her mother-in-law telephonically called accused to their house who asked them to bring a hen and thereafter Prakash (accused) again treated her on 11.06.2013 and during the course of treatment, he gave her something to drink and thereafter sexually molested her. It was mentioned that on 12.06.2013, he again came to their house at around 6:00 p.m. and on the said date also, he gave her something to drink and thereafter molested her and abducted her in an unconscious state of mind. It is further mentioned therein that when she gained consciousness near Kandrour bridge, she asked accused to leave her at her home, but accused told her that he was taking her to Chandigarh and thereafter he took her to Chandigarh and there also he molested her. It is further recorded in the statement that accused asked her to marry him but she refused and accused told her that he would send her to Rajasthan after two days to which also she objected. She further stated that when her mother-in-law made a telephonic call to accused from Police Chowki Baldwara, accused by threatening her told her to say that both of them are happy with each other. It is further recorded in the statement that thereafter her family members made a telephonic call to accused and told that police has arrested his parents. It is further mentioned therein that thereafter accused asked her to go to her house and she told Prakash (accused) that as she was not having money, he should leave her at the place from where he had abducted her. It is further mentioned therein that thereafter Prakash made her drink some water and on the night of 13.06.2013, he dropped her at her parental house at around 1:00 a.m.

11. When prosecutrix entered the witness box as PW1, she deposed that she was suffering from some unknown disease and despite treatment, there was no improvement in her condition. Her sister alongwith mother-in-law one day came to her house and told that one '*chela*' named Prakash Chand used to treat such like ailments, on which she alongwith her sister's mother-in-law went to village Baloh, where accused told that there was some big '*Veer*' inside her and asked her to perform '*saat Chowki*' in his temple. She further deposed that accused told her that there was something in her bed and he had go to her house to remove the same. She deposed that thereafter accused came to their house and removed one piece of '*mouli*' from the corner of her bed. She deposed that during that night accused remained in their house and in the night, he made her drink a glass of water. She deposed that accused slept with her husband and other family members slept in their respective rooms and she slept in a separate room. She deposed that accused came to her room in the night and committed rape and threatened her to kill her and her son if she disclosed the matter to any one and also told that he would not cure her illness. She deposed that on 11.06.2013, accused came to their house on being called by her mother-in-law telephonically for the treatment of her husband. She further deposed that on 11.06.2013, at about 10/11:00 p.m., accused made her drink a glass of water and again committed rape with her. She further deposed that on 12.06.2013, at about 5/6:00 p.m., accused again came to their house and again made her consume a glass of water at about 11:00 p.m. due to which she became unconscious and accused took her from her house in the night and she gained consciousness near Kandrour. She further deposed that accused was talking with someone on telephone that he was taking her to Chandigarh. She further deposed that accused again committed rape with her in the vehicle and thereafter, he took her in the same vehicle to Chandigarh where she remained in the vehicle itself. She further deposed that during day time, her in-laws went to police station and police made a telephonic call to the accused on mobile and accused told her to tell police that both of them had married to each other. She also deposed that accused had shown her a dagger and threatened her. She deposed that police asked her to talk with her mother on mobile but accused did not allow her to talk with her mother. She further deposed that accused was talking with someone on mobile that he would sell her for Rs. 3,00,000/- in Rajasthan. She deposed that on the same day, her in-laws went to the house of accused alongwith her husband and wife of accused talked with him. She deposed that thereafter accused asked her to come back to her house and when she asked accused to drop her at her house, accused dropped her at her parental house on the road. She further deposed that she remained in her parental house on 13.06.2013 and on the next day, she was taken to Pradhan of

village Bastawar and Pradhan took her to police post Baldwara. She deposed that she could not give statement before the police on that day as she was mentally shocked and after 2-3 days, she lodged complaint Ext. PW1/A in Police Station Sarkaghat. She deposed that her medical was conducted on the next day. She stated that her statement was also recorded by the Magistrate. She further deposed that she had shown spots to the police where accused had committed rape on her. In her cross examination, she deposed that she had made a statement before the police on 14.06.2013 that she had voluntarily gone and came back to her house of her own. Thereafter she clarified that on that day she was not feeling well. She also deposed that her treatment by the accused lasted for about 2-3 months. She denied that on 12.06.2013, no rape was committed by the accused. She also denied that no rape was committed by accused before 11.06.2013. She further deposed in her cross examination that the accused had not raped her in Chandigarh. She also stated in her cross examination that she had disclosed before the Magistrate that rape was committed by accused on her on 11.06.2013 and she was confronted with her statement Ext. PW1/C wherein it was not so recorded. She further stated that she had disclosed before the Magistrate that accused had raped her in the vehicle near Kandrour and again she was confronted with her statement Ext. PW1/C wherein it was not so recorded. She deposed in her cross examination that on 14.06.2013 she had disclosed to the police that no rape was committed by accused with her. She admitted it to be correct that said statement was given by her before the police in a sound state of mind and on that day, Pradhan Prakash Chand, her in-laws and her husband were with her. She also stated that now she was not suffering from the problem after getting treatment from some other '*chela*'. She further deposed that their house had eight rooms, four on ground floor and four on first floor. She admitted it to be correct that while sleeping, she used to bolt the door. She stated that she used to sleep in a room on the first floor. She self stated that accused had instructed not to bolt the room in which she used to sleep and accused had taken a lot of money for her treatment. She denied that in fact accused had demanded money for her treatment and it was on that count, a false case was filed against the accused.

12. Father-in-law of the prosecutrix entered the witness box as PW2. This witness deposed that prosecutrix was married with his son about six years back and they were having one son out of said wedlock. He also stated that prosecutrix was suffering from strange illness and she was not recovering despite treatment. He also stated that sister of the prosecutrix Reenu and her mother-in-law told them that one '*Chela*' in village Baloh used to treat such like illness. He stated that thereafter he alongwith Premi Devi, Reenu, prosecutrix and one Gulaba Ram went to the temple of accused at village Baloh. This witness deposed that on the pretext of treating prosecutrix, accused came to their house and made prosecutrix drink a glass of water and she went to sleep in a separate room. He deposed that accused and his son went to sleep in a separate room. This witness further deposed that in the night around 12 'O' Clock, child started weeping and when they went to see as to what had happened, prosecutrix was not found in the room and accused was also not in the room and even the vehicle of the accused was not there. He further deposed that as both of them could not be found, his wife made a telephonic call to the accused who told that prosecutrix was not with him. He further deposed that thereafter they went to Up Pradhan, who told that matter be reported next morning and on the next morning, he alongwith his wife, Up Pradhan Prakash Chand and Gulaba Ram went to report the matter to the police at Baldwara and lodged missing report of the prosecutrix. He further deposed that they also met the parents of accused and his wife and inquired about the accused from them who told that accused had not come to his house. He also deposed that on 13.06.2013, prosecutrix came to her parental house at about 1:00 a.m. and she was brought to his house by her parents and thereafter, they took the prosecutrix to Up Pradhan Prakash Chand, alongwith whom, they went to Police Post Baldwara. He further deposed that inquiry was made by the police from the prosecutrix but she was not in a sound state of mind and health. This witness further stated that thereafter prosecutrix lodged a complaint to the police and also disclosed to him about the acts committed upon her by the accused and that accused had threatened to kill her son and to sell her. In his cross examination, this witness admitted it to be correct that he went to Police Post Hatli on 14.06.2013. He denied that on 17.06.2013, he alongwith his wife pressurized the prosecutrix to give statement against the accused to falsely implicate him. He further stated in

his cross examination that prosecutrix did not disclose about the commission of rape on 14.06.2013. He admitted it to be correct that it was not disclosed to him by the prosecutrix that rape was committed upon her by accused for the last 20 to 22 days. He deposed that prosecutrix disclosed to him only on 17.06.2013 about the rape having been committed upon her by the accused.

13. Husband of the prosecutrix entered the witness box as PW3 and stated that accused was treating his wife who was suffering from some ailment and accused had come to their house to treat her and he took one piece of '*mouli*' from the bed. He deposed that accused used to sleep with him in their house and after drinking a glass of water given by accused, he became unwell. He further deposed that on 13th accused took his wife during the night and matter was reported to the police. In his cross examination, he denied that his wife had voluntarily gone with accused. He denied that on 13.06.2013, his wife had gone to the house of Reenu. He stated that they used to sleep without bolting the door and other family members also used to do the same. He stated that his wife had not disclosed to him that accused had committed rape on her. He deposed that he could not tell how he came to know that his wife was raped by the accused.

14. PW4 Gulaba Ram also deposed in the Court that on 13.06.2013, his sister Kamla telephonically informed him that accused had abducted the prosecutrix and she requested him to accompany them to police post. He deposed that thereafter he alongwith his sister, Up Pradhan, Kamla Devi, and Mansa Ram went to police post Hatli (Baldwara) where the matter was reported. He further deposed that they alongwith police went to house of the accused but prosecutrix was not found there. He deposed that wife of accused tried to contact him on mobile phone but his mobile phone was switched off. He deposed that thereafter prosecutrix was dropped by accused on the road at place Pantehra. He also deposed that prosecutrix had disclosed to the police that she was taken to Chandigarh by the accused.

15. Statement of PW5 Prakash Chand is also to the same effect. However, it is relevant that in his cross examination this witness admitted it to be correct that on 14.06.2013, prosecutrix had disclosed to the police that she had voluntarily gone with the accused and had come back at her own.

16. Mother of the prosecutrix entered the witness box as PW7 and she deposed that during summer days, they were informed by in-laws of prosecutrix that she (prosecutrix) had run away with one Baba. She deposed that she do not know the name of that Baba and at around 1:00 a.m. in the night, prosecutrix called her and she opened the door and slapped her twice or thrice. She further deposed that thereafter they called her mother-in-law. She also deposed that her son took prosecutrix to the house of Up Pradhan in the morning. In her cross examination, this witness deposed that she did not disclose to the police that on 14.06.2013, prosecutrix told her that she was abducted by the accused and was also dropped by him.

17. Dr. Kanika Kaushal, who had medically examined the prosecutrix entered the witness box as PW8 and she proved on record MLC issued by her as Ext. PW8/B.

18. Inspector Kamla Ghai, entered the witness box as PW11 whereas ASI Jagdish Kumar entered the witness box as PW12. HHC Ranbir Singh entered the witness box as PW17 and in his cross examination, he admitted it to be correct that prosecutrix had given statement that accused had not done anything wrong with her and rapat No. 18, dated 14.06.2013 was entered in rojnamcha to the effect that prosecutrix had given statement that she had voluntarily gone after the accused and she was not abducted by the accused. This witness deposed that when statement of prosecutrix was recorded by him, at that time, Up Pradhan Prakash Chand, mother-in-law, father-in-law and husband of the prosecutrix were present. He deposed that prosecutrix had given her statement in sound state of mind.

19. Now when we appreciate ocular testimony of prosecution witnesses, it is apparently evident that after the prosecutrix was dropped near the house of her parents on the intervening night of 13/14.06.2013 at about 1:00 a.m. and thereafter when she went to police

post for the first time on 14.06.2013, she had made a statement to the effect that she had voluntarily gone with the accused and also returned back of her own volition. This factum is borne out from the cross examination of the prosecutrix herself as well as from the testimony of PW17 Ranvir Singh.

20. We have already referred to the complaint filed by the prosecutrix initially, on the basis of which, FIR was lodged on 17.06.2013 as well as to her statement recorded under Section 164 of Cr.P.C and her deposition in the Court as PW1. A perusal of all these demonstrates that there are lot of improvements and contradictions in the complaint, statement of prosecutrix recorded under Section 164 of Cr.P.C and her deposition made in the Court of law as PW1 which renders the version of the prosecutrix to be highly unbelievable. The prosecutrix wants this Court to believe that in an intoxicated position, she was abducted by the accused from the house of her in-laws, wherein besides the prosecutrix and her minor son, her husband and her in-laws were putting up and no one came to know of this fact. Not only this, she also wants this Court to believe that before the said abduction of the prosecutrix, she was sexually assaulted by the accused against her wish in the house of her in-laws during night hours and none noticed this fact. It is prosecutrix's own case that it is not as if accused used to sleep with her in her room but accused used to sleep with her husband in a separate room. As per prosecutrix after her husband went to sleep, accused came to her room and sexually molested her. She further stated that when accused sexually molested her, her minor son used to sleep in other room. However, when we peruse the testimony of PW2 Mansha Ram, father-in-law of prosecutrix, he has deposed that minor son of prosecutrix used to sleep with her and on the fateful night they were woken up by the cries of minor child and when they went to see as to what had happened, they found prosecutrix missing and later found that accused was also missing with his vehicle.

21. In complaint Ext. PW1/A, it is not mentioned that after the accused had abducted the prosecutrix on the night of 12.06.2013 and after she gained consciousness near Kandrour bridge, he had raped her at Kandrour bridge. Besides this, it is not mentioned in the said complaint that while at Chandigarh, she heard accused talking with someone that the prosecutrix was to be taken to Rajasthan and there she was to be sold for Rs. 3,00,000/-. Now when we refer to her statement under Section 164 of Cr.P.C, there are improvements made to the effect that as per the prosecutrix, after she was abducted by the accused on the night of 12.06.2013 and taken to Chandigarh by accused, he asked her to marry him and when she refused to do so, he told her that he would send her to Rajasthan after two days.

22. Similarly, it is not so recorded in complaint Ext. PW1/A that while at Chandigarh, any telephonic call was received by the accused from mother-in-law of the prosecutrix and accused threatened the prosecutrix to inform her mother-in-law that both of them had married to each other however this finds mention in her statement recorded under Section 164 of Cr.P.C before learned Judicial Magistrate 1st Class, Sarkaghat.

23. It is not mentioned in the complaint Ext. PW1/A that at Chandigarh, accused had asked the prosecutrix to go back to her house and prosecutrix told him that she was not having money and therefore, he should drop her at the place from where he had abducted her but it is so mentioned in the statement of prosecutrix recorded under Section 164 of Cr.P.C.

24. Now when we compare the complaint and statement of prosecutrix under Section 164 of Cr.P.C with her deposition made in the court of law, it is evident from the cross examination of the prosecution that she not only admitted that she had stated before the police on 14.06.2013 that she had voluntarily gone with the accused and had returned back on her own, she also admitted it to be correct that no rape was committed on her by the accused at Chandigarh.

25. When we compare these contradicting statements of the prosecutrix including her initial complaint with the testimonies of other prosecution witnesses especially Up Pradhan Prakash Chand (PW5) and PW17 Ranvir Singh, it is apparent that in fact on 14.06.2013 statement was made by the prosecutrix at concerned police post that she had gone alongwith

accused of her own and returned back at her own will and it was subsequently that she was forced, may be by her in-laws or by her husband, to lodge complaint against the accused.

26. The testimony of the husband of the prosecutrix is both unnatural and unreliable. In his examination-in-chief, this witness has deposed that accused came to his house to treat his wife and he used to sleep with him in his house and that on 13th he took his wife during night hours and the matter was reported to the police and then his parents visited the house of accused and thereafter he did not remember as to what happened. Not only this, in his cross examination, this witness deposed that his wife never disclosed to him that accused had committed rape on her. It is slightly difficult to believe that accused who as per prosecution was sleeping with husband of prosecutrix in his house was able to sexually molest his (PW3's) wife on more than two occasions and PW3 never came to know about anything. Similarly, the testimony of her mother PW7 Jamna Devi also fortifies the fact that prosecutrix had on her own volition gone with the accused as this witness in her examination-in-chief deposed that during summer days, she was informed by in-laws of prosecutrix that prosecutrix had run away with one Baba and when prosecutrix called her at around 1:00 a.m. in the night, she opened the door and slapped her twice or thrice and thereafter prosecutrix did not talk with them, neither did she had any meal. This witness also deposed that thereafter they called mother-in-law of prosecutrix and her son took the prosecutrix to the house of Up Pradhan in the morning. In her cross examination, this witness also deposed that she had not disclosed to the police that prosecutrix had told her on the night on 13/14.06.2013 that she was abducted by accused and was dropped by him.

27. From what we have discussed above, it is apparent that on the basis of testimony of the prosecution witnesses as well as documents placed on record by the prosecution, the prosecution was not able to prove beyond reasonable doubt that in fact the accused had taken away the prosecutrix from the house of her in-laws on the intervening night of 12/13.06.2013 or that he had outraged the modesty of prosecutrix against her will. On the contrary, it is apparent and evident from the statements of prosecution witnesses including the statement of Up Pradhan and PW17 Ranvir Singh that on 14.06.2013, prosecutrix had stated at Police Post Baldwara that she had gone alongwith accused of her own free will and thereafter returned back of her own free will and subsequently she was forced, may be by her in-laws or husband to lodge a false complaint against the accused.

28. In these circumstances, especially when the prosecution has not been able to prove the guilt of accused beyond reasonable doubt and when testimony of prosecutrix is neither cogent nor trustworthy nor the same seems to be reliable, it cannot be said that learned trial Court erred in acquitting the accused for commission of offences with which he was charged.

29. There is no material on record placed by the prosecution from which it can be inferred that any threats etc. were induced by the accused to the prosecutrix so as to render the accused liable for being punished for commission of offence punishable under Section 506 of IPC. There is no cogent evidence on record that prosecutrix was intimidated by the accused as has been alleged by the prosecution.

30. Besides this, we have also carefully gone through the judgment passed by the learned trial Court and a perusal of the judgment passed by learned trial Court demonstrates that the entire evidence produced on record by the prosecution had been minutely taken into consideration by the learned trial Court and after a careful consideration of the same, learned trial Court had returned the finding of acquittal in favour of accused.

31. Therefore, while concurring with the findings of acquittal returned by learned trial Court, we dismiss the present appeal being devoid of any merit, so also pending miscellaneous application(s), if any.

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

State of Himachal Pradesh .....Petitioner
Versus
Sanjeev Kumar and another .....Respondents.

Cr. Appeal No. 187 of 2008
Decided on : 03/05/2017

Indian Penal Code, 1860- Section 323, 325, 504, 506 read with Section 34- **Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989-** Section 3- The complainant was returning to his home, when both the accused alongwith an unknown person attacked the complainant from the backside – they used filthy language against the complainant and told that they would not allow the Chamaar to move freely in the village and kill him and his family- wifeand brother of the complainant along with some other persons reached at the spot – the accused left on seeing them- the accused were tried and acquitted by the trial Court- held in appeal thatthere are improvements and contradictions in the testimony of the complainant – the medical examination of the complainant was conducted after ten days – the Trial Court had correctly appreciated the evidence- appeal dismissed.(Para-9 to 12)

For the petitioner: Mr. Vivek Singh Attri, Dy. A.G.
For the Respondent: Mr. Umesh Kanwar, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal stands directed against the impugned judgement of acquittal recorded by the learned Special Judge, Bilaspur, H.P. whereby he pronounced an order of acquittal upon the accused qua the offences allegedly committed by them.

2. The brief facts of the case are that the complainant is a scheduled caste and resident of village Morsinghi. As far as accused Sanjiv Kumar and Amit Kumar are concerned they are also the residents of the said village and that by caste they are Rajput. Allegedly, accused Amit Kumar runs an electronic shop in the said village and asked the complainant 2/3 times to purchase articles from his shop. On 26.09.2004 at about 7 p.m, when the complainant was coming to his house from Kasohal, both the accused alongwith another person to whom the complainant could not recognize attacked him from the backside. They used filthy language against him. It is further alleged that accused persons threatened the complainant that they would not allow the Chamaar to move freely in the village and kill him as well as his entire family. In the meantime, his wife, Smt. Premi Devi, brother Munshi Ram alongwith Shri Deep Ram and some other persons reached on the spot. On having noticed them they left the spot by saying that now all the Chamaars have come and further threatened to see them lateron. After the registration of the case, the complainant was got medically examined and the investigation was carried out by the then Dy.S.P. and after completing all codal formalities and on conclusion of the investigation into the offences, allegedly committed by the accused, challan was prepared and filed in the Court.

3. A notice of accusation stood put to the accused by the learned trial Court for theirs committing offences punishable under Section 3 of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 read with Section 34 IPC and under Section 323, 325, 504, 506 IPC read with Section 34 IPC to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 8 witnesses. On closure of prosecution evidence, the statements of the accused under Section 313 of the Code of Criminal

Procedure, were recorded in which they pleaded innocence and claimed false implication. They did not choose to lead any defence evidence.

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

6. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of acquittal warranting reversal by this Court in the exercise of its appellate jurisdiction and theirs standing replaced by findings of conviction.

7. The learned counsel appearing for the respondent has with considerable force and vigour contended qua the findings of acquittal recorded by the Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

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

9. The initial version qua the occurrence is embodied in Ext.PW-4/A. In the aforesaid exhibit the accused are disclosed to by fist and leg blows hence assault the complainant, also they are alleged to make derogatory references with respect to his caste. Moreover, it is disclosed therein that in sequel to a stone flung by co-accused Sanjeev at the nose of the victim, blood oozing therefrom, in sequel whereof his clothes gathering stains of blood. During the assault, the complainant raised shriekes, shriekes whereof begot the arrival of Premi Devi, Munshi Ram and Deep Ram, at the spot of occurrence. The prosecution by examining PW-1 has proven Ext.PW-1/A wherein it is depicted of the victim suffering fracture of nasal bone. PW-1 has also proven his report comprised in Ext.PW-1/B. In his cross-examination, PW-1 has testified qua the injury reflected in Ext.PW-1/A being caused within a period of less than two weeks, since his x-raying the relevant portion of the body of the victim whereat a stone stood allegedly flung by co-accused Sanjeev Kumar. PW-2 has proven MLC borne on Ext.PW-2/A, wherein he has detailed the hereinafter inflicted injuries:-

1. Contusion left side of Nasal bridge. Tenderness present.
2. Tenderness left temporal region.
3. Tenderness back right scapular region.
4. Tenderness right HC region.

which stood noticed by him to be occurring on the person of the victim, on his subjecting him to medical examination. In his cross-examination, he has proven that the injuries detailed therein being causeable by stone Ext.P-1 being flung at the body of the victim. However, he has deposed qua Ext.P-1 not holding any stains of blood. Apart from the aforesaid evidence adduced by the prosecution, in support of the version qua the occurrence embodied in Ext.PW-4/A, for its hence striving to sustain charge to which both the accused stood subjected to, the prosecution had also depended upon the testimonies of PW-4 besides had depended upon the testimonies of PW-5 and PW-6, latter PWs whereof had arrived at the site of occurrence in pursuance to theirs hearing the shrieks raised by PW-4. The solitary testification of PW-4 with respect to the version held in Ext.PW-4/A would alone be sufficient to constrain this Court to pronounce an order of conviction upon the accused 'unless' on an incisive perusal thereof, echoings occur therein in display of his improving besides embellishing upon his version comprised in Ext.PW-4/A "or unless" his testimony is contradictory vis-à-vis the testification(s) of PW-1 and PW-2 who respectively prove Ext.PW-1/B and Ext.PW-2/A. In discerning whether the solitary testification of PW-4 is sufficient for imputation of credence thereon it is imperative to allude to the factum that in Ext.PW-4/A, he had made a disclosure qua his being assaulted by three persons, in contradiction whereof, he, in his testification borne in his examination in chief, has ascribed the relevant incriminatory role

only with respect to the accused/respondent. In sequel, the aforesaid fact per se comprises a blatant improvement besides a contradiction vis-à-vis his previous statement recorded in writing,corollary whereof, is qua his version qua the occurrence is rendered incredible. Both PW-5 and 6 are relatives of the victim yet the mere fact of theirs being related to the victim would not dispel the vigour of their respective testification(s) 'unless' their respective testifications reveal that they hence contradict the testification(s) of PW-4 or when a display occurs in their respective testifications, qua theirs visiting the site of occurrence subsequent to its taking place thereat, thereupon with theirs obviously not being ocular witnesses to the occurrence, hence the vigour of their respective testifications would stand eroded. In determining the prime factum whether they are ocular witnesses to the occurrence, an allusion to the testification borne in the cross-examination of PW-4, is, imperative, wherein he vividly deposes qua both the accused fleeing from the site of occurrence, on theirs sighting the aforesaid purported ocular witnesses. The aforesaid echoings occurring in the cross-examination of PW-4 also erodes the vigour of the subsequently deposed fact by him that on PW-5 intervening in the assault perpetrated on his person by the accused thereafter theirs fleeing from the site of occurrence significantly when he immediately prior thereto deposes qua both the accused fleeing from the site of occurrence, on theirs sighting PW-5 and PW-6 the purported ocular witnesses. Consequently, the contradictory stands adopted by PW-4 with respect to presence at the site of occurrence of PW-5 and of PW-6 at a time contemporaneous to his standing assaulted by both the accused, does constrain an inference that PW-5 and PW-6 recorded their presence at the site of occurrence subsequent to its taking place thereat, whereupon their testifications displaying that they had eye witnessed the accused assaulting the victim hence not acquiring any virtue of credibility. Sequel of the aforesaid incisive perusal of the testifications of PW-4, PW-5 and PW-6 is that the victim rearing a false case against the accused. The reason for the victim rearing a false case against the accused, stems from the accused proving the factum of the victim rearing animosity against them arising from the factum of his facing charge under Section 354 IPC for his outraging the modesty of the sister of one of co-accused.

10. The site plan qua the occurrence is comprised in Ext.PW-9/A. A perusal of the aforesaid exhibit proven by the Investigating officer, who stepped into the witness box as PW-9, reveals that the shops of Surender Kumar, Sandeep Kumar and Dina Nath are located at a short distance from the site of occurrence. The aforesaid fact when is appraised in conjunction with PW-9 testifying in his cross-examination, of commercial establishments being open at the relevant time, holds the effect of the Investigating Officer hence standing enjoined cite them as prosecution witnesses, especially when he recorded their previous statements under Section 161 Cr.P.C. However, despite the Investigating Officer recording the statements of the aforesaid persons who evidently held commercial establishments in close proximity to the site occurrence, hence when he would have facilitated theirs rendering a candid impartisan version qua the occurrence, theirs standing not cited as prosecution witnesses, consequently renders open an inference that the Investigating Officer in connivance with the victim contriving a false case upon the accused/respondents.

11. Be that as it may, PW-1 who prepared Ext.PW-1/B had examined the victim on 6.10.2004. Consequently, the examination of victim by PW-1 occurred with almost 10 days elapsing since the ill-fated occurrence taking place at the relevant site. He, though in Ext.PW-1/B makes a disclosure qua his noticing, fracture of nasal bone of the victim yet when the aforesaid pronouncement made by PW-1 in Ext.PW-1/B, is construed in conjunction with PW-2 who in quick spontaneity to the occurrence examined the victim also who in his cross-examination has deposed that the injuries borne on Ext.PW-2/A being causeable thereon by flinging of 'stone', does beget an inevitable inference, that initially the prosecution was rearing the factum of stone Ext.P-1 entailing upon the victim, the injuries borne on Ext.PW-2/A amongst injuries borne therein the fracture of nasal bone of the victim remains unreflected therein rather, the fact of the victim suffering fracture of nasal bone when is displayed in Ext.PW-1/B, fracture whereof purportedly occurred on a stone being flung thereat by one of the co-accused, it is hence construable to be entirely a contrivance of the Investigating Officer, in collusion with the victim.

Even though the victim, in Ext.PW-4/A, has disclosed that a stone had been flung on his nose by co-accused Sanjeev Kumar and his nasal bone hence suffered a fracture, nonetheless the failure of the Investigating Officer to ensure the prompt examination of the victim by PW-1 does also extinguish the effect of the aforesaid recital borne in Ext.PW-4/A.

12. In aftermath, the aforesaid falsity qua the aforesaid fact, with respect to the aforesaid recital borne in Ext.PW-4/A, does also negate the veracity of Ext.PW-4/A also negates the testifications of PW-5 and PW-6. For the reasons which stand recorded hereinabove, this Court holds that the learned trial Court has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of material on record by the learned trial Court does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record whereupon its judgement warrants no interference.

13. In view of the above, I find no merit in this appeal, which is accordingly dismissed. In sequel, the impugned judgement is affirmed and maintained. Record of the learned trial Court be sent back forthwith.

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

HCL Infotech Limited ....Petitioner
Versus
HPSEB and another ....Respondents

Arbitration Case No. 17 fo 2017
Date of Decision 4th May, 2017

Arbitration and Conciliation Act, 1996- Section 11- Parties had a dispute regarding issuance of C-form for which arbitration clause was invoked – respondents failed to appoint the arbitrator on which the present petition was filed seeking the appointment of the arbitrator – held that respondents have failed to appoint the arbitrator even after the issuance of notice by the petitioner– hence, arbitrator appointed with the consent of the parties. (Para-4 to 11)

Case referred:
National Aluminium Co. Ltd. vs. Metalimpex Ltd., (2001)6 SCC 372.

For the Petitioner: Shri Suneet Goel, Advocate.
For the Respondents: Mr. J.S. Bhogal, Sr. Advocate with Mr.Satish Sharma, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J. (oral)

This petition has been filed under Sub-section (6) of Section 11 of the Arbitration and Conciliation Act, 1996 (for short 'Act') for appointment of Sole Arbitrator in terms of Clause 8.2 of GCC agreement and Clause 8.2 (a) of SCC agreement.

2. In pursuance to tender floated by respondents for supply of various power related equipments under R-APDRP (Restructured-Accelerated Power Development Reform Program) in order to reduce AT&C losses, petitioner company was appointed as IT Implement Agency (ITIA) on the rates, terms and conditions mentioned in Letter of Award (LoA) dated 30.8.2010 (Annexure P-2).

3. A dispute with respect to entitlement of petitioner to avail concessional rates of tax has arisen between parties as petitioner is claiming its entitlement for concessional rate of tax and is demanding the statutory C-Form under CST Act, whereas, respondents, on the basis of clarification issued by Excise and Taxation Department, have rejected the request of petitioner. Petitioner company is demanding C-Form or the differential tax to the tune of Rs.1.56 crore with interest thereon, whereas respondents are denying their liability to issue C-Form or to pay differential tax. Both parties are relying upon terms of contract between them. It is claimed by petitioner that due to failure of respondents' board to issue C-Form, petitioner has been burdened with additional tax liability and therefore, respondent is liable to compensate petitioner for additional tax liability along with incidental and ancillary claims and costs related thereto.

4. For resolving aforesaid dispute, petitioner company invoked the arbitration clause contained in Clause 8.2 (a) of the SCC of agreement in terms of Clause 8.2 of the GCC and issued a notice dated 22.9.2015 seeking the appointment of arbitrator by proposing the name of its nominee arbitrator, as according to agreement, the Arbitral Tribunal shall consist of three Arbitrators, out of which each party shall nominate an Arbitrator and two nominated Arbitrators shall mutually agree and nominate a third Presiding Arbitrator. The respondents had to resolve issue within 28 days from the date of notice, but on failure to act upon the notice, petitioner company has approached this Court by invoking Section 11 of Arbitration and Conciliation Act 1996 with prayer to appoint nominee Arbitrator on behalf of respondents's board or in alternative to appoint a Sole Abitrator.

5. Arbitration agreement envisages two Arbitrators, one each to be appointed by petitioner and respondent, who in turn have to nominate a third Presiding Arbitrator.

6. Section 10(1) of the Act provides that parties are free to determine the number of Arbitrators provided that such number shall not be an even number. However, Sub-section 2 of this Section lays down that failing the determination referred to in Sub-section (1), the Arbitral Tribunal shall consist of a sole arbitrator.

7. Section 11(2) of the Act provides that subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. Sub-section (6) of Section 11 of the Act provides that where, under an appointment procedure agreed upon by the parties, a party fails to act as required under that procedure, a party may request the Supreme Court or as the case may be, the High Court or any person or institution designated by such Court, to take necessary measure unless the agreement on the appointment procedure provides other means for securing the appointment.

8. In present case, respondents have failed to nominate Arbitrator in purusnace to notice issued by petitioner company. Petitioner company has prayed for nomination of Arbitrator on behalf of respondents and in alternative for appointment of Sole Arbitrator.

9. Learned counsel for the respondents under instructions of his client submits that in order to reduce the cost of arbitration proceedings and to save public money, respondents have agreed to the prayer of petitioner company to appoint the Sole Arbitrator. On combed reading of Sections 10 and 11 of the Act, I find that irrespective of Clause in Arbitration agreement to have three members Arbitral Tribunal, parties are free to determine number of Arbitrator(s), and to agree on procedure for appointing the Arbitrator and to appoint Sole Arbitrator with mutul consent. On this count, I also draw support from judgment of the Apex Court in case ***National Aluminium Co. Ltd. vs. Metalimpex Ltd.*** reported in ***(2001)6 SCC 372.***

10. In present case, learned counsel for the parties, under instructions of their respective clients, jointly submit that parties have arrived at consensus to appoint only a single member Arbitral Tribunal and to appoint Hon'ble Mr. Justice Kuldip Singh, (Retd), as Sole Arbitrator to adjudicate the respective claims of parties.

11. Being so, Hon'ble Mr. Justice Kuldip Singh (Retd) is appointed as Sole Arbitrator with consent of parties to adjudicate the matter in accordance with law and in terms of agreement

by making a speaking reasoned award. He shall be entitled for fee as per Schedule. Registry is directed to transmit necessary communication in this regard to the Sole Arbitrator immediately.

12. Petition stands disposed of on above terms.***Dasti*** copy on usual terms.

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

M/s Divyang Associates (P) Limited & another ...Appellants/applicants

Versus

Himachal Pradesh State Industrial DevelopmentCorporation Limited & another ...Respondents/non-applicants

CMP(M) No. 697 of 2016 and
CMP No. 3509 of 2016 in
OSA No. 13 of 2006
Date of Decision : May 4, 2017

Code of Civil Procedure, 1908- Order 41 Rule 19- The appeal filed by the applicant was dismissed in default for non-appearance – an application for restoration of the appeal was filed on the ground that the counsel was engaged by the applicant who had assured to appear in the appeal but the counsel did not fulfill the assurance- the applicant came to know about the dismissal of the appeal when the son of the applicant visited Shimla – held that there is delay of more than 5 years and 5 months in filing the application–the defence taken by the applicants is not plausible – the application is not supported by the affidavit of the parties – son of the applicant did not state that assurances were made in his presence – the applicant was under constant legal advice – it was her duty to follow the counsel and not the duty of the counsel to follow her – the advocate cannot pursue the matter in absence of any instruction – the appeal was dismissed due to lack of instruction- the applicants did not have any reasonable cause for condonation of delay- application dismissed.(Para-8 to 18)

Cases referred:

NagendraNath v. Suresh, AIR 1932 Privy Council 165
General Accident Fire & Life Assurance Corporation Ltd. v. Janmahomed Abdul Rahim, AIR 1941 Privy Council 6
Ramlal vs. Rewa Coalfields Ltd., AIR 1962 SC 361
Collector, Land Acquisition, Anantnag vs. Mst.. Katiji, (1987) SCC 107
P.K. Ramchandran vs. State of Kerala & another, 1997 (4) RCR (Civil) 242 (SC)
N. Balakrishan vs. M. Krishnamurthy, (1998) 7 SCC 123
Parimal Vs. Veena, AIR 2011 SC 1150
Basawaraj & Anr vs. Special Land Acquisition Officer, AIR 2014 SC 746

For the applicants : Mr. Bimal Gupta, Senior Advocate with Ms. Kusum Choudhary, Advocate, for the appellants/applicants.
For the respondent : Mr. Dheeraj Vashisht, Advocate, for the respondent/non-applicant.

The following judgment of the Court was delivered:

Sanjay Karol, ACJ. (Oral)

On 12.9.2006, Civil Suit No. 165 of 1992, so filed by the plaintiff – H.P. State Industrial Development Corporation (respondent No. 1 herein), came to be decreed against

defendant D-1 (appellant No. 1 herein), defendant D-2 (proforma respondent No. 2 herein) and defendant D-3 (appellant No. 2 herein). With the passing of the impugned judgment and decree, plaintiff was held entitled to a sum of `33,57,528/- alongwith interest @13.5% p.a. with half yearly rests from the date of filing of the suit.

2. Appeal assailing the same, so filed on 24.11.2006, by D-1 and D-3 impleading D-2 as proforma respondent was admitted on 27.2.2007. Subsequently on the request of the appellants it was adjourned on 16.3.2009 and 2.6.2009. On 22.7.2009, though none appeared for them, but was ordered to be listed before another Bench. However, on 23.9.2010, when again none appeared, it was dismissed in default.

3. In terms of the present applications, so filed on 31.3.2016, under Sections 41 Rule 19 read with Section 151 CPC, D-1 and D-3 have prayed for restoration of the appeal and the delay in filing the same be condoned.

4. Applicants, through the averments made in the applications, want the Court to believe that (a) M/s Divyang Associates (P) Limited (A-1/D-1) has two Directors i.e. Smt. Promila Pandeya (A-2/D-3) and her husband Pradeep Pandeya (proforma respondent No. R-2/D-2). Affairs of D-1 were being managed only by D-2; (b) for the reason that D-2 was not available, D-3 filed the appeal on her behalf as also on behalf of D-1 by impleading D-2 as R-2; (c) acting on the assurances of D-2 that he would pursue the appeal, D-3 did not take any further steps, save and except of getting prepared an application for transposingD-2 as an appellant; (d) for the reason that both D-2 and D-3, since the year 2007 were having strained relationship, they permanently started residing separately and "stopped interfering in each other's affairs". In November, 2014, D-3 received summons from the Court of Additional District Judge, Gaziabad, in an execution petition, filed by the plaintiff. Hence, she immediately got in touch with D-2, who assured that he would "take care" and pursue the matter with the counsel in Shimla. Also that he would do all that was required to be done and she deed not worry; (e) on the basis of "arrangement" made by D-2, she "engaged a counsel in Ghaziabad and put appearance in the Execution Petition on 27.3.2015". Again she pursued the matter with D-2 who assured of taking all necessary action in the matter. Such interaction continued between both of them till November, 2015 when she realized that the assurances appeared to be false. Resultantly their sons visited Shimla on 27.12.2015 and on 11.1.2016 after visiting the office of learned counsel learnt about the dismissal of the appeal and were filing an application for restoration thereof. She was informed by the counsel assisting the original counsel that such application could be filed with the reopening of the court, after vacation, on 22.2.2016. Accordingly, she authorized her son to visit Shimla, who on 25.3.2016 got the application prepared and filed.

5. Undisputedly, the delay in filing the application is more than five years and five months.

6. Plaintiff vehemently opposes the application *inter alia* on the ground that (a) each day's delay remains unexplained; (b) averments made are based on falsehood, for D-3 was already aware of the dismissal of the appeal as she had been vigorously pursuing her remedies before the executing Court.

7. Let us first examine the relevant law on the issue of limitation.

8. "*Interest Reipubulicae Ut Sit Finis Litium*": The legal maxim means that it is for the general welfare that a period be put to litigation. If legal remedy is kept alive beyond the legislatively fixed period of time, it only generates dissatisfaction. The parties cannot be allowed to have an unbridled and unfettered free play in matters of timing of approaching the Court. The Courts must keep in mind, while dealing with the limitation petition, that there is a distinction between the delay for a plausible reason and delay because of inaction or negligence which deprives a party of the protection of Section 5 of the Limitation Act, 1963.

9. In the case of *NagendraNath v. Suresh*, AIR 1932 Privy Council 165 and in *General Accident Fire & Life Assurance Corporation Ltd. v. Janmahomed Abdul Rahim,* AIR 1941

Privy Council 6, their Lordships and the Privy Council while dealing with the aspect of limitation specifically observed that "Limitation Act ought to receive such a construction as the language in its plain meaning imports. The rule must be enforced even at the risk of hardship to a particular party. The Judge cannot, on equitable grounds, enlarge the time allowed by the law, postpone its operation, or introduce exceptions not recognized by it.

10. In *Ramlal vs. Rewa Coalfields Ltd.*, AIR 1962 SC 361, the Supreme Court, while interpreting Section 5 of the Limitation Act, laid down the following proposition:

> "In construing Section 5 (of the Limitation Act), it is relevant to bear in mind two important considerations. The first consideration is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree-holder to treat the decree as binding between the parties. In other words, when the period of limitation prescribed has expired, the decree-holder has obtained a benefit under the law of limitation to treat the decree as beyond challenge, and this legal right which has accrued to the decree- holder by lapse of time should not be light-heartedly disturbed. The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown, discretion is given to the court to condone delay and admit the appeal. This discretion has been deliberately conferred on the court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice."

11. In *Collector, Land Acquisition, Anantnag vs. Mst.. Katiji*, (1987) SCC 107, the Supreme Court made a significant departure from the earlier judgments and observed:

> "The legislature has conferred the power to condone delay by enacting Section 5 of the Indian Limitation Act of 1963 in order to enable the courts to do substantial justice to parties by disposing of matters on "merits". The expression "sufficient cause" employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice-that being the life-purpose for the existence of the institution of courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that:
>
> 1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.
>
> 2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.
>
> 3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.
>
> 4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.
>
> 5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.
>
> 6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so. Making a justice-oriented approach from this perspective, there was sufficient cause for condoning the delay in the institution

of the appeal. The fact that it was the "State" which was seeking condonation and not a private party was altogether irrelevant. The doctrine of equality before law demands that all litigants, including the State as a litigant, are accorded the same treatment and the law is administered in an even- handed manner. There is no warrant for according a step-motherly treatment when the "State" is the applicant praying for condonation of delay. In fact experience shows that on account of an impersonal machinery (no one in charge of the matter is directly hit or hurt by the judgment sought to be subjected to appeal) and the inherited bureaucratic methodology imbued with the note- making, file-pushing and passing-on-the-buck ethos, delay on its part is less difficult to understand though more difficult to approve. In any event, the State which represents the collective cause of the community, does not deserve a litigant-non-grata status. The courts therefore have to be informed with the spirit and philosophy of the provision in the course of the interpretation of the expression "sufficient cause". So also the same approach has to be evidenced in its application to matters at hand with the end in view to do even- handed justice on merits in preference to the approach which scuttles a decision on merits."

12. But however in the case of *P.K. Ramchandran vs. State of Kerala & another*, 1997 (4) RCR (Civil) 242 (SC): Judgments Today 1997 (8) SC 189, their Lordships of the Supreme Court while dealing with that matter answered that "Law of limitation may harshly effect a particular party but it has to be applied with all its rigour when the statute so prescribe and the courts have no power to extend the period of limitation on equitable grounds."

13. In *N. Balakrishan vs. M. Krishnamurthy,* (1998) 7 SCC 123, the Supreme Court expanded the scope and ambit of law of limitation and elucidated as follows:

"It is axiomatic that condonation of delay is a matter of discretion of the court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to a want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory. Once the court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammelled by the conclusion of the lower court.

Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a lifespan must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus founded on public policy. It is enshrined in the maxim interest reipublicae up sit finis litium (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly.

The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.

It must be remembered that in every case of delay, there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy, the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time, then the court should lean against acceptance of the explanation. While condoning the delay, the court should not forget the opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred quite large litigation expenses. It would be a salutary guideline that when courts condone the delay due to latches on the part of the applicant, the court shall compensate the opposite party for his loss."

14. In *Parimal Vs. Veena*, AIR 2011 SC 1150it was held:

"The legislature in its wisdom, made the second proviso, mandatory in nature. Thus, it is not permissible for the court to allow the application in utter disregard of the terms and conditions incorporated in the second proviso herein."

"9. "Sufficient Cause" is an expression which has been used in large number of Statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a cautious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive". However, the facts and circumstances of each case must afford sufficient ground to enable the Court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously. (Vide: Ramlal & Ors. v. Rewa Coalfields Ltd., AIR 1962 SC 361; Sarpanch, Lonand Grampanchayat v. Ramgiri Gosavi & Anr., AIR 1968 SC 222; Surinder Singh Sibia v. Vijay Kumar Sood, 1991(2) R.C.R.(Rent) 576 ; and Oriental Aroma Chemical Industries Limited v. Gujarat Industrial Development Corporation & Another, 2010(2) R.C.R.(Civil) 284 : 2010(2) R.A.J. 205 : (2010) 5 SCC 459)

10. In Arjun Singh v. Mohindra Kumar &Ors., AIR 1964 SC 993, this Court observed that every good cause is a sufficient cause and must offer an explanation for non-appearance. The only difference between a "good cause" and "sufficient cause" is that the requirement of a good cause is complied with on a lesser degree of proof than that of a "sufficient cause". (See also: BrijIndar Singh v. Lala Kanshi Ram & Ors., AIR 1917 PC 156; Manindra Land and Building Corporation Ltd. v. Bhutnath Banerjee & Ors., AIR 1964 SC 1336; and Mata Din v. A. Narayanan, AIR 1970 SC 1953.)

11. While deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away the illegality perpetuated on the basis of the judgment impugned before it. (Vide: State of Bihar & Ors. v. Kameshwar Prasad Singh & Anr., 2000(2) S.C.T. 889 ; Madanlal v. Shyamlal, 2002(2) R.C.R.(Civil) 361 ; Davinder Pal Sehgal & Anr. v. M/s. Partap Steel Rolling Mills (P) Ltd. &Ors., 2002(1) R.C.R.(Civil) 555 ; Ram Nath Sao alias Ram Nath Sao &Ors. v.

Gobardhan Sao &Ors., 2002(2) R.C.R.(Civil) 337 ; Kaushalya Devi v. Prem Chand &Anr. (2005) 10 SCC 127; Srei International Finance Ltd., v. Fair growth Financial Services Ltd. &Anr., (2005) 13 SCC 95; and Reena Sadh v. Anjana Enterprises, 2008(3) R.C.R.(Civil) 62 : 2008(2) R.C.R.(Rent) 125 : 2008(3) R.A.J. 290)."

15. In *Basawaraj & Anr vs. Special Land Acquisition Officer,* AIR 2014 SC 746, the Supreme Court has gone on to state that equity is not a ground to extend the limitation period by condoning the delay if there is no "sufficient cause". The reason assigned by the Supreme Court is that an unlimited period of litigation would have an impact of rendering a sense of insecurity and uncertainty, depriving a successful party of enjoying the fruits of litigation as finality to a judgment is postponed.

16. In the instant case, we do not find the defence taken by the applicants (D-1 and D-3) to be plausible. Averments so made in the application do not appear to be true. It is not supported by an affidavit of either of the defendants. Sh. Divyang Pandya, son of the parties, who has sworn the affidavits, accompanying the applications, categorically does not state that the assurances met out to his mother were in his presence. What is the basis of his knowledge in verifying the contents, he does not disclose. Also when information came to be received by him, he does not state. However, we clarify that such fact has not at all weighed with us in adjudicating the merits of the present applications.

17. Assuming hypothetically the contents of the application are correct, even then we find D-3 to have taken a mutually contradictory stand. It is not that she is a rustic villager or simpleton. At the time of filing of the original application she must have travelled to Shimla for engaging a counsel. Appeal came to be admitted on 27.2.2007. It is not her case that she was not informed by the learned counsel about such fact. Her averment of having strained relationship and living separately from her husband is not supported by any record, apart from the defence being vague and unspecific. On one hand she wants the court to believe that the instant appeal was to be pursued by her husband but then when it comes to pursuing the execution petition, she is doing it herself. It is not that appellant was not having access to any legal counsel or advise. For more than two years, prior to the filing of the instant application, she had been under constant legal advise. She knew it very well that a decree for money came to be passed against her as also the Company of which she was the Director. It is the duty of the litigant to follow the case with the lawyer and not the other way round. An advocate, in the absence of any instructions, cannot pursue the matter any further. Lack of instructions appears to be the only cause which led to the dismissal of the appeal. Her averments that she is living in penury with her father-in-law are not substantiated by any contemporaneous material. Between February and March, 2016 also no steps were taken.

18. As such, we do not find the applicants to even *prima facie* having shown, much less proven, that they were prevented by any 'sufficient cause' from appearing when the appeal was called for hearing. In the instant case the delay is of more than five years and five months which in our considered view remains unexplained.

Hence, for all the aforesaid reasons, both the applications are dismissed.

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

Sanjay Kumar .....Petitioner

Versus

Dinesh Chand since deceased through his LRs .....Respondents

Civil Revision No. 42 of 2009
Decided on: 4th May, 2017

H.P. Urban Rent Control Act, 1987- Section 14- Landlord filed an eviction petition on the ground of arrears of rent and the tenant having ceased to occupy the premises without any reasonable cause – the petition was allowed on the ground of arrears of rent – an appeal was filed, which was allowed and the eviction was ordered on the ground that tenant had ceased to occupy the premises – held in revision that power of revision should be exercised sparingly in a case of gross miscarriage of justice where the findings recorded are in complete departure of the facts and circumstances of the case- the electricity consumption from May, 2003 till December, 2003 was nil, whereas, it was 40 units till February 2014 – the consumption was nil from April 2004 to February 2006 – occasional and casual visits of the tenant are not equivalent to occupation - the Appellate Court had taken correct view of the matter- Revision dismissed.(Para-4 to 13)

Cases referred:
Gurbachan Singh V. Ravinder Nath Bhalla and others Latest HLJ 2006 (HP) 177
Joginder Nath Sood V. Jagat Ram Sood 1989(1) Sim.L.C. 179
Sohan Lal Khanna V. Amar Singh 2000(2) Latest HLJ 1008,
St. Michaeal's Cathedral Catholic Club V. Smt. Harbans Kaur Nayani 1997(1) Sim.L.C. 237
Lajwati V. H.P. University, 1997(2) Sim.L.C. 504
Sohan Lal Khanna V. Amar Singh, 2001 (1) RCR (Rent) 29

For the petitioner: Mr. Deepak Kaushal and Mr. Lovneesh Thakur, Advocates.
For the respondent: Mr. Bimal Gupta, Sr. Advocate with Ms. Kusum Chaudhary, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

Petitioner herein is a tenant. He was respondent in the Rent Petition filed under Section 14 of the H.P. Urban Rent Control Act in the Court of learned Rent Controller (I), Sirmour, District Nahan. His eviction was sought on the following grounds:-

"(i) That the tenant/respondent has not paid the rent to the petitioner/landlord from 01-01-2003 till the filing of this petition. Thus, the respondent is liable to be proceeded against the payment of arrears of rent and, thus, the petitioner seeks the direction of this Court to direct the respondent to pay the entire arrears of rent to the petitioner along with interest @ 9% per annum.

(ii) That the tenant is keeping the demised premises locked/unused for the last two years and the value of the premises has diminished. There is no consumption of power and daily routine items."

2. Learned Rent Controller after holding full trial has declined his eviction on the ground of ceased to occupy, however, determining the rent @ Rs. 150/- per month, held him in arrears of rent and ordered his eviction from the demised premises on the ground of he being in arrears of rent vide order dated 31.08.2007.

3. The order passed by learned Rent Controller was assailed by the petitioner-landlord before the appellate Authority, Sirmour District at Nahan by way of filing an appeal under Section 24(I) (b) of the Act. The landlord did not agitate the findings recorded by learned Rent Controller qua determination of rent of demised premises @ 150/- per month and the arrears due and admissible and also that the petitioner-tenant failed to pay the arrears, however, the findings recorded on issue No. 2 were assailed on several grounds, mainly that the pleadings and evidence qua this part of the controversy have not been appreciated by learned Rent Controller in its right perspective. Learned Appellate Authority on re-appraisal of the given facts and circumstances of the case as well as the evidence available on record has arrived at a conclusion that the petitioner-tenant had ceased to occupy the demised premises for a continuous period of 12 months preceding the institution of Rent Petition and as such while

reversing the findings recorded by learned Rent Controller on issue No. 2 has ordered the eviction of the petitioner-tenant on the ground of ceased to occupy also vide judgment dated 8.1.2009, which is under challenge in this petition.

4. It is apt to note at the out set that the scope of the Court exercising the revisional jurisdiction is very limited and as per settled legal principles, such powers should be exercised sparingly and in a case of gross miscarriage of justice and where the findings recorded are in complete departure of the facts and circumstances of the case and the evidence available on record hence perverse and legally unsustainable.

5. Now if coming to the case in hand, learned Appellate Authority has formed an opinion on the basis of evidence available on record that the consumption of electricity for the period May, 2003 till December, 2003 was nil, whereas, till February, 2004, 40 units. Also that during the period from April, 2004 to February, 2006, again the consumption of electricity in the demised premises was nil. After taking note of the law laid down by this Court in ***Gurbachan Singh*** V. ***Ravinder Nath Bhalla and others Latest HLJ 2006 (HP) 177*** and in ***Joginder Nath Sood*** V. ***Jagat Ram Sood 1989(1) Sim.L.C. 179*** has held that the nil consumption of electricity during the period April, 2004 to February, 2006 i.e. preceding the institution of Rent Petition, which was instituted on 23.12.2005 extends a ground in favour of the landlord to seek eviction of the tenant on the ground of ceased to occupy. In order to meet out the claim of the petitioner-tenant that he had been visiting the demised premises occasionally, learned Appellate Authority, while taking note of the law laid down by this Court in ***Joginder Nath Sood*** V. ***Jagat Ram Sood 1989(1) Sim.L.C. 179*** and in ***Sohan Lal Khanna*** V. ***Amar Singh 2000(2) Latest HLJ 1008***, has held that occasional and casual visits of the tenant would not clothe him with the status of in occupation of the demised premises so as to frustrate the right of the landlord to seek his eviction on the ground of ceased to occupy. The further contention of the petitioner-tenant that irrespective of he remained posted at Rajgarh and Paonta Sahib and ultimately transferred to Nahan and again occupied the demised premises also does not find favour with learned Appellate Authority in view of the ratio of the judgment of this Court in ***St. Michaeal's Cathedral Catholic Club*** V. ***Smt. Harbans Kaur Nayani 1997(1) Sim.L.C. 237*** and the object sought to be achieved by the legislature by incorporating Section 14(2) (v) in the Act, which extends an indefeasible right in favour of the landlord to seek the eviction of the tenant from the demised premises on the ground of ceased to occupy. Learned Appellate Authority while taking note of the conduct of the petitioner-tenant has held that the petitioner-tenant in order to prove the assertion qua he did not abandon the demised premises for a period over 3-4 months in a stretch and in continuity, did not produce any evidence in the form of his transfer and posting orders etc.

6. Mr. Deepak Kaushal, learned counsel while taking this Court to the provisions contained under Clause V below Sub-section 2 of Section 14 of the Act has strenuously contended that word 'without reasonable cause' and the case pleaded by the petitioner-tenant has not been taken into consideration by learned Appellate Authority in its right perspective. Mr. Deepak Kaushal has urged that petitioner had reasonable cause not to occupy the demised premises during the period in question i.e. his transfer from Nahan where the demised premises is situated to Rajgrah. Therefore, according to him, it is not a case where the petitioner-tenant had ceased to occupy the demised premises without reasonable cause. In order to buttress the submissions so made by him, Mr. Kaushal has placed reliance on the judgment of a Co-ordinate Bench of this Court in ***Lajwati*** V. ***H.P. University, 1997(2) Sim.L.C. 504***. Para 7 of the judgment reads as follows:-

> "7. I am unable to accept the contention of learned Counsel that the order of the Civil Court could be interpreted in the manner in which he wants this Court to interpret it. The question before me is whether the requirement of section 14 (1) (v) of the Himachal Pradesh Urban Rent Control Act is satisfied. Under that section what has to be proved before the Court is that the tenant has ceased to occupy the building or rented land for a continuous period of twelve months without reasonable cause The crucial expression is 'without reasonable cause'.

The said expression has to be understood subjectively and not objectively. It is a question, which has to be decided on the facts and circumstances of each case What may appear to be a reasonable cause to one man under certain circumstances may not be a reasonable cause for another man under different circumstances. It is not a question, which can be deeded by interpretation of the order of the Civil Court according to one's will. The question is whether the University had bona fide understood the order of the Civil Court while it claimed to follow the order and failed to allot the premises to any other member. In this case, the order of the Civil Court is extracted by the Appellate Authority in his order, which reads as follows:

> "This Court is satisfied and a prima facie case is made out in favour of the plaintiffs and doth order that you the above named defendants/respondent are restrained from making allotment of houses to any person whatsoever who is junior in service to the plaintiffs i e. to any person who has joined service in the University after 28-4-1981 and 13-7-1981 respectively, till further orders."

7. On the other hand, Mr. Bimal Gupta, learned Senior Advocate assisted by Ms. Kusum Chaudhary, Advocate in support of the findings recorded by learned Appellate Authority has drawn the attention of this court to the pleadings in the Rent Petition and also the evidence available on record. He has also cited the judgment rendered by a Co-ordinate Bench of this Court on 23.08.2010 in ***Civil Revision No. 90 of 2010 titled Vipin Kumar V. Raj Kumar and on 9.4.2012*** in ***Civil Revision No. 50 of 2005 titled Shri Satya Parkash V. Karam Chand***.

8. On analyzing the rival submissions and the entire records, the present is not a case of misreading or mis-appreciation of the pleadings and evidence available on record so as to infer that the miscarriage of justice serious in nature has been caused to the petitioner-tenant. As such, the judgment under challenge is not perverse hence calls for no interference by this Court in exercise of its limited revisional jurisdiction.

9. Though, there was no need to have scanned the evidence available on record and also the pleadings of the parties, however, it is deemed appropriate to do so as the present is a case of reversal of findings on issue No.2 and the eviction of the petitioner-tenant on the ground of ceased to occupy, which initially was not inclined to by learned Rent Controller has been ordered by the appellate Authority below in the Rent Petition, the specific ground (18(b) raised by the respondent-landlord is that the petitioner-tenant has kept the demised premises locked/unused for the last two years, as a result whereof its value has diminished. The response of the petitioner-tenant to para 18(b) of the Rent Petition is absolutely absurd as no head and tail can be made out therefrom. The same is reproduced as under:-

> 18(b). That, para No. 18(b) of the petition has not been answered by the petitioner, therefore, no reply need be given.

10. The reply, however, has been given to para 18(a) (ii) and as per the same, he has denied the demised premises having been lying locked for the last two years or its value diminished and there is no consumption of electricity.

11. The evidence as has come on record by way of testimony of PW-3 Kundan Singh, Clerk in the office of H.P.S.E.B Sub-Division, Ranitaal (Nahan) is a material piece of evidence qua this aspect of the matter as he has proved from the record that from May, 2003 to December, 2003, consumption of electricity was nil, whereas, up to February, 2004, the consumption was 40 units. Also that from April, 2004 to February, 2006, the consumption of electricity in the demised premises was again nil. Though he has been cross-examined, however, nothing lending support to the case of the petitioner-tenant could be elicited therefrom. It is, therefore, proved from the record that during the period April, 2004 till institution of the Rent Petition i.e. 23rd December, 2005, the consumption of the electricity in the demised premises was nil. Meaning thereby that learned Appellate Authority has not committed any illegality or irregularity while

arriving at a conclusion that during this period, the petitioner-tenant had ceased to occupy the demised premises. The findings so recorded by learned Appellate Authority are legally sustainable as the law applicable in such situation has also been taken note of. Even in ***Vipin Kumar's*** case cited supra, a Co-ordinate Bench of this Court after taking note of the law laid down by the Apex Court in ***Sohan Lal Khanna*** V. ***Amar Singh, 2001 (1) RCR (Rent) 29*** has held that mere consumption of few units of electricity during some months would not mean that the person was staying in the demised premised. Similar is the view of the matter taken again by a Co-ordinate Bench of this Court in ***Satya Parkash's*** case cited supra. Therefore, it would not be improper to conclude that the petitioner-tenant had ceased to occupy the demised premises for a period preceding 12 months of the institution of the petition, which in the case in hand is approximately 20 months.

12. The occasional and casual visits of the petitioner, if any, to the demised premises are hardly of any help to him nor on the basis thereof, it can be said that he has not ceased to occupy the demised premises. Admittedly, he was transferred and remained posted out of Nahan i.e. at Rajgarh and Paonta Sahib. It was for him to have produced the evidence to show the duration of his outside posting. He, however, has not produced any evidence, which he could have easily produced by producing in evidence his transfer and posting orders. Therefore, an adverse inference has to be drawn against him. I am not persuaded to take a view of the matter that the petitioner-tenant had not ceased to occupy the demised premises for a continuous period of 12 months 'without reasonable cause' and rather he stayed away under the conditions attached to his service for the reason that if such interpretation is given to words 'without reasonable cause' in Clause 5 of Sub-section 2 of Section 14, the tenant after having remained away for a period over 12 months from the demised premises may return and re-occupy the same, may be during the pendency of the Rent Petition the very purpose of such provisions under the Act shall be frustrated and it may not be possible for the landlord to seek eviction of the tenant on this ground. Such an approach shall also be detrimental to the landlord.

13. True it is that as per ratio of the law laid down in ***Lajwati's*** case cited supra, the landlord is required to plead and prove that tenant has ceased to occupy the demised premises for a continuous period of 12 months without reasonable cause. There can't be any denial to the law so laid down as it depends on the facts of each case and have no universal application, particularly when it has further been held in the judgment supra that expression 'without reasonable cause' is crucial and has to be understood subjectively and not objectively. Also that each case has to be decided on its own facts and circumstances because a reasonable cause in one case may not be a reasonable cause in other case. The present for the reasons recorded hereinabove, however, is a case where the petitioner-tenant has ceased to occupy the demised premises without reasonable cause.

14. In view of what has been said hereinabove, I find no merits in this petition and the same is accordingly dismissed. Pending application(s), if any, shall also stand disposed of.

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

CWP Nos. 2309 and 2310 of 2016
Date of decision: May 04, 2017.

1.CWP No. 2309 of 2016

Saroj Devi. .....Petitioner.

Versus

State of H.P. & anr. .....Respondents.

2.CWP No. 2310 of 2016

Pushpender Thakur .....Petitioner.

Versus

State of H.P. & anr. .....Respondents.

Constitution of India, 1950- Article 226- Petitioners filed a writ petition seeking mandamus to the respondent to count the period of services when they were prevented from discharging duties on account of cancellation of their appointment towards seniority- held that the petitioners were prevented from discharging the duties on the basis of an order, which was quashed and set aside by the Appellate Authority –petition allowed and direction issued to regularize the services for the purpose of seniority and to release the grant in aid. (Para-4 to 6)

Cases referred:

Balak Ram versus State of Himachal Pradesh and others, 2015 (i) Shim. LC 505

Hem Chand versus State of H.P. & others, 2014(3) Him. L.R. 1962

For the petitioner(s) Ms. Jyotsna R. Dua, Senior Advocate with Ms. Charu Bhatnagar, Advocate.

For the respondents Mr. Pramod Thakur, Additional Advocate General.

The following judgment of the Court was delivered:

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

This judgment shall dispose of both writ petitions involving similar facts and points in issue.

2. The relief sought in these writ petitions common in nature is qua issuance of writ of mandamus to the respondents to count the period towards petitioners' seniority which in this writ petition is from 10.10.2008 to 26.8.2009 whereas in the connected one from 10.10.2008 to 27.6.2009 when they both were prevented to discharge their duties on account of cancellation of their appointment on PTA basis consequent upon a complaint made to Sub Divisional Magistrate, Rajgarh vide Annexure P-4 in both writ petitions. A direction has also been sought to be issued to the respondents to release grant-in-aid to the petitioners in these writ petitions for the period 10.10.2008 to 26.8.2009 and 10.10.2008 to 27.6.2009 when they remained out of job on account of cancellation of their appointments which ultimately was held illegal in appeal they preferred to the Deputy Commissioner, District Sirmour. A direction has also been sought to be issued to the respondents to regularize/take on contract basis the service of the petitioners as PTA teachers at par those PTA teachers who on the completion of seven years of service have been appointed on contract basis with all consequential benefits.

3. Since the respondents have failed to file reply to these writ petitions, therefore, on the previous date the following order came to be passed:

> "Despite opportunities afforded, response not filed. Be positively filed within a period of four weeks, failing which it shall be presumed that response is not required to be filed and petition shall be heard on the basis of material available on record. Rejoinder, if any, be also filed within a period of two weeks thereafter.
>
> List on 24.04.2017 before the Deputy/Additional Registrar (Judicial), before whom, learned counsel for the parties undertake to appear/cause appearance for compliance of the order. Thereafter, matter be listed before the Court on 04.05.2017."

4. Irrespective of the order *ibid* the respondents have failed to file their response to the averments in these writ petitions. The period w.e.f. 10.10.2008 to 26.8.2009 in the case of the petitioner in this writ petition whereas w.e.f. 10.10.2008 to 27.6.2009 in the case of the petitioner Pushpender Thakur in the connected writ petition has to be counted for the purpose of seniority because they both were prevented by order Annexure P-4 from discharging their duties which ultimately was quashed and set aside by the Appellate Authority vide judgment Annexure P-9 in this petition. In the connected writ petition though the order passed by the Appellate

Authority has not been placed on record, however, the same is dated 12.8.2008. Therefore, the petitioner in this cases had resumed her duty again on 26.8.2009 vide joining report Annexure P-7 whereas in the connected petition on 27.6.2009 vide joining report Annexure P-7. Being so, the period from 10.10.2008 to 26.8.2009 in the case of the petitioner in this writ petition and from 10.10.2008 to 27.6.2009 in the case of the petitioner in connected writ petition should be counted for the purpose of determination of their seniority. This point is covered in their favour by a division Bench judgment dated 1.5.2012 of this Court in *CWP No. 188 of 2012*, titled ***Chatter Singh*** *versus* ***State of H.P. and others.*** This judgment has even been followed by another Division Bench of this Court in ***Shri Balak Ram*** *versus* ***State of Himachal Pradesh and others, 2015 (i) Shim. LC 505*** and a Single Bench in ***Hem Chand*** *versus* ***State of H.P. & others, 2014(3) Him. L.R. 1962.***

5. The respondents are also under an obligation to release grant-in-aid in the case of the petitioner in this writ petition for the period from 10.10.2008 to 26.8.2009 whereas in the case of the petitioner in connected petition w.e.f. 10.10.2008 to 27.6.2009 when they both remained out of service on account of their removal from service which ultimately was held to be illegal by the Appellate Authority i.e. Deputy Commissioner, Sirmour district at Nahan vide order Annexure P-9 in this petition. There exists policy Annexure P-10 (*colly)* framed by the respondents-State which provides for taking over the services of the PTA (GIA Rules 2006) on contract basis. Therefore, the petitioners are also entitled for being appointed on contract basis if otherwise fulfill the criteria prescribed under the policy.

6. In view of what has been said hereinabove, I allow both the writ petitions and direct the respondents to regularize the period from 10.10.2008 to 26.8.2009 in the case of Saroj Devi the petitioner in this petition and from 10.10.2008 to 27.6.2009 in the case of Pushpender Thakur, the petitioner in connected writ petition notionally i.e. for the purpose of seniority. The respondents shall also release the grant-in-aid in the case of the petitioner in this petition for the period w.e.f. 10.10.2008 to 26.8.2009 whereas in that of the petitioner in the connected petition from 10.10.2008 to 27.6.2009 within two weeks from today. The petitioners in these petitions be also considered for the purpose of their appointments on contract basis, if otherwise eligible in terms of the policy Annexure P-10 *colly.*

7. Both the writ petitions are accordingly allowed and stand disposed of, so also the pending application(s), if any.

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

Jagrup Chand Dogra ....Applicant/Petitioner
Versus
Ramesh Kumar Ramrishan Sharma and others ....Respondents.

CMPM No.: 430 of 2017.
Decided on: 05.05.2017.

Limitation Act, 1963- Section 5- An application for condonation of delay has been filed pleading that the file was misplaced while carrying out the whitewash – the file was traced in January 2017 and thereafter the application for condonation of delay was filed- held that the explanation given by the applicant is implausible, weak and untenable – there is a delay of more than two years in filing the application, which cannot be condoned lightly – application dismissed.

(Para-3 to 7)

For the petitioner : Mr. Adarsh Kumar Vashishta, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this application filed under Section 5 of the Limitation Act, the applicant has prayed for condonation of more than two years' delay in filing the present appeal.

2. I have heard learned counsel for the applicant/ appellant and also perused the grounds mentioned in the application for condonation of delay. The award which is now intended to be assailed by way of this time barred appeal is dated 09.12.2014. The explanation which has been given in the application filed under Section 5 of the Limitation Act praying for condonation of delay is that the case file alongwith impugned award was misplaced by the family members of the applicant while carrying out whitewash in the house during the month of February, 2015 and on said account, the case file was not traceable and when said case file alongwith award was traced in January, 2017, thereafter, steps were taken to file the application for condonation of delay.

3. In my considered view, the reason which has been assigned in the application does not inspire any confidence. It is highly un-believable that a party who was aggrieved by the award passed by Motor Accident Claims Tribunal took no steps for assailing the same on the alleged ground that the case file was misplaced during whitewash. The story which has been put forth in the application apparently is concocted just to furnish an explanation to file the present application.

4. In my considered view, though procedure is hand maiden of justice but still the fact remains that in case a party does not assail an impugned order or judgment within the prescribed period of limitation, then a valuable right accrues upon the other party who is the beneficiary of such order or judgment. In case such right which is accrued upon the beneficiary party, by the afflux of time, has to be taken away by condoning delay, then the Court has to be satisfied that the delay in filing the appeal etc. was on account of bonafide reasons and the same was neither intentional nor attributable to lapses or negligence on the part of a party praying for condonation of delay. As I have already mentioned above, in this application there is no sufficient cause shown by the applicant as to why steps were not taken to file appeal within the period of limitation and further the reason which has been mentioned in the application does not inspire confidence.

5. Undoubtedly, Court does condone delay even of a reasonably long period but then there has to be a cogent explanation coming forth from the applicant who is praying for condonation of delay. In the present case, the reason given is both weak and untenable. Even otherwise, it is settled law that normally after the expiry of period of limitation right to sue extinguishes and other side acquires right which normally should not be disturbed except when sufficient cause is shown by the applicant.

6. In the present case, as I have already mentioned above, the explanation given by the application for condonation of delay is weak and does not inspire confidence and moreover delay in filing the application for condonation of delay is of a long period i.e. more than two years.

7. Therefore, as there is no merit in the present application because the applicant has failed to convince this Court that delay in filing the application for condonation of delay in filing the appeal was bonafide and beyond reasons in control of the applicant, this application is dismissed.

****

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

M/S. Farm Fresh Food Pvt. Ltd. .....Petitioner

Versus

Himachal Pradesh State Electricity Board Limited .....Respondent

Arbitration Case No.: 29 of 2017
Date of decision : 05.05.2017

Code of Civil Procedure, 1908- Order 23 Rule 1- Petitioner had withdrawn the petition in view of the judgment of Hon'ble Supreme Court in **State of West Bengal &Ors. Associated Contractors 2015 (1) SCC 32-** permission granted to withdraw the petition with liberty to file the fresh petition in the competent court of law- time spent in prosecuting the present petition ordered to be excluded in accordance with the judgment of Hon'ble Supreme Court in**State of Goa Vs. Western Builders(2006) 6 SCC 239,Consolidated Engineering Enterprises Vs. Principal Secretary, Irrigation Department and others(2008) 7 SCC 169** and **Commissioner, M.P. Housing Board and Others Vs. M/S. Mohanlal and Company decided vide judgment dated 19.07.2016 passed in Civil Appeal No. 6573 of 2016 (Arising out of S.L.P.(C) No. 39511 of 2013**.

For the Petitioner : Mrs. Jyotsna Rewal Dua, Senior Advocate, with Ms. Shalini Thakur and Ms. Charu Bhatnagar, Advocates.

For the Respondent : Mr. Vivek Sharma, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge (Oral)

This petition was filed on 17.10.2016.

Now, in view of law laid down by the Apex Court in case State of West Bangal Vs. Associate Contractor, reported in***(2015) 1 SCC 32,*** learned counsel for petitioner Mrs. Jyotsna Rewal Dua, Senior Advocate, under instructions of Ms. Shalini Thakur and Ms. Charu Bhatnagar, Advocates seeks liberty to withdraw this petition for filing before appropriate Court having jurisdiction to adjudicate the same, with benefit of exclusion of time spent in pursuing matter in this Court, available under Section 14 of Limitation Act for calculation of limitation period.

In view of law laid down by Apex Court in case State of West Bangal Vs. Associate Contractor, reported in **(*2015) 1 SCC 32***Arbitration case is permitted to be withdrawnwith liberty to file the same before appropriate Court having jurisdiction to adjudicate the same.

Needless to say that petitioner shall be entitled for the benefit of Section 14 of the Limitation Act in consonance with ratio of law, laid down by the Apex Court in cases State of Goa Vs. Western Builders, reported in ***(2006) 6 SCC 239,*** Consolidated Engineering Enterprises Vs. Principal Secretary, Irrigation Department and others, reported in ***(2008) SCC 169*** and Commissioner, M.P. Housing Board and Others Vs. M/S. Mohanlal and Company decided vide judgment dated 19.07.2016 passed in Civil Appeal No. 6573 of 2016 (Arising out of S.L.P.(C) No. 39511 of 2013.

Petition stands dismissed as withdrawn in above terms alongwith pending applications.

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

M/S. Farm Fresh Food Pvt. Ltd. .....Petitioner

Versus

Himachal Pradesh State Electricity Board Limited .....Respondent

Arbitration Case No. : 28 of 2017
Date of decision : 05.05.2017

Code of Civil Procedure, 1908- Order 23 Rule 1- Petitioner had withdrawn the petition in view of the judgment of Hon'ble Supreme Court in **State of West Bengal &Ors. Associated Contractors 2015 (1) SCC 32-** permission granted to withdraw the petition with liberty to file the fresh petition in the competent court of law- time spent in prosecuting the present petition ordered to be excluded in accordance with the judgment of Hon'ble Supreme Court in**State of Goa Vs. Western Builders(2006) 6 SCC 239,Consolidated Engineering Enterprises Vs. Principal Secretary, Irrigation Department and others(2008) 7 SCC 169** and **Commissioner, M.P. Housing Board and Others Vs. M/S. Mohanlal and Company decided vide judgment dated 19.07.2016 passed in Civil Appeal No. 6573 of 2016 (Arising out of S.L.P.(C) No. 39511 of 2013**.

Cases referred:

State of West Bangal Vs. Associate Contractor, (2015) 1 SCC 32
State of Goa Vs. Western Builders, (2006) 6 SCC 239
Consolidated Engineering Enterprises Vs. Principal Secretary, Irrigation Department and others, (2008) SCC 169

For the Petitioner : Mrs. Jyotsna Rewal Dua, Senior Advocate, with Ms. Shalini Thakur and Ms. Charu Bhatnagar, Advocates.
For the Respondent : Mr. Vivek Sharma, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge (Oral)

This petition was filed on 17.10.2016.

Now, in view of law laid down by the Apex Court in case State of West Bangal Vs. Associate Contractor, reported in***(2015) 1 SCC 32,*** learned counsel for petitioner Mrs. Jyotsna Rewal Dua, Senior Advocate, under instructions of Ms. Shalini Thakur and Ms. Charu Bhatnagar, Advocates seeks liberty to withdraw this petition for filing before appropriate Court having jurisdiction to adjudicate the same, with benefit of exclusion of time spent in pursuing matter in this Court, available under Section 14 of Limitation Act for calculation of limitation period.

In view of law laid down by Apex Court in case State of West Bangal Vs. Associate Contractor, reported in ***(2015) 1 SCC 32***Arbitration case is permitted to be withdrawnwith liberty to file the same before appropriate Court having jurisdiction to adjudicate the same.

Needless to say that petitioner shall be entitled for the benefit of Section 14 of the Limitation Act in consonance with ratio of law, laid down by the Apex Court in cases State of Goa Vs. Western Builders, reported in ***(2006) 6 SCC 239,*** Consolidated Engineering Enterprises Vs. Principal Secretary, Irrigation Department and others, reported in ***(2008) SCC 169*** and Commissioner, M.P. Housing Board and Others Vs. M/S. Mohanlal and Company decided vide judgment dated 19.07.2016 passed in Civil Appeal No. 6573 of 2016 (Arising out of S.L.P.(C) No. 39511 of 2013.

Petition stands dismissed as withdrawn in above terms alongwith pending applications.

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

M/S. Farm Fresh Food Pvt. Ltd. .....Petitioner

Versus

Himachal Pradesh State Electricity Board Limited .....Respondent

Arbitration Case No.: 30 of 2017
Date of decision: 05.05.2017

Code of Civil Procedure, 1908- Order 23 Rule 1- Petitioner had withdrawn the petition in view of the judgment of Hon'ble Supreme Court in **State of West Bengal &Ors. Associated Contractors 2015 (1) SCC 32-** permission granted to withdraw the petition with liberty to file the fresh petition in the competent court of law- time spent in prosecuting the present petition ordered to be excluded in accordance with the judgment of Hon'ble Supreme Court in**State of Goa Vs. Western Builders(2006) 6 SCC 239,Consolidated Engineering Enterprises Vs. Principal Secretary, Irrigation Department and others(2008) 7 SCC 169** and **Commissioner, M.P. Housing Board and Others Vs. M/S. Mohanlal and Company decided vide judgment dated 19.07.2016 passed in Civil Appeal No. 6573 of 2016 (Arising out of S.L.P.(C) No. 39511 of 2013**.

For the Petitioner : Mrs. Jyotsna Rewal Dua, Senior Advocate, with Ms. Shalini Thakur and Ms. Charu Bhatnagar, Advocates.

For the Respondent : Mr. Vivek Sharma, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge (Oral)

This petition was filed on 17.10.2016.

Now, in view of law laid down by the Apex Court in case State of West Bangal Vs. Associate Contractor, reported in***(2015) 1 SCC 32,*** learned counsel for petitioner Mrs. Jyotsna Rewal Dua, Senior Advocate, under instructions of Ms. Shalini Thakur and Ms. Charu Bhatnagar, Advocates seeks liberty to withdraw this petition for filing before appropriate Court having jurisdiction to adjudicate the same, with benefit of exclusion of time spent in pursuing matter in this Court, available under Section 14 of Limitation Act for calculation of limitation period.

In view of law laid down by Apex Court in case State of West Bangal Vs. Associate Contractor, reported in ***(2015) 1 SCC 32***Arbitration case is permitted to be withdrawnwith liberty to file the same before appropriate Court having jurisdiction to adjudicate the same.

Needless to say that petitioner shall be entitled for the benefit of Section 14 of the Limitation Act in consonance with ratio of law, laid down by the Apex Court in cases State of Goa Vs. Western Builders, reported in ***(2006) 6 SCC 239,*** Consolidated Engineering Enterprises Vs. Principal Secretary, Irrigation Department and others, reported in ***(2008) SCC 169*** and Commissioner, M.P. Housing Board and Others Vs. M/S. Mohanlal and Company decided vide judgment dated 19.07.2016 passed in Civil Appeal No. 6573 of 2016 (Arising out of S.L.P.(C) No. 39511 of 2013.

Petition stands dismissed as withdrawn in above terms alongwith pending applications.

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

Piar Chand & Others ....Appellants-Plaintiffs
Versus
Sant Ram & Others ....Respondents-Defendants

Regular Second Appeal No.23 of 2006
Judgment Reserved on: 28.04.2017
Date of decision: 05.05.2017

Specific Relief Act, 1963- Section 34 and 38- Plaintiff filed a civil suit pleading that he is owner in possession of the suit land – the entries in the revenue record in favour of the defendants are wrong- the defendants are interfering with the suit land without any right to do so- hence, the suit was filed for seeking the relief of declaration and injunction - the defendants pleaded that they are joint owners in possession of the suit land- land was partitioned in the year 1994 and they are owners in possession of the suit land since then - the suit was decreed by the Trial Court- an appeal was filed, which was allowed- held in second appeal thatthe plea of the defendants regarding the partition was not proved – the evidence regarding Azadinama/relinquishment was beyond pleadings and cannot be looked into- relinquishment deed is not registered and not admissible in evidence- the Appellate Court had wrongly accepted the case of the defendants- appeal allowed- judgment of the Appellate Court set aside and that of the Trial Court restored.(Para-17 to 35)

Cases referred:
Suraj Lamp and Industries Private Limited Through Director vs. State of Haryana and Another, (2009)7 SCC 363
SMS Tea Estates Private Limited vs. Chandmari Tea Company Private Limited, (2011)14 SCC 66
M/s.Kamakshi Builders vs. M/s. Ambedkar Educational Society & Ors., AIR 2007 SC 2191
Satyawan and others vs. Raghubir, AIR 2002 Punjab and Haryana, 290

For the Appellants: Mr.G.D. Verma, Senior Advocate with Mr.B.C. Verma, Advocate.
For Respondent No.1: Mr.T.S. Chauhan, Advocate.
For Respondents 2(a) to 2(c): Already ex-parte.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

This Regular Second Appeal filed under Section 100 of the Code of Civil Procedure is directed against the judgment and decree dated 22.09.2005, passed by learned Additional District Judge, Ghumarwin, District Bilaspur, in Civil Appeal No.164/13 of 2004/2001, reversing the judgment and decree dated 06.06.2001 passed by learned Sub Judge Ist Class, Ghumarwin, District Bilaspur, whereby suit of the plaintiff was decreed.

2. Briefly stated facts, as emerged from the record, are that one Munshi Ram, predecessor-in-interest of the plaintiffs-appellants *(hereinafter referred to as the 'plaintiff')* filed a suit for declaration, permanent prohibitory injunction as well as for possession averring therein that he is owner in possession of the land measuring 24-17 bighas, comprised in Khatta/Khatauni No.36/53, Khasra No.136 and 138, Kitta-2, situated in village Ropa Ghullatar,

Pargana Sariun, Tehsil Ghumarwin, District Bilaspur, H.P. *(hereinafter referred to as the `suit land').* It is alleged by the plaintiff that entries in the revenue record qua the suit land in favour of the defendants are wrong and without having any right, title or interest in the suit land. It is averred by the plaintiff that on 10.3.1995, on the basis of wrong entries in the revenue record, the defendants threatened to interfere with possession of the plaintiff over the suit land. It is further averred by the plaintiff that the suit has been filed for declaration and permanent injunction to the effect that the plaintiff be declared owner in possession of the suit land and the defendants be restrained from interfering with their possession. In this background, the plaintiff filed a suit for declaration, for issuance of permanent injunction restraining the defendants from interfering with the suit land in any manner as well as for possession.

3. Defendants No.1 and 2, by way of filing written statement, refuted the claim of the plaintiff on the ground of maintainability, estoppel, valuation and limitation. On merits, it is alleged by the defendants that they are joint owners in possession of ½ share of the suit land and they alongwith plaintiff are correctly recorded as joint owners in possession of the suit land, which stood partitioned amongst them on 15.5.1994 and since then the defendants are coming in separate possession of their shares. In nutshell, the defendants refuted the case of the plaintiff and prayed for dismissal of the suit. In the aforesaid background, the defendants sought dismissal of the suit filed by the plaintiff.

4. By way of replication, the plaintiff, while denying the allegations made in the written statement, reaffirmed the averments made in the plaint and controverted the contrary averments made in the written statement.

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

"1. Whether the plaintiff is entitled to declaration as prayed for? OPP.

2. Whether the entries incorporated in the revenue record are illegal as alleged? OPP.

3. Whether the plaintiff is entitled to permanent injunction as prayed for? OPP.

4. Whether the suit is not maintainable? OPD

5. Whether the plaintiff is estopped to file the present suit as alleged? OPD

6. Whether the suit has not been properly valued for the purpose of court fee and jurisdiction ? OPD.

7. Whether the suit is time barred? OPD

8. Relief"

6. Subsequently, learned trial Court, on the basis of pleadings as well as evidence adduced on record by respective parties, decreed the suit of the plaintiff.

7. Being aggrieved and dissatisfied with the aforesaid judgment and decree passed by learned trial Court, defendant Sant Ram preferred an appeal under Section 96 of the Code of Civil Procedure in the Court of learned Additional District Judge, Ghumarwin, District Bilaspur, which came to be registered as Civil Appeal No.164/13 of 2004/2001. Learned Additional District Judge, taking note of the pleadings as well as evidence adduced on record by respective parties, allowed the appeal and set aside the judgment and decree passed by learned trial Court.

8. In the aforesaid background, appellants-plaintiffs filed instant Regular Second Appeal laying therein challenge to the aforesaid judgment and decree passed by learned Additional District Judge, Ghumarwin, District Bilaspur, whereby suit of the plaintiff was dismissed with a prayer to quash and set aside the same.

9. This Court vide order dated 10.05.2006 admitted the appeal on the following substantial question of law:-

"1. Whether the finding of the first appellate court that respondents/defendants acquired title to the extent of one-half share in the suit property by virtue of Azadinama referred to in the red ink note recorded in the remarks column of Misal Hakiet Ex.P-1, is bad in law on account of no such plea having been raised by the respondents-defendants in the written statement?"

10. Mr.G.D. Verma, learned Senior Counsel representing the appellants-plaintiffs, vehemently argued that the impugned judgment passed by the learned first appellate Court is not sustainable in the eyes of law as the same is not based upon the pleadings as well as proper appreciation of evidence adduced on record by the respective parties and as such same deserves to be quashed and set aside. Mr.Verma further contended that bare perusal of the impugned judgment suggests that the learned first appellate Court mis-directed itself while setting aside the well reasoned judgment passed by learned trial Court, whereby suit of the plaintiff for declaration/permanent injunction came to be decreed. Mr.Verma contended that bare perusal of the written statement having been filed by the defendants suggests that there was no pleadings/averments made by the defendants that they have acquired title to the extent of ½ share in the suit property by virtue of *'Azadinama'* as reflected in the Misalhaquiate Ex.P-1 and as such there was no occasion, whatsoever, for learned first appellate Court to conclude that plaintiff Munish Ram has relinquished his ½ share of the suit land in favour of the defendants by way of *'Azadinama'*. Mr.Verma further contended that otherwise also there is no evidence led on record by the defendants to prove *'Azadinama/relinquishment,* if any, made by the plaintiff in favour of the defendants.

11. Mr.Verma further contended that since no pleadings, as such, with regard to aforesaid *'Azadinama'* were made by the defendants in the written statement, no issue qua the same was framed by the Court below and as such the parties, more particularly, plaintiff was prevented from leading evidence to the effect that he had never relinquished his share in favour of the defendants. Mr.Verma further contended that otherwise also it is settled law that the Court could not go beyond pleadings, where admittedly no plea of *'Azadinama'* having been made by the plaintiff was taken by the defendants. While referring to the evidence led on record by the plaintiff as well as defendants, Mr.Verma contended that it stands duly proved on record that plaintiff; namely; Munshi Ram, was exclusive owner of the suit land, which was granted to him as Nataur. Mr.Verma contended that title of immovable property only vests in other persons by way of registered documents and not through mutation, as has been claimed in the present case by the defendants. Similarly, Mr.Verma contended that learned first appellate Court below has placed much reliance upon compromise/admission to conclude that defendants were co-owners to the extent of ½ share in the suit property completely ignoring the fact that at the time of preparation of partition deed Ex.DW-3/A defendants were not having any pre-existing title over the suit land, as such, there is/was no relevance of aforesaid document while deciding the controversy at hand. Learned counsel further contended that the aforesaid document was not required to be considered and looked into by the Court below because Gram Panchayat had no authority to effect the partition of the suit land and houses situated thereon and as such partition deed Ex.DW-3/A, prepared by Gram Panchayat on the directions of A.D.M., Bilaspur, was wrongly taken into consideration by first appellate Court while setting aside the well reasoned judgment passed by the first appellate Court.

12. While concluding his arguments, Mr.Verma contended that there was no occasion, whatsoever, for plaintiff to lay challenge to mutation Ex.DX, whereby defendants were shown to be owners to the extent of ½ share on the basis of alleged *'Azadinama'* because as per settled law no title could be transferred by way of oral statement, rather, title could only be transferred/relinquished by way of registered document. In the aforesaid background, Mr.Verma, prayed that the judgment and decree passed by learned trial Court below be restored after setting aside the judgment and decree passed by the learned first appellate Court.

13. Mr.Tara Singh Chauhan, learned counsel appearing for respondent-defendant No.1, supported the impugned judgment passed by learned first appellate Court below. While

inviting the attention of this Court to the impugned judgment and decree passed by learned first appellate Court below, Mr.Chauhan contended that there is no illegality and infirmity in the same, rather, perusal of the same suggests that each and every aspect of the matter has been considered and decided carefully by the Court below and as such, there is no scope of interference of this Court. While refuting the contention having been made by learned counsel representing the plaintiff that no pleadings were made by the defendants in written statement with regard to *'Azadinama'* having been made by the plaintiff in favour of defendants, Mr.Chauhan contended that there was no requirement, as such, for defendants to specifically plead with regard to relinquishment/*'Azadinama'* made in favour of the defendants by the plaintiff, in view of documentary evidence led on record by the plaintiff himself in the shape of Ex.P-1. Mr.Chauhan, while inviting the attention of this Court to Ex.P-1, strenuously argued that bare perusal of the same suggests that in the year 1968 the plaintiff himself relinquished his ½ share in the suit land in favour of defendants and as such learned first appellate Court rightly held defendants entitled to ½ share in the suit land.

14. Mr.Chauhan further contended that during the pendency of first appeal, defendants had moved an application under Order 41 Rule 27 of the code of Civil Procedure, whereby defendants were allowed to place on record copy of mutation Ex.DX, which clearly suggests that plaintiff, of his own volition and fee will, relinquished ½ share of suit land in favour of defendants. He further invited the attention of this Court to copies of Jamabandi Ex.D-1 to Ex.D-6 and Ex.P-2 to suggest that after relinquishment made in favour of defendants on 12.7.1968, defendants are continuously recorded as joint owners to the extent of ½ share of the suit land, as such, there is no illegality in the findings returned by the Court below. Mr.Chauhan, while supporting the impugned judgment passed by learned first appellate Court, forcibly contended that bare perusal of judgment passed by trial Court suggests that learned Court below miserably failed to take note of relinquishment/ *'Azadinama'* made in favour of defendants and as such learned first appellate Court rightly reversed the findings returned by the learned trial Court, which were admittedly passed without taking note of endorsement with regard to relinquishment made in Misalhaquiat Ex.P-1. Mr.Chauhan further contended that there is no evidence led on record by the plaintiff suggestive of the fact that he had ever taken steps after 12th July, 1968 for laying therein challenge to mutation made in favour of defendants and as such he cannot be allowed to stateat this stage that mutation attested in favour of defendants pursuant to statement of plaintiff made on 12.7.1968 cannot be looked into.

15. While concluding his arguments, Mr.Chauhan invited the attention of this Court to the partition deed Ex.DW-3/A to suggest that Gram Panchayat effected partition of suit land and houses situated thereon amongst plaintiff and defendants on 15.4.1994 on the direction of Deputy Commissioner, Bilaspur and at that time no objection, if any, was ever raised by the plaintiff and as such there is no force in the arguments having been made by learned counsel for the plaintiff and the present appeal deserves to be dismissed.

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

17. While exploring answer to the substantial question of law, referred hereinabove as well as submissions having been made by learned counsel for the parties, this Court carefully perused the pleadings adduced on record by the respective parties. Plaintiff by way of suit for declaration and permanent injunction pleaded before the Court below that he is owner in possession of the suit land as described hereinabove and revenue entries made in favour of defendants qua the suit land showing them owners to the extent of ½ share of the suit land, are without any right, title and interest. Whereas, defendants, while refuting aforesaid claim having been made by the plaintiff, stated that they were joint owners in possession of the suit land alongwith the plaintiff to the extent of ½ share and as such revenue entries are rightly recorded showing them to be owners in possession to the extent of ½ share of the suit land. Defendants further claimed that no threat to dispossess the plaintiff from the suit land was ever made, as there was already family partition, which took place inter se parties on 15.5.1994.

18. After having carefully perused the pleadings, specifically written statement having been filed by the defendants, it nowhere suggests that plea, if any, of acquisition of title to the extent of ½ share of the suit property by virtue of *'Azadinama',* as recorded in the remarks column of Missalhaquiat Ex.P-1, was ever taken by the defendants. Similarly, impugned judgment passed by learned trial Court suggests that no specific issue with regard to the acquisition of title to the extent of ½ share in the suit property by virtue of *'Azadinama'* as recorded in Missalhaquiat Ex.P-1 was framed.

19. This Court also carefully examined statement of witnesses, especially defendants witnesses, perusal whereof nowhere suggests that case, if any, was ever set up before the trial Court below that defendants got ½ share in the suit property by virtue of *'Azadinama'*/relinquishment having been made by the plaintiff in favour of the defendants as recorded in the Missalhaquiat Ex.P-1. All the defendants' witnesses, including defendant himself, stated before the Court below that suit land was granted as Nataur to Munshi Ram in the year 1947 by the Erstwhile Ruler of Bilaspur Estate and since then the suit land is coming into possession of Munshi Ram.

20. DW-3, Basant Singh stated in his statement that plaintiff Munshi Ram had not alienated the suit land nor defendants were having any right, title or interest therein. In his cross-examination he only stated that he had moved an application for partition of their land before the Deputy Commissioner, Bilaspur and Gram Panchayat had effected partition of the ancestral land of the parties. Partition itself was adduced in writing. Similarly, DW-1 Sant Ram stated that defendants were joint owners of ½ share of suit land and the Deputy Commissioner had forwarded the application to the Gram Panchayat and Gram Panchayat partitioned the suit land between Munshi Ram and the defendants. DW-3, who happened to be Pradhan of Gram Panchayat, Kuh Majhwar, also stated that Gram Panchayat was ordered to effect partition of the land and houses of the parties and accordingly the Gram Panchayat effected the partition of suit land and houses and partition deed Ex.DW-3/A was scribed by him which was signed by the parties. DW-4 Shiv Ram, who was member of the Gram Panchayat, also stated that Deputy Commissioner or A.D.M. Bilaspur had ordered the Gram Panchayat to effect partition of suit land between Munshi Ram and the defendants and accordingly the Panchayat had effected partition on 15.4.1994 and a partition deed Ex.DW-3/A was executed by the parties.

21. After having carefully perused the pleadings adduced on record by the defendants in shape of written statement as well as oral evidence in the shape of DW-1 to DW-4, it can safely be inferred that claim of the plaintiff as put forth in the plaint was never sought to be refuted by the defendants on the ground that they had acquired title to the extent of ½ share of the suit property by virtue of *'Azadinama'* as referred in Missalhaquiat Ex.P-1. It emerge from the statement of aforesaid defendants witnesses that A.D.M., Bilaspur had directed Gram Panchayat, Kuh Majhwar to effect partition of suit land and houses situated therein between Munshi Ram and the defendants, but this Court was unable to lay its hands to any document adduced on record by either of the parties from where it could be inferred that how matter with regard to partition of the suit land landed up before A.D.M. Bilaspur. Defendants by way of partition deed Ex.DW-3/A made an endeavour to prove that on 15.5.1994 Gram Panchayat had effected partition interse parties qua suit land as well as houses existing thereon. But, this Court was unable to find mention, if any, with regard to order passed by A.D.M., Bilaspur. In the alleged partition deed Ex.DW-3/A, it was only mentioned that Gram Panchayat on 15.5.1994 visited the site to effect partition in terms of orders passed by A.D.M., Bilaspur. After carefully perusing the pleadings as well as evidence on record, be it ocular or documentary led on record by the defendants, this Court sees substantial force in the arguments made by learned counsel representing the plaintiff that since no plea of *'Azadinama'*/relinquishment having been made by the plaintiff in favour of defendants was raised, learned trial Court rightly not framed issue qua the same and proceeded to decide the case on the basis of pleadings as well as evidence adduced on record by the respective parties. As clearly emerged from the evidence of defendant witnesses, as have been discussed hereinabove, defendants have not been able to specifically provethat on what basis they became owners to the extent of ½ share in the suit land. DW-1, defendant Sant

Ram himself admitted that entire suit land was granted as a Nautor to Munish Ram in the year 1947 by erstwhile Ruler of Bilaspur Estate and since then it is coming in the possession of Munshi Ram. Defendant No.1 also admitted that Munshi Ram had not alienated the suit land. If the aforesaid version of defendant is accepted, there is no explanation worth the name, if any, rendered on record by the defendants that in what manner they came to be owners to the extent of ½ share of the suit land. Though it is well settled that Courts below while adjudicating claim of the parties cannot go beyond the pleadings, but, in the instant case learned first appellate Court while holding the defendants to be owners to the extent of ½ share of the suit land heavily placed reliance on Ex.P-1. True, it is, that perusal of Ex.P-1 i.e. Misslahaquiat suggests that the plaintiff Munshi Ram had relinquished his ½ share of suit land by way of *'Azadinama'* in favour of defendants vide mutation No.148, dated 12.7.1968. The aforesaid factum of having effected mutation in favour of the defendants further gets corroborated by Ex.DX, which was subsequently placed on record by the defendants during the pendency of first appeal, perusal of which suggests that on 12.7.1968 mutation Ex.DX was attested in favour of defendants on the basis of *'Azadinama'*/relinquishment qua the immovable property.Now, question which requires to be considered by this Court is that, whether mutation could be attested in favour of defendants on the basis of oral *'Azadinama'* or statement having been made by the plaintiff at the time of alleged mutation. In the instant case, there is no document led on record by either of the parties suggestive of the fact that the plaintiff, while relinquishing his ½ share in the suit property, had executed registered relinquishment deed, if any.

22. At this stage, this Court deems it fit to take note of Sections 17 and 49 of the Registration Act, 1908, which is reproduced hereinbelow:-

> *"17. Documents of which registration is compulsory.—*
>
> *(l) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:—*
>
> *(a) instruments of gift of immovable property;*
>
> *(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;*
>
> *(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and*
>
> *(d) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent;*
>
> *[1][(e) non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property:]*
>
> *Provided that the [2][State Government] may, by order published in the [3][Official Gazette], exempt from the operation of this sub-section any lease executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees.*
>
> *[4] [(1A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of section 53A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and Other Related laws (Amendment) Act, 2001 and if such*

documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said section 53A.]

(2) Nothing in clauses (b) and (c) of sub-section (l) applies to—

(i) any composition deed; or

(ii) any instrument relating to shares in a joint stock Company, notwithstanding that the assets of such Company consist in whole or in part of immovable property; or

(iii) any debenture issued by any such Company and not creating, declaring, assigning, limiting or extinguishing any right, title or interest, to or in immovable property except in so far as it entitles the holder to the security afforded by a registered instrument whereby the Company has mortgaged, conveyed or otherwise transferred the whole or part of its immovable property or any interest therein to trustees upon trust for the benefit of the holders of such debentures; or

(iv) any endorsement upon or transfer of any debenture issued by any such Company; or

(v) [5][any document other than the documents specified in sub-section (1A)] not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immovable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest; or

(vi) any decree or order of a Court [1] [except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding]; or

(vii) any grant of immovable property by [2][Government]; or

(viii) any instrument of partition made by a Revenue-Officer; or

(ix) any order granting a loan or instrument of collateral security granted under the Land Improvement Act, 1871, or the Land Improvement Loans Act, 1883; or

(x) any order granting a loan under the Agriculturists, Loans Act, 1884, or instrument for securing the repayment of a loan made under that Act; or

[3][(xa) any order made under the Charitable Endowments Act, 1890, (6 of 1890) vesting any property in a Treasurer of Charitable Endowments or divesting any such Treasurer of any property; or]

(xi) any endorsement on a mortgage-deed acknowledging the payment of the whole or any part of the mortgage-money, and any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage; or

(xii) any certificate of sale granted to the purchaser of any property sold by public auction by a Civil or Revenue-Officer. [4][Explanation.—A document purporting or operating to effect a contract for the sale of immovable property shall not be deemed to require or ever to have required registration by reason only of the fact that such document contains a recital of the payment of any earnest money or of the whole or any part of the purchase money.]

(3) Authorities to adopt a son, executed after the 1st day of January, 1872, and not conferred by a will, shall also be registered. … … … … …"

Section 49 of the Registration Act, 1908 reads as under:-

"49. Effect of non-registration of documents required to be registered.—No document required by section 17 [1][or by any provision of the Transfer of Property Act, 1882 (4 of 1882)], to be registered shall—

(a) affect any immovable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered: [1][Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3 of 1877) [2,3] [***] or as evidence of any collateral transaction not required to be effected by registered instrument.]… … … …"

23. Perusal of aforesaid Section 17 clearly suggests that document/instrument, which intends/purports to create right/title to an immovable property having value of Rs.100/- should be registered. Similarly, perusal of Section 49 of the Act suggests that documents, which are required to be registered under Section 17 shall not affect any immovable property; comprised therein or confer any power to adopt or to receive any evidence to any transaction affecting the said property or conferring power unless it has been registered.

24. After having carefully perused aforesaid provisions of law, this Court is of the view that Ex.P-1 as well as Ex.DX, which were admittedly not registered documents, as prescribed/defined under Section 17 of the Act, could not be read in evidence by learned first appellate Court, especially, in the absence of any registered relinquishment deed made by the plaintiff in favour of defendant No.1.

25. As per Section 17 of the aforesaid Act, any document or instrument, which purports or intends to create title should be registered and in case same is not registered, it would not affect any immovable property comprised therein or moreover it could not be allowed as evidence of any transaction affecting such property.

26. In this regard, this Court deems it fit to rely upon the judgment passed by Hon'ble Apex Court in ***Suraj Lamp and Industries Private Limited Through Director vs. State of Haryana and Another, (2009)7 SCC 363,*** wherein the Hon'ble Apex Court has held as under:-

"15. The Registration Act, 1908, was enacted with the intention of providing orderliness, discipline and public notice in regard to transactions relating to immovable property and protection from fraud and forgery of documents of transfer. This is achieved by requiring compulsory registration of certain types of documents and providing for consequences of non-registration.

16. Section 17 of the Registration Act clearly provides that any document (other than testamentary instruments) which purports or operates to create, declare, assign, limit or extinguish whether in present or in future "any right, title or interest" whether vested or contingent of the value of Rs.100 and upwards to or in immovable property.

17. Section 49 of the said Act provides that no document required by Section 17 to be registered shall, affect any immovable property comprised therein or received as evidence of any transaction affected such property, unless it has been registered. Registration of a document gives notice to the world that such a document has been executed.

18. Registration provides safety and security to transactions relating to immovable property, even if the document is lost or destroyed. It gives publicity and public exposure to documents thereby preventing forgeries and frauds in regard to

transactions and execution of documents. Registration provides information to people who may deal with a property, as to the nature and extent of the rights which persons may have, affecting that property. In other words, it enables people to find out whether any particular property with which they are concerned, has been subjected to any legal obligation or liability and who is or are the person/s presently having right, title, and interest in the property. It gives solemnity of form and perpetuate documents which are of legal importance or relevance by recording them, where people may see the record and enquire and ascertain what the particulars are and as far as land is concerned what obligations exist with regard to them. It ensures that every person dealing with immovable property can rely with confidence upon the statements contained in the registers (maintained under the said Act) as a full and complete account of all transactions by which the title to the property may be affected and secure extracts/copies duly certified.

(pp.367-368)

27. Perusal of aforesaid law, having been laid by Hon'ble Apex Court, clearly suggests that title of immovable property, having value of more than Rs.100/-, can only be transferred by registered documents, as provided under Section 17 of the Registration Act, 1908. Similarly, it also emerge from the aforesaid judgment that no document as required by Section 17 to be registered shall, affect any immovable property comprised therein or received as evidence of any transaction affected such property unless it is registered.

28. Reliance is also placed upon ***SMS Tea Estates Private Limited vs. Chandmari Tea Company Private Limited, (2011)14 SCC 66***, wherein the Hon'ble Apex Court has held as under:

"11. Section 49 makes it clear that a document which is compulsorily registrable, if not registered, will not affect the immovable property comprised therein in any manner. It will also not be received as evidence of any transaction affecting such property, except for two limited purposes. First is as evidence of a contract in a suit for specific performance. Second is as evidence of any collateral transaction which by itself is not required to be effected by registered instrument. A collateral transaction is not the transaction affecting the immovable property, but a transaction which is incidentally connected with that transaction. The question is whether a provision for arbitration in an unregistered document (which is compulsorily registrable) is a collateral transaction, in respect of which such unregistered document can be received as evidence under the proviso to section 49 of the Registration Act. (p.71)

29. In ***M/s.Kamakshi Builders vs. M/s. Ambedkar Educational Society & Ors., AIR 2007 SC 2191***, the Hon'ble Apex Court has held:

"*24. Acquiescence on the part of Respondent No.3, as has been noticed by the High Court, did not confer any title on Respondent No.1. Conduct may be a relevant fact, so as to apply the procedural law like estoppel, waiver or acquiescence, but thereby no title can be conferred.*

25. It is now well-settled that time creates title.

26. Acquisition of a title is an inference of law arising out of certain set of facts. If in law, a person does not acquire title, the same cannot be vested only by reason of acquiescence or estoppel on the part of other.

27. It may be true that Respondent No.1 had constructed some buildings; but it did so at its own risk. If it thought that despite its status of a tenant, it would raise certain constructions, it must have taken a grave risk. There is nothing on record to show that such permission was granted. Although Respondent No.1 claimed its right, it did not produce any document in that behalf. No application for seeking such permission having been filed, an adverse inference in that behalf must be drawn."(p.2196)

30. In ***Satyawan and others vs. Raghubir, AIR 2002 Punjab and Haryana, 290,*** the Hon'ble Court has held as under:-

> *"18. It was submitted that there is no difference between exchange and sale. Except that, in sale, title is transferred from the vendor to the vendee in consideration for price paid or promised to be paid. In exchange, the property of 'X' is exchanged by "A" with property "Y" belonging to "B". In this manner, the property is received in exchange of property. There is transfer of ownership of one property for the ownership of the other. It was submitted that prior to when decree dated 20.10.1992 was not passed, there was no title of "A" in property "Y" and there was no title of "B" in property "X". It was submitted that for the first time, the right was created in immovable property by decree and, therefore, that decree required registration. It was submitted that if there was no pre-existing right in the property worth more than Rs.100/- and the right was created in the immovable property for the first time by virtue of decree, that decree would require registration. In my opinion, oral exchange was not permissible in view of the amendment of Section 49 of the Registration Act brought about by Act No. 21 of 1929, which by inserting in Section 49 of the Registration Act the words "or by any provision of the Transfer of Property Act, 1882" has made it clear that the documents of which registration is necessary under the Transfer of Property Act but not under the Registration Act falls within the scope of Section 49 of the Registration Act and if not registered are not admissible as evidence of any transaction affecting any immovable property comprised therein, and do not affect any such immovable property. Transaction by exchange which required to be affected through registered instrument if it was to affect any immovable property worth Rs.100 or more."(p.297)*

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.

33. Similarly, this Court has no hesitation to conclude that there is/was no authority vested in Gram Panchayat to conduct partition proceedings on the basis of order passed by Deputy Commissioner or A.D.M., Bilaspur, which is admittedly not on record because partition of the land can only be effected by the authority as prescribed under Sections 122 and 123 of the H.P. Land Revenue Act. Moreover, partition deed Ex.DW-3/A, which was prepared on 15.5.1994, could not be prepared because admittedly the defendants had no pre-existing title in the suit land, as stands duly proved on record. Defendant himself has admitted that Munshi Ram was absolute owner in possession of the land which he had acquired as Nataur.

34. Since this Court has already come to the conclusion, on the basis of aforesaid provision of law as well as material available on record, that no immovable property could be relinquished without there being registered document, mutation, if any, conducted on the basis of oral relinquishment/*'Azadinama'* as reflected in Ex.P-1 and Ex.DX has no bearing on the rights of plaintiff, who is absolute owner of the suit land and as such judgments relied upon by the learned counsel representing the defendants with regard to attestation of mutation in favour of defendants has no bearing in the present case and as such same are not discussed herein. Substantial question of law is answered accordingly.

35. Consequently, in view of detailed discussion made hereinabove, this Court sees valid reason to interfere in the judgment passed by first appellate Court, which is apparently not based upon the proper appreciation of evidence as well as law. Accordingly judgment passed by learned first appellate Court is quashed and set aside and that of the learned trial Court is restored. There shall be no order as to costs. Interim order, if any, stands vacated. All miscellaneous applications are disposed of.

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

Ram Karan & Others ....Appellants-Plaintiffs
Versus
Smt.Kaushalaya Devi & Others ....Respondents-Defendants

Regular Second Appeal No.172 of 2005
Date of decision: 05.05.2017

Specific Relief Act, 1963- Section 38- Plaintiffs filed a civil suit for seeking permanent prohibitory injunction for restraining the defendants from interfering in the possession of the plaintiffs over the suit land – it was pleaded that plaintiffs are in possession since 1931-32 – suit land was mortgaged but the mortgage was rejected by Tehsildar- possession of the plaintiffs continued- defendants are threatening to interfere in the possession of the plaintiffs – hence, the suit was filed for seeking the reliefof possession – the suit was decreed by the Trial Court- an appeal was filed, which was allowed and the judgment passed by Trial Court was set aside – held in second appeal that Revenue Court had recorded a finding regarding the entry made in the year 1931-32- this finding was affirmed by the Appellate Authority – Civil Court could not have re-considered the said finding of the Revenue Court – mutation was cancelled by the Revenue Authority and the plaintiffs cannot assert their possession on the basis of the mutation – suit land was lying vacant and the plea that the plaintiffs are in cultivating possession was not established – there are variations in the pleasraised before the Revenue Authority and before the Civil Court – appeal dismissed.(Para-13 to20)

For the Appellants: Mr.Sanjeev Kuthiala, Advocate.
For Respondents: Mr.Ramakant Sharma, Senior Advocate with Ms.Devhyani Sharma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

This Regular Second Appeal filed under Section 100 of the Code of Civil Procedure is directed against the judgment and decree dated 11.01.2005, passed by learned Additional District Judge, Solan, District Solan, in Civil Appeal No.61-NL/13 of 2000, reversing

the judgment and decree dated 29.08.2000, passed by learned Sub Judge Nalagarh, District Solan, H.P., whereby suit filed by the plaintiffs for permanent prohibitory injunction was decreed.

2. Briefly stated facts, as emerged from the record, are that the plaintiffs-appellants *(hereinafter referred to as the 'plaintiffs')* filed a suit for permanent prohibitory injunction restraining the defendants from interfering in any manner in the possession of the plaintiffs and proforma defendant over the suit land comprised in Khewat/Khatauni No.23 min/24, Khasra Nos.14(7-9), 18(0-5), 37(4-15), 60(2-9), 81(0-11), 85(0-3), 89(0-10), 123(0-1), 313(0-2), 221(0-4), 223(0-7), 224(0-7), Kittas 12, measuring 17 Bighas 3 Biswas, situated in village Beh Kanaitan, Pargana Dharampur Pahar, Tehsil Nalagarh, District Solan, H.P. *(hereinafter referred to as the 'suit land').* It is averred by the plaintiffs that the defendant is residing in village Bagguwal for the last more than 20 years and as per Jamabandi for the year 1995-96, plaintiffs alongwith proforma defendants are recorded in possession of the suit land, which possession of the plaintiffs and proforma defendants is absolute and unfettered to the knowledge of the defendant. It is further averred by the plaintiffs that the suit land is in cultivating possession since the year 1931-32 i.e.during the life time of the plaintiffs and their predecessor-in-title. It is the claim of the plaintiffs that initially the suit land was mortgaged and mutation No.30 dated 20.9.2005 BK was entered and the factum of the mortgage was rejected by the Tehsildar, Nalagarh. However, the possession of the plaintiffs continued since 20.9.2005 BK and since then the plaintiffs have been occupying this land exclusively to the knowledge of the defendant or his predecessor-in-title conclusively and since then their possession remained peaceful and continuous. It is the claim of the plaintiffs that the defendant or his predecessor-in–title never objected to the possession of the plaintiffs or even during the life time of their father over the suit land. It is also alleged by the plaintiffs that in the first settlement, predecessor-in-title of the plaintiffs, Sh.Mast Ram, was in possession of the suit land and Rulia was its first owner. It is averred by the plaintiffs that the defendant had admitted the plaintiffs and proforma defendants to be owners in possession of suit land by his act and conduct and he himself or through Rulia never objected the occupation of the suit land since the year 1931. It is further averred by the plaintiffs that the defendant is estopped to interfere in possession of the plaintiffs over the suit land. It is also the claim of the plaintiffs that the defendant threatened the plaintiffs to dispossess them form the suit land under the guise of illegal order of the revenue authorities. In this background, the plaintiffs filed the suit for permanent injunction restraining the defendants from causing interference in their possession over the suit land.

3. Defendant, by way of filing written statement, refuted the claim of the plaintiffs on the ground of maintainability, locus standi and jurisdiction. On merits, it is alleged by the defendant that he is owner in possession of the suit land, the plaintiffs and proforma defendant never cultivated the land and the entries in their names are wrong and illegal. It is alleged by the defendant that the Land Reforms Officer has corrected the entry of the defendant, which order has also been upheld by the District Collector, Solan and the same has become final. It is also alleged by the defendant that the Civil Suit before Civil Court is/was not maintainable. In the aforesaid background, the defendant sought dismissal of the suit filed by the plaintiffs.

4. By way of replication, the plaintiff, while denying the allegations made in the written statement, reaffirmed the averments made in the plaint and controverted the contrary averments made in the written statement.

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

> *"1. Whether the plaintiffs are entitled for the relief of injunction? OPP.*
>
> *2. Whether this suit is not maintainable? OPD.*
>
> *3. Whether the plaintiffs have no cause of action? OPD.*
>
> *4. Whether the plaintiffs have no locus standi to file the present suit? OPD.*
>
> *5. Whether entries recorded in the revenue record in favour of the plaintiffs are wrong, illegal, null and void, as alleged? OPD.*

6. Relief."

6. Subsequently, learned trial Court, on the basis of pleadings as well as evidence adduced on record by respective parties, decreed the suit of the plaintiffs for permanent prohibitory injunction restraining the defendant from dispossessing the plaintiffs from the suit land except in accordance with law.

7. Being aggrieved and dissatisfied with the aforesaid judgment and decree passed by learned trial Court, defendant preferred an appeal under Section 96 of the Code of Civil Procedure in the Court of learned Additional District Judge, Solan, District Solan, H.P., who, taking note of the pleadings as well as evidence adduced on record by respective parties, allowed the appeal and set aside the judgment and decree passed by learned trial Court.

8. In the aforesaid background, appellants-plaintiffs filed instant Regular Second Appeal laying therein challenge to the aforesaid judgment and decree passed by learned Additional District Judge, Solan, District Solan, H.P., whereby suit of the plaintiffs was dismissed, with a prayer to quash and set aside the same.

9. This Court vide order dated 2.8.2006 admitted the appeal on the following substantial question of law:-

"1. Whether the first appellate court has committed a serious illegality in returning the finding that the plaintiffs-appellants are not in possession of the suit land, while the entries in the revenue papers since the year 1931 show them to be in possession up to the year 1996 when the order for correction of entries was passed by the Land Reforms Officer?"

10. While exploring answer to aforesaid substantial question of law framed by this Court, this Court had an occasion to peruse pleadings, evidence, be it ocular or documentary, adduced on record by respective parties, more particularly, Exs.D-1 and D-2 i.e. copies of orders dated 29.10.2006 and 31.12.1997 passed by Land Reforms Officer and Collector, Solan, District Solan respectively, perusal whereof certainly not persuade this Court to agree with the contentions/submissions made by Mr.Sanjeev Kuthiala, learned counsel representing the appellants-plaintiffs that learned first appellate Court has failed to appreciate the evidence in its right perspective, rather, this Court is convinced and satisfied that the learned first appellate Court below has dealt with issue in question carefully and has rightly come to the conclusion that entry showing the plaintiffs to be in possession was existing wrongly in revenue record as is evident from Ex.D-1.

11. Careful perusal of aforesaid orders Exs.D-1 and D-2 suggests that respondent-defendant herein had filed Civil Suit bearing No.173/1 in Civil Court claiming himself to be joint owner in possession of the suit land. However, fact remains that aforesaid Civil Suit filed by the respondent-defendant was withdrawn on the objection with regard to maintainability, having been raised by present appellants-plaintiffs. Vide aforesaid suit, as emerged from the record, respondent-defendant had laid challenge to the revenue entries showing appellants-plaintiffs to be owners in possession of the suit land, as reflected in Jamabandi for the year 1931-32, which further continued till year 1995-96. Since specific objection with regard to maintainability of suit was taken by appellants-plaintiffs, therefore, respondent-defendant rightly approached Land Reforms Officer for correction of entries made in the revenue record. Perusal of Ex.D-1, order dated 29.10.1996, passed by Land Reforms Officer, Nalagarh in Missal No.23/94 clearly suggests that both the parties were heard by Land Reforms Officer before passing final order. Careful perusal of aforesaid order Ex.D-1 suggests that Land Reforms Officer, on the basis of material made available to him, came to conclusion that names of appellants-plaintiffs were wrongly entered in the column of ownership and possession in Jamabandi for the year 1931-32 and 1935-36. Land Reforms Officer further concluded that subsequent entries in favour of appellants-plaintiffs are wrong and not in accordance with law. Further perusal of Ex.D-1, placed on record by the defendant, suggests that aforesaid order dated 29.10.1996 passed by Land Reforms Officer-cum-Assistant Collector Ist Grade, Nalagarh, was taken into appeal by the present

appellants-plaintiff before Collector, Solan, District Solan, which came to be registered as Case No.4/7 of 1997, instituted on 8.11.1996. Learned Collector, Solan vide its order dated 30.12.1997 upheld the order dated 29.10.1996, passed by the Land Reforms Officer, while rejecting the appeal. This Court was unable to lay its hands to any document adduced on record by either of the parties suggestive of the fact that aforesaid orders having been passed by Revenue Authorities were ever assailed before competent Authority under H.P. Land Revenue Act; meaning thereby that the order dated 29.10.1996, which was further affirmed by Collector vide its order dated 30.12.1997, attained finality. This Court, after having carefully perused the aforesaid orders Exs.D-1 and D-2, finds no force in the contentions having been made by Mr. Kuthiala that the aforesaid orders, having been passed by Land Revenue Authorities, were passed at the back of appellants-plaintiffs because admittedly perusal of aforesaid orders passed by Revenue Authorities suggests that the same were passed in the presence of appellants-plaintiffs, who respectively laid challenge to the orders passed by Land Reforms Officer before the District Collector by filing an appeal.

12. After having gone through the pleadings, especially suit for permanent prohibitory injunction filed by the appellants-plaintiffs under Order 7 Rule 1 CPC, this Court is compelled to agree with the averments having been made by Mr.Ramakant Sharma, learned Senior Counsel, representing the respondent-defendant, that suit was filed by the appellants-plaintiffs to defeat the mandate of order dated 29.10.1996, passed by the Land Reforms Officer, wherein entry in the Jamabandi for the year 1931-32 reflecting the name of predecessor-in-interest of the appellants-plaintiffs in the column of ownership and possession, was held to be illegal. It clearly emerge from the record that aforesaid suit was filed on 9.2.1998 i.e. after dismissal of appeal filed by appellant-plaintiff in the Court of Collector, which came to be decided on 30.12.1997 Ex.D-2.

13. After having bestowed my thoughtful consideration to the documentary evidence i.e. Ex.D-1 and Ex.D-2, I have no hesitation to conclude that learned trial Court, while decreeing the suit of appellants-plaintiffs, failed to appreciate that there was a clear cut finding recorded by the Revenue Court with regard to entry allegedly made in favour of the appellants-plaintiffs in the year 1931-32. Learned trial Court below also failed to take note of the fact that aforesaid order passed by the Revenue Authority was affirmed by the Appellate Authority and as such same could not be reconsidered and decided in the suit and as such, Court below had no occasion to record findings with regard to possession of the appellants-plaintiffs over the suit land. Interestingly, there is no mention, if any, of passing of aforesaid orders by Revenue Authorities in the plaint; meaning thereby that the appellants-plaintiffs, by way of filing the suit, made an attempt to hoodwink the Court. It also emerged from the record that at the first instance respondent-defendant had approached Civil Court by way of Civil Suit for correction of entries, but they were made to approach Revenue Authorities for correction of revenue record.

14. Leaving everything aside, there is no challenge, if any, to the aforesaid orders Exs.D-1 and D-2 passed by the Revenue Authorities on the application of respondent-defendant and thereafter appeal having been filed by the appellants-plaintiffs, in the present suit filed by the appellants-plaintiffs. Further perusal of evidence led on record by appellants-plaintiffs nowhere proves on record that they are in possession of the suit land.

15. True, it is, that the plaintiffs and proforma defendant have been shown as owners in possession of the suit land as non-occupancy tenant in Ex.P-16 and P-15 i.e. copies of Jamabandi for the years 1996-97 and 1995-96 in the column of possession. No doubt, the legal presumption of truth is attached to these Jamabandi entries but presumption is rebuttable.

16. In the instant case, plaintiffs and proforma defendant, on the basis of the entries in the Jamabandi, cannot be held to be in possession of the suit land, especially when appellants-plaintiffs have failed to prove on record that on what basis names of Shri Kanshi Ram and Bhagtoo, predecessors-in-interest of the plaintiffs and proforma defendant, came to be recorded in revenue record in the year 1931-32. When it is an admitted case of the plaintiffs that defendants are owners of the suit land, it was incumbent upon them to place on record order or

direction, if any, passed by Revenue Authorities to the effect whereby S/Shri Kanshi Ram and Bhagtoo, their predecessors-in-interest were ordered to be entered in possession of the suit land. The plaintiffs and their predecessors have been recorded in possession of the suit land in Ex.P-4 to Ex.P-14, copies of Jamabandi for the years 1935-36 to 1991-92. Admittedly, plaintiffs have not produced any rapat Roznamcha, from where it could be inferred that some orders were passed by the Authorities to make change in the revenue entries, which were admittedly prior to the year 1935-36, were in the name of predecessor-in-interest of respondent-defendant. Similarly, there is nothing in pleadings brought on record by the plaintiffs-appellants suggestive of the fact that they are in possession of the land as tenants and as such learned first appellate Court rightly came to conclusion that entries recorded them in the suit land is wrong and illegal and without any basis. Similarly, it is admitted case of the appellants-plaintiffs that they have not placed on record the mutation which was entered about the mortgage and moreover such mortgage was not admittedly attested in favour of the plaintiffs, rather it was cancelled by the revenue Authorities and as such learned Court below rightly concluded that the plaintiffs, on the basis of such mutation, cannot assert that their possession came to be recorded in the revenue record. Since mutation of mortgage was not attested by the Tehsildar, rather it was ordered to be rejected, entry, if any, made on the basis of the same was rightly held to be illegal by revenue Authority in its order dated 26.10.1996 Ex.D-1.

17. Apart from above, there is nothing in the oral evidence led on record by the plaintiffs, which could persuade this Court to hold that they were in possession of the suit land, rather statements made by the plaintiffs' own witness suggests that suit land was lying vacant on the spot, as the defendant had shifted to village Bagguwal in Tehsil Kasauli. Apart from above, nature of suit land is recorded as Banjar Kadim, Gair Mumkin Bird, Ghasni, as is reflected in Ex.P-14 to Ex.P-17 i.e. copies of Jamabandi for the year 1991-92, 1995-96 and 1996-97. The aforesaid entries are continuous since beginning, therefore, it is evident that the suit land is not in cultivating possession of the plaintiffs. Similarly, there is no evidence brought on record by the plaintiffs suggestive of the fact that they had changed the nature of the land or had done any other overt act, hence, learned court below rightly came to conclusion that the plaintiffs also cannot be held to be in possession of Banjar Kadim and Gair Mumkin land and possession of such land, which is barron and uncultivated is followed by the title holder.

18. Apart from above, perusal of order passed by Land Reforms Officer shows that plaintiffs and proforma defendant have claimed themselves to in possession of the suit land as non-occupancy tenant on payment of rent and have claimed that entry in favour of the respondent-defendant was wrong and illegal. The plaintiffs claimed before Land Reforms Officer that they were inducted in possession over the suit land, which stand is totally contrary to the stand taken in the instant suit, wherein they have claimed themselves to be in possession of the suit land on the strength of Jamabandi for the year 1931-32. Moreover, there is nothing in pleadings suggestive of the fact that they were inducted as non-occupancy tenant. Similarly, there is no mention, if any, with regard to their induction as a tenant on the suit land in the year 1926. Hence, this Court, after having carefully perused the pleadings as well as order passed by learned Revenue Authorities, sees substantial force in the arguments made by Mr.Ramakant Sharma, learned Senior Counsel, that there is complete variation in stand taken by the appellants-plaintiffs before trial Court below as well as Revenue Authorities and as such there is no illegality and infirmity in the judgment passed by the learned first appellate Court.

19. After having carefully perused impugned judgment passed by learned first appellate Court as well as record of Court below, this Court sees no illegality and infirmity in the judgment passed by the learned first appellate Court, which is apparently based upon correct appreciation of evidence adduced on record by the respective parties. Appellants-plaintiffs have not been able to prove their possession over the suit land, rather there is overwhelming evidence led on record by the respondent-defendant suggestive of the fact that name of predecessor-in-interest of the plaintiffs-appellants was wrongly recorded in the column of possession in the revenue record, which was rectified in accordance with law by the Revenue Authorities in the proceedings having been filed by the respondent-defendant. Moreover, at the cost of repetition, it

may be stated that findings qua the ownership and possession of the respondent-defendant as returned by Land Reforms Officer have attained finality and as such same could not be looked into in the present proceedings by the Court below. Substantial question of law is answered accordingly.

20. Consequently, in view of detailed discussion made hereinabove, this Court sees no reason to interfere in the judgment passed by first appellate Court, which is based upon the proper appreciation of evidence as well as law. Hence this appeal is dismissed. Accordingly judgment passed by learned first appellate Court is upheld and that of the learned trial Court is quashed and set aside. There shall be no order as to costs. Interim order, if any, stands vacated. All miscellaneous applications are disposed of.

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

State of Himachal Pradesh .....Applicant/appellant
Versus
Dharmender Singh .....Respondent

CrMP(M) No. 265 of 2017
Decided on: May 5, 2017

Code of Criminal Procedure, 1973-Section 378- A case was registered against the accused for the commission of offences punishable under Sections 354, 323 and 504 IPC and Section 3(1)(x) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989- the Special Judge acquitted the accused after holding that case was not proved beyond reasonable doubt – aggrieved from the judgment, the State preferred an application to grant leave to file appeal – held that no evidence was led to prove that accused was not a member of scheduled caste community- there are variations in the statement of the complainant made before the Court and the statement made before the Police –material witnesses were not examined – Trial Court had taken a reasonable view while deciding the matter.(Para- 7 to 15)

For the applicant: Mr. P.M. Negi, Additional Advocate General.
For the respondent: Nemo

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

By way of instant petition under Section 378 (3) CrPC, the State has sought leave of this Court to file appeal against judgment dated 30.11.2016 passed by the learned Special Judge, Hamirpur, Himachal Pradesh in Sessions Trial No. 04 of 2015, whereby respondent-accused (hereinafter, 'accused'), who was charged with and tried for the commission of offence punishable under Sections 354, 323 and 504 IPC and, Section 3(1)(x)(xi) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter, 'Act'), has been acquitted of the aforesaid charges.

2. Briefly stated the facts as emerge from the record are that the complainant is wife of one Shri Kulwant Rai Sandhu, who is running "Sandhu Health Clinic" at Village Mair and accused is also running Dental Clinic in the shop adjoining to that of the husband of complainant. Both are tenants of one Shri Sansar Bandhu son of Shri Ram, resident of village and post office Mair, Tehsil and District Hamirpur. Complainant is a '*Chamar'* by caste, which is recognized as Scheduled Caste under the Constitution (Scheduled Caste) Order, 1950 and Scheduled Castes and Scheduled Tribes Order (Amendment) Act, 1976. It is alleged that on

15.9.2013, at about 3 pm, accused came to the shop of the complainant and started abusing her, tore her clothes and made unwelcome and explicit overtures causing her sexual harassment and also caused simple hurt to the complainant. It is further alleged that accused intentionally insulted the complainant by abusing her with an intent to humiliate her in public place and in public view. Complainant filed complaint on the aforesaid allegations in the Police Station Hamirpur. FIR No. 257/2013 dated 16.9.2013 under Sections 354 and 504 IPC and Section 3(1)(x)(xi) of the Act was registered against accused at Police Station Sadar, District Hamirpur. Complainant was medically examined. Statement of complainant under Section 164 CrPC was recorded before Judicial Magistrate 1st Class, Court No. IV, Hamirpur on 26.9.2013. Spot map was prepared and statements of witnesses were recorded under Section 161 CrPC. Challan under Sections 354, 323 and 504 IPC and Section 3(1)(x)(xi) of the Act, was prepared against accused and case was committed by the Chief Judicial Magistrate, Hamirpur on 28.11.2014. Learned Special Judge, below, on finding a prima facie case against accused, charged him for the commission of offence punishable under Section 354A and 323 IPC and Section 3(1)(x)(xi) of the Act, to which accused pleaded not guilty and claimed trial.

3. Subsequently, the Special Judge below, vide judgment dated 30.11.2016, acquitted the accused of the aforesaid charges by concluding that the prosecution has not been able to prove the case beyond all reasonable doubt. In the aforesaid background, State preferred instant petition, seeking leave of this Court to file appeal against the judgment of acquittal passed by learned Special Judge.

4. Mr. P.M. Negi, learned Additional Advocate General, vehemently argued that impugned judgment passed by the learned trial Court is not sustainable in the eye of law as the same is not based upon correct appreciation of evidence adduced on record by the prosecution and as such same deserves to be set aside. Mr. Negi, while inviting attention of this Court to the impugned judgment passed by learned trial Court vis-à-vis evidence led on record by the prosecution, strenuously argued that prosecution proved beyond reasonable doubt that the accused intentionally humiliated the complainant by calling her bad names. Mr. Negi, further contended that there is ample evidence, be it ocular or documentary, adduced on record by the prosecution, suggestive of the fact that on 15.9.2013, accused entered the shop of complainant and abused her in the presence of certain persons, as a result of which, great humiliation was caused to the complainant. In the aforesaid background, Mr. Negi, prayed that leave to appeal may be granted and accused may be convicted for the charges framed against him, after setting aside the judgment of acquittal.

5. Since the matter has come up before this Court for the first time today, as such, learned Additional Advocate General was requested to make available record of the State, in the case i.e. pleadings of the parties, statements of witnesses and exhibits, relied upon by the Court below. The record provided by the learned Additional Advocate General, was perused.

6. With a view to ascertain the genuineness and correctness of the aforesaid submissions having been made by Mr. Negi, learned Additional Advocate General as well as to ensure that impugned judgment passed by learned trial Court is not perverse, this Court carefully examined and perused impugned judgment as well as record maintained by the office of Advocate General, perusal whereof, certainly does not suggest that learned court below misappreciated, misconstrued or misread the evidence led on record by the prosecution, rather this court, after having carefully perused impugned judgment, has no hesitation to conclude that prosecution failed to prove its case beyond reasonable doubt and, as such, learned Special Judge rightly acquitted the accused of the charges framed against him. Close scrutiny of impugned judgment passed by learned Court below clearly suggests that no evidence worth the name was led on record by prosecution to prove that accused was not a member of the scheduled caste community, because, as per Section 3(1)(x) of the Act, it was incumbent upon the prosecutrix/complainant to prove that accused was not a member of scheduled caste or scheduled tribe and he intimidated the complainant with an intent to humiliate her in public place and within public view.

7. In the instant case, prosecution though proved on record that complainant is a member of Scheduled Caste community, as defined under the under the Constitution (Scheduled Caste) Order, 1950 and Scheduled Castes and Scheduled Tribes Order (Amendment) Act, 1976, but, certainly, no evidence is made available on record to conclude that accused was not a member of the aforesaid community and he intentionally insulted or intimidated complainant with an intent to humiliate her in public place and within public view.

8. At this stage, this Court deems it fit to reproduce provisions of Section 3(1) of the Act as under:

> "3(1) Whoever, not being a member of Scheduled Caste or Scheduled Tribe:
>
> (x) intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within the public view;
>
> (xi) assault or uses force to any woman, belonging to a Scheduled Caste or a Scheduled Tribe with intent to dishonour or outrage her modesty.
>
> (xii) to (xv)x x x x x x
>
> shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to five years and with fine"

9. Aforesaid provision of law, as reproduced herein above, certainly suggests that, if a person, not belonging to the community of Scheduled Caste or Scheduled Tribe, intentionally insults or intimidates, with an intent to humiliate a member of the Scheduled Caste or Scheduled Tribe, in any place, within the public view, shall be liable to be punished in terms of provisions of aforesaid Act, meaning thereby, it was incumbent upon the prosecution to prove in the first place that accused was not a member of the Scheduled Castes and Scheduled Tribes community. But, in the instant case, as clearly emerges from the record, no evidence worth the name has been led on record by prosecution to prove the caste of accused, rather, there is total variation in the oral evidence as well as documentary evidence led on record by the prosecution qua the caste of accused. Complainant, in her statement, has alleged that accused is a *Brahmin* by caste, whereas prosecution, with the help of Ext.PW-8/A, has made an endeavour to prove on record that the accused was *Rajput* by caste, otherwise also, none of the prosecution witnesses has stated anything specific with regard to the caste of accused, as such, learned Court below rightly rejected the case of the prosecution on this ground.

10. Otherwise also, this Court had an occasion to peruse statements of prosecution witnesses, perusal whereof nowhere suggests that prosecution was able to prove its case strictly in terms of Section 3(1)(x)(xi) of the Act.

11. Though, PW-1, in her statement stated that on 15.9.2013, at about 3 pm, accused entered the clinic being run by her husband, in his absence and started abusing her, but there is no independent witness as such to corroborate the aforesaid version put forth by the complainant. No reliance, if any, could be placed upon PW-2, husband of complainant, who was not present at the place of occurrence. PW-3 Raj Kumar though corroborated the version put forth by the complainant that he found accused calling the complainant bad names but if his statement is read in its entirety, it certainly suggests that he was not present at the spot at the time of alleged incident, rather he came little late because, he categorically stated that he intervened and went inside the shop, where accused again called complainant by bad names.

12. This court, finds that there is complete variation in the statements of complainant made before the Court and the statement made before the police, at the time of recording statement under Section 154 CrPC. Conjoint reading of aforesaid prosecution witnesses, certainly suggests that there is complete variation with regard to details of actual words and caste related remarks, if any, uttered by the accused, as such, learned Court below

rightly concluded that it was difficult to infer as to what words were actually uttered by accused in order to insult the complainant in a public place within the public view. This Court also finds from the record that it has come in the statement of the complainant that she also filed such cases against Shri Sansar Bandhu, who happened to be landlord of her husband. Both, PW-1 and PW-2, have admitted in their cross-examination that they have also filed cases under the Act against Sansar Bandhu and in that regard, they received compensation and monetary relief under the Act.

13. Interestingly, prosecution has made endeavour to prove that the incident occurred in the main Bazaar, wherein admittedly, more than 50-60 shops exist, but, no independent witness from that locality/bazaar was associated by the prosecution to prove its case beyond reasonable doubt. Plea put forth by PW-3 Raj Kumar, so called eye witness is also doubtful in view of statement Ext. DL, recorded by the police during investigation, one Shri Ajay Kumar, in his statement recorded by the police during investigation, categorically stated that aforesaid Raj Kumar PW-3 was present in the Hotel on 15.9.2013 and was offered money by the husband of complainant for deposing falsely, in his favour. True it is, that no reliance could be placed upon the statement of aforesaid Ajay Kumar, Ext. DL, but, keeping in view the material on record, wherein, it clearly emerges that complainant as well as husband of the complainant have been filing complaints under the Act against other persons also, learned Court below, rightly placed reliance upon the statement of Ajay Kumar. It also emerges from the record that during the investigation, investigating officer, had recorded statement of Sansar Bandhu, landlord of the husband of complainant, as well as accused Kuldeep Singh alias Bantu and Suresh Kumar, Exts. DG, DH and DJ, respectively but, for the reasons best known to the prosecution, none of these witnesses was cited as prosecution witness.

14. Hence, this Court is compelled to draw adverse inference against the prosecution for withholding evidence, which could be material in deciding controversy at hand. Apart from above, this Court had an occasion to peruse MLC, Ext. PW-4/A, which nowhere suggests that injury, if any, was found on the person of the complainant. Though, complainant, in her statement, claimed that she was not taken for medical examination by the Police, but perusal of MLC, Ext. PW-4/A, which has been duly proved on record by PW-4, Dr. Vinod Gupta shows that false stand has been taken by the complainant. Dr. Vinod Gupta, PW-4 has specifically stated that medical examination of the complainant was carried out by him and it failed to suggest any external injury sustained by the complainant.

15. Consequently, in view of discussion made herein above, this Court sees no illegality or infirmity in the impugned judgment passed by learned Special Judge, as such, same is upheld. Leave to appeal is rejected. Petition is dismissed.

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

Gulab Singh & another ....Petitioners.
Versus
Smt. Manorama Devi and others ....Respondents.

Civil Revision No. 89 of 2015.
Reserved on: 19.04.2017.
Date of Decision: 8th May, 2017.

Hindu Adoption and Maintenance Act, 1956- Section 18- Applicants applied for interim maintenance- the Court allowed the application and awarded maintenance @ Rs. 3,000/- per month – held in revision that the Court has the power to grant interim maintenance –the applicants has a right to inherit the ancestral property and would get the income from the same-

no evidence was led and it was not proper to rely upon the pleadings at this stage – the revision allowed- order passed by Trial Court set aside- Trial Court directed to conclude the trial of the suit within six months. (Para- 3 to 8)

Cases referred:
Rajesh Burman versus Mitul Chatterjee (Burman), (2009)1 SCC 398
Atul Shashikant Mude vs. Niranjana Atul Mude, AIR 1998 Bombay 234

For the Petitioners: Mr. Sunil Mohan Goel, Advocate.
For the Respondents : Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant Civil Revision Petition is directed against the impugned order recorded by the learned Additional District Judge, Solan, H.P., on 04.04.2015, whereby, he granted interim maintenance to Miss Ridhima and Miss Sidhima, the minor daughters of deceased Sanjay Shandil, interim maintenance whereof is comprised in a sum of Rs. 3000/- each per month.

2. The learned counsel appearing for the petitioners has with much vigour contended that the reason assigned by the learned trial Court for granting interim maintenance in favour of the aforesaid minor daughters of deceased Sanjay Shandil, is ridden with a pervasive taint of illegality, comprised in want of statutory provisions apposite thereto standing engrafted in the Hindu Adoption and Maintenance Act (hereinafter referred to as the "Act").

3. Contrarily, the learned counsel appearing for the respondents, for validating the impugned pronouncement recorded by the learned Additional District Judge, relied upon a decision rendered by the Hon'ble Apex Court in ***Rajesh Burman versus Mitul Chatterjee (Burman), (2009)1 SCC 398,*** wherein, the Hon'ble Apex Court, has while making an in depth analysis of the provisions of the Act, has pronounced that irrespective of want of any statutory provisions standing engrafted in the Act, for leveraging a claim of the plaintiffs' for interim maintenance, yet the husband is entailed with an obligation pay interim maintenance to the aggrieved, "only" with respect to monetary sums covering expenses incurred by her towards her medical treatment. Relevant paragraph No.30 of the judgment supra stands extracted hereinafter:-

> "30. Recently in *Ajay Saxena v. Rachna Saxena, AIR 2007 Del 39*, analysing the provisions of Hindu Adoptions and Maintenance Act, 1956, the Court held that in a suit under Section 18 of the Act, the wife can claim interim maintenance. It was further held that such interim maintenance may also cover expenses incurred towards medical treatment. Obligation of the husband to pay such expenses cannot be deferred till final adjudication of the suit. Nor can husband avoid obligation to pay further sum to his wife towards medical reimbursement on the ground that the amount of interim maintenance being passed included entire expenses on medical treatment. (See also Mangat Mal v. Punni Devi, (1995)6 SCC 88)" (....P.406)

4. The innate nuance of the verdict pronounced by the Hon'ble Apex Court in Rajesh Barman's case (supra), does leverage the espousal of the aggrieved, to claim interim maintenance from her husband, yet the clout of the pronouncement is restricted for validating only those claims of interim maintenance which cover "only" the expenses incurred by the aggrieved towards hers medical treatment also obviously, the grant of interim maintenance vis-a-vis the aggrieved plaintiffs' dehors no statutory provisions apposite thereto standing engrafted in the Act, is with a further implied rider that the liability thereof being fastenable only upon the surviving husband of the aggrieved. The learned counsel appearing for the respondents, has also

relied upon a pronouncement made by the Hon'ble Bombay High Court in ***Atul Shashikant Mude vs. Niranjana Atul Mude, AIR 1998 Bombay 234,*** wherein, the Hon'ble Bombay High Court has recorded an explicit judicial mandate that absence of any express provisions in the "Act", with respect to the grant of interim maintenance would not be either fatal to the success of an application "filed" for grant of interim maintenance by the aggrieved plaintiff during the pendency of the "suit" nor curtails the power of the Civil Court to rely upon the provisions of Section 151 of the Code of Civil Procedure, conspicuously, when there is no express prohibitive provision, cast in the apposite statute against rendition of affirmative orders by the Civil Court upon an apposite application for grant of interim maintenance.

5. Apparently, both the decisions as relied upon by the learned counsel appearing for the respondents, do succor his submission that there occurs no absolute bar upon Civil Courts against theirs granting relief of ad interim maintenance to the aggrieved plaintiffs, yet the occurrence of a visible graphic fact as borne in the pronouncement(s) recorded in the aforesaid citations, fact whereof, is constituted by the pronouncements aforestated fastening the apposite liability upon the surviving husband of the aggrieved plaintiff, "whereas", the impugned order hereat occurring with respectively the husband and the father of the aggrieved not surviving. Contrarily, also when the extant claim for interim maintenance, in a suit constituted under the Act, is reared against the estate of the predeceased husband of plaintiff No.1/respondent No.1 herein, rather hence, brings to the fore, an apparent distinctivity inter se the factual scenario existing in the aforesaid citations vis-a-vis the factual scenario prevailing in the instant case. Also in their suit, the plaintiffs foist their claim for maintenance against the estate of their predecessor-in-interest, foisting whereof is averred to be holding an aura of tenability, arising from the fact of the estate of their predecessor-in-interest holding traits and characteristics of it being construable to be ancestral coparcenary property, wherein,on his demise, they obviously hold an indefeasible right to inherit it. The sequel of the aforesaid manner, of rearing by the plaintiff(s), of their apposite claim upon the estate of their predecessor-in-interest, comprised in the fact of it holding besides partaking the traits of ancestral coparcenary property, fact whereof remains not firmly denied by the defendants, thereupon, with no personal claim for maintenance being reared by the plaintiffs upon the salary or income derived from the respective avocations of the defendants also when the fact of the estate of the deceased holding the tinge of it being construable to be ancestral coparcenary property, hence, theirs holding a right to inherit it along with the defendants, remains not firmly denied by the contesting defendants. The obvious corollary thereof is, hence, when from the estate of the deceased, obviously, income may accrue to the plaintiffs, in aftermath, awaiting the plaintiffs' acquiring through inheritance the estate of their predecessor-in-interest, it was insagacious for the learned trial Court, to make an order for grant of ad interim maintenance with respect to the aggrieved concerned also it was insagacious for the learned trial Court, to, order for the grant of interim maintenance being satisfied from the salary of the defendants and from not the profits earned by them from the estate of their predeceased son, whereupon, hence as aforestated, they prima facie untenably stand fastened with a liability to personally satisfy the mandate of the order granting interim maintenance. The reason for forming the aforesaid conclusion, is, for reiteration besides for emphasis earned by the trite fact of its being in stark dichotomy with the plaintiffs rearing in their suit, a claim for maintenance against the defendants, claim whereof is harboured upon the fact of theirs holding the estate of their predecessor-in-interest, estate whereof holds or partakes the trait of it being construable to be an ancestral coparcenary property, wherein they hold a right to inherit it, fact whereof remains not firmly denied by the defendants. Corollary whereof, is on the plaintiffs inheriting the estate of their predecessor-in-interest, they may rear an income therefrom, whereupon, their claim in the suit may suffer frustration. Sequel whereof, is of the impugned order being prima facie construable to stand rendered in a post haste manner, also with the learned trial Court remaining oblivious tot he impact of the aforestated pleaded factum.

6. Be that as it may, as aforestated, the clout of the pronouncement of the Bombay High Court made in *Atul Sashikant Mude's case (supra)*, "save and except" that dehors want of statutory provisions apposite thereto standing engrafted in the Act, the Civil Court(s) holding

jurisdictional empowerment to award interim maintenance upon the aggrieved plaintiffs, "is immensely diluted" by a subsequent pronouncement thereto recorded by the Hon'ble Apex Court in Rajesh Burman's case (supra), wherein, contrarily, the Hon'ble Apex Court has restricted the grant of ad interim maintenance vis-a-vis the aggrieved only with respect to it being confined to cover the expenses incurred by the spouse upon her medical treatment. Hence, obviously with the verdict of the Bombay High Court recorded in *Atul Sashikant Mude's case (supra)*, hence, holding no prevalence with respect to the facts at hand, conspicuously when the aggrieved plaintiffs do not within the ambit of the verdict of the Hon'ble Apex Court in *Rajesh Burman's case (supra)* claim interim maintenance confined to cover expenses incurred towards their medical treatment also rather when their claim is directed purportedly towards the income reared by the petitioners/defendants from the estate of the deceased husband of plaintiff No.1, thereupon, also the impugned order directing the apposite liability being satisfied from the income reared by the defendants from their respective avocations,hence, warrants interference.

7. Apart from the aforesaid discussion, the learned trial Court had merely dwelt upon the contention(s) reared in the pleadings of the respective parties. The learned trial Court has not either struck issues on the relevant pleadings nor has asked for adduction of evidence thereon. Consequently, imputation of credence by it to the pleadings of the plaintiffs is also unwarranted.

8. For the foregoing reasons, the instant Civil Revision Petition is allowed and the impugned order is quashed and set aside. The parties are directed to appear before the learned trial Court on 8th June, 2017. The learned trial Court is directed to conclude the trial of Civil Suit within six months. All pending applications also stand disposed of. Records be sent back forthwith.

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

Maina Devi & another .....Appellants.

Versus

Baru Devi & others .....Respondents.

RSA No. 493 of 2005
Reserved on: 18.04.2017
Decided on: 08.05.2017

Specific Relief Act, 1963- Section 38- Plaintiff pleaded that he is owner in possession of the suit land – defendants threatened to dispossess the plaintiff from the suit land without any right to do so- hence, the suit was filed for seeking injunction- the defendants pleaded that defendant No.2 had filed a suit for possession by way of ejectment in which the present plaintiff was arrayed as defendant No.4- the suit was decreed and defendant No.2 became the owner – plaintiff has no right over the suit land – the suit was decreed by the Trial Court- an appeal was filed, which was dismissed- held in second appeal that defendant No.2 had filed a civil suit in which original plaintiff was arrayed as defendant No.4- the suit was compromised and 9 Biswas of land was given to the original plaintiff - application for correction was filed, which was dismissed- plaintiff being the owner has a right to restrain the stranger from interfering with his ownership and possession- the suit was rightly decreed by the Trial Court- appeal dismissed. (Para- 11 to18)

For the appellants. Mr. Anand Sharma, Advocate.
For the respondents.Mr. Nikhil Khanna, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present regular second appeal has been maintained by the appellants, who were defendants before the learned Trial Court (hereinafter referred to as "the defendants"), challenging the judgment and decree, dated 18.06.2005, of the learned District Judge, Kullu, H.P. passed in Civil Appeal No. 83-04, whereby the judgment and decree, dated 30.09.2004, passed by learned Civil Judge (Senior Division), Lahul and Spiti at Kullu, H.P. passed in Civil Suit No. 48 of 1999, was upheld wherein the suit of the respondent, who was plaintiff before the learned Trial Court (hereinafter referred to as 'the plaintiff'), was decreed.

2. At the very outset it wroth mentioning that the instant appeal has been preferred by the appellants and appellant No. 1, Smt. Maina Devi, is daughter and legal representative of Smt. Dodi (defendant No. 1 before the learned Trial Court), as Smt. Dodi died during the pendency of appeal before the learned First Appellate Court. The respondents in the present appeal are the legal representatives of Shri Dinu Ram (the original plaintiff), who also died during the pendency of the present appeal.

3. Briefly, the key facts, which are indispensable for determination and adjudication of the present appeal, are that the original plaintiff maintained a suit in the Court of first instance seeking a decree of permanent prohibitory injunction by restraining the defendants from making any type of interference in the land comprised in Khata Khatauni No. 947/1777 min, Khasra No. 6098/4967, measuring 0-3-0 bighas, situate in Phati Hallan, Kothi Naggar, Tehsil and District Kullu, H.P. (hereinafter referred to as "the suit land"). The original plaintiff alleged that he was the owner-in-possession of the suit land, a portion of which was *abadi,* having his house, and rest of the land was agricultural land. As per the original plaintiff, he became the original owner of the suit land vide mutation No. 7137, dated 08.08.1996, and defendants have no right, title and interest over the same. The defendants threatened the original plaintiff to dispossess him. Defendant No. 2 is a deity, i.e., *"Devta Gopal Ji"* of Sarsei and original defendant No. 1 was the '*Kardar'* of defendant No. 2. The defendants did not accept the claim of the original plaintiff, thus the original plaintiff maintained a suit for injunction against the defendants.

4. The defendants, by way of filing the written statement, contested and resisted the suit of the plaintiff. Preliminary objections, viz., maintainability, non-joinder of necessary parties, suppression of material facts, resjudicata, estoppel and that the suit has not been properly instituted, were raised. On merits, it is averred that the original plaintiff was neither owner nor in possession of the suit land. It was contended that defendant No. 2, maintained a suit for possession, by way of ejectment under Sections 34 and 58 of the H.P. Tenancy and Land reforms Act, 1972, and plaintiff was arrayed as defendant No. 4 therein. The said suit was decreed vide judgment and decree dated 18.01.1990. Consequently, defendant No. 2 became owner of Khasras No. 4967 and 3836 to extent of 9 biswas and Khasras No. 4465 and 4466 to the extent of 1/4th share. It was averred that the suit land was also part of the suit property in the aforesaid civil suit, wherein decree for possession was passed in favour of defendant No. 2, i.e., *"Devta Gopal Ji".* As per the defendants, a compromise decree was passed in the abovementioned suit *inter se* the parties. As per the covenant, land measuring 0-9-0 bighas, out of Khasras No. 4967 and 3836 was agreed to be left in favour of the plaintiff. It was further averred that the original plaintiff approached the defendants and accentuated them that instead of giving land measuring 9 biswas in Khasras No. 4967 and 3836, as held in the decree passed in the abovementioned suit, he may be given 9 biswas of land in Khasra No. 3836, so as to avoid severance of land and he may enjoy a single compact plot. The said proposal was accepted and in sequel the plaintiff was given 9 biswas of land in Khasra No. 3836, which was assigned *Shikmi* Khasra No. 3836/1. As per the defendants, the plaintiff had no right, title and interest over the suit land and the same is left for them by the original plaintiff himself. It was further averred that behind the back of the defendants and in collusion with the revenue officials, the original plaintiff instead of getting mutation attested qua land measuring 0-9-0 bighas, out of Khasra No. 3836, got the mutation

No. 3137, dated 08.08.1996, attested, qua land measuring 0-12-0 bigha, Khasras No. 3836/1 and 6098/4967, i.e., the suit land. As per the defendants, the original plaintiff got the said mutation attested on the basis of compromise decree passed by the learned Sub Divisional Collector, Kullu, thus they were not bound by the said decree. Precisely, the stand of the defendants, while filing the written statement, was that the plaintiff had no right, title and interest over the suit land and the same was wrongly and illegally bifurcated in *Shikmi* Khasra No. 6098/4967. It was further averred that on the basis of settlement, the original plaintiff had sold land measuring 0-9-0 bighas, comprised in khasra No. 7836/1 to one Shri Nes Ram, by way of a registered sale deed, dated 14.09.1998, which he could not have sold. Subsequently, the original plaintiff got wrong mutation attested and entries incorporated in his favour so as to dispossess the defendants from the suit land. Lastly, the defendants averred that the original plaintiff had no right, title and interest over the suit land.

5. The original plaintiff filed replication wherein he ingeminated the averments made in the plaint and denied the contents of the written statements.

6. The learned Trial Court on 13.12.1999 framed the following issues for determination and adjudication:

> *"1. Whether the plaintiff is entitled to the relief of permanent injunction as prayed for? OPP.*
>
> *2. Whether the suit is not maintainable? OPD*
>
> *3. Whether the suit is barred by principle of resjudicata? OPD*
>
> *4. Whether the plaintiff is estopped by his acts and conduct from filing the present suit? OPD*
>
> 5. *Relief"*

7. After deciding issue No. 1 in favour of the plaintiff, issue No. 2 against the defendants, the suit of the plaintiff was decree. Issues No. 3 and 4 were not pressed before the learned Trial Court. Subsequently, the defendants preferred an appeal before the learned Lower Appellate Court which was also dismissed. Hence the present regular second appeal, which was admitted for hearing on the following substantial questions of law:

> *"1. Whether the judgment and decree passed by the learned Sub Divisional Collector, Kullu on 18.01.1990 and thereafter the dismissal of the application filed by the plaintiff-respondent for correction of the judgment and decree on 12.06.2000 would operate as resjudicata and the plaintiff-respondent was estopped from filing the present suit?*
>
> *2. Whether the learned Courts below erred in holding that the defendants/appellants should have challenged the judgment and decree passed by the learned Sub Divisional Collector, Kullu on 18.01.1990 and also the order dated 12.06.2000, which order was passed in favour of the defendants-appellants?*
>
> *3. Whether the learned Courts below have mis-construed the principle of estoppel and resjudicata?"*

8. I have heard the learned Counsel for the appellants and the learned Court for the respondents.

9. The learned counsel for the appellants has argued that the judgment and decree passed by the learned Lower Appellate Court affirming the judgment and decree of the learned Trial Court is not maintainable and the same is liable to be set aside simply for the reason that the plaintiff had already sold his land to one Shri Nes Ram vide sale deed dated 14.09.1998, so he has left with no land and the appeal is required to be allowed as the learned Courts below have not taken the into consideration. He has further argued that there is no evidence on record that defendant No. 2, '*Devta Gopal Ji*' stands duly represented and no decree could have been passed against an idol, who is taken as a minor. The learned counsel appearing for the respondents has

argued that the judgment and decree passed by the learned Lower Appellate Court affirming the judgment and decree passed by the learned Trial Court is based upon correct appreciation of evidence which has come on record and the same needs no interference. In rebuttal, the learned counsel for the appellants has argued that the suit filed by the original plaintiff was barred by the principle of resjudicata, which fact was never considered by the learned Courts below and further the learned Courts below have committed grave illegality in not appreciating the evidence in its right and true perspective.

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

11. It is true that defendant No. 2, *Devta Gopal Ji,* on 20.07.1981 maintained a suit for possession by way of ejectment under Sections 34 and 58 of the H.P. Tenancy and Land Reforms Act, 1972, against Nihal Chand and others before the learned Sub Divisional Collector, Kullu. The original plaintiff was defendant No. 4 in that suit. The suit land in that suit included the suit land in the present suit. Manifestly, there was compromise in the suit and the same was decided on 18.01.1990, vide judgment, Ex. D-4 and decree, Ex. D-3. The relevant portion of the order of the Collector in that suit reads as under:

> *"This suit coming for final disposal today before me (S.R. Thakur Collector, Kullu Sub Division, Kullu) in the presence of Shri B.C. Thakur, Advocate for the plaintiff and shri Chetu for the defendants. It is ordered tht the suit of the plaintiff is decreed partly and the plaintiff is entitled to get joint possession of the suit land fully detailed herein to before barring Khasra No. 4967 and Khasra No. 3836 to the extent of 9 Biswas and Khasra No. 4465 and 4466 for 1/4th share therein which was once held by Smt. Atmu as tenant at will."*

Further on 12.06.2000, on an application, the Collector, Sub Division Kullu, passed the following order:

> *"From the perusal it has been found tht the plaintiff Devta Gopal Ji has been entitled to get the joint possession of the disputed land fully detailed in the judgment barring Khasra No. 4967 measuring 0-4 biswas and Khasra No. 3836 to the extent of 0-9 biswas and Khasra No. 4465 and 4466 for 1/4th share which was once held by Smt Atmu as tenant at Will. Thus it is clear that Khasra No. 4967 measuring 0-4 biswas and Khasra No. 3836 to the extent of 0-9 biswas has already been exclusided from the entitlement of joint possession of the plaintiff. Therefore, the application moved by the defendan t No. 4 is without any substance as the relief claimed by the defendant No. 4 has already been given by the Collector in his Judgement and Decree passed on 18.1.90. Hence this application is dismissed."*

Thus, it is clear that some land has already been given to the plaintiff, which was to the extent of 9 biswas in Khasra No. 3836 and 4 biswas in Khasra No. 4967.

12. Therefore, as per the judgment, Ex. D-4, the suit of the plaintiff was decreed partly entitling the plaintiff to get joint possession of the suit land barring Khasra No. 4967, as a whole, and Khasra No. 3836 to the extent of 9 (nine) biswas. In fact, the above land includes the suit land in the present case as well. There is also no dispute qua filing of application under Sections 151 and 152 CPC by the original plaintiff, Shri Dinu Ram, for correction and amendment of judgment and decree. Apparently, the application was filed by the original plaintiff on 01.11.1999 in the said civil suit. The original plaintiff sought correction in the judgment and decree dated 18.01.1990 by incorporating therein that *"land comprised in khasra No. 4967 (suit land) measuring 4 biswas out of the land comprised in khasra No. 3836 measuring 0-19-0 bigha be shown to have been left in favour of plaintiff".* Learned Sub Divisional Collector, Kullu, dismissed the said application on 12.06.2000, whereby it was held that relief sought, by way of the application, by the plaintiff stood already granted to him. It was also clarified in the order dismissing the application that Khasra No. 4967, measuring 0-4-0 bigha has already been

excluded from the entitlement of the joint possession of the plaintiff. Furthermore, the judgment, decree and order in the application have not been challenged by any of the parties and the same have attained finality.

13. Precisely, the case of the defendants is that land measuring 9 (nine) biswas, out of Khasra No. 4967 and 3837, was left in favour of the plaintiff and not Khasra No. 4967, measuring 4 (four) biswas and 9 (nine) biswas of land out of Khasra No. 3836. The contention of the defendants is that total area of khasra No. 3836 is 0-19-0 bigha and after passing of compromise decree by the learned Sub Divisional Collector, Kullu, whereupon the plaintiff was entitled to occupy 9 (nine) biswas of land from two khasras No., i.e., 4967 and 3836, the plaintiff himself approached them and proposed that instead of giving land measuring 9 (nine) biswas in aforesaid two Khasras No., he may be given land measuring 9 (nine) biswas in one Khasra No. 3836 in order to avoid severance of land and to keep a single compact plot. The said offer was accepted by the defendants and settlement was effected *inter se* the parties. According to that settlement, out of Khasra No. 3836, 9 (nine) biswas of land was assigned *Shikmi* Khasra No. 3836/1 and was left to the plaintiff.

14. DW-1, Smt. Maina Devi, tendered her affidavit wherein she has testified and deposed the contents of the written statement in verbatim. She, in her cross-examination, has refused that 9 (nine) plus 4 (four) biswas of land was given in compromise to the plaintiff, however, the testimony of this witness remained uncorroborated. She has further deposed that as per the compromise, after passing of the said judgment and decree, the plaintiff was given 9 (nine) biswas of land, out of Khasra No. 3836. Thus, no land was given to the plaintiff in Khasra No. 4967. She has further testified that said 9 (nine) biswas of land, out of Khasra No. 3836 had been sold by the plaintiff vide sale deed dated 14.09.1998 to one Shri Nes Ram. There is no dispute qua execution of the sale deed of said 9 (nine) biswas of land out of Khasra No. 3836. The plaintiff has not produced any evidence qua compromise and relinquishing the land of Khasra No. 4967 in favour of the defendants. It is settled that mere attestation of mutation does not confer any right, title or interest, especially when any entry contrary to the interest of the plaintiff qua Khasra No. 4967 had been incorporated, the same had no binding effect on the rights of the plaintiff. Even if the plaintiff had left or relinquished his right in Khasra No. 4967, then a new right was to be created in favour of the defendants and the same was required to be created by a registered deed. The defendants have led no evidence qua the fact that the plaintiff had left his claim over the suit land. The defendants are claiming their right over the suit land on the basis of mis-construing, mis-reading and wrong interpretation of the judgment and decree, whereupon the plaintiff derived his title over the suit land. Statements, Ex. P-1 and Ex. P-2, are clear and unambiguous to the extent that whole of Khasra No. 4967 and 9 (nine) biswas of land, out of Khasra No. 3836, was left in favour of the plaintiff. However, the defendants, by resorting to mis-interpretation of the judgment and decree, are wrongly and unlawfully claiming their rights over the suit land. No settlement/compromise, as pleaded by the defendants, stands proved, which renders the claim of the defendants qua the suit land illegal and unlawful.

15. From the above, it is crystal clear that the judgment and decree passed by Sub Divisional Collector, Kullu, on 18.01.1990 was interpreted correctly by learned Sub Divisional Collector, Kullu, while passing order in the application of Dinu on 12.06.2000 and he has rightly arrived at the conclusion that the land was given to Dinu (plaintiff) to the extent he was claiming, thus the application was dismissed. Meaning thereby that the plaintiff has a fresh cause in case the defendants started interfering in the land and the suit was not barred by resjudicata and estoppel. Further as the defendants have not pressed the issues of suit being barred by resjudicata and estoppel before the learned Trial Court, the substantial question of law No. 1 is answered holding that the learned Court below has committed no illegality in appreciating the evidence and the same has been appreciated in its true and right perspective.

16. In fact, the judgment and decree passed by Sub Divisional Collector, Kullu, dated 18.01.2000, and the order dated 12.06.2000 passed on an application, were in favour of Dinu (plaintiff), whereby he was given land to the extent of 9 (nine) and 4 (four) biswas, in case the

defendants were dis-satisfied with the said judgment, decree and order, then they should have maintained an appeal. Substantial question of law No. 2 is answered holding that the learned Courts below have passed the judgment and decree within the confines of law.

17. Substantial question of law No. 3 is answered holding that the learned Courts below have neither mis-construed the principle of resjudicata nor failed to apply the law correctly to the facts of the present case. Thus, the judgments and decree passed by the learned Courts below needs no interference and the instant appeal, which sans merits, deserves dismissal and is dismissed. However, in view of peculiar facts and circumstances of the case, the parties are left to bear their own costs.

18. Pending miscellaneous application(s), if any, also stand(s) disposed of.

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

Rattan Lal .....Appellant
Versus
H.P. State Forest Corporation Ltd. .....Respondent

RSA No. 64 of 2005
Reserved on: 01.05.2017
Decided on: 08.05.2017

Code of Civil Procedure, 1908- Section 100- Defendant entered into an agreement for extraction of resin from 4500 blazes @Rs. 321 per quintal – the defendant could not extract the full quantity – hence, the suit was filed for the recovery of Rs.49,031/- from the defendant- the defendant filed a counterclaim for the recovery of Rs.28,381/- - the Trial Court decreed the suit of the plaintiff and dismissed the counterclaim – an appeal was preferred, which was dismissed- held in second appeal that agreement was not in dispute – 10% shortfall is permissible on account of fire, which was duly allowed to the defendant – the defendant had undertaken to pay the balance amount – there is no infirmity in the judgments and decrees passed by the Court- appeal dismissed.

(Para-12 to 26)

For the appellant. Mr. Ramakant Sharma, Advocate.
For the respondent. Mr. Bhupinder Pathania, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present regular second appeal has been maintained by the appellant, who was defendant before the learned Trial Court (hereafter referred to as "the defendant"), assailing the judgment and decree, dated 01.11.2004, of the learned District Judge, Hamirpur, H.P. passed in Civil Appeal No. 108 of 2002, whereby the judgment and decree, dated 04.09.2002, passed by learned Civil Judge (Junior Division), Barsar, District Hamirpur, H.P., passed in Civil Suit No. RBT 1998/97, was upheld.

2. The key facts, which are necessary for determination and adjudication of the present appeal, are that the respondent/plaintiff (hereinafter referred to as "the plaintiff") is a body incorporated under the Companies Act, owned and controlled by State of Himachal Pradesh and is having its Division Office at Hamirpur, which deals with the extraction of resin, as well as other activities relating to the forest produce. As per the plaintiff, the Divisional Manager of the Corporation is competent to institute a suit on behalf of the plaintiff. The case of the plaintiff is that on 5th March, 1994, the defendant entered into an agreement with the plaintiff, through its

Divisional Manager, Forest working Division, Hamirpur, for extracting the resin of lot No. 3/R/94. As per the said agreement, the defendant was given the contract to extract the resin from 4500 blazes @ Rs. 321/- per quintal. The minimum quantity of net pure resin which was to be collected by the defendant per one thousand blazes was 42 quintals. Thus, the defendant was required to extract 189 quintals of pure resin and deposit the same in the resin depot at Bara. However, as per the terms and conditions of the agreement dated 05.03.1994, the defendant could not extract the required quantity of net pure resin and he could only obtain 156.95 quintals, resulting a shortfall of 32.05 quintals of net pure resin, thus the amount recoverable from the defendant for extraction of less quantity @ Rs. 2500/- per quintal is Rs. 80,125/-. The damage caused by the defendant during the extraction work was 2710 tapped resin blazes, for which, the penalty @ Rs. 2/- per defective blazes comes to Rs. 5420/-. For the said extraction work the plaintiff paid a total sum of Rs. 23,129/- to the defendant and the defendant deposited Rs. 9,000/- as security at the time of the tender. The interest accrued thereon was Rs. 262/-. Hence, the amount, which is payable to the defendant is Rs. 9262/- and after deducting the security amount etc, the plaintiff is entitled to recover a sum of Rs. 49,031/- from the defendant. As per the plaintiff, in-spite of various requests so made, the defendant neither supplied the remaining quantity of resin nor made the payment of the amount. According to the affidavit dated 28.03.1994 given by the defendant, the defendant had agreed to deposit the balance amount, but he has failed to do so, despite various letters issued to him regarding payment of said amount.

3. The defendant, by way of filing the written statement, contested the suit of the plaintiff, wherein preliminary objections, qua, maintainability, estoppel and cause of action were raised. On merits, it was averred that defendant worked as a labour supply mate to the plaintiff for extracting resin from lot No. 3/R/94. The defendant further averred that his signatures were obtained on blank papers and no agreement was ever executed between the parties. The defendant has admitted the fact that he was to extract resin from 4500/- pine trees blazes. However, he denied that less quantity of resin was supplied by him. He alleged that the Incharge, Sara Depot, has not entered 71 tins of resin, which was supplied to him during the period of 16th to 31st October, 1994, this fact was brought to the notice of the plaintiff, as well as the local Police, but no action in this regard was taken. It was also averred that out of 4500/- blazes, 3304 blazes were destroyed due to fire in the forest, so the shortfall to the extraction of resin took place, thus he has not violated the terms and conditions of the agreement. It has been denied that the defendant has received many letters from the plaintiff and he admitted that only one letter, dated 16.09.1995 was received by him and the same was duly replied by him on 02.01.1996. Lastly, the defendant prayed for the dismissal of the case with costs.

4. The defendant has also preferred a counter claim against the plaintiff for the recovery of Rs. 38,921/- alongwith costs and interest @ 18% per annum, wherein he alleged that he worked as labour supply mate with the counter defendant in the year 1994-95, his job was to supply the labour for the extraction of resin from lot No. 3/R/94. It was further averred that the defendant was supposed to supply 189 quintals of resin, which was to be extracted @ 321 per quintals and he supplied 160.3 quintals of resin to the plaintiff-corporation. The rest of the resin could not be supplied by him, as the forest destroyed in fire. Further the Incharge of Bara Depot has also not entered 36 tins of resin consisting of 18 Kgs resin, per tin and this fact was also brought to the notice of the authority, but no action in this regard was taken. The total amount of labour payable to him for extraction of the resin is Rs. 50,381/- out of which, only Rs. 22,000/- have been paid to him by the plaintiff and he is entitled to recover a balance amount of Rs. 28,381/- alongwith the amount of security etc.

5. The plaintiff filed replication wherein he reiterated the averments made in the plaint and denied the objections of the defendant.

6. The plaintiff, by filing written statement to the counter claim raised preliminary objection qua maintainability, limitation, cause of action and that the counter claim has not been properly valued for the purpose of Court fee and jurisdiction. On merits, it was averred that the

plaintiff/defendant has supplied only 156.95 quintals of pure resin and he is not entitled to recover any amount from the corporation.

7. The learned Trial Court on 24.05.2000 framed the following issues for determination and adjudication:

"1. Whether the plaintiff is entitled to recover the suit amount alongwith costs and interest from the defendant as alleged? OPP.

6. Whether the suit is not maintainable in the present form? OPD

7. Whether the plaintiff is stopped from filing the suit by its act and conduct? OPD

8. Whether the plaintiff has a cause of action? OPP

9. Whether the defendant is entitled to recover the amount claimed alongwith costs and interest as alleged? OPD

10. Whether the counter claim of the defendant is not maintainable in the present form? OPP

11. Whether the counter claim in time barred? OPP

12. Whether the counter claim has not been properly valued for the purposes of court fee and jurisdiction? OPP

13. Whether the defendant has a cause of action for the counter claim? OPD

14. Relief."

8. After deciding issues No. 1, 4 & 6 in favour of the plaintiff, issues No. 2, 5 & 9 against the defendant, the suit of the plaintiff was decreed with costs and counter claim of the defendant was dismissed. Issues No. 3, 7 and 8 were not pressed before the learned Trial Court. Subsequently, the defendant preferred an appeal before the learned Lower Appellate Court which was also dismissed. Hence the present regular second appeal, which was admitted for hearing on the following substantial question of law:

"1. Whether the Courts below erred in not considering that the loss caused in the tapping of the turpentine was due to the fire which was not attributable to any negligence on the part of the appellant?

9. I have heard the learned Counsel for the parties.

10. The learned counsel for the appellant has argued that the findings recorded by both the learned Courts below are perverse as the same are contrary to the evidence on record and thus liable to be set aside. On the other hand, learned counsel for the respondent has argued that the learned Courts below have passed the judgments and decrees after taking into consideration each and every aspect of the case and also after considering the evidence on record, the judgments were passed after true appreciation of evidence, thus calls for no interference. He has further argued that the appellant/defendant has not filed appeal against the dismissal of his counter claim and decree of the learned trial Court, with regard to the dismissal of the counter claim and finding in the suit has attained finality, as the findings were given jointly in the civil suit and counter claim. In rebuttal, the learned counsel for the appellant has argued that the present appeal is maintainable against the findings given by the learned lower Appellate Court, affirming the judgment and decree of the learned trial Court, as both the learned Courts below have failed to take into consideration the facts with respect to the damage caused by the fire.

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

12. Plaintiff, in order to prove its case has examined Sh. Kashmir Singh as PW-1, who remained posted as Divisional Manager of Himachal Pradesh State Forest Corporation, Hamirpur, from October, 1991 to July, 1994, he has deposed that the contract of extracting resin was given to the defendant and its copy is Ext. P-1. The agreement was executed in presence of S/Sh. Munshi Ram and Dev Dutt, which bears the signatures of the defendant, as well as the

witnesses and as per the agreement, the defendant was asked to extract 189 quintals of resin from 4500 blazes @ Rs. 321/- per quintal. In his cross-examination, he stated that the agreement was read over by him to the defendant. He denied that during the relevant period, Sh. Pritam Chand was the Incharge of Bara Depot. He also denied that the incident of fire in forest was reported to him by Sh. Pritam Chand.

13. PW-2, has deposed that he was posted as Director (North), Forest Corporation, Dharamshala, w.e.f. May, 1994 to March, 1998 and Divisional Manager, Hamirpur used to work under him, who had written him to waive off the shortfall in the extraction of resin and as per terms and conditions of the agreement, he waived off 10% of the shortfall and asked to effect the recovery for the remaining shortfall. In his cross-examination he feigned ignorance about the reason of shortfall.

14. PW-3, Divisional Manager, Himachal Pradesh State Forest Corporation, Hamirpur, testified the letters Ext. P-3 & P-4, dated 21.04.1995 and 03.07.1995, which were issued to the defendant by him. In his cross-examination he admitted that the security, deposited by the defendant to the tune of Rs. 9,000/- was lying deposited with the Corporation.

15. PW-4, who was posted as Assistant Manager in the Forest Corporation at Bijhar w.e.f. 1991 to July, 1995, has admitted that he had written the letter, dated 15.08.1994, Ext. P-5, to the defendant and a copy of said letter was also sent to Divisional Manager, Hamirpur. In his cross-examination he admitted that the letters, in which the incident of fire in forest was reported, were written by Sh. Rattan Lal/defendant and Sh. Pritam Chand/depot Incharge and his report, Exts. D-1 & D-2 is also there.

16. Sh. Rattan Lal/defendant has stepped into the witness box as DW-1 and deposed that he has taken the contract of Bara jungle for extraction of resin. As per said contract, he was supposed to extract 189 quintals of resin. However, the forest caught fire and 3304 trees were either dried up or fell down. The said fact was also brought to the notice of Sh. Pritam Chand, depot Incharge, who reported the matter to the Block Officer and Assistant Manager, copies of which are Ext. D-1 & D-2. He has deposed that he also reported the matter to the Divisional Manager on 25.10.1994, but not action in this regard was taken. He further deposed that he had deposited 71 tins of resin w.e.f. 16.10.1994 to 31.10.1994, but only 35 tins were entered by the depot Incharge, and for which a complaint, dated 09.11.1994 was made by him to the Divisional Manager. He further stated that as he did not sell resin, so he is not required to pay the sale tax and his FDR of Rs. 9,000/- is lying deposited with the plaintiff. The plaintiff paid him only Rs. 22,000/-, and he is entitled to recover the balance labour charges, as well as amount of FDR from the plaintiff. In his cross-examination, he admitted that Ext. P-1, bears his signature. He denied that only 156.95 quintals of resin was supplied by him. He admitted that the penalty @ Rs. 2500/- per quintal could be imposed, in case of insufficient supply. He denied that Affidavit Mark-A was confirmed by him.

17. DW-2, depot Incharge, Bara forest, has testified that he has sent the report, Ext. D-1 to the Divisional Manager, Hamirpur, which bears his signatures. In his cross-examination, he denied that he has not entered all the tins of resin supplied by the defendant. He deposed that the defendant has only supplied 156.95 quintals of pure resin.

18. DW-3, Senior Assistant, Forest Corporation Hamirpur, has brought the record and proved Ext. DW-3/A and Ext. DW-3/B, copies of the complaints, dated 9.11.1994 and 22.10.1994.

19. In rebuttal, the plaintiff has examined three witnesses, wherein, PW-5-R, has deposed that the agreement, Ext. PW-5/A, has been signed by him as witness. In his cross-examination he deposed that the agreement was not read over in his presence.

20. PW-6-R, has deposed that the Affidavit, Ext. PW-6/A, bears his signatures as a witness. In his cross-examination he admitted that the Affidavit was got typed by the defendant at Hamirpur and at the time of execution of the Affidavit, he had read the same.

21. PW-7-R, retired, Divisional Manager, Himachal Pradesh Forest Corporation, Hamirpur, has deposed that the suit was instituted by him, as there was shortfall of approximately 32 quintals of resin. In his cross-examination, he feigned ignorance about the fact that the shortfall resulted due to the fire in the jungle.

22. In the learned trial Court, while arguing the case, agreement Ex.PW-5/A was admitted by the learned counsel for the appellant/defendant. From this evidence on record, it is clear that there was an agreement *inter se* the plaintiff and the defendant, which was duly executed for the extraction of the resin from the allotted jungle and the minimum quantity was also fixed. The case of the appellant/defendant is that resin could not be extracted due to fire in the jungle. On the other hand, defendant has also maintained counter claim and stated that the shortfall has occurred due to fire in jungle, as a result, bulk of blazes were destroyed and secondly 71 resin tins supplied by him at Bara depot between 16 to 31.10.1994 were not calculated by Incharge of the said depot, but no evidence in this regard is on record and PW-2, who was the Incharge of the Bara depot, has specifically denied such allegations. The report qua this aspect made by the defendant to the Divisional Manager of the Forest Corporation could not prove the allegations, as no evidence in this regard is brought on record and there is no proof to this aspect that 71 tins supplied by the defendant were not calculated by the Incharge, Bara depot.

23. It is admitted fact that on account of fire in the forest, 10% shortfall was permitted to the defendant from the contractual obligations by the competent authority and this fact was also admitted by the defendant. When defendant pointed out the destruction of blazes on account of fire, he was offered 10% dispensation qua the quantity of resin to be supplied as per the terms and conditions and to prove this fact, letter Ext. P-2, dated 27.03.1995, which was sent by the Manager, Forest Corporation, Hamirpur, before Director, Forest Corporation, Dharamshala, is on record. Thereafter, letter, Ext. P-3, dated 21.04.1995 was also issued to the defendant regarding intimating him that he only supplied 156.95 quintal of pure resin against the terms and conditions of the agreement. He was further intimated that under Clause 15 & 42 of the agreement, 10% rebate was granted in his favour, which is subject to giving of an Affidavit by the defendant. He was also intimated about the due amount and requested to pay the same. After such intimation, the defendant has given Affidavit, Mark-X to the plaintiff, but later on, the defendant has denied that he has ever given the said Affidavit, however PW-6, who was the attesting witness of the Affidavit, has identified the signatures of the defendant, Ext. PW-6/A on Mark-X. In these circumstances, it is established that the defendant has submitted his Affidavit, Mark-X in favour of the plaintiff and agreed that, in case, 10% rebate was given to him, he will pay the price of shortfall of resin and for shortfall of 10% he will not go to any Court for recovery. In view of this aspect, the defendant cannot say that his contract was frustrated due to fire and he has no excuse from making payment of the due amount.

24. The defendant though has written letters for the shortfall, but this is no grounds as he has also given Affidavit and accepted 10% shortfall due to fire. In these circumstance, this Court finds that the learned Courts below have taken into consideration the fact with regard to the less tapping of resin due to fire and the substantial question of law is answered accordingly holding that the learned Courts below have not erred and have considered the loss, if any, caused in the tapping of resin and have rightly come to conclusion that less resin is collected due to the negligence of the defendant.

25. Resultantly, the findings arrived at by both the learned Courts below are just, reasoned and needs no interference, as the appellant/defendant, has himself agreed to accept 10% shortfall due to fire and undertook to pay the balance amount of shortfall, as per agreement, Ext. PW-5/A. Thus, the substantial question of law is answered accordingly and the instant appeal, which sans merits, deserves dismissal and is accordingly dismissed. However, in view of peculiar facts and circumstances of the case, the parties are left to bear their own costs.

26. Pending miscellaneous application(s), if any, also stand(s) disposed of.

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

Som Nath ....Petitioner.
Versus
Gurdev ....Respondent.

Civil Revision No.69 of 2015.
Reserved on: 19th April, 2017.
Decided on : 8th May, 2017.

Code of Civil Procedure, 1908- Order 26 Rule 9- Plaintiff filed an application for appointment of local commissioner for determining the encroachment on the suit land – the application was dismissed by the Trial Court- held that it is permissible for the plaintiff to apply to the Court for determining the encroachment on his land – the appointment of local commissioner does not amount to creating evidence in favour of the plaintiff – the revision allowed- order passed by Trial Court set aside- a Local Commission ordered to be issued to ascertain whether any encroachment has been made on the suit land or not. (Para-3)

For the Petitioner : Mr. N.K. Thakur, Senior Advocate with Mr. Divya Raj Singh, Advocate.
For the Respondent: Mr. T. S. Chauhan, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiff had preferred before, the learned trial Court, an application constituted under the provisions of Order 26, Rule 9 of the Code of Civil Procedure, wherein, he sought relief for appointment of a local commissioner for determining the veracity of his contention qua the defendant encroaching upon a portion of khasra No. 2443, portion whereof stands reflected as ABCD in the site plan appended to the plaint. Under the impugned orders recorded on 27.03.2015, the aforesaid application stood dismissed by the learned trial Court. The plaintiff/petitioner is aggrieved by the impugned order, hence, concerts to assail it, by instituting the instant Civil Revision before this Court.

2. The reasons as assigned by the learned trial Court for dismissing the aforesaid application, is comprised in the factum of (a) with no boundary dispute arising inter se the parties at contest, hence, there was no necessity to order for appointment of a local commissioner for demarcating the contiguous estate(s) of the parties at contest, concomitantly hence, it was not necessary to also determine whether a portion of suit land, depicted as ABCD in the site plan appended to the plaint, being encroached upon by the defendant nor there being a necessity to appoint a local commissioner; (b) the plaintiff being enjoined to prove his case by leading evidence with respect to portion ABCD reflected in the site plan being encroached upon by the defendant; and (c) there being no solemn obligation under law upon the trial Court to create evidence in favour of the plaintiff for sustaining the trite pleaded fact aforesaid.

3. The aforesaid reasons as assigned by the learned trial Court for dismissing the aforesaid application, suffer enfeeblement, for reasons ascribed hereinafter:-

(I) Even though, it was imperative for the plaintiff to along with his plaint append a copy of the apposite demarcation report prepared by a Revenue Officer concerned, yet omission aforesaid may not extantly dis-empower him to, through the aegis of the learned trial Court, aspire for the latter clinching the fact of the defendant encroaching upon portion ABCD reflected in the site plan appended to the plaint, portion whereof is averred by the plaintiff to form part of the suit khasra number. The reason for making the aforesaid conclusion is anvilled upon the fact that since the site plan, wherein, portion ABCD is depicted to be the apt

portion encroached upon by the defendant, not standing prepared by a Revenue Officer rather it being prepared by a draftsman. Also, hence, the factum of its preparation, makes a vivid display of the plaintiff not rearing either a specious nor a spurious claim in respect thereto upon the defendant. Contrarily, it appears of the plaintiff, hence, prima facie rearing a bonafide case upon the defendant. Consequently, the endeavour of the plaintiff to seek appointment of a local commissioner, was hence merely for facilitating the learned trial Court, to clinch the issue relating to the fact of the defendant encroaching upon portion ABCD depicted in the site plan appended to the plaint, portion whereof is averred to be a part of suit khasra number. Moreover, furnishing of an apposite report by a local commissioner, in sequel, to his holding a valid demarcation of the contiguous estate(s) of the parties at lis would ensure adduction of best evidence in respect of the pleaded fact, before the learned trial Court, whereas, the benumbing of the endeavour of the plaintiff, by the learned trial Court hence refusing to order for appointment of Local Commissioner, has contrarily begotten an inapt sequel of its scotching eruption of best evidence for its resting the trite pleaded factum aforesaid.

(II). It appears, that the learned trial Court in recording the findings that with their occurring no boundary dispute inter se the parties at contest, hence, its refusing to order for appointment of a local commissioner, for determining whether one or the other party to the lis, encroaching upon any portion of their respective adjoining estates, is palpably prima facie erroneous, given, the plaintiff espousing that portion ABCD depicted in the site plan appended with the plaint, forming part of the suit khasra number also his espousing that the aforesaid portion being encroached upon by the defendant. Consequently, when the plaintiff apparently reared a claim qua the defendant encroaching upon his estate, estate whereof is contiguous to the estate of the defendant, hence, with a boundary dispute erupting inter se the parties at contest, obviously, for resting the said dispute, the appointment of a local commissioner by the learned trial Court, was imperative.

(III) The reason as assigned by the learned trial Court that it holds no legal obligation to create evidence in favour of the plaintiff, evidence whereof, it would create in his favour by appointing a local commissioner, is also not clothed with any aura of validation, given the claim of the plaintiff with respect to the trite pleaded fact, hence, enjoining the learned trial Court, to put it at rest, by its seeking adduction of best evidence in respect thereto comprised in the local commissioner concerned furnishing his apposite report. However, it by assigning the aforesaid reason, for hence dismissing the application, it has abandoned its duty, to firmly clinch the trite pleaded fact, with respect whereto the parties were litigating.

4. For the foregoing reasons, the instant Civil Revision is allowed and the impugned order rendered by the learned trial Court on 27.03.2015 is quashed and set aside. In sequel, the application constituted before the learned trial Court by the plaintiff under the provisions of Order 26, Rule 9 of the CPC, is allowed. The learned trial Court is directed to appoint a Revenue Officer, as a local commissioner, to ascertain the fact whether the portion ABCD reflected in the site plan appended to the plaint, is a part of suit khasra No. 2443 or not. All pending applications stand disposed of. The parties are directed to appear before the learned trial Court on 7th June, 2017.

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

Benu Dhar Bhanja ....Appellant-Plaintiff
Versus
Smt.Dyalo & Others ....Respondents-Defendants

Regular Second Appeal No.415 of 2006
Date of decision: 09.05.2017

Specific Relief Act, 1963- Section 20- Plaintiff filed a civil suit for specific performance of the agreement – it was pleaded that plaintiff and defendants No.7 and 8 had entered into an agreement with the predecessor-in-interest of defendants No.1 to 6 for sale of one bigha of land for a sum of Rs.40,000/- -plaintiff raised the construction over his share measuring 7 Biswas – the sale deed was not executed – hence, the suit was filed for seeking the relief – the suit was partly decreed by the Trial Court- an appeal was filed, which was dismissed- held in second appeal that no permission was granted by the State Government for the purchase of the land – there is no evidence of partition between the purchasers – the specific performance could not have been granted in these circumstances and the Courts had rightly ordered the return of the purchase money – appeal dismissed. (Para-11 to 30)

Cases referred:
State of Rajasthan vs. Harphool Singh (Dead) through his LRs, (2000)5 SCC 652
Laliteshwar Prasad Singh vs. S.P. Srivastava, (2017)2 SCC 415
Mukesh Kumar and Others vs. Col.Harbans Waraiah and others, AIR 2000 SC 172.
Jagdeo Singh and others vs. Bisambhar and others, AIR 1937 Nagpur, 186
Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264

For the Appellant: Mr.Saurav Rattan, Advocate.
For Respondents: Mr.Bhupender Gupta, Senior Advocate with Mr.Neeraj, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

This Regular Second Appeal filed under Section 100 of the Code of Civil Procedure is directed against the judgment and decree dated 29.06.2006, passed by learned District Judge, Solan, District Solan, in Civil Appeal No.9-NL/13 of 2005/03, affirming the judgment and decree dated 29.10.2002, passed by learned Sub Judge, Nalagarh, District Solan, whereby suit of the plaintiff was partly decreed.

2. Briefly stated facts, as emerged from the record, are that the appellant-plaintiff *(hereinafter referred to as the `plaintiff')* filed a suit for specific performance of contract dated 29.2.1988, directing respondents-defendants No.1 to 6 *(hereinafter referred to as defendants No.1 to 6)* to execute sale deed of land measuring 1 bigha and in the alternative 1/3rd share i.e. 7 biswas of the suit land, description whereof has been given in the head note of the plaint *(hereinafter referred to as the 'suit land')*. It is averred by the plaintiff that on 29.2.1988 Partap Singh, predecessor-in-interest of defendants No.1 to 6, entered into an agreement for sale of 1 Bigha of land for a sum of Rs.40,000/- with the plaintiff and defendants No.7 and 8 and handed over the possession to them on the same day on receipt of full sale consideration. It is averred by the plaintiff that plaintiff and defendants No.7 and 8 effected the partition amongst themselves and subsequently plaintiff raised the construction over his share measuring 7 biswas with the consent of Partap Singh and defendants No.7 and 8. It is the claim of the plaintiff that the said Partap Singh conspired with defendants No.8 and wife of defendant No.7. It is further averred in the plaint that the plaintiff, on coming to know about it, approached Partap Singh for execution of

the sale deed, but, Partap Singh, delayed the execution of the sale deed till his death. It is also averred by the plaintiff that Partap Singh, during his life time and after his death his legal representatives, is/are bound to obtain the requisite permission of the State Government of Himachal Pradesh and to execute the sale deed in favour of the plaintiff, pursuant to the agreement dated 29.2.1988. In this background, the plaintiff filed a suit for specific performance of contract and for prohibitory and mandatory injunction and in the alternative for possession against the defendants.

3. Defendants No.1 to 6, by way of filing written statement, refuted the claim of the plaintiff on the ground of maintainability, locus standi, cause of action and estoppel. It is alleged by the defendants that the suit is not maintainable under the provisions of Section 118 of the H.P. Tenancy and Land Reforms Act and Rules framed thereunder as well as the same is also hit by the provisions of Section 23 of the Indian Contract Act and barred by limitation. On merits, it is alleged by the defendants that the plaintiff is not Himachali bonafide and is non-agriculturist in the State of Himachal Pradesh, therefore, the agreement is hit by Section 118 of the H.P. Tenancy and Land Reforms Act and that the same stood frustrated on account of want of permission of the State Government. It is specifically denied that the possession was delivered to the plaintiff or that the plaintiff had raised any construction. It is averred by the defendants that the agreement is indivisible as the same has been rescinded by other co-owners i.e. defendants No.7 and 8, therefore, the same has become unenforceable. In the aforesaid background, the defendants sought dismissal of the suit filed by the plaintiff.

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

> *"1. Whether the plaintiff had entered into agreement dated 29.2.1988 with Shri Partap Singh? OPP.*
>
> *2. Whether the plaintiff is ready and willing to perform agreement? OPP.*
>
> *3. Whether this suit is not maintainable? OPD.*
>
> *4. Whether the plaintiff is estopped to file the present suit on account of his act, conduct and acquiescence? OPD.*
>
> *5. Whether the suit of the plaintiff is hit by Section 118 of the H.P. Tenancy and Land Reforms Act and Rules? OPD.*
>
> *6. Whether this suit is barred by Limitation ? OPD.*
>
> *7. Whether agreement dated 29.2.1988 cannot be specifically performed, as alleged? OPD*
>
> *8. Relief"*

5. Subsequently, learned trial Court, on the basis of pleadings as well as evidence adduced on record by respective parties, partly decreed the suit of the plaintiff for recovery of Rs.13,333.33 alongwith interest at the rate of 6% per annum from the date of filing of the suit till the date of its realization against defendants No.1 to 6.

6. Being aggrieved and dissatisfied with the aforesaid judgment and decree passed by learned trial Court, plaintiff preferred an appeal under Section 96 of the Code of Civil Procedure in the Court of learned District Judge, Solan, District Solan, which came to be registered as Civil Appeal No.9-NL/13 of 2005/03. Learned District Judge, taking note of the pleadings as well as evidence adduced on record by respective parties, dismissed the appeal and affirmed the judgment and decree passed by learned trial Court.

7. In the aforesaid background, appellant-plaintiff filed instant Regular Second Appeal, laying therein challenge to the aforesaid judgment and decree passed by learned District Judge, Solan, District Solan, whereby suit of the plaintiff was partly decreed; with a prayer to quash and set aside the same and decree in its entirety be passed.

8. This Court vide its order dated 01.10.2007 admitted the appeal on the following substantial question of law:-

> *"1. Whether the learned lower appellate Court being last court of fact is right in not discussing the entire evidence of the parties as required of it in view of the law laid down in 2000(5) SCC Page 652.*
>
> *2. Whether the impugned judgment and decree is the result of complete misreading as well as misappreciation of Exhibit P13 agreement dated 29.2.1998 (sic).*
>
> *3. Whether the learned courts below have misread as well as misconstrued the law laid down by the Apex Court reported in AIR 2000 SC Page 172.*
>
> *4. Whether the learned courts below are right in not considering the provisions of Section 53-A of the Transfer of Property Act.*
>
> *5. Whether the learned courts below are right in holding the agreement Ext.P13 to be indivisible more particularly when on the date of agreement itself, the plaintiffs as well as respondents No.7 and 8 were put in separate possession."*

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

10. This Court propose to take the aforesaid substantial questions of law altogether for consideration. Mr.Saurav Rattan, learned counsel representing the appellant-plaintiff, while inviting the attention of this Court to the impugned judgment passed by learned Courts below, strenuously argued that same is not based upon proper appreciation of evidence adduced on record by respective parties, as a result of which erroneous findings have come on record. During proceedings of the case, Mr.Rattan also made this Court to travel through evidence led on record by the plaintiff to demonstrate that learned Courts below misread, mis-appreciated and misconstrued the evidence led on record by the plaintiff, specifically Ex.P-13 i.e agreement dated 29.2.1988 entered into between the plaintiff alongwith defendants No.7 and 8 as well as predecessor-in-interest of defendants No.1 to 6. Learned counsel further contended that bare perusal of impugned judgment passed by the first appellate Court, nowhere suggests that it took into consideration the entire evidence led on record by the plaintiff while considering the grounds of appeal having been preferred by the plaintiff against the judgment passed by learned trial Court. In this regard, learned counsel invited the attention of this Court to the law laid down by Hon'ble Apex Court in ***State of Rajasthan vs. Harphool Singh (Dead) through his LRs, (2000)5 SCC 652***, to state that it was incumbent upon the learned first appellate Court being last facts finding Court to consider all the issues and then decide the same by assigning reasons. Lastly, learned counsel contended that learned Court below miserably erred in holding agreement Ex.P-13 to be indivisible, more particularly, when plaintiff as well as defendants No.7 and 8 were put in separate possession on the date of agreement itself.

11. This Court, with a view to explore answer to the substantial questions of law, as referred above, as well as to ascertain the genuineness and correctness of aforesaid submissions having been made by learned counsel representing the appellant-plaintiff, carefully perused pleadings as well as evidence adduced on record by respective parties, perusal whereof certainly not suggest that Court below mis-appreciated, mis-read and mis-construed the evidence, more particularly, Ex.P-13 i.e. agreement dated 29.2.1988.

12. It is undisputed that appellant-plaintiff alongwith respondents No.7 and 8 entered into an agreement to sell of suit land for a sum of Rs.40,000/- with predecessor-in-interest of defendants No.1 to 6. Perusal of aforesaid agreement Ex.P-13 certainly suggests that late Partap Singh had agreed to sell suit land in favour of appellant-plaintiff alongwith respondents-defendants No.7 and 8, but sale deed was to be executed after grant of permission under Section 118 of H.P. Tenancy and Land Reforms Act, 1972 *(hereinafter referred to as the 'Act')* from the State Government. Since appellant as well respondents No.7 and 8 were non-agriculturists, sale deed qua the suit land could not be executed by late Partap Singh in favour of

appellant-plaintiff as well as defendants No.7 and 8 in the absence of permission under Section 118 of the Act.

13. This Court is unable to lay its hand to any averment/recital made in the agreement Ex.P-13 suggestive of the fact that permission for sale/purchase of land was to be obtained by vendor Partap Singh, predecessor-in-interest of defendants No.1 to 6, rather, there is no specific mention, if any, with regard to person by whom permission was to be obtained under Section 118 of the Act. Hence this Court is unable to accept contention of Shri Saurav Rattan, learned counsel representing the appellant-plaintiff, that the appellant-plaintiff was always ready and willing to perform his part of contract in terms of agreement, but since defendants failed to procure requisite permission, sale deed could not be executed. This Court, after having carefully perused Ex.P-13, sees/finds substantial force in the arguments having been made by Mr. Bhupender Gupta, learned Senior Counsel, that relief of specific performance of contract, as prayed for by the appellant-plaintiff, could not be granted to plaintiff since contract was not alone with the appellant-plaintiff, but also was with other vendees i.e. defendants No.7 and 8, who lateron not pressed their claim. Since suit land was intended to be sold by the predecessor-in-interest of defendants No.1 to 6 by way of agreement Ex.P-13 in favour of appellant-plaintiff as well as defendants No.7 and 8, no decree for specific performance could be passed by Court below in the suit having been filed by the appellant-plaintiff alone, because admittedly, contract was indivisible.

14. True, it is, that in the instant suit, appellant-plaintiff arrayed other co-contractees as party respondents-defendants, but that cannot be termed to be sufficient for grant of decree of specific performance in favour of appellant-plaintiff. Though appellant-plaintiff, by way of making averment in his suit, claimed that immediately after execution of agreement all the contractees were put into possession qua the specific share, but unfortunately there is no evidence of partition, if any, between the appellant and other two vendees, who allegedly came into possession of 7 biswas of land each after execution of agreement Ex.P-13. Otherwise also, it is not understood that how plaintiff alongwith other co-contractees i.e. defendants No. 7 and 8 could be put to possession of the suit land in the absence of requisite permission under Section 118 of the Act to effect the sale. There is no evidence of partition between the appellant and other two co-contractees on the record, rather, co-contractee; namely Mukar Charan, respondent No.7, while deposing before the Court as DW-2, has categorically stated that when permission was not obtained under Section 118 of the Act, they left the possession in favour of Partap Singh, predecessor-in-interest of defendants No.1 to 6, after taking the amount from him, which amount was equally divided by them. Aforesaid defendant witness has also stated that he and respondent No.8 Lachhman Dass had specifically written to Partap Singh that agreement should be treated as cancelled. This Court carefully perused cross-examination conducted upon the defendant witnesses, which certainly not suggest that plaintiff was able to extract anything contrary to what he stated in their examination-in-chief. Once two co-contractees conveyed to the vendor Partap Singh that agreement may be treated as cancelled, learned Court below rightly came to the conclusion that they were not interested in specific performance of the agreement and, as such, no decree of specific performance can be passed in favour of appellant-plaintiff, who happened to be one of the co-contractee.

15. Similarly, this Court finds that though plea has been taken by the appellant-plaintiff that after having taken possession qua 7 biswas of land, he raised construction over the same, but interestingly, no evidence worth credence has been led on record by the appellant-plaintiff in this regard. Appellant-plaintiff in this regard has placed on record electricity and water bills, which are admittedly not his name. Appellant-plaintiff produced PW-2 and PW-3, who happen to be mason and tenant, to prove that construction has been raised on the suit land by the appellant-plaintiff, but same was rightly not considered by Courts below in view of peculiar facts, wherein other co-contractees specifically stated before Court that since permission under Section 118 of the Act was not obtained, they left the possession in favour of Partap Singh and amount of Rs.40,000/- was taken from him which was divided equally. Though appellant-plaintiff has placed on record site-plan Ex.P-1, but there is no document suggestive of the fact

that Nagar Panchayat, under whose jurisdiction suit land situates, ever issued permission to appellant-plaintiff to raise construction over the suit land. Otherwise also, perusal of Ex.P-1 nowhere suggests that site-plan in question was ever approved by the Nagar Panchayat. There is no evidence led on record by plaintiff that no permission for construction is/was required from Nagar Panchayat. Further perusal of record suggests that appellant-plaintiff was only able to prove on record notice dated 29.3.1997 Ex.P-2 because there is no communication between 1980 to 1994 from where it could be inferred that appellant-plaintiff repeatedly asked Partap Singh, predecessor-in-interest of defendants No.1 to 6, to execute sale deed during aforesaid period and as such learned Court below rightly came to the conclusion that the plaintiff has not been able to show his readiness and willingness to perform his part of contract.

16. This Court, after having carefully examined and analyzed the evidence adduced on record by the plaintiff-appellant, sees no force in the aforesaid contentions having been raised/made by learned counsel representing the appellant-plaintiff, rather this Court is of the view that both the Courts below have carefully appreciated/perused the evidence in its right perspective and there is no misreading or misconstruction of evidence, as alleged by the appellant-plaintiff, in the instant proceedings. Since this Court, in process of finding answer to substantial questions of law, had an occasion to peruse pleadings as well as impugned judgments, it really finds it difficult to accept the contention of learned counsel representing the appellant-plaintiff that learned lower appellate Court has failed to discuss the entire evidence of the parties, while upholding the judgment passed by learned trial Court. Perusal of impugned judgment passed by first appellate Court clearly suggests that learned first appellate Court has dealt with each and every aspect of the matter meticulously and has carefully analyzed the evidence led on record by appellant-plaintiff.

17. True, it is, that Court of first appeal must cover all important questions involved in the case and they should not be general and vague. Similarly, it is well settled that when first appellate Court reverses findings of trial Court, it is expected to record findings in clear terms specifically stating therein, in what manner reasoning of trial Court is erroneous.

18. The Hon'ble Apex Court in ***Laliteshwar Prasad Singh vs. S.P. Srivastava, (2017)2 SCC 415,*** has held that when appellate Court agrees with the views of the trial court on evidence, it need not restate effect of evidence or reiterate reasons given by trial Court; expression of general agreement with reasons given by trial court would ordinarily suffice. Hon'ble Apex Court has further held that when the first appellate Court reverses the findings of the trial court, it must record the findings in clear terms explaining how the reasoning of the trial court are erroneous. The Hon'ble Apex Court has held as under:

> *"14. The points which arise for determination by a court of first appeal must cover all important questions involved in the case and they should not be general and vague. Even though the appellate court would be justified in taking a different view on question of fact that should be done after adverting to the reasons given by the trial judge in arriving at the finding in question. When appellate court agrees with the views of the trial court on evidence, it need not restate effect of evidence or reiterate reasons given by trial court; expression of general agreement with reasons given by trial court would ordinarily suffice. However, when the first appellate court reverses the findings of the trial court, it must record the findings in clear terms explaining how the reasonings of the trial court are erroneous."*

19. In the case at hand, learned first appellate Court, who concurred with the findings returned by learned trial Court was not expected to reiterate reasons given by trial Court, rather mere expression of general agreement with the reason given by the trial Court was sufficient. Moreover, in the instant case, as clearly emerge from the reading of impugned judgment passed by the first appellate Court that it has dealt with each and every issue involved in the case and as such there is no force in the arguments of learned counsel for the appellant that first appellate Court has failed to discuss the entire evidence of parties as required in terms of law laid down by Hon'ble Apex Court in ***Stateof Rajasthan vs. Harphool Singh's*** case*supra*.

20. This Court also carefully examined the submissions having been made by learned counsel representing the appellant-plaintiff that learned Courts below misread as well as mis-construed law laid down by Hon'ble Apex Court in ***Mukesh Kumar and Others vs. Col.Harbans Waraiah and others, AIR 2000 SC 172***. It would be apt to reproduce para-6 of the aforesaid judgment:-

> *"6. Specific performance of a contract can be enforced by any party to the contract. If there are more parties than one specific performance of a contract cannot be decreed in the absence of some of the parties to the contract. If some of the parties entitled to the benefit of the contract are not willing to be arrayed as plaintiffs they should be impleaded as defendants. Section 23 (a) of the Specific Relief Act (now Section 22) covers such a case. In Nirmala Bah Dasi v. Suddarsan Jana, AIR (1980) Cal. 258, it is held that one of the co-promisees may sue for specific performance making the other co-promisees as defendants. Judgment can be given in favour of the persons interested whether they are joined as plaintiffs or as defendants. See: Monghibai v, Cooverji Umersry, AIR (1939) PC 170, In a case where property was agreed to be transferred to three co- promises and all the three filed a suit for specific performance of the contract but only one of them came to witness box in support of the claim, it has been held that the other two co-promisees would also be entitled to a decree of specific performance. In the case of co-contractees it is not necessary that all of them should be ranged on the same side for obtaining specific performance. It is sufficient if all of them are before the court. (See: Jagdeo Singh v. Bisambhar, AIR (1937) Nag. 186). But where a single contract is to convey a land to several persons and the contract is not indivisible some of the joint contractees cannot seek specific performance if the other contractees do not want that relief. (p.174)*

21. In the aforesaid judgment, Hon'ble Apex Court has held that specific performance of contract can be enforced by any party to the contract. If there are more parties than one, specific performance of a contract cannot be decreed in the absence of some of the parties to the contract. Hon'ble Apex Court has further held that it is not necessary that all of them should be ranged on the same side for obtaining specific performance and it is sufficient, if all of them are before the Court.

22. In the instant case, learned appellate Court has rightly held the suit, having been filed by appellant-plaintiff, to be maintainable because admittedly other co-contractees were impleaded as party respondents No.7 and 8. But in the aforesaid judgment, Hon'ble Apex Court has categorically held that where a single contract is to convey a land to several persons and the contract is not indivisible, some of the joint contractees cannot seek specific performance, if the other contractees do not want that reliefs.

23. As has been discussed hereinabove, predecessor-in-interest of defendants No.1 to 6, by way of specific contract, intended to sell suit land in favour of appellant-plaintiff and defendants No.7 and 8. There is nothing in the agreement Ex.P-13 from where it could be inferred that suit land was intended to be sold to the appellant as well as defendants No.7 and 8 in portion. Rather, entire suit land was intended to be sold in favour of appellant as well as defendants No.7 and 8. It is another matter that appellant-plaintiff claimed that after execution of agreement, co-contractees i.e. plaintiff and respondents No.7 and 8, partitioned the land and plaintiff was put to the possession qua specific share i.e. 7 biswas of land. Admittedly, in the present case plaintiff agreed to purchase land with –respondents-defendants No.7 and 8 equally and as such learned trial Court, taking note of stand taken by defendants No.7 and 8, wherein they claimed that they did not want specific performance of contract, rightly held that agreement cannot be performed specifically in favour of plaintiff since contract is indivisible.

24. This Court also perused the judgment passed by Hon'ble High Court of Bombay Bench at Nagpur in ***Jagdeo Singh and others vs. Bisambhar and others, AIR 1937 Nagpur, 186,***wherein the Court has held that where one or more co-contractors want to enforce specific

performance of the contract against the will of others, they can do so under Section 23 of the Specific Relief Actand it is not necessary, therefore, that all the co-contractors should be arranged on the same side for obtaining specific performance of contract and it is enough if all persons to the contract are before the Court.

25. Since all the co-contractees were impleaded as party by the appellant-plaintiff, his suit was held to be maintainable by the learned Court below. But, where a single contract was to convey a land to several persons, learned Court below rightly came to the conclusion that contract is not indivisible and one of co-contractees cannot seek specific performance if the other co-contractees do not want that relief. Hence, this Court, after having carefully perused the judgment, referred hereinabove, sees no illegality in the judgment passed by Court below and is of the view that learned Courts below have rightly applied the ratio of the aforesaid judgment in the case at hand.

26. This Court also perused Section 53A of the Transfer of Property Act, which is reproduced hereinbelow:-

> *"53A. Part performance.- Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,and the transferee has performed or is willing to perform his part of the contract,then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:*
>
> *PROVIDED that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."*

27. This Court, after having carefully perused the aforesaid provisions of law, finds that the same is not applicable in the case at hand. In the instant case, as has been discussed hereinabove, appellant-plaintiff was not able to prove on record that he was put into possession of the property, pursuant to agreement executed *interse* him as well as Partap Singh, predecessor-in-interest of defendants No.1 to 6. Had appellant-plaintiff succeeded in proving on record that he had taken possession of the property, pursuant to agreement Ex.P-13, he could take refuge to the aforesaid provisions of law.

28. In the instant case, appellant-plaintiff has not been able to prove his possession over the suit land after execution of agreement to sell Ex.P-13, rather co-contractees i.e. defendants No.7 and 8, who had entered into an agreement alongwith appellant-plaintiff with predecessor-in-interest of defendants No.1 to 6 have categorically stated that since no permission was obtained in terms of Section 118 of the Act, they left possession in favour of Partap Singh and took amount of Rs.40,000/- from Partap Singh and divided the same equally. Substantial questions of law are answered accordingly.

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

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

30. 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 finding given on the issues framed by the trial Court below as well as specifically taken up by this Court to reach the root of the controversy appears to be based on correct appreciation of oral as well as documentary evidence.

31. Hence, in view of detailed discussion made hereinabove, this Court sees no illegality and infirmity in the judgment passed by both the Courts below. The judgment and decree passed by both the Courts below are upheld. The present appeal fails and is dismissed, accordingly.

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

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

National Insurance Company Ltd. ...Appellant.

Versus

Smt. Sarla and another ...Respondents.

FAO No.: 493 of 2016
Date of Decision : 09/05/2017

Employees Compensation Act, 1923- Section 2 (d)- It was contended that the mother of the deceased was not a dependent as she had independent income from the orchard – held that the deceased was unmarried and had no family to support, hence, it can be concluded that he would have given his earnings to his mother –thus, she would fall within the definition of the dependent and claim petition would be maintainable at her instance – the insurer is liable to pay the interest, however, the interest has to be paid after one month from the date of accident- appeal partly allowed and order of Trial Court modified. (Para- 3 to 7)

For the Appellant: Mr. Lalit Kumar Sharma, Advocate.
For the respondent No.2: Mr. H.C.Sharma. Advocate

The following judgment of the Court was delivered:

Sureshwar Thakur, *Judge (oral)*

The Insurer/appellant herein stands aggrieved by the pronouncement recorded by the learned Civil Judge (Jr. Division), Shimla, while exercising powers of 'Commissioner'

under the Employees' Compensation Act, 1923, wherefrom, it, for hence begetting its reversal, has instituted the instant appeal herebefore.

2. This Court had on 04.10.2016 admitted the instant appeal, on the hereinafter extracted substantial questions of law:-

> 1"Whether the claim petition was maintainable within the four corner of Employees Compensation Act in the facts and circumstances where the claimant Sarla Devi was/is not dependant as per Section 2(d) of the Act ibid as in the evidence she has admitted that she is owner of apple orchard also generate her income from agriculture pursuit and her husband is alive?
>
> 2. Whether the Commissioner was competent to award the interest from 10.02.2012 although the accident in question as occurred on 02.09.2012 as the interest if at all payable becomes due 30 days after the accident.

3. The learned counsel for the insurer submits that the mother of the deceased, the latter whereof, is not contested by him "to" suffer his demise during the course of his performing employment, in the relevant ill-fated vehicle, under one Joginder Singh, also he does not contest the fact of his drawing from his relevant employment, wages per mensem comprised in a sum of Rs.8,000/-. However, the learned counsel for the insurer submits that the claimant does not fall within the ambit of the definition of 'dependent' as encapsulated in the provisions of Section 2(1)(d) of the Employees' Compensation Act, 1923 (hereinafter referred to as the 'Act'), provisions whereof stand extracted hereinafter, hence he submits that the claim petition warranted dismissal.

> "2(1)(d) dependant" means any of the following relatives of a deceased workman, namely:--
>
> (i) a widow, a minor legitimate son, and unmarried legitimate daughter, or a widowed mother; and
>
> (ii) if wholly dependent on the earnings of the workman at the time of his death, a son or a daughter who has attained the age of 18 years and who is infirm;
>
> (iii) if wholly or in part dependent on the earnings of the workman at the time of his death, (a) a widower, (b) a parent other than a widowed mother, (c) a minor illegitimate son, an unmarried illegitimate daughter or a daughter legitimate or illegitimate if married and a minor or if widowed and a minor, (d) a minor brother or a unmarried sister or a widowed sister if a minor, (e) a widowed daughter- in-law, (f) a minor child of a pre- deceased son, (g) a minor child of a pre- deceased daughter where no parent of the child is alive, or (h) a paternal grandparent if no parent of the workman is alive;]

For carrying forward the aforesaid submission, he makes a reference to clause (i) of Section 2(d) of the 'Act' wherein the right to rear a claim for compensation is foisted only in a widow, a minor son and an unmarried daughter or a widowed mother. He hence proceeds to submit that with the aforesaid relevant clause of sub section (i) of Section 2(d) of the 'Act', while specifically including the aforesaid 'category' of relatives of the deceased "within" the ambit of theirs being "his dependents" whereas with the claimant not falling in any of the relevant categories as spelt therein, wherefrom he contends with the category of the claimant who is the mother of the deceased, who however has her husband surviving hence standing explicitly excluded from its ambit, begets an inference that the claim petition preferred by her entailing the effect of its dismissal. However, in his making the aforesaid submission, he has remained unmindful to the provisions, in succession thereof, occurring in sub section 2(1)(d)(iii) of the Act, provisions whereof stand extracted hereinabove. A perusal of clause (iii)(b) of the Act palpably displays that a 'parent' other than the widowed mother also holding the apposite statutory leverage to prefer a petition for compensation, on occurrence of demise of her employee son, on whose income she at the time of his demise is evidently wholly or in part hence evidently dependent. The underlying

import of the phraseology occurring therein 'a parent other than a widowed mother' 'is' that it carves an exception to the principle constituted in Section 2(1)(d)(i), which however, includes within the definition of 'dependant' a widow, a minor son, an unmarried daughter or a widowed mother, whereas the mother of the deceased, when her husband is surviving hence therein stands explicitly excluded from the definition of a 'dependent'. Consequently, with Section 2(1)(d)(iii)(b) of the Act, which apparently occurs subsequent to sub clause 2(1)(d)(i), in sequel, with its operating as an exception to the provisions which occur prior thereto also its visibly fastening a facilitation in a parent other than a widowed mother, to prefer a claim petition on demise of deceased employee son. In aftermath, with the parlance borne by the aforesaid phraseology occurring in Section 2(1)(d)(iii)(b) of the Act being none other than 'of' even if the claimant within the ambit of Section 2(1)(d)(i) of the Act is excluded to be a dependent of her deceased employee son, she is yet not statutorily ousted from being construed to be a dependent of her deceased employee son nor also she is debarred to, on occurrence of his demise, during the course of his performing employment, to institute or to rear a claim for compensation. In other words even if she is not the widowed mother of the deceased employee, she is hence construable to a 'dependent' of her deceased employee son also she holds a right to rear a claim for compensation, in event of his demise evidently occurring during the course of his performing employment. However, the learned counsel for the insurer also proceeds to submit before this Court, that even if assumingly the claimant holds a right to rear a claim for compensation against her employer, on account of demise of her son evidently occurring during the course of his performing duties under his employer, nonetheless it is also imperative for the claimant, to also prove the fact 'of hers' at the relevant time of occurrence of his demise being wholly or in part dependent upon his earnings. He submits that the ingredients cast in Section 2(1)(d)(iii) of the Act, comprised in the phraseology 'wholly or in part' when stand unsatiated, he hence contends that no benefit thereof being ensuable vis-à-vis the claimant, inference whereof qua unsatiation of the imperative ingredients held in Section 2(1)(d)(iii) of the Act, is contended by him, to stand aroused, from the fact of a communication occurring in the cross-examination of PW-1 qua her husband holding ownership over an apple orchard wherefrom he rears an income of Rs.2 to 3 lacs. He hence proceeds to argue that the claimant at the relevant time was hence neither wholly or partly dependent upon the earning of her deceased employee son. However, the aforesaid submission warrants its standing rejected, as a further reading, in its entirety of the cross-examination, of the claimant, unveils that she besides the deceased has another son also its reading unveils that the family of the siblings of her deceased employee son, residing jointly with her husband. Since no evidence occurs on record revealing that the deceased employee son, of the claimant, was married hence when he obviously was not rearing a family upon whom he could spend his income, in sequel it is concluded that he handed over his earnings to his mother. Moreover, despite the husband of the claimant rearing an income of Rs. 2 to 3 lacs from his apple orchard, would not oust the claim for compensation reared by the claimant against the owner of the ill-fated truck, in truck whereof the deceased at the relevant time was engaged as a driver. Significantly when the income aforesaid, is to be concluded to be spent on the family members of the siblings of the deceased employee besides on other members of the deceaseds' family hence when no residual substantial or sufficient income for maintaining the mother of the deceased, may hence be left. In aftermath the claimant, the mother of the deceased employee son, hence standing deprived from hers receiving the income reared by her deceased employee son from his relevant employment also when the entire income reared by her husband from his orchard is not spent entirely on her, rather may be spent upon all members of the joint family hence even if the claimant was partly dependent upon the earnings of her deceased employee son, it is to be concluded that the ingredient(s) of Section 2(d)(iii) of the Act, holding a contemplation that even if the surviving unwidowed mother of the deceased employee son, 'is partly' at the relevant time 'dependent upon the earnings of her deceased employee son', she would hence on his demise stand deprived of the same also she would fall within the statutory signification of 'dependent' of her deceased employee son. In sequel, with the claimant evidently being at the relevant time partly dependent upon the earning of her deceased employee son, she on his demise is entitled to stake a claim for compensation. Fortifying impetus to the aforesaid inference is gathered by the

fact of PW-1, the husband of the claimant while his standing cross-examined, his not being put any suggestion, displaying the fact that the income reared from his orchard being in its entirety spent for the well being and upkeep of the claimant. Absence of the aforesaid suggestion(s) to RW-1, constrains this Court to conclude that hence only a part of the income reared by him from his orchard being spent upon the upkeep of the claimant. Moreover, no apposite suggestion has been put by the learned counsel for the insurer while holding RW-1, to cross-examination with an echoing therein that the earnings reared by the deceased from the relevant employment were never during his life time handed over by him to the claimant. Consequently, absence of the aforesaid suggestion also coaxes an inference that the claimant was at the relevant time, receiving from her deceased employee son, the earnings derived by him from his relevant employment, hence she on demise of her son, has been deprived of the aforesaid income also when the entire income, as reared by her husband, is evidently not spent upon her, she is to be concluded to be sufficiently dependent or in part dependent upon the earnings of her deceased employee son. Accordingly the substantial question No.1 is answered against the insurer. Corollary of the aforesaid, is that she hence has satisfied the ingredients held in Section 2(1)(d)(iii) of the Act and is entitled to maintain the claim petition.

4. The mandate of Section 4A(3) of the Act, whereby on occurrence of default, in the apposite defraying within one month, from the date it fell due "of compensation", upon the aggrieved, by the owner, provisions whereof stands extracted hereinafter:-

> "Where any employer is in default in paying the compensation due under this Act within one month from the date it fell due, the Commissioner shall-
>
> (a) direct that the employer shall in addition to the amount of the arrears, pay simple interest thereon at the rate of 12% per annum or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government, by notification in the Official Gazette, on the amount due; and"

hence entail the consequence of his being statutorily encumbered with the liability to pay interest on the compensation amount at the rate(s) stipulated in clause (a) and (b) of Section4A(3) of the Act. However, since it is not contested that the employer, did not, immediately on occurrence of the ill-fated mishap involving the offending vehicle, make deposit of the compensation amount. Consequently, the mandate of clause (a) and (b) of Section 3 of the Act stood attracted.

5. The learned counsel for the insurance, has made a vigorous submission that since the Insurance Company has not denied the fact that the relevant insurance cover issued with respect to the offending vehicle not holding a clause therein whereby the liability of interest carried on the compensation amount was not fastenable upon the insurer. Consequently, with the relevant insurance cover issued with respect to the offending vehicle 'not' excluding the liability of the insurer to defray/indemnify the owner, the interest borne on the compensation amount. In sequel, any liability, in respect thereof is to be fastened upon the insurer, as aptly done by the learned Commissioner. However, the error which is apparently committed by the learned Commissioner, is comprised in the factum of his infracting the mandate of clause (a) and (b) of sub- section (3) of Section 4A of the Act, comprised in his holding that interest on compensation amount being leviable on occurrence of the ill-fated mishap whereas it was leviable thereon on one month elapsing from the date when the accident occurred. Consequently, the error is rectified by ordering that the interest shall be levied upon the amount of compensation on one month elapsing since occurrence of the ill-fated accident. The substantial questions of law are answered accordingly. The impugned judgement is modified accordingly. All pending applications also stand disposed of.

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

Oriental Insurance Company Ltd. .....Appellant.
Versus
Smt. Shankri Devi and another ...Respondents.

FAO No.: 52 of 2017
Date of Decision : 09/05/2017

Employees Compensation Act, 1923- Section 4- The owner was not examined to prove that he had employed the deceased as a driver of the vehicle – however, this cannot lead to an inference that the deceased was not employed as a driver by him especially when the claimant had stated this fact on oath- the deceased was driving the vehicle at the time of accident and it can be inferred that this was by virtue of the contract of employment between the parties – appeal dismissed. (Para-2 to 4)

For the Appellant: Mr. Lalit Kumar Sharma, Advocate.
For the respondents: Mr. Raman Sethi. Advocate, for respondent No.1.
Mr. Vivek Sharma, Advocate forrespondent No.2.

The following judgment of the Court was delivered:

Sureshwar Thakur, *Judge (oral)*

The Insurer/appellant herein stands aggrieved by the pronouncement recorded by the learned Civil Judge (Jr. Division), Shimla, while exercising powers of 'Commissioner' under the employees' Compensation Act, 1923, wherefrom it for hence begetting its reversal, has instituted the instant appeal.

2. Today this Court upon hearing counsel for the contesting parties has framed the hereinafter extracted substantial question of law, for pronouncing an adjudication thereon:-

> "Whether their exists a subsisting contract interse the deceased workman and the employer the owner of the offending vehicle."

3. The learned counsel for the insurance company submits that for want of the owner of the offending vehicle stepping into the witness box also hence his not testifying that he had prior to the date of accident employed the deceased as a driver upon the ill-fated vehicle also his not hence testifying that at the relevant time he was manning the drivers' seat of the relevant vehicle, ought to have constrained the learned Commissioner concerned to not impute credence to the testifications in respect thereto rendered by the claimants. He submits that the deposition of the owner of the relevant vehicle, constituted the best evidence for returning findings upon the relevant issues whereas its not surging-forth, renders an inference that the affirmative findings recorded by the learned Commissioner with respect to a contract of employment existing interse the deceased and the relevant owner of the offending vehicle hence warranting interference. He further submits that hence also the claimants not proving the fact of demise of the deceased workman occurring during the course of his, at the time contemporaneous to the ill-fated mishap involving the offending vehicle concerned taking place hence performing employment under the relevant owner, thereupon renders the claim petition to suffer dismissal. However, the effect of the aforesaid submission, is effaced, as, even if the claimants had not led into the witness box, the owner of the vehicle yet the insurer was not incapacitated to take appropriate steps for enjoining the learned Commissioner, for summons being ordered to be issued upon the owner of the vehicle, for facilitating his stepping into the witness box. Absence on the part of insurer, to, at the earliest take the apposite steps, contrarily constrains this Court to conclude that an adverse inference is drawable against the insurer, that hence it has deliberately omitted to

adduce the best evidence in respect to the relevant issue, its fearing its eruption would not hold leanings vis.a.vis it.

4. Be that as it may, the effect of the aforesaid submission, is also effaced, by the fact of RW-2 who is the witness of the Insurance Company, in his cross-examination, copy whereof has been placed before this Court by the learned counsel for the insurer, communicating that the deceased workman at the relevant time was manning the drivers' seat of the relevant offending vehicle. Consequently, it is befitting to conclude that the deceased was engaged, as a driver upon the relevant vehicle, by its owner. In sequel, it is to be concluded that hence there exists an evident contract of employment inter se the deceased and the owner of the offending vehicle also it is to be concluded that the demise of the deceased, occurred during the course of his performing his apposite employment under the owner of the offending vehicle. I find no infirmity in the impugned judgement of the learned Commissioner, which is maintained and affirmed. No costs. Substantial questions of law are answered accordingly.

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

Jaiwanti .....Appellant

Versus

Smt. Heera Mani and others .....Respondents

LPA No. 176 of 2016
Reserved on: May 4, 2017
Decided on: May 11, 2017

Constitution of India, 1950- Article 226- Petitioner along with other persons appeared for the post of AnganwadiWorker- petitioner was selected- respondent No.4 filed an appeal against her appointment, which was allowed and selection of petitioner was set aside- petitioner filed an appeal before Divisional Commissioner, who dismissed the same- a writ petition was filed and the matter was remanded to Deputy Commissioner, who dismissed the appeal – an appeal was filed, which was also dismissed- another writ petition was filed, which was disposed of with a direction to Tehsildar to decide the income of petitioner- Tehsildar found that the income of the petitioner was more than the ceiling prescribed under the Rules – petitioner filed an appeal before SDO (Civil) who dismissed the same- appeals were filed before Deputy Commissioner and Divisional Commissioner, which were dismissed- a writ petition was filed, which was allowed and the order of Divisional Commissioner was set aside- aggrieved from the judgment- present appeal has been filed- held that the provisions of Limitation Act are not applicable to the proceedings before the Divisional Commissioner but if there is a delay in obtaining the copy, the appellant cannot be penalized for the same – the matter remanded to the Divisional Commissioner to count the period of limitation from the date of supply of copy and not from the date of order.(Para-9 to 15)

Case referred:
M.P. Steel Corporation vs. Commissioner of Central Excise, (2015) 7 SCC 58

For the appellant : Mr. Dinesh Kumar, Advocate.

For the respondents : Mr. I.D. Bali, Senior Advocate with Mr. Virender Bali, Advocate, for respondent No.1.

Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan, Additional Advocate General and Mr. J.K. Verma, Deputy Advocate General, for respondents No. 2 to 4.

The following judgment of the Court was delivered:

Per Sandeep Sharma, Judge

Instant Letters Patent Appeal under Clause 10 of the Letters Patent of High Court of Judicature at Lahore applicable to the High Court of Himachal Pradesh, is filed against judgment dated 22.9.2016 passed by learned Single Judge of this Court, in CWP No. 514 of 2016.

2. Briefly stated the facts of the case, as emerge from the record are that the respondent No.1-petitioner (hereinafter, 'petitioner') filed a writ petition being CWP No. 514 of 2016, stating therein that she alongwith other persons appeared for interview to the post of Anganwari Worker in Anganwari Centre Janaul, under ICDS Block Seraj. Petitioner was appointed as such on 4.8.2007. Appellant (respondent No.4 in the writ petition) filed appeal against her appointment before Deputy Commissioner Mandi, who allowed the same on 17.4.208 and selection of petitioner was set aside. Petitioner filed further appeal before Divisional Commissioner, which was dismissed on 25.9.2008. Petitioner thereafter filed CWP No. 1949 of 2008, which was disposed of by remanding matter back to Deputy Commissioner with a direction to decide the same afresh, on 20.10.2008. Deputy Commissioner, on 16.3.2011, dismissed the appeal of present appellant, against which she approached Divisional Commissioner, Mandi, who also dismissed the appeal filed before him. Appellant filed CWP No. 9637 of 2012 and petitioner filed CWP No. 3575 of 2012, which were clubbed and decided on 26.11.2012, with the direction to Tehsildar to decide the status of petitioner, who, on the basis of report of Naib Tehsildar found income of appellant more than ceiling prescribed under the Rules occupying the field. Petitioner approached Sub Divisional Officer(Civil), who also dismissed her appeal and appellant was directed to join as Anganwari Worker. Petitioner challenged said order before Deputy Commissioner and Divisional Commissioner, both of whom, dismissed the claim of the petitioner.

3. Feeling aggrieved with the dismissal of her appeal by the Divisional Commissioner, petitioner approached this Court, by filing CWP No. 514 of 2016, on the ground that her appeal before Divisional Commissioner was within limitation, but same was dismissed on the ground limitation itself. In reply to the writ petition, respondents-State, alongwith other objections, it was averred that the appeal filed by petitioner before Divisional Commissioner was time barred and as such rightly dismissed.

4. The learned Single Judge, vide judgment dated 22.9.2016, while discussing issue of limitation, taking cue from judgment of Hon'ble Apex Court in **M.P. Steel Corporation** vs. **Commissioner of Central Excise**, (2015) 7 SCC 58, held that the provisions of Limitation Act would apply to proceedings being prosecuted in the Courts appropriate i.e. Courts as understood in the strict sense of being part of judicial branch of the State. Learned Single Judge, set aside the order dated 18.9.2015 passed by Divisional Commissioner and requested him to decide the appeal by or before 30.11.2016. Feeling aggrieved by the same, the appellant has preferred the present appeal.

5. Mr. Dinesh Kumar, learned counsel representing the appellant, stated that view maintained by the learned Single Judge, vide impugned judgment is not tenable and runs contrary to the view taken by a Division Bench of this Court in **Raksha Devi** vs. **State of H.P. & Others** and other connected matters decided on 17.5.2010, whereby it has been held in para 19 as under:

> "19. Another legal contention is as to whether the Appellate Authority has power to condone delay in filing appeal. The Guidelines provide a period of 15 days for filing an appeal. Being a statutory authority, in terms of the Policy Guidelines, the Appellate Authority does not have the power under Section 5 of the Limitation Act. No power is conferred also in the guidelines for condonation of delay. Therefore, he cannot enlarge the time, by condoning delay in filing the appeal. In other words, if an appeal is not filed within the prescribed time, it has

only to be dismissed, since the Appellate Authority has no power to condone the delay in filing the appeal."

6. Mr. Dinesh Kumar, further averred that the office of Divisional Commissioner is neither a 'Court', nor a 'quasi judicial tribunal' and as such provisions of Limitation Act would not apply to the proceedings filed or pending before aforesaid authority.

7. Mr. I.D. Bali, learned Senior Advocate, duly assisted by Mr. Virender Bali, Advocate, supported the judgment of the learned Single Judge and prayed for dismissal of the appeal.

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

9. Record reveals that the petitioner while seeking quashment of annexure P-10, order dated 18.9.2015, specifically averred that the appeal preferred by her was within limitation and Divisional Commissioner wrongly dismissed the same on the ground of delay. Apart from above, petitioner also sought direction to the authorities concerned to appoint her as Anganwari Worker, with all consequential reliefs. Close perusal of judgment passed by learned Single Judge suggests that the learned Single Judge instead of ascertaining correctness of claim put forth by the petitioner that her appeal was within limitation, ventured to ascertain and hold that provisions of Limitation act, are applicable while determining period of limitation for filing appeal in terms of guidelines for appointment of Anganwari Workers.

10. It is further revealed that the Divisional Commissioner dismissed the appeal on the ground that it was filed beyond stipulated period of 15 days, as prescribed for filing the appeal in the relevant guidelines. As far as observations made by this Court, in Raksha Devi's case (supra) that a statutory authority like the Divisional Commissioner has no power to condone delay of even one day, are concerned, same are correct. Careful perusal of aforesaid judgment passed by Division Bench of this Court suggests that this Court, while dealing with guidelines/ regulations having been framed by the State, for the appointment of Anganwari Workers, came to the conclusion that no power, if any, vests with an authority under these guidelines, to condone delay in filing appeal. But, admittedly, careful perusal of aforesaid judgment passed by Division Bench, nowhere suggests that issue, if any, with regard to applicability of Limitation Act was considered by the Division Bench, while holding/concluding that statutory authority as prescribed under guidelines have no power to condone delay, whereas, learned Single Judge placing reliance upon judgment passed by Apex Court in **M.P. Steel Corporation** vs. **Commissioner of Central Excise** (supra) has come to the conclusion that provisions of Limitation Act can be made applicable.

11. Hence, we are not inclined to agree with the contention put forth by the learned counsel representing the appellant that judgment passed by learned Single Judge is in conflict with the judgment rendered by Division Bench of this Court. At the cost of repetition, it may be stated that the Division Bench of this Court nowhere deliberated upon the issue whether provisions of Limitation Act can be made applicable to the proceedings pending before an authority as envisaged under the guidelines for appointment of Anganwari Workers.

12. This Court, solely taking note of regulations itself, came to the conclusion that there is no power as such with the statutory authority to condone delay. However, it is another thing that the learned Single Judge, while examining the prayer having been made by the petitioner before him, ventured to explore whether provisions of Limitation Act, can be made applicable in proceedings arising out of aforesaid guidelines/ regulations framed by the State for the appointment of Anganwari Worker. Since, in this case, learned Single Judge was only required to see whether Divisional Commissioner rightly came to the conclusion that appeal was filed within statutory period i.e. 15 days from the date of passing of impugned order, this Court in the peculiar facts and circumstances of the case, deems it fit not to go into the correctness of the

judgment passed by learned Single Judge as far as finding qua issue of applicability of Limitation Act to the proceedings, as referred to above, and same shall be decided in appropriate proceedings.

13. In the instant case, as has been observed above, Divisional Commissioner rightly concluded that he had no power to condone delay of even one day in terms of judgment passed by this Court in Raksha Devi's case (Supra). But, admittedly, this Court sees merit in the observations made by the learned Single Judge that no one can be left remediless, especially, when he/she has no control /power to have certified copy within stipulated period as prescribed for filing appeal under the guidelines in question.

14. Hence, this Court, is of the view that the Divisional Commissioner, while ascertaining factum with regard to delay, if any, in maintaining the appeal, should have ascertained at the first instance, when the certified copy of order of Deputy Commissioner, was obtained by the appellant before him, and incase appeal was filed within 15 days of receipt of certified copy, he should have heard the appeal on merits and decided the same accordingly. Needless to say, if appellant before the Divisional Commissioner had preferred appeal after 15 days of receipt of copy of order from the Deputy Commissioner, Divisional Commissioner was well within his right to dismiss the appeal on the ground of limitation.

15. Consequently, in view of observations made herein above, this Court deems it fit to modify the judgment of the learned Single Judge to the extent that Divisional Commissioner, at the first instance, shall ascertain whether appeal was within period as stipulated by counting period of limitation from the date of supply of order and not from the date of passing of such order by Deputy Commissioner and, in case, Divisional Commissioner comes to the conclusion that appeal was within limitation from the date of receipt of certified copy, he shall proceed to decide the appeal, on merits, in accordance with law.

16. The appeal is disposed of accordingly. Pending applications, if any, are disposed of.

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

Kalyan Singh and others .....Appellants.

Vs.

Shri Mehar Singh and others .....Respondents.

RSA No.: 124 of 2002
Reserved on: 03.04.2017
Date of Decision: 11.05.2017

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit seeking injunction pleading that plaintiff and defendants were co-sharers – the suit land is in exclusive possession of the plaintiff- defendants are forcibly trying to occupy the suit land – the suit was dismissed by the Trial Court- an appeal was filed, which was allowed- held in second appeal that plaintiff had admitted in cross-examination that he had filed the suit for taking possession from the defendant, which shows that plaintiff is not in possession- the evidence of the defendant also proved the possession of K- the findings recorded by the Trial Court that plaintiff had failed to prove his possession are the correct findings – appeal allowed- judgment of Appellate Court set aside.(Para-12 to 19)

For the appellants: Mr. Karan Singh Kanwar, Advocate.
For the respondents: Mr. K.D. Sood, Senior Advocate, with Mr. Rajnish K. Lal, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge :

By way of this appeal, the appellants have challenged the judgment and decree passed by the Court of learned District Judge, Sirmaur in Civil Appeal No. 80-CA/13 of 2001 dated 16.01.2002, vide which, learned appellate Court while accepting the appeal filed by the predecessor-in-interest of the present respondents, set aside the judgment and decree passed by the Court of learned Sub Judge 1st Class, Court No. 2, Paonta Sahib in Civil Suit No. 196/1 of 1999, dated 26.05.2001, whereby learned trial Court had dismissed the suit for permanent injunction filed by the predecessor-in-interest of the present respondents.

2. Brief facts necessary for the adjudication of the present case are that predecessor-in-interest of the present respondents, namely, Telu Ram (hereinafter referred to as 'the plaintiff") filed a suit for permanent injunction on the grounds that he alongwith defendants and others were co-sharers in land comprised in Khata Khatauni No. 30/98 alongwith other lands and that the plaintiff in fact was in exclusive possession of Khasra No. 951 and 1458, measuring 1-2 bighas and 1-14 bighas, situated in Mauza Bali Koti, Tehsil Shillai, H.P. and pursuant to a partition, said Khasra numbers were allotted to him alongwith other Khasra numbers. Further, the case of the plaintiff was that defendants never remained in possession of the suit land, i.e., land comprised in Khasra No. 951, measuring 1-2 bighas and Khasra No. 1458, measuring 1-14 bighas, situated in Mauza Bali Koti, Tehsil Paonta Sahib, District Sirmaur nor were they allotted the suit land in partition. However, despite this, the defendants were forcibly trying to occupy the suit land, which was being resisted by the plaintiff. In May 1998, defendants had again tried to interfere in the suit land and if the defendants were not restrained from interfering in the same and from occupying the suit land forcibly, then the plaintiff would suffer irreparable loss. According to the plaintiff, he being in exclusive possession of the suit land pursuant to partition, had a prima facie case in his favour and on these bases, he filed the suit praying for decree of permanent injunction restraining the defendants from interfering and occupying the suit land.

3. The suit so filed was resisted by the defendants, who in their written statement specifically denied the factum of suit land being in exclusive possession of the plaintiff. As per the defendants, one Jangli Ram was in possession over the suit land and the same was being cultivated by the defendants on behalf of Jangli Ram. Jangli Ram was duly recorded in revenue records in possession of suit land and after his death, defendants were in possession of the same, who had developed the suit land and had made it cultivable and the same was thus in cultivating possession of the defendants. According to the defendants, plaintiff never remained in possession of the suit land in any capacity. Entry in revenue records in the column of possession in favour of the plaintiff was stated to be false, fictitious and contrary to factual possession at the spot by the defendants. It was further the case of the defendants that it was in fact the plaintiff, who wanted to forcibly occupy the suit land with the assistance of his family members without any right, title and interest. Thus, on these bases, the suit of the plaintiff was resisted by the defendants.

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

"1. Whether the plaintiff is in exclusive possession of Khasra No. 951 and 1458 having been given to him in partition, as alleged? OPP

2. If issue No. 1 is proved in affirmative, whether the plaintiff is entitled for the relief of injunction? OPP

3. Whether the plaintiff has no cause of action as alleged? OPP

4. Whether the suit is not maintainable as alleged? OPD

5. Whether the suit is not properly valued as alleged? OPD

6. Whether Jangli was in possession of suit land since beginning and therefore the defendants are coming in possession of Khasra Nos. 951 and 1458 as alleged? OPD

7. Whether the entries in the record to the contrary one false and fictitious as alleged? OPD

8. Relief.

5. On the basis of evidence adduced by the respective parties in support of their respective claims, the following findings were returned by learned trial Court on the issues so framed:

"Issue No. 1:	*No.*
Issue No. 2:	*No.*
Issue No. 3:	*Yes.*
Issue No. 4:	*Yes.*
Issue No. 5:	*No.*
Issue No. 6:	*Yes.*
Issue No. 7:	*Yes.*
Relief:	*Suit of plaintiff fails and is dismissed as per operative part of judgment.*

6. Learned trial Court while dismissing the suit filed by the plaintiff held that in Jamabandi Ex. PA, Jangli was shown as one of the co-sharers in Khasra Nos. 951 and 1458 and the said position was also reiterated in Ex. PB, jamabandi for the year 1990-91 and Ex. PC, which was copy of order of partition in which defendants had been proceeded against *ex parte*. Learned trial Court also held that the said order was passed by the Assistant Collector on 08.09.1993, which demonstrated that at that time Jangli was alive. Learned trial Court also held that it was admitted factual position that father of plaintiff Shri Nanda and father of Jangli Shri Devi Singh were real brothers and they had joint land and after partition, Jangli also got the same. Learned trial Court also held that perusal of ocular testimonies of witnesses, especially the suggestions given to DW-1 and DW-2 demonstrated that it were the defendants, who in fact were in possession of the suit land on the spot. Learned trial Court also held that this was also evident from the statement of the plaintiff himself, who in cross-examination had stated that he wanted to have the possession of the suit land from the defendants. On these bases, it was concluded by the learned trial Court that this demonstrated that the suit land was in fact in possession of the defendants. It was further held by the learned trial Court that Ex. DA, Ex. DB and Ex. DC, which were jamabandis pertaining to the suit land for different years, demonstrated that Jangli was in possession of the suit land alongwith other co-sharers and the said fact could not be disputed by the plaintiff. Learned trial Court also held that it stood admitted by the plaintiffs that Jangli had died in the year 1998 and that there was nothing on record to demonstrate that the suit land had ever remained in possession of the plaintiff. It further held that plaintiff in fact himself had admitted in cross-examination that the suit land was not in his possession and yet he had filed the suit for injunction. On these basis, it was concluded by the learned trial Court that as plaintiff was not in exclusive possession qua the suit land, he was not entitled for relief of injunction. Learned trial Court also held that possession of the suit land was with the defendants and revenue entries were contrary to the factual position.

7. Feeling aggrieved by the dismissal of his suit, plaintiff preferred an appeal. Learned appellate Court vide judgment and decree dated 16.01.2002, while setting aside the judgment and decree passed by the learned trial Court, allowed the appeal. Learned appellate Court held that jamabandis for the year 1980-81 (Ex. DA), 1975-76 (Ex. DB) and 1970-71 (Ex. DC) suggested that Jangli was in possession over the suit land, but later jamabandis reflected that suit land was in possession of the plaintiff. Learned appellate Court referred to Ex. PA, copy of jamabandi for the year 1995-96 and Ex. PB, copy of jamabandi for the year 1990-91 to arrive

at the said conclusion. It was further held by the learned appellate Court that it appeared that the said entry came to be corrected on the basis of some partition that took place amongst co-sharers, as was evident from copy of order dated 08.09.1993 (Ex. PC). It further held that mode of partition was prepared in 1990, in which suit land appeared to have been allotted to the plaintiff, though copy of mode of partition was not exhibited. On these basis, it was held by the learned appellate Court that from documentary evidence, it appeared that previously Jangli was in possession of the suit land, however, later on the same was allotted to the plaintiff. It further held that as presumption of truth was attached to jamabandis, therefore, it could be presumed that after the year 1990, plaintiff was in possession of the suit land. Learned appellate Court further held that the conclusion arrived at by the learned trial Court that plaintiff was not in possession of the suit land was evident from his cross-examination amounted to misreading of the statement of the plaintiff as learned trial Court had not read the statement of the plaintiff in its totality. The findings returned by the learned appellate Court in this regard are as under:

> *"12. The learned trial Court has discussed the oral evidence adduced by the parties and made reference to the testimony of plaintiff Telu Ram, wherein in cross-examination he is stated to have admitted that he wants to take possession of the suit land. This suggestion led the learned trial Court to the conclusion that the plaintiff is not in possession of the suit land. However, this is not so. The learned trial Court has not read the entire evidence. The plaintiff has specifically stated that he is in possession of the suit land and this land never remained in possession of the defendants. Similar reply was given by him to the learned counsel for the defendants in cross-examination and it appears that the suggestion of the defendants' counsel was denied by the plaintiff, but since the same suggestion was repeated twice, it was taken that the plaintiff has stated regarding his intention to take possession of the suit land through this suit. As such, I make reference to the exact words used in the cross-examination of the plaintiff. He has stated that it is incorrect that he intends to take forcible possession of the suit land. Thereafter, there is again a sentence that he wants to take possession from the defendants. To me there appears to be no full stop between two sentences and when both these sentences are read together, it appears that both the suggestions have been denied by the plaintiff. Moreover, there appears to be no reason as to why the plaintiff should have stated that he wants to take possession of the suit land when from the very beginning of his statement he has denied that the defendants are in possession of the suit land and he also denied the suggestion given by the learned counsel for the defendants that he wants to forcibly occupy the suit land."*

8. Learned appellate Court also held that in its view report of the Patwari and Kanungo was the best evidence but the defendants had not proved the same for the reasons best known to them, which amounted to withholding of the best evidence by defendants. On these bases, it was concluded by the learned appellate Court that whereas defendants had failed to prove their case that they were in possession of the suit land, plaintiff had duly proved the same and the case of the plaintiff was also supported by revenue entries. Learned appellate Court took note of the contention of the learned counsel for the appellant therein that even if it was taken that defendants were in possession of the suit land, they had no right to remain in possession over the same, as they had no concern with the same. On these bases, it was held by the learned appellate Court that as there was no material on record to suggest as to what right, title and concern defendants had with the suit land, it could not be said that they had any right to remain in possession over the same. Learned appellate Court concluded that neither the defendants could prove their possession over the suit land nor they were able to prove that they had any right, title and concern with the same. Learned appellate Court thus while setting aside the judgment and decree passed by the learned appellate Court, decreed the suit of the plaintiff for permanent prohibitory injunction restraining the defendants from interfering in the possession of the plaintiff with the suit land.

9. The judgment and decree so passed by the learned appellate Court stands assailed by way of present appeal.

10. This appeal was admitted on 10.05.2002 on the following substantial question of law:

> *"Whether the findings of reversal recorded by the learned District Judge are de hors the evidence on record, based on conjectures and surmises?*

11. I have heard the learned counsel for the parties and have also gone through the records of the case as well as the judgment passed by both the learned Courts below.

12. A perusal of the averments made in the plaint demonstrates that the case put forth by the plaintiff was that he was in exclusive possession of the suit land which stood allotted to him on partition alongwith other Khasra numbers, meaning thereby the factum of defendants being co-sharers alongwith the plaintiff over the suit land has not been disputed by him, but as per the plaintiff, it was he who was in exclusive possession of the same pursuant to a partition in which the suit land came to his shares. Learned trial Court disbelieved the version of the plaintiff that it was he who was in possession over the suit property. While disbelieving the version of the plaintiff, learned trial Court besides taking into consideration the other evidence on record, it also relied upon the statement of the plaintiff. Learned appellate Court while setting aside the judgment passed by the learned trial Court held that learned trial Court had concluded the factum of plaintiff not being in possession over the suit land by misconstruing and misreading his statement, whereas as per learned appellate Court no such conclusion could have had been arrived at on the basis of the statement of the plaintiff, who had entered the witness box as PW-1.

13. In order to appreciate as to whether the findings returned by the learned trial Court in this regard are borne out of the records or the findings returned by the learned appellate Court are supported by the records, this Court has minutely scrutinized the testimony of the plaintiff alongwith other evidence on record. A perusal of the statement of PW-1 Telu Ram demonstrates that in his examination-in-chief, he deposed that Khasra Nos. 951 and 1458 were in his possession and the same never remained in possession of the defendants and that defendants were interfering with his peaceful possession since the years 1997-1998 and the intent of the defendants was to forcibly grab the suit land. Now, his cross-examination demonstrates that he has deposed therein as under:

> *"Mai waadgrast bhumi ka pratiwadigan se kabza lena chahta hun"*
>
> This line is preceded by the following line:
>
> *"Yeh galat hai ki mai aaraji mutnaja par jabardasti kabza karna chahta hun."*

14. Further, both these sentences are complete sentences in themselves and in my considered view, there cannot be any confusion that it has been so stated in his cross-examination by the plaintiff that he wanted the possession of the suit land from the defendants. Therefore, the conclusion arrived at by the learned appellate Court that the finding returned by the learned trial Court to the effect that the plaintiff had admitted in his cross-examination that he wanted the possession of the suit land from the defendants was incorrect finding, is a perverse conclusion. In my considered view, it is the learned appellate Court which has misread and mis-construed the statement of PW-1 and not the learned trial Court.

15. Learned appellate Court has tried to read something in the cross-examination of the plaintiff, which does not exist in the same. It has to be remembered that the statements of the witnesses have to be read as they are and the Courts can neither add anything into it nor the Courts can subtract anything from the same. This basic principle apparently had been ignored by the learned appellate Court while appreciating the statement of the plaintiff.

16. As I have already mentioned above, the claim put forth by the plaintiff in the plaint was that he alongwith defendants were co-sharers qua Khata Khatauni No. 30/98 and that

Khasra Nos. 951 and 1458 had come in exclusive possession of the plaintiff pursuant to a partition. Though partition has been pleaded by the plaintiff, however, he has failed to prove that any partition took place intra the co-sharers and in partition suit land came into the possession of the plaintiff. In fact, a perusal of the statement of plaintiff in the Court as PW-1 demonstrates that there is not even a murmur about the plaintiff having come in exclusive possession of the suit land by virtue of a partition. Now, in this background, when we peruse the judgment passed by the learned appellate Court, it demonstrates that the conclusions which have been arrived at by the learned appellate Court in favour of the plaintiff are based on conjectures and surmises, rather than on evidence placed on record by the parties. In para-11 of the judgment, learned appellate Court has held that whereas jamabandis Exhibits DA, DB and DC pertaining to the year 1980-81, 1975-76 and 1970-71, respectively demonstrated that the suit land was in possession of Jangli, but latter jamabandis Ex. PA and PB for the year 1995-96 and 1990-91, respectively demonstrated that the suit land was in possession of plaintiff and it appeared that said entries came to be corrected on the basis of **"some partition that took place among the co-sharers."** Learned appellate Court further held that "**mode of partition was prepared in 1990 in which suit land appears to have been allotted to the plaintiff, though copy of mode of partition has not been exhibited."** On these bases, it was concluded by the learned appellate Court that it appeared that previously Jangli was in possession of the suit land, but later on the same was allotted to the plaintiff. In my considered view, the findings so returned by the learned appellate Court to arrive at the conclusion that the plaintiff was in possession over the suit land are not sustainable in the eyes of law. This is for the reason that the findings which are to be returned by the Court of law have to be based on evidence which is available on record of the case and not on conjectures and surmises. Admittedly, as has also been held by the learned appellate Court, no partition proceedings have been proved by the plaintiff on record. It is settled principle of law that he who alleges, has to prove. In the present case, it was the case of the plaintiff that he was in exclusive possession over the suit land which came into his share by virtue of a partition and thus, the onus to prove the partition was on the plaintiff. However, neither the plaintiff proved the factum of partition nor he proved that the suit land had fallen in his exclusive share on the basis of a partition. Plaintiff was not able to demonstrate that he otherwise was in exclusive possession over the suit land.

17. In addition to the plaintiff having stated in his cross-examination that he wanted the possession of the suit land from the defendants, the factum of his not being in possession over the suit land is otherwise also borne out from other material on record. Plaintiff has not led any ocular evidence except his bald testimony to substantiate and prove that either any partition took place in which the suit land came to his share or that he was otherwise in possession over the suit land. On the other hand, the defendants besides the testimony of defendant Kalyan Singh, have also led evidence of Mani Ram (DW-2), who has deposed in the Court that the plaintiff and defendants were known to him and that the suit land was in possession of Kalyan Singh, who was cultivating the same and that the suit land was not in possession of the plaintiff. In his cross-examination, this witness denied the suggestion that it was the plaintiff who used to cultivate the suit land on behalf of Jangli. Further, a perusal of the statement of defendant Kalyan Singh, who entered the witness box as DW-1, demonstrates that this witness has categorically stated that the suit land was in possession of Jangli, which was being cultivated by the defendants. This witness also deposed that Jangli was putting up with them and that the plaintiff in connivance with Patwari, had manipulated revenue entries in his favour. This witness also deposed that Jangli died about two years back and after his death, the suit land was in possession of the defendants. In his cross-examination, this witness categorically denied the suggestion that suit land was either in possession of the plaintiff or it was being cultivated by him. He also denied the suggestion that defendants had forcibly tried to take possession over the suit land, as was the case put forth by the plaintiff.

18. Be that as it may, the fact of the matter remains that as it was the plaintiff who had filed a suit praying for a decree of injunction, onus was upon him to have had proved his case. In my considered view, the findings returned by the learned trial Court to the effect that the

plaintiff had failed to demonstrate that he was in possession over the suit land are correct findings, which are duly borne out from the records of the case. Similarly, the findings to the contrary returned by the learned appellate Court are perverse, as they are not borne out from the records of the case and further the conclusions which have been arrived at by the learned appellate Court are based on conjectures and surmises, rather than the evidence available on record. Substantial question of law is answered accordingly.

19. Therefore, in view of the discussion held above, this appeal succeeds. Judgment and decree passed by the Court of learned District Judge, Sirmaur in Civil Appeal No. 80-CA/13 of 2001, dated 16.01.2002 are set aside, whereas the judgment and decree passed by the Court of learned Sub Judge 1st Class, Court No. 2, Paonta Sahib in Civil Suit No. 96/1 of 1999, dated 26.05.2001 are upheld. Miscellaneous applications, if any, stand disposed of. No order as to costs.

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

Lalchand .....Petitioner

Versus

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

CWP No. 2530 of 2016
Reserved on: May 4, 2017
Decided on: May 11, 2017

Constitution of India, 1950- Article 226- Petitioner and respondent No.3 submitted a tender – the work was awarded to respondent No.3- aggrieved from the award, the present writ petition has been filed- held that the committee had calculated the rates submitted by the bidders – rates quoted by respondent No.3 were found to be the lowest regarding the items to be supplied mandatorily –the committee had rightly considered the rates for the items to be supplied mandatorily- no mala-fide action was proved on record- petition dismissed.(Para- 8 to 13)

Case referred:
Tata Cellular versus Union of India, (1994) 6 SCC 651

For the petitioner : Mr. Rajesh Kumar, Proxy Counsel.
For the respondents : Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan and Mr. Romesh Verma, Additional Advocate Generals and Mr.Kush Sharma, Deputy Advocate General, for respondents No.1 and 2.
Mr. Diwakar Dev Sharma, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Per Sandeep Sharma, Judge

Petitioner claims following main reliefs by way of instant petition:

"(i) That the action of the respondents declaring respondent No.3 to be the successful bidder and awarding the same work for running the mess in the premises of respondent No. 2 may kindly be declared as null and void.

(ii) That the respondent No.2 may kindly be directed to place on record the award dated not known and office order by which the respondent No.3 has been declared to be the successful bidder and the same may be quashed and set aside.

(iii) That the respondent No.2 may kindly be directed to award the work of running the mess in the premises of respondent No.2 in favor of the petitioner being the lowest bidder."

2. Briefly stated the facts of the case, as emerge from the record are that respondent No.2 issued a public notice calling for rates for providing food and refreshment in the canteen and hostel of the aforesaid institute, providing taxi, Mali/Mazdoor for the garden/lawns/poly-house, managing hostel, sweeping and security guard, as per list and conditions shown in tender form, by or before 30.8.2016. In response thereto, bids/rates from five persons were received including petitioner and respondent No.3, which were opened on 30.8.2016, and, on the basis comparative statement of rates, respondents awarded work to respondent No. 3 on 8.9.2016. Petitioner feeling aggrieved, preferred present petition.

3. Mr. Rajesh Kumar, learned counsel representing the petitioner vehemently argued that the petitioner being lowest bidder, ought to have been awarded work.

4. Mr. Shrawan Dogra, learned Advocate General, duly assisted by Mr. Kush Sharma, learned Deputy Advocate General, while supporting the action of respondent No.2 in awarding work to respondent No. 3, brought to our notice, condition No. 22 of tender form prescribing conditions for the mess, which provides that work will be awarded only to the person, who has experience of performing similar work in a training institute, hotel or restaurant, experience certificate in support of which shall have to be enclosed. As per Mr. Dogra, petitioner was considered for awarding of work in question, since he had not annexed any such experience certificate, rendering him ineligible for the work in question. Further plea taken by learned Advocate General, while defending action of respondent No.2, is that while considering award of work, rates of mandatory items were taken into consideration, for which items, rates of respondent No.3 were found lowest. As per reply of respondents No.1 and 2, rates of other items were negotiated with respondent No.3.

5. Petitioner, in rejoinder filed by the petitioner to the reply of respondents No.1 and 2, put forth argument that once bids were called for all the items shown in the annexure, prices of all the items, on an average, ought to have been considered. Petitioner further stated that even if mandatory items are taken into consideration, petitioner has offered lowest rates for the same also and as such he was the lowest bidder.

6. Mr. Diwakar Dev Sharma, learned counsel representing respondent No.3, stated that his client has sufficient experience in the field and, petitioner being ineligible, did not have any ground to challenge award of work in his favour.

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

8. In the instant case, respondents invited tenders for one year i.e. from 1.10.2016 to 30.9.2017, to run work of hostel mess. It also emerges from the reply filed by the respondents that five bidders submitted their rates and, accordingly, tenders were opened on 30.8.2016 by the Committee constituted for the purpose, in the presence of bidders. Perusal of comparative statement placed on record by the respondent i.e. Annexure R-III, suggests that the Committee, while finalizing tenders submitted by bidders, calculated rates submitted by bidders qua items, which were to be provided mandatorily i.e. breakfast, lunch, dinner and evening tea with snacks. Further perusal of list of items enclosed with terms and conditions as contained in the tender form clearly suggests that three meals i.e. breakfast, lunch and dinner were required to be served mandatorily as per items prescribed in tender form, Annexure R-III and Annexure R-IV. Perusal of Annexure R-III i.e. list of items further suggest that apart from aforesaid mandatory items, bidders were also to offer rates for special items. Comparative statement as referred to

above, clearly suggests that rates quoted by respondent No.3, Manoj Kumar, which were `548/- in total, qua all mandatory items were found lowest because, admittedly, petitioner had offered rates, which in total came to `690/-, qua all mandatory items. It also emerges from the reply filed by respondents that rates offered by bidders qua special food were not taken into consideration, while preparing aforesaid comparative statement because, special food is only provided on demand basis or occasionally. Authority concerned, while finalizing tender, only took into consideration, rates offered by parties for mandatory items, whereas, admittedly, respondent No. 3 was found to be lowest bidder. It also emerges from the reply of respondents that rate offered by petitioner for special items, which were not taken into consideration, while finalizing tender, were lowest, but replying respondent negotiated rate of special items with respondent No.3, who agreed to provide same on minimum rates and accordingly, tender was awarded in his favour. It further emerges from the note appended to the comparative statement that respondent No.3 Manoj Kumar had been providing mess service to the Department and during that period, his services as well as quality of food served by him were found to be satisfactory and as such, authority decided to award tender in his favour. Petitioner, by way of rejoinder, refuted aforesaid claim having been put forth by the respondents, in their reply and made an attempt to demonstrate that even as per calculations made on the basis of rate offered by petitioner , same were lowest as such, authority ought to have awarded tender in his favour. But, this Court, after having carefully examined details given in the rejoinder by the petitioner, sees no force in the aforesaid contentions of the petitioner because, admittedly, perusal of comparative statement made prepared by the Committee, clearly suggests that rates offered by respondent No.3 qua mandatory items were far less than rates offered by petitioner.

9. After bestowing thoughtful consideration to the material adduced on record by respective parties as well as documents available on record, this Court sees force in the arguments having been made by learned counsel representing the petitioner that there is nothing as such in the tender document, from where, it can be inferred that while finalizing tender, rates quoted against mandatory items only were to be considered. Admittedly, perusal of annexure R-IV, list annexed with the tender form, nowhere provides that while finalizing tender, rates quoted against mandatory items would only be considered. However, in the instant case, as emerges from the record, respondents, while awarding tender in favour of respondent No.3, made him to negotiate rates offered by him, qua special items, who revised the same accordingly.

10. It is well settled by now that the Courts would normally not interfere in the tender/contractual matters while exercising powers of judicial review. Power of judicial review can only be exercised by constitutional courts if it is proved on record that process adopted or decision so made by the authorities is intended to favour someone or the authority has acted with malafide or decision made is so arbitrary and irrational that no responsible authority acting reasonably could have reached. Needless to say that Court can also exercise power of judicial review in case it is shown that public interest is affected. In this regard, reliance is placed upon judgment rendered by Hon'ble Apex Court in **Tata Cellular** versus **Union of India**, reported in (1994) 6 SCC 651.

11. Though, this Court has no hesitation to conclude that authorities concerned, while finalizing tender have not adopted fair approach and injustice has been caused to the petitioner, who was lowest bidder, but this Court does not deem it fit at this stage to cancel tender awarded in favour of respondent No.3, especially when the contract in question shall be expiring on 30.9.2017 i.e. after five months. This Court also can not lose sight of the fact that tender in question is for providing breakfast, lunch, dinner and evening tea with snacks to the hostel mess attached to the office of the respondent No.2, wherein admittedly, number of officers come for training regularly. Cancelling of tender awarded in favour of respondent No. 3 at this stage, would cause undue hardship to the concerned department, which is supposed to provide mess service to the visitors throughout the year.

12. Otherwise also, considerable time would be consumed in finalizing of fresh tender, if any, ordered to be invited. Apart from above, it also emerges from the record that

petitioner was not eligible to be considered as he was not having requisite experience in the field as provided in the terms and conditions. True it is, rates offered by petitioner were considered by the department but that would not make him eligible, if he was not eligible in terms of terms and conditions contained in tender form.

13. However, this is a case, where petitioner has made out a case for himself by pointing out material illegalities and irregularities committed by the respondent-authorities while awarding work to respondent No.3 and this is a fit case, where this Court would have recommended action against erring officials but, in this case, we deem it fit to warn authorities to be more cautious and fair in their approach while deciding such matters.

14. With the aforesaid findings, the petition is dismissed. Pending applications, if any are also disposed of. Interim directions, if any, are also vacated.

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

Muni Lal ...Petitioner

Versus

State of H.P. & others ...Respondents

CWP No. 4940 of 2011
Date of Decision: 11.5.2017

H.P. Public Premises and Land (Eviction and Rent Recovery) Act, 1971- Section 5- Petitioner was ordered to be evicted from the government land, which was acquired for the construction of Karsog –Parlogroad – an appeal was filed, which was allowed and the case was remanded with a direction to decide the same afresh after conducting demarcation- the petitioner was again ordered to be ejected- an appeal was filed, which was dismissed- held in writ petition that due opportunity of hearing was given to the parties- the encroachment was proved by demarcation- the acquisition was not challenged by any person and has attained finality – petition dismissed. (Para- 12 to 14)

For the petitioner: Ms. Archana Dutt, Advocate.

For the respondents : Mr. Vikram Thakur and Ms. Parul Negi, Deputy Advocate Generals, for the respondent-State.

The following judgment of the Court was delivered:

Per Justice Ajay Mohan Goel, Judge(oral)

By way of this writ petition, petitioner has challenged the order passed by learned Sub Divisional Collector, Karsog, District Mandi in file No. 15 of 2010, dated 12.1.2010, Annexure P-3, under the provisions of H.P. Public Premises and Land (Eviction & Rent Recovery) Act, 1971 and the order passed by learned Divisional Commissioner, Mandi, District Mandi in case No. 73 of 2011, dated 19.5.2011, Annexure P-4 in appeal under Section 9 of the H.P. Public Premises Act, vide which, the present petitioner has been ordered to be evicted from the government land, comprised in Khasra No. 503/250/1, which as per the respondent-State, was encroached upon by the present petitioner, which land stood acquired by the respondent-State for the purpose of construction of karsog-Parlog road.

2. Brief facts necessary for the adjudication of the present case are that an application was filed under H.P. Public Premises Act, 1971, (hereinafter referred to as "the 1971 Act"), by Assistant Engineer, HPPWD, Sub Division, Karsog before Sub-Divisional Collector, Mandi to the effect that the petitioner had encroached upon the government land belonging to

HPPWD by way of construction of house over khasra No. 503/250/1, situated in Mohal Kau, Tehsil Karsog measuring 0-0-9 bighas. As per the applicant/Assistant Engineer, land was owned by the state of Himachal Pradesh and was in the possession of Public Works Department and the same stood acquired for the purpose of construction of Karsog-Parlog road for public utility. It was further the case of applicant that encroachment of the same by Muni Lal-petitioner was causing hindrance to the users of same and on these basis, the application was so filed to get the said land vacated from Muni Lal, petitioner and for having possession thereof delivered to the applicant.

3. Vide order dated 20.3.2006, said application was allowed by Sub-Divisional, Collector, Mandi, exercising powers conferred upon him under Sub Section (1) of Section 5 of the 1971 Act who ordered Muni Lal to vacate the said premises within 30 days of the date of publication of the said order.

4. Feeling aggrieved, present petitioner filed an appeal under Section 9 of the Act. The appellate Authority i.e. Divisional Commissioner, Mandi, vide order dated 2.8.2010 allowed the appeal, so filed against order dated 20.3.2006, on the ground that the demarcation of the land in dispute had not been carried out by the competent authority in the presence of the aggrieved party, i.e., the present petitioner.

5. Learned appellate authority thus remanded back the case to Collector, Sub Division, Karsog, District Mandi with a direction to decide the case afresh after affording an opportunity of being heard to the parties.

6. Thereafter, vide Annexure P-3, order dated 12.1.2010, Sub Divisional Collector, Karsog again ordered the present petitioner to vacate the public premises, subject matter of the present petition, within 30 days of publication of the said order by holding the present petitioner to have had unauthorizedly encroached upon the public premises. A perusal of the said order demonstrates that after the case was remanded back, the land in dispute was demarcated by Assistant Engineer- 1st Grade, Karsog in the presence of the parties and in fact the demarcation also stood accepted by the present petitioner. By relying upon the said demarcation report of Assistant Collector, 1st Grade, it was held by learned Collector that present petitioner had encroached upon Khasra No. 503/250/1 measuring 0-0-15 bighas situated in Muhal Kao/423. Learned Collector also held that though the said land was in possession of ancestors of the present petitioner till 26.7.1986 but thereafter vide mutation No. 177, dated 26.7.1986, said land was transferred in the name of Himachal Pradesh Public Works Department. It further held that thereafter, as was evident from the demarcation earlier done by Field Kanungo and thereafter done by Assistant Collector, 1st Grade, Karsog, the present petitioner was found to have had encroached upon the said land measuring 0-0-15 bighas. Learned Collector also took note of the fact that demarcation report given by Assistant Collector, 1st Grade stood accepted by the present petitioner and the same was not challenged by way of appeal etc. Learned Collector also took note of the contentions of present petitioner that the land being *abadideh* could not have been acquired and further that Assistant Collector, 1st Grade, who had demarcated the said land was not examined before the learned Collector. Learned Collector held that the H.P. Public Premises Act was a special law and the same overrides all other Acts whether enacted before or after the enactment of this Act, so far public property is concerned, nor the provisions of H.P. Roadside Control Act were applicable in the facts of the case. Learned Collector also took note of the contention of the State that as the State had full faith in the demarcation carried out by Assistant Collector, 1st Grade, there was no occasion to have examined him and that the present petitioner was also free to have had examined the said Officer whom he chose not to examine.

7. On these basis, it was finally concluded by learned Sub Divisional, Collector, Mandi that the petitioner had encroached upon the government land comprised in Khasra No. 503/250/1, measuring 0-0-15 bighas, situated in Muhal Kao/423 and ordered the present petitioner to vacate the said premises.

8. In appeal, the order so passed by the learned Collector was upheld by Divisional

Commissioner, Mandi vide order dated 19.5.2011, Annexure P-4. Learned Divisional Commissioner, Mandi, while upholding the order passed by learned Collector, held that there was no merit in the contention of the present petitioner that the proceedings initiated against him under Public Premises Act were not maintainable. Learned appellate authority also took note of the fact that disputed land had been demarcated by Assistant Engineer, 1st Grade on 4.11.2010 in the presence of the parties and the statements of the parties reflected that they had no objection of the demarcation so carried out and said demarcation stood accepted by the petitioner. It was further held by the appellate authority that the order passed by learned Collector was a speaking order, which was passed after affording reasonable opportunity of being heard. On these basis, it was concluded by learned appellate authority that there was no illegality or irregularity with the orders passed by both the authorities below.

9. Feeling aggrieved by the orders passed by the learned authorities below, petitioner has filed the present petition.

10. Ms. Archana Dutt, learned counsel for the petitioner has primarily attacked the orders passed by both the authorities below on the ground that both the learned courts below have erred in not appreciating that said land was *abadi deh*, therefore, the same could not have been acquired, without duly compensating the present petitioner. She further argued that there was no question of the petitioner having encroached upon the said land, as he was in possession of the said land much before the land was allegedly acquired by the State. No other point was urged by learned counsel for the petitioner.

11. Learned Deputy Advocate General, on the other hand, while supporting the orders passed by both the authorities below, argued that it was a matter of record that the disputed land is now owned by State of Himachal Pradesh after the same was duly acquired in accordance with law and as the present petitioner was found to have had unauthorizedly encroached upon the public premises, therefore, there is no infirmity and illegality with the orders passed by both the authorities below, who have ordered the eviction of the present petitioner from the said premises.

12. I have heard learned counsel for the parties and also gone through the records of the case, which was placed before the Court by learned Deputy Advocate General.

13. In the present petition, which has been filed under Article 226 read with Article 227 of the Constitution of India, this Court cannot lose site of the fact that it is exercising its powers of judicial review qua the orders which have been passed by the statutory authorities. It is not the case of the petitioner that the impugned orders passed by the authorities concerned, have been passed without any jurisdiction. Though feeble attempt was made during the course of argument to stress that the proceedings initiated under the 1971 Act were not maintainable, however, this argument could not be taken to its logical conclusion. Besides this, records of the case demonstrate that after the application was filed by Assistant Engineer, HPPWD, Sub Division, Karsog under Public Premises Act for eviction of present petitioner from the public premises, due opportunity was afforded to the present petitioner to put forth his case before the authority concerned and after hearing the parties, orders of eviction were passed by the learned Sub Divisional, Collector. Similarly, the said order in appeal was confirmed by the appellate authority again after affording due opportunity of being heard to the parties. It is not the case of the petitioner that the impugned orders have been passed by the statutory authorities without following the procedure, as prescribed under the 1971 Act. It is also apparent and evident from the records that in fact after the first order of eviction was passed against the present petitioner on 20.3.2006, in appeal, the same was set aside on the ground that the demarcation, which was the genesis of order dated 20.3.2006, conducted by the Field Kanungo, had been carried out without associating the present petitioner. Thereafter, on remand, the demarcation was carried out by an authority not less than the Assistant Collector, 1st Grade in the presence of the parties and statements of the parties recorded in the process of demarcation, demonstrate that they were satisfied with the said demarcation, which demarcation revealed that in fact the petitioner had encroached upon the government land, as was the case set up against the petitioner by the State.

14. Therefore, in this background, when admittedly, the land in dispute as per revenue record stands recorded in the name of State and when demarcation carried out by Assistant Collector, 1st Grade, to which the present petitioner was also a party further proves that the petitioner has encroached upon the government land, the findings returned to this effect by both the authorities below, are neither perverse nor the same can be said to be illegal. As far as contention of learned counsel for the petitioner that as the said land was *abadideh*, same could not have been acquired is concerned, in my considered view, this issue cannot be decided by this Court in present petition when it is judicially reviewing the orders passed by statutory authorities under the H.P. Public Premises Act, 1971. Beside this, whether or not, the land, which is subject matter of the present petition, was acquired in accordance with law or not, is not the subject matter of the present petition. If the petitioner was in any manner aggrieved by the acquisition, process which was initiated by the State for the purpose of acquiring said land, then the petitioner was at liberty to have had assailed the same in accordance with law. However, in the garb of this contention, petitioner now cannot be permitted to escape the orders of eviction, which have been passed by both the authorities below, under the provisions of the 1971 Act.

15. Accordingly, in view of the discussions made hereinabove, as there is no merit in the present petition, the same is dismissed. Pending application(s), if any, are also disposed of. No orders as to costs.

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

Satish Kumar Sood .....Appellant/Plaintiff.
Versus
Green Carrier, Contractor (Delhi) Private Limited .....Respondent/Defendant.

RSA No. 66 of 2007 and CMP No. 4569 of 2016.
Reserved on : 03.05.2017.
Decided on : 11th May, 2017.

Code of Civil Procedure, 1908- Section 100- Plaintiff filed a civil suit seeking recovery of Rs.2,00,000/- on the ground that clothes were handed over to the defendant for delivery to the plaintiff- all the bundles were not delivered to the plaintiff due to which the plaintiff suffered damages – the defendant pleaded that truck caught fire causing damage to the bundles of the clothes- there was no negligence on the part of the defendant- the suit was decreed by the Trial Court- an appeal was filed, which was allowed – held in second appeal that an application for additional evidence was filed for placing on record the documents to show that plaintiff had not sent the relevant documents and the claim could not be settled for want of documents – the documents are important- hence, application allowed and the documents permitted to be led in evidence – case remanded to the Appellate Court with a direction to allow the additional evidence.(Para-9 to 13)

For the Appellant: Mr. B. C. Verma, Advocate.
For the Respondents: Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiff instituted a suit against the defendant, claiming therein that a decree for recovery of a sum of Rs. 2,00,000/- being pronounced against it. The suit of the plaintiff stood decreed by the learned trial Court. In an appeal carried therefrom by the

defendant before the learned First Appellate Court, the latter Court allowed the appeal, whereupon, it dis-concurred with the verdict recorded by the learned trial Court. In sequel thereto, the plaintiff/appellant herein is driven to institute the instant appeal herebefore.

2. Briefly stated the facts of the case are that the plaintiff is the Cloth Merchant and is having his shop at Shali Bazar, Theog. The defendant is a Goods Transport Company. It is alleged that in December, 1996 and January, 1997, the plaintiff had purchased various kinds of clothes worth Rs. 1,79,332/- from Ranilia Trading Company, Surat against the bills mentioned in the plaint and thereafter these were entrusted to defendant for transporting the same to Shimla, so as to deliver them to the plaintiff. Thereafter the defendant issued different receipts to the plaintiff and was under an obligation to deliver the said cloth bundles to him. It is pleaded that the defendant did not deliver these cloth bundles to the plaintiff and hence a notice was served upon the defendant on 24.2.1997 and after the receipt of this notice one bundle was delivered to the plaintiff and remaining bundles were not delivered to the plaintiff. It is pleaded that because of non receipt of cloth bundles, the plaintiff suffered huge loss and he also could not sell the same in his shop. As such, he has claimed a sum of Rs.2,00,000/- from the defendant.

3. The defendant contested the suit and filed written statement. In its written statement, the defendant has taken preliminary objections inter alia jurisdiction, maintainability and non compliance of provisions of Section 6 and 10 of the Carriers Act. It is also pleaded that the plaintiff had no property in the goods nor he had entrusted any goods to him at Surat for transportation. According to the defendants, the goods had been booked by a third party at Surat for transportation to Shimla and the delivery was also to be made by a third party, namely, P.K. Transport Company, which sent the goods through truck No. HR-38-4879 but the said truck caught fire and the cloth bundles had burnt. Therefore, FIR No. 14 dated 21.2.1997 lodged with Police Station, Laldu. It is pleaded that there was no negligence in handling the goods and the same were transported with reasonable care and the loss has been caused on account of act of God. After this incident consignor of the goods were duly informed and at his instance the information was also given to the plaintiff and the original documents were sent to the plaintiff to negotiate a settlement of claim, as a matter of good will only but the matter could not be settled. The value of the goods is also stated to be not more than Rs.20,000/-. It is pleaded that in view of the provisions of Section 6 of the Carriers Act, the suit is not maintainable and the suit is also bad for want of notice under Section 10 of the Carriers Act.

4. The plaintiff/appellant herein filed replication to the written statement of the defendant/respondent, wherein, he denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the plaintiff is entitled for the recovery of suit amount as prayed?OPP
2. Whether this Court has jurisdiction?OPD
3. Whether the suit is not maintainable?OPD
4. Whether the suit is barred under Section 10 of the Carriers Act?OPD
5. Whether the plaintiff has not disclosed the material facts?OPD.
6. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiff/appellant herein. In an appeal, preferred therefrom by the defendant/respondent herein before the learned First Appellate Court, the latter Court allowed the appeal and reversed the findings recorded by the learned trial Court.

7. Now the plaintiff/appellant herein, has instituted the instant Regular Second Appeal before this Court, wherein he assails the findings recorded in its impugned judgment and decree, by the learned first Appellate Court.

8. The plaintiff under Exts.P-1 to P-9, purportedly purchased bundles of cloth from M/s Ranilia Trading Company, Surat. The bundles of cloth were entrusted to the defendant, for their onward delivery at the commercial premises of the plaintiff. However, the defendant omitted to deliver the bundles of cloth at the commercial premises/establishment of the plaintiff. Consequently, the plaintiff was led to institute the instant suit against the defendant claiming therein, that a decree in a sum of Rs.2,00,000/- being pronounced against the defendant, the sum aforesaid comprising the price of the undelivered bundles of cloth.

9. The learned First Appellate Court had alluded to Ex. P-1 and Ex. P-4, exhibits whereof display qua theirs standing prepared with respect to Yog Brothers, Theog, hence, apparently with the aforesaid exhibits not bearing/carrying the name of the plaintiff, hence, it concluded that imputation of credence thereto, being shaky. Consequently, the learned Appellate Court concluded that the purchase(s) as made by the plaintiff under the aforesaid exhibits also constraining a sequeling conclusion that "no evidence", hence, surging forth with respect to entrustment thereof by Ranilia Trading Company vis-a-vis the defendant. Also the learned First Appellate Court, had alluded to the factum of all bills of consignment comprised in Ex. P-10 upto P-18 "excepting Ex.P-17", wherein the plaintiff stands displayed as the consignee, "not" therein specifically displaying the plaintiff to be consignee thereof, rather with in the apt column of consignee thereof, a coinage "self" occurring, hence, it concluded that the bills of consignment comprised in the aforesaid exhibits, being prepared "not" with respect to the bundles of cloth purchased by the plaintiff from Ranilia Trading Company. In sequel, the learned First Appellate Court concluded that "no" entrustment of the relevant goods being made by Ranilia Trading Company vis-a-vis the defendant, for the latter transporting them upto the commercial establishment of the plaintiff, hence, for want of the relevant goods being received by the plaintiff at his commercial establishment, it, concomitantly concluded that he could not stake a claim for recovery of price thereof.

10. Be that as it may, since during the pendency of the instant appeal before this Court, the plaintiff/appellant has instituted herebefore, an application cast under the provisions of Order 41, Rule 27 of the CPC, application whereof bears CMP No.4569 of 2016, hence, it would not be befitting to make any pronouncement upon the legality of the findings recorded by the learned First Appellate Court upon the contentious issue, significantly, when through the documentary piece(s) of evidence, proposed to be hence with the leave of the Court adduced into evidence, the plaintiff is striving to establish the factum probandum "of" apposite connectivity surging forth inter se the relevant purchase(s) made by him vis-a-vis the bills of consignment prepared in respect thereto, consignment bills whereof are comprised in Ex.P10 to Ex.P18. Before proceeding to permit the appellant/applicant/plaintiff, to adduce the aforesaid documentary evidence, it is incumbent upon this Court, to record findings qua the plaintiff/applicant begetting satisfaction of the mandate of the provisions of Order 41, Rule 27, of the Code of Civil Procedure (hereinafter referred to as the CPC), relevant provisions whereof stand extracted hereinafter:-

> "**27. Production of additional evidence in Appellate Court**.
>
> (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if-
>
> (a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or
>
> [(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or]

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the Appellate Court may allow such evidence or document to be produced, or witness to be examined.....

2....."

11. Though, clause (aa) of sub rule (1) to Order, 41, Rule 27 of the CPC, enjoin upon the aspirant, to establish that despite exercise of due diligence, the proposed evidence, oral or documentary, for adduction whereof, he with the leave of the Court, hence, makes a concert, being not previously within his knowledge or dehors his holding previous knowledge thereto, he, despite exercise of due diligence, yet for pressing reasons, stood constrained to not produce, it, before the Court concerned. However, clause (b) of sub rule (a) of Order 41, Rule 27 of the CPC, empowers the Appellate Court, to dehors the appellant/applicant not begetting satisfaction of the statutory ingredients, cast in clause (aa) of sub rule (a) of Order 41, Rule 27 of the CPC, to, yet grant the apposite leave, to the aspirant concerned, on its apt discernments qua the nature of the dispute engaging the contestants besides the issues whereupon the parties to the lis are at contest, hence, goading its wisdom to record a conclusion that, its, adduction into evidence, is required for facilitating it, to pronounce a judgment. The subtle nuance of the aforesaid clause (b) of sub rule (1) to Order 41, Rule 27 of the CPC, is of the Appellate Court being enjoined to make a clinching conclusion that prima facie the document(s) purposed, to, with its leave adduced in evidence is/are just and essential for hence facilitating it to pronounce a judgment on the relevant issue.

12. Be that as it may, even if, assumingly, the statutory parameters or the ingredients embodied in clause (aa) of sub rule (1) of Order 41, Rule 27 of the CPC, may not apparently beget their apposite satiation, nonetheless, when construed in the light of the learned First Appellate Court, for reasons aforesaid, dispelling the vigour of the aforesaid exhibits, on the short ground of their existing no apparent connectivity inter se Ex. P-1 and Ex. P-4 vis-a-vis the nomenclature of the commercial establishment of the plaintiff also with "excepting" Ex. P-17, other bills of consignment not therein depicting the name of the plaintiff, whereupon, it was led to dismiss the suit of the plaintiff, whereas, with the proposed documents, with the leave of the Court, strived to be adduced into evidence, making a prima facie display of the defendant, making a communication addressed at the commercial establishment of the plaintiff also with the proposed documentary evidence, bringing to the fore that the bills of consignment prepared with respect to the purchased made by the plaintiff from Ranilia Trading Company, Surat, prima facie holding the apposite analogity with the exhibits comprised in Exts. P10 to P-19 besides with respect thereto it articulating that for want of the plaintiff dispatching to the defendant, the relevant claim papers, for hence facilitating it to settle his claim, hence, constraining it to not settle claim of the plaintiff. Moreover, with the aforesaid display(s) occurring in the document(s) proposed to be adduced into evidence, with the leave of the court, being in consonance with the written statement of the defendant. Corollary thereof beside effect is that, if leave to adduce it into evidence is granted, it may dispel the vigour of the findings erected by the learned First Appellate Court, for its hence non suiting the plaintiff. Consequently, the permission to the plaintiff to adduce it into evidence would obviously facilitate, the cause of justice also would facilitate this Court, to pronounce a just and effective decision up-on the relevant issue, whereupon, the parties are at contest. Conspicuously, with hence, the adduction of document(s) proposed to be hence adduced, is just and essential for resting the entire gamut of the controversy, whereupon, the parties are engaged, hence, this Court deems it fit to grant the apposite permission to the plaintiff, for adducing it into evidence. Consequently, CMP No.4569 of 2016 is allowed.

13. However, since the aforesaid piece of documentary evidence, did not exist before the learned First Appellate Court, in sequel, when its probative vigour or impact upon the apposite issue(s) could obviously not be pronounced upon by it, hence, it is deemed fit, to permit the plaintiff/appellant to tender it in evidence before the learned First Appellate Court. The

learned First Appellate Court, is also directed to permit the respondent/defendant to adduce evidence in rebuttal thereto. Since, this Court has concluded that for want of its existence before the learned First Appellate Court, it stood precluded to pronounce upon both its probative vigour or impact upon the contentious issue, hence, unless the learned First Appellate Court after its being tendered into evidence by the plaintiff before it, pronounces upon its probative vigour or upon its impact upon the relevant issue, whereupon, the parties to the lis are at contest, it would be also unbefitting, for this Court, when it would find its existence only before the First Appellate Court also would in accordance with law, stand proven thereat, whereat, its worth also would be appraised, to hence scuttle the findings recorded by the learned First Appellate Court. For obviating the aforesaid, also with this Court directing the plaintiff, to tender it before the learned First Appellate Court, it is deemed fit that the learned First Appellate Court, after its being tendered into evidence before it by the plaintiff, it shall appraise its worth, whereafter, it shall record its findings upon the apposite issue(s) whereupon, the parties to the lis are at contest. In aftermath, obviously, it is deemed fit to remand the case to the learned First Appellate. Consequently, only in the light of the aforesaid directions, the impugned judgment and decree is quashed and set aside. The instant appeal stands disposed of with the aforesaid directions. The parties are directed to appear before this learned First Appellate Court on 23rd June, 2017. The learned First Appellate Court is directed to decide the appeal within six months from today. All pending applications also stands disposed of. Records be sent back forthwith.

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

State of Himachal Pradesh and another ....Appellants
Versus
Mahinder Singh ...Respondent

LPA No. 45 of 2017
Date of Decision: May 11, 2017

Industrial Disputes Act, 1947- Section 25- Workman was engaged as daily wage beldar on muster roll basis-the workman claimed regularization – the Tribunal held the workmen entitled to continue in service and seniority with further direction to regularize his services as per the policy of the State – aggrieved from the award, the present writ petition has been filed- held that petition cannot be dismissed on the ground of delay – the reference was made by the Government and was answered by the Tribunal – Writ Court has limited jurisdiction to interfere with the award – writ petition dismissed.(Para-11 to 20)

Cases referred:

Karan Singh v. Executive Engineer, Haryana State Marketing Board, (2007) 14 SCC 291
Raghubir Singh v. General Manager, Haryana Roadways Hissar, (2014) 10 SCC 301
Mukand Ltd. v. Mukand Staff & Officers' Assn.. (2004) 10 SCC 460
Prabhakar vs. Joint Director, Sericulture Department and another, (2015) 15 SCC 1
Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd. 2014 AIR SCW 3157.

For the appellant Mr. Shrawan Dogra, Advocate General with Mr. M.A. Khan, Additional Advocate General and Mr. J.K. Verma & Mr.Kush Sharma, Deputy Advocate Generals.
For the respondent: Mr. Rahul Mahajan, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral**)**

CMP(M) No. 2234 of 2016

By way of present application under Section 5 of Limitation Act, the applicants seek condonation of delay in filing the accompanying letters patent appeal. For the reasons set out in the application, delay in filing the appeal is condoned. Application is disposed of.

LPA No. 45 of 2017

2. Be registered.

3. With the consent of the parties, the matter was taken up at this stage, to be disposed of on merit.

4. Brief facts of the case are that the appropriate Government made a reference to the Labour Court-cum-Industrial Tribunal, Dharamshala, HP ('Tribunal', hereafter), under Section 10(1) of the Industrial Disputes Act, 1947 ('Act', in short) as under:

> "Whether termination of the services of Shri Mahinder Singh S/O Shri Durga, R/O Village and P.O. Haripur, Tehsil Dehra, District Kangra, H.P. from time to time during year 1996 to 31-12-2005 by the Executive Engineer, I&PH Division, Dehra, District Kangra, H.P. without complying with the provision of the Industrial Disputes Act, 1947, is legal and justified? If not, what amount back wages, seniority, past service benefits and compensation the above worker is entitled to from the above employer?"

5. As per the statement of claim filed before the Tribunal, respondent-workman ('workman', hereafter) was engaged as daily wage Beldar on muster roll basis by the appellant-employer ('employer', hereafter), in 1996. No appointment order was issued in his name by the employer. Workman worked under Assistant Engineer, I&PH Sub Division Haripur upto December, 2005. It is further averred in the claim petition that from the date of appointment till 31.12.2005, fictional breaks in service were given to him. Sometimes, complete muster roll was also not issued in his name. Workman further stated that the period of fictional break is to be counted for the purpose of regularization, as such, he was entitled for regularization from 1.1.2006, with all consequential benefits.

6. The Tribunal framed issues and after appreciating the evidence, partly answered the reference in favour of the workman, by holding him entitled to continuity in service and seniority, with further direction to regularize his services as per policies of the State, in vogue, and in case any junior of the workman had been regularized prior to him, he (workman) shall be regularized from that date.

7. The employer being aggrieved with the award of the Tribunal, preferred a writ petition in this Court, which was registered as CWP No. 3011 of 2015, raking up issue of delay on the part of workman in approaching the authorities. The learned Single Judge, while dismissing the petition filed by the employer, held, on the basis of law settled by the Hon'ble Apex Court in **Karan Singh** v. **Executive Engineer, Haryana State Marketing Board**, (2007) 14 SCC 291 and **Raghubir Singh** v. **General Manager, Haryana Roadways Hissar,** (2014) 10 SCC 301, that the labour court is bound to answer the reference made to it, without looking into the aspect of delay and laches. Hence, this appeal by the employer.

8. Mr. Shrawan Dogra, learned Advocate General, duly assisted by Mr. J.K. Verma, learned Deputy Advocate General vehemently argued that the learned Single Judge has not appreciated the fact that the workman had approached the authorities after a period of nine years and further the learned Single Judge has not looked into the requirement of completing 240 days in a calendar year.

9. Mr. Rahul Mahajan, learned counsel representing the workman, has supported the judgment of the learned Single Judge.

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

11. As far as contention raised on behalf of the employer that since there was considerable delay in raising demand by the workmen, learned Tribunal below ought to have dismissed their claim, on the ground of delay and laches, is concerned, same has no substance. Though, it clearly emerges from the pleadings as well as award that aforesaid workman had raised dispute after a considerable time, but that can not be a ground for learned Tribunal below to reject the claim, specifically in view of the fact that it was bound to answer the specific term of reference, made to it by the appropriate Government, under Section 10 of the Act. Objections, if any, with regard to raising demand after considerable delay, could be taken by the employer before framing of term of reference. Term of reference framed in the instant case for adjudication nowhere suggests that the learned Tribunal below was required to decide with regard to delay in raising demand. Rather, learned Tribunal below was called upon to answer reference that whether termination of the workmen by the employer was legal and justified.

12. Though the respondents have taken refuge of law laid down by this Court in CWP No. 1912 of 2016 titled **Bego Devi** versus **State of HP and others** and other analogous matters, decided on 26.10.2016, but the same is applicable in cases where reference has been denied by the appropriate Government to be referred to the Tribunal/labour Court. However, in this case, since a specific term of reference was sent to the Tribunal, it was bound by the same, as it could record its findings only to the extent as per terms carved out in the reference itself.

13. In **Mukand Ltd.** v. **Mukand Staff & Officers' Assn.**. reported in (2004) 10 SCC 460, the Hon'ble Apex Court has held as under:

> "22. We shall now analyse the submissions made by the learned senior counsel appearing on either side with reference to the pleadings, documents, records and also with reference to the judgments cited. The Reference is limited to the dispute between the Appellant-Company and the `workmen' employed by it.
>
> 23. We have already referred to the order of Reference dated 17.2.1993 in paragraph supra. The dispute referred to by the order of Reference is only in respect of workmen employed by the appellant-Company. It is, therefore, clear that the Tribunal, being a creature of the Reference, cannot adjudicate matters not within the purview of the dispute actually referred to it by the order of Reference. In the facts and circumstance of the present case, the Tribunal could not have adjudicated the issues of the salaries of the employees who are not workmen under the Act nor could it have covered such employees by its award. Even assuming, without admitting, that the Reference covered the non-workmen, the Tribunal, acting within its jurisdiction under the Act, could not have adjudicated the dispute insofar as it related to the `non- workmen'.
>
> 95. The Industrial Tribunal did not have jurisdiction to adjudicate the present dispute inasmuch as it pertains to the conditions of service of non-workmen. The learned single Judge and the Division Bench of the High Court failed to appreciate that parties cannot by their conduct create or confer jurisdiction on an adjudicating authority when no such jurisdiction exists. We have already noticed that the Division Bench has erred in holding that there is community of interest between the workmen and the non-workmen and holding further that the workmen could raise a dispute regarding the service conditions of non-workmen."

14. It is ample clear from law cited hereinabove that the Tribunal had no authority to adjudicate the matter /dispute, which was not within the purview of dispute actually referred to it

by the order of reference and as such this Court sees no force in the argument of learned Advocate General that petition having been filed by the workman ought to have been dismissed on the ground of delay by the learned Single Judge.

15. Similarly, this Court, after having carefully perused the judgment passed by the Hon'ble Apex Court in **Prabhakar** vs. **Joint Director, Sericulture Department and another**, (2015) 15 SCC 1, has no hesitation to conclude that the same has no application in the present case, because in that case, issue was with regard to delay in raising demand by the workman for referring the matter to the labour court. The Apex Court, in the aforesaid judgment has held that very stale claims should not be allowed to be referred to the labour court to maintain the industrial peace. Aforesaid judgment specifically deals with issue where references are made by appropriate Government to the labour court for adjudication after considerable delay. It would be profitable to refer following para of the judgment

> "44. To summarise, although there is no limitation prescribed under the Act for making a reference under Section 10(1) of the ID Act, yet it is for the "appropriate Government" to consider whether it is expedient or not to make the reference. The words "at any time" used in Section 10(1) do not admit of any limitation in making an order of reference and laws of limitation are not applicable to proceedings under the ID Act. However, the policy of industrial adjudication is that very stale claims should not be generally encouraged or allowed inasmuch as unless there is satisfactory explanation for delay as, apart from the obvious risk to industrial peace from the entertainment of claims after long lapse of time, it is necessary also to take into account the unsettling effect which it is likely to have on the employers' financial arrangement, and to avoid dislocation of an industry."

16. In the case at hand, undisputedly, matter was referred to the labour Court, by the appropriate Government, by framing specific term of reference, and, as such, judgment, referred to herein above, has no application in the present case, because, in the aforesaid case, dispute was, whether appropriate Government could refer the dispute after a considerable delay or not? At the cost of repetition, it is stated that labour Court was only bound to answer term of reference made to it by appropriate Government, and not the issue with regard to delay in raising demand by the workman.

17. Otherwise also, learned Tribunal below, taking note of the fact that dispute was raised after considerable time, has denied back wages to the aforesaid workmen.

18. This Court, is in agreement with the arguments having been made by the learned counsel representing the workman that this Court has very limited jurisdiction to re-appreciate findings of fact returned by the learned Tribunal below, while exercising writ jurisdiction under Article 226 of the Constitution of India and it has a limited scope of appreciating findings of fact. In this regard, reliance is placed upon judgment passed in case ***Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd. 2014 AIR SCW 3157.***

19. As far as judgment passed by the Hon'ble Apex Court in case ***Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd.*** is concerned, there can not be any quarrel with the settled proposition of law that the Courts while examining correctness and genuineness of the Award passed by Tribunal has very limited powers to appreciate the evidence adduced before the Tribunal below, especially the findings of fact recorded by the Tribunal below and same can not be questioned in writ proceedings and writ court can not act as an appellate Court. Careful perusal of aforesaid judgment having been relied upon by the learned counsel representing the workmen, clearly suggests that error of law, which is apparent on the face of record, can be corrected by writ Court but not an error of fact, however, grave it may appear to be. Hon'ble Apex Court has further held in the aforesaid judgment that if finding of fact is based upon no evidence that would be recorded as error of law, which can be corrected by a writ of certiorari. Hon'ble Apex Court has further held that in regard to findings of fact recorded by Tribunal, writ

of certiorari can be issued, if it is shown that in recording said findings, tribunal erroneously refused to admit admissible evidence or erroneously admitted inadmissible evidence, which influenced impugned findings. It would be profitable to reproduce following paras of the judgment:

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

20. Hence, we do not see any reason to interfere with the judgment passed by learned Single Judge, which is well reasoned, which is accordingly upheld. The appeal is dismissed. Pending applications, are also disposed of.

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

State of Himachal Pradesh ...Appellant
Versus
Smt. Ruchy Sharma & another ...Respondents

LPA No.183 of 2015
Date of decision: 11.05.2017

Constitution of India, 1950- Article 226- An advertisement was issued for filling 90 posts of Lecturers (College Cadre) in Commerce in which two posts were reserved for persons with disability in orthopaedical - only one candidate was selected and appointed – another

advertisement was issued for filling up the vacant posts- the petitioner applied for the post- a call letter was issued for interview – two persons were declared successful and were recommended for appointment against the posts reserved for physically handicapped persons –the advertisement was issued for the regular post but she was appointed on contract basis – she made representation but no action was taken – a writ petition was filed, which was allowed – direction was issued to make appointment on regular basis – aggrieved from the judgment, present appeal has been filed – held that the Commission had recommended appointment in the pay scale of Rs.8000- 13500/- - education department had no authority to appoint the petitioner on contract basis on a consolidated salary of Rs.12,000/- per month – hence, the Writ Court had rightly set aside the appointment on contract basis – appeal dismissed. (Para-10 to 24)

Cases referred:
Director Institute of Management Development UP vs Smt. Pushpa Srivastava AIR 1992 SC 2070
Y.H. Pawar versus State of Karnataka and another AIR 1996 Supreme Court 3194

For the Appellant:	Mr. Shrawan Dogra, Advocate General, with Mr. M.A.Khan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General.
For the respondents:	Mr. Bhuvnesh Sharma, Advocate, for respondent No.1. Mr. D.K.Khana, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge

The instant Letters Patent Appeal is directed against the judgment dated 22nd October, 2014, passed by learned Single Judge in CWP No.7229 of 2010, whereby the petition having been filed by the respondent-petitioner ***(for short petitioner***) came to be allowed.

2. Briefly stated facts, as emerged from the record are that on the requisition having been made by the respondent department of Education, H.P. Public Service Commission ***(for short 'Commission')*** issued advertisement No. X/2007 **(Annexure P-4)** for filling up 90 posts of Lecturers (College Cadre) in Commerce, wherein two posts were reserved for persons with disability in orthopaedical. However, fact remains that against aforesaid two posts reserved for orthopaedical, only one candidate was selected and accordingly he was appointed against one post reserved for ortho. Since, one post reserved for ortho handicapped remained unfilled, Commission again issued advertisement No. X/2008 in the year, 2008.

3. Perusal of aforesaid advertisement ***(***Annexure P-5) suggests that post of Lecturer in Commerce reserved for ortho handicapped was a regular post in the pay scale of Rs.8000-13500/- and the petitioner being fully eligible and qualified, applied for the post in question within the stipulated period. Perusal of Annexure P-6, placed on record by the petitioner suggests that the Commission issued her call letter to appear in the interview on 30th July, 2009 for the post of Lecturer (College cadre) in Commerce in the pay scale of Rs. 8000-13500/- reserved for physically handicapped persons being backlog post. Vide press note (Annexure P-7) issued by the respondent-Commission, two candidates including the petitioner were declared successful and recommended for appointment to the post of Lecturer (College Cadre) in Commerce on regular basis against the post reserved for physically handicapped persons. Since, the petitioner had applied for the post of Lecturer (College Cadre) in Commerce against the post reserved for physically handicapped person in ortho, she became entitled to be considered for appointment as Lecturer on regular basis after having been recommended for appointment by the respondent-commission.

4. But in the instant case, respondent vide notification (Annexure P-8), dated 5.6.2010 appointed the petitioner on contract basis against the post of Lecturer in Commerce

(College Cadre). The petitioner joined her duties on 11.6.2010 under protest and represented the matter to respondent No.1 on 29.6.2010 vide representation (Annexure P-9). Since, no action, whatsoever, was taken on the aforesaid representation having been filed by the petitioner, she was compelled to approach this Court by way of CWP No.7229 of 2010, seeking therein following main relief:-

> *1. That notification dated 5.6.2010 at Annexure P-8 to the extent the petitioner has been given appointment on contract basis instead of giving her regular appointment as Lecturer in Commerce (College Cadre), may very kindly be quashed and set aside and respondent No.1 may further be directed to give her appointment on regular basis as recommended by the respondent commission at Annexure P-7 w.e.f. due date with all consequential benefits."*

5. Learned Single Judge after having carefully perused the pleadings as well as documents annexed therewith found merit in the petition of the petitioner and accordingly allowed the same vide judgment dated 22nd October, 2014. The learned Single Judge while allowing the petition of the petitioner held that "words appointment on contract basis as per contractual amount of Rs. 12,000/- per month mentioned in the Notification No. EDN-A-B(1)18/2009, dated 5.6.2010 is illegal and same is ordered to be deleted and quashed with immediate effect and words regular appointment in the pay scale of Rs.8000-13500/- is ordered to be incorporated qua petitioner only with immediate effect in the Notification, as referred hereinabove. Learned Single Judge also held the petitioner entitled for all consequential monetary benefits in accordance with law.

6. In the aforesaid background, appellant-respondent has approached this Court in the instant proceedings, praying therein for setting-aside the judgment passed by the learned Single Judge.

7. Mr. Shrawan Dogra, learned Advocate General, representing the appellant, while inviting attention of this Court to the impugned judgment passed by the learned Single Judge vehemently argued that the same is not sustainable in the eyes of law as the same is not based upon the correct appreciation of the pleadings as well as documents adduced on record by the appellant-respondent in support of their decision to offer appointment to the petitioner on contract basis. Learned Advocate General further contented that there is provision of contract appointment in the R & P Rules and all appointments in the State has been made on contract basis after inserting this provision in the R&P Rules and as such, there is no illegality in the order passed by the Education department, whereby appointment has been offered to the petitioner on contract basis. Learned Advocate General further contended that learned Single Judge while upholding the claim of the petitioner failed to appreciate that many appointments of Lecturers (College Cadre) have been made on contract before the appointment of the petitioner and it would be not fair to appoint junior on regular basis and seniors on contract basis. In the aforesaid background, learned Advocate General prayed that the impugned judgment passed by the learned Single Judge be set-aside after accepting the instant appeal having been preferred by the appellant-respondent.

8. Mr. Bhuvnesh Sharma, learned counsel representing respondent No.1 supported the impugned judgment passed by the learned Single Judge and stated that bare perusal of the impugned judgment suggest that there is no illegality and infirmity in the same and as such, same deserve to be upheld. While inviting attention of this Court to the impugned judgment passed by the learned Single Judge, Mr. Sharma, strenuously argued that learned Single Judge has rightly come to the conclusion that respondent ought to have offered appointment to the petitioner on regular basis, especially when she had applied for the post of Lecturer (College Cadre) in Commerce against a regular post. To substantiate his aforesaid argument, Mr. Sharma, invited attention of this Court to Annexure P-6 and Annexure P-7 annexed with the writ petition to demonstrate that post in question was backlog post and it was intended to be filled on regular basis by the respondent department.

9. We have heard learned counsel representing the parties and have gone through the record of the case.

10. Before ascertaining the correctness and genuineness of the aforesaid submissions having been made by the learned counsel for the parties viz –a-viz impugned judgment passed by the learned Single Judge, this Court deems it fit to take note of preliminary submissions having been made by respondent No.2-Commission in its reply filed in the writ petition, relevant portion whereof is reproduced as under:-

> "That the replying respondent advertised 73 (backlog) posts of Lecturer (College Cadre) reserved for persons with disabilities including 06 posts i.e. (03 for visually impaired, 02 for deaf and & Dumb & 01 post for Ortho. (Handicapped) of Lecturer (College Cadre) Commerce, in the pay scale of Rs.8000-13500/- vide advertisement at Annexure P-5 to CWP. In response thereto 09 applications were received by the Commission. On scrutiny 06 candidates were provisionally admitted including petitioner and were called for interview on dated 30.07.2009 & 31.07.2009. Based on the performance of candidate before the Interview Board, the Petitioner alongwith others were recommended for appointment by the respondent Commission to the Secretary(Higher Education) as Lecturer (College Cadre) in Commerce vide letter dated 15.09.2009 (Annexure R-2/1) in the pay scale of Rs. 8000-13500/-."

11. It is apparently clear from the aforesaid reply having been filed by the respondent-Commission that 73 (backlog) posts of Lecturer (College Cadre) reserved for persons with disabilities including 06 posts i.e.(03 for visually impaired, 02 for Deaf and Dumb & 01 post for Ortho. Handicapped) of Lecturer (College Cadre) Commerce, in the pay scale of Rs.8000-13500/- were advertised vide Notification No.X/2008, **(Annexure P-5**), dated 04.12.2008. It also emerge from the aforesaid reply that 6 candidates including the petitioner were called for interview on 30.07.2009 and 31.07.2009 and based upon the performance of the candidate before the interview Board, the petitioner alongwith others were recommended for appointment by the respondent Commission to the Secretary (Higher Education) as Lecturer (College Cadre) in Commerce vide letter (Annexure R-2/A), dated 15.09.2009 in the pay scale of Rs. 8000-13500/-.

12. It is also apt to reproduce recommendation made by the respondent-Commission herein below:-

Confidential

No.3-33/2007-PSC(R-1)22429
Himachal Pradesh
Public Service Commission

Dated: Shimla-171002 the Sept.2009

From The Secretary,
H.P.Public Service Commission,
Shimla-171002

To The Principal Secretary (Higher Education) to
Govt. of Himachal Pradesh, Shimla-2

Subject: Recommendation for the posts of Lecturer (College Cadre) in Commerce Class-I (Gazetted) in the pay scale of Rs. 8000- 135000/- in the Department of Higher Education, Himachal Pradesh.

Sir,

I am directed to refer to your letters No .EDN-A Kha (6)-24/2006 dated 05.10.2007 and even number of dated 02.11.2007 vide which 773 posts of Lecturer

College Cadre in different subjects were requisitioned which were later on withdrawn vide your letter No. EDN-(A)-B(1)-7/2006,dated 07.03.2008 except the 92 post reserved for disabled persons in various subjects. Out of 92 posts only 18 candidates in different subjects could be recommended vide this office recommendation letter of even no dated 06.06.2008. It is further, stated that requisition for filling up of one post of Lecturer Bio-Tech reserved for Blind person was withdrawn lateron vide your letter No.EDN-A(B)B(1)-7/2006, dated 01.09.2008. Therefore, remaining 73 posts reserved for disabled persons in various subjects of Lecturer College Cadre were advertised vide Advertisement No.X/2008 dated 4.12.2008. In which 06 posts (Blind=03, Deaf and Dumb=02 and Ortho Handicapped=01) of Lecturer College Cadre in Commerce subject were also advertised. The candidates belonging to physically handicapped categories of Lecturer Commerce were called for interview on 31.07.2009. On the basis of their performance before the interview Board, the Commission recommends the name of following candidates in order of merit for appointment to the post of Lecturers (College Cadre) Class-I (Gazetted) reserved for persons with disabilities in the subjects Commerce as under:-

Sr. NoRoll No.		**Name and Address of the candidates**	**Category**
1.	xxx	xxx	xxx
2.	03	Ms. Ruchy Sharma D/o Sh.S.K.Sharma C/o Kumar Traders, Talwara Road, Daulatpur Chowk, District Una(H.P) Pin :177204	Ortho handicapped
3	xxx	xxx	xxxx

2. The applications of the candidates on the prescribed form along with the relevant documents including the attestation forms are enclosed for being retained by you in the personal files of the concerned candidates.
3. The offer of appointment may please be given to the candidates after verifying/checking their credentials/documents and completing all other codal formalities to the satisfaction of appointing authority.
4. Pay of the above mentioned recommended candidates may be fixed as per rules.
5. The annual assessment reports on the working of the candidates for a period of two years from the date of assuming their duties in the department may also be sent to this office for being placed before the Commission.
6. The candidates for remaining unfilled 03 posts (Blind/ Visually impaired -02 and Hearing Impaired 01) could not be filled up due to non available of the candidates. These posts shall be re-advertised after a period of six months.

Encls: As above.

Yours faithfully

s/d
Secretary
H.P.Public Service Commission.

13. After having carefully perused the aforesaid reply as well as letter placed on record by the respondent-Commission, there cannot be any dispute that post in question (Lecturer college Cadre in Commerce) was backlog post and petitioner, who happened to be a ortho handicapped was recommended by the respondent commission to be appointed as Lecturer (college Cadre) in the subject of Commerce in the pay scale of Rs. 8000-13500/-. But,

interestingly in the instant case, respondent department instead of offering regular appointment to the petitioner in terms of aforesaid recommendation made by the Commission, appointed her as a Lecturer (College Cadre) in the subject of Commerce on contract basis on consolidated salary of Rs. 12000/- per month, which offer was admittedly accepted by the petitioner under protest. It is also admitted case of the appellant-respondent that requisition was sent to the Commission for filling up 742 posts of Lecturer in collage cadre, wherein 92 posts were reserved for persons having disability. It also emerge from the reply that during the year, 2008, Government withdrew the aforesaid requisition from the Commission except 92 posts reserved for the disabled person. Thereafter, respondent again sent requisition for filling up 633 posts of lecturers in colleges on contract basis and accordingly these posts were advertised by the Commission.

14. In nutshell, the case of the respondent before the learned Single Judge was that before offering appointment to handicapped candidates pursuant to the recommendation having been made by the respondent-Commission, Education department had already offered appointments to number of candidates as lecturer in various subjects on contract basis in college and as such, if regular appointment was given to handicapped persons, they would have become Senior to the persons, who were already offered appointment on *ad hoc*basis prior to the petitioner. Respondent also pleaded before the learned Single Judge that to avoid such conflict, it was decided administratively to offer the appointment to the handicapped persons/candidates on contract basis.

15. This Court, after having gone through the pleadings adduced on record by the respective parties as well as impugned judgment, sees no illegality in the impugned judgment passed by the learned Single Judge, rather this Court is convinced and satisfied that learned Single Judge after having carefully perused the record has rightly come to the conclusion that the petitioner could not be offered appointment on contract basis in the teeth of her selection made by the Commission on regular basis.

16. It is quite evident from the record that the Commission had advertised 73 posts for disabled persons, out of which 32 posts were reserved for blind persons , 30 posts were reserved for deaf and dumb persons and 11 posts were reserved for Ortho handicapped persons for different subjects. Petitioner namely Ms. Ruchy Sharma applied for the post of Lecturer (College Cadre) in the subject of commerce in the pay scale of Rs. 8000-13500/- against the post reserved for Ortho handicapped. The Commission recommended the name of petitioner for the post of lecturer college cadre in commerce subject in the pay scale of Rs. 8000-13500 and as such, there was no occasion for the respondent Education department to offer her appointment on contract basis. Once, the Commission had recommended Education Department to offer appointment to the petitioner for the post of lecturer college cadre in the pay scale of Rs. 8000-13500, there was no occasion whatsoever, for the Education Department to appoint the petitioner on contract basis that too on consolidated salary of Rs.12000/- per month.

17. Otherwise also, explanation having been rendered by the respondent for offering appointment to the petitioner on contact basis is totally baseless because admittedly petitioner was interviewed against the post intended to be filled up by the Education Department on regular basis and by no stretch of imagination persons appointed to a post on *ad hoc* basis can be held to be senior to a person, who is/was admittedly appointed against regular post.

18. It is well settled law that person appointed to a post on ad hoc basis does not have any lien on the post, rather it has been repeatedly held by Hon'ble Apex Court as well as this Court that person appointed to a post on ad hoc basis should be replaced as expeditiously as possible by direct recruits because admittedly persons working on ad hoc basis have to give place to regular appointee. The Hon'ble Apex Court in case titled ***Director Institute of Management Development UP versus Smt. Pushpa Srivastava*** AIR 1992 SC 2070***;*** has categorically held that appointment on contractual basis is only for a limited period and after expiry of period of contact post comes to an end. The relevant paras-20 and 23 of the judgment is reproduced hereinbelow:-

"20. Because the six months' period was coming to an end on 28th February, 1991, she preferred the writ petition a few days before and prayed for mandamus which was granted by the learned judge under the impugned judgment. The question is whether the directions are valid in law. To our mind, it is clear that where the appointment is contractual and by efflux of time, the appointment comes to an end, the respondent could have no right to continue in the post. Once this conclusion is arrived at, what requires to be examined is, in view of the services of the respondent being continued from time to time on 'ad hoc' basis for more than a year whether she is entitled to regularization?. The answer should be in the negative. However, reliance is placed by learned counsel on behalf of the respondent on the case in **Jacob v. Kerala Water Authority, (1990(1) Supp. SCR 562:AIR 1990 SC 228) Supra).**

22. In dealing with this, at page 577(of 1990(1) Supp. SCR 562): (at p.2238 of AIR 1990 SC 2228), The Court observed:

If any person who does not possess the requisite qualifications is appointed under the said clause, he will be liable to be replaced by a qualified person. Clauses (iii) of Rule 9 states that a person appointed under clause (i) shall, as soon as possible, be replaced by a member of the service or an approved candidate qualified to hold the post. Clause (e) of Rule 9, however, provided for regularization of service of any person appointed under clause (i) of sub-rule (a) if he had completed continuous service of two years on December 22, 1973, notwithstanding anything contained in the rules. This is a clear indication that in the past the Government also considered it just and fair to regularize the service of those who had been in continuous service for two years period to the cut-off date. The spirit underlying this treatment clearly shows that the Government did not consider it just, fair or reasonable to terminate the services of those who were in employment for a period of two or more years period to the cut-off date. This approach is quite consistent with the spirit of the rule which was intended to be invoked to serve emergent situations which could not brook delay. Such appointments were intended to be stop-gap temporary appointments to serve the stated purpose and not long term ones. The rule was not intended to fill large number of posts in the service but only those which could not be kept vacant till regular appointments were made in accordance with the rules. But once the appointment continued for long, the services had to be regularised if the incumbent possessed the requisite qualifications as was done by sub-rule (e). Such an approach alone would be consistent with the constitutional philosophy adverted to earlier. Even otherwise, the rule must be so interpreted, if the language of the rule permits, as will advance this philosophy of the Constitution. If the rule is so interpreted it seems clear to us that employees who have been working on the establishment since long, and who possess the requisite qualifications for the job as obtaining on the date of their employment, must be allowed to continue on their jobs and their services should be regularised."

23.In the instant case, there is no such rule. The appointment was purely ad hoc and on a contractual basis for a limited period. Therefore, by expiry of the period of six months, the right to remain in the post comes to an end."

19. The Hon'ble Apex Court in case ***Y.H. Pawar versus State of Karnataka and another*** AIR 1996 Supreme Court 3194; also held that Seniority is to be determined with effect from the date on which the employee is regularized. The relevant paras No.5,6 and 7 of the judgment are reproduced hereinbelow:-

5. It is contended by the learned counsel for the appellant that in view of the judgment of the Constitution Bench of this Court in Direct Recruit Class II Engineering Officers Association v. State of Maharashtra & Ors.[(1990) 2 SCC 715] where appointment was made on regular basis, the seniority was required to be determined with effect from the initial date of appointment. We find no force in the contentions. As seen, the appointments are made on ad hoc basis without conducting any competitive examination. As and when vacancy had arisen local candidates were called from Employment Exchange and were appointed. Therefore, the appointments cannot be considered to have been made on regular basis. When the Rules came to be made, all the appointments are sought to be regularized. The sanction given by the Government for such an appointment is only to enable the candidates to continue till the statutory Rules are made to regularize the services.

6. This Court in Excise Commissioner Karnataka & Anr. v. V. Sreekanta [(1993) Supp. 3 SCC 53], in similar circumstances had considered the effect of such an appointment in paragraph 14 which reads thus:

"After giving our anxious consideration to the respective contention of the parties it appears to us that the writ petitioner/ respondent, Sri V. Sreekanta, was appointed as a local candidate through Employment Exchange in view of the specific sanction of the government for such ad hoc appointment. The terms of appointment in the context of sanction of the said posts by the Government, in our view, clearly demonstrates that such appointment of the said respondent and other employees in 1968 was ad hoc appointment given to local candidates being sponsored by the local Employment Exchange. It was only on October 26, 1971, the said respondent became eligible to be recruited in the said Class III post, and such appointment or regularization of his ad hoc appointment was made possible because of the framing of the said Special Rules of Recruitment in 1970. In our view, Mr. Narasimha Murthy is justified in his submission that the respondent was not entitled to claim seniority from the date of his initial appointment on ad hoc basis but he was only entitled to claim seniority from the date of his subsequent appointment or regularization under the said Special Rules of Recruitment in 1970. It appears to us that under Rule 3 of the said Special Rules of Recruitment of 1970, the respondent, having possessed the minimum qualifications prescribed be the said Special Rules of Recruitment for recruitment to Class III posts and the said respondent having been appointed on or after January 1, 1965 as a local candidate to a Class III post and having put in a continuous service of one year prior to October 1, 1970, was eligible to be appointed under the said Special Rules of Recruitment and the respondent was given such appointment with effect from October 26, 1971 under the said Special Rules of Recruitment of 1970. The said respondent was entitled to be treated as direct recruit properly made under the said Special Rules of 1970 only from October 26, 1971 and the service rendered by him prior to the said date was only on the basis of ad hoc employment not made in accordance with the rules of recruitment. In the aforesaid circumstances, the decision of the division Bench of the Karnataka High Court appears to be clearly erroneous and we have no hesitation in setting aside the same. Learned Single Bench of the Karnataka High Court, in our view, has rightly dismissed the writ petition and we affirm the said decision. The appeal is accordingly allowed without any order as to costs."

7. In that view of the matter, we hold that the appointment of the appellant is only an ad hoc appointment. Accordingly, his seniority is to be determined with effect from the date on which the statutory Rules came into force.

20. In the instant case, it is undisputed that the petitioner was offered to be appointed to the post of lecturer college cadre in commerce in the pay scale of Rs.8000-13500/-

and as such, action of respondent in appointing the petitioner on contract basis was rightly held illegal by the learned Single Judge.

21. Similarly, this Court is fully in agreement with the findings returned by the learned Single Judge that the selection of the petitioner made pursuant to advertisement issued by the Education Department could not be scattered by administrative decision, if any, taken by the respondent Education department because admittedly administrative decision taken in the instant case, is contrary to the advertisement notice as well as recommendation of the Commission. This is none of the case of the appellant-respondent that advertisement issued for regular appointment of lecturer in commerce was ever withdrawn qua handicapped persons by the Commission by way of subsequent advertisement, if any, and as such, petitioner was rightly interviewed by the Commission against the post of lecturer college cadre in commerce against the quota of handicapped ortho.

22. During the pendency of the present LPA, this Court vide order dated 27.4.2016 reserved liberty to the appellant- respondent to file supplementary affidavit indicating therein "whether the post against which the writ petitioner was appointed, was a backlog post?." The appellant-respondent by way of supplementary affidavit dated 30th August, 2016 stated that as per information conveyed by the State Government vide letter dated 10.8.2016, the post against which petitioner Ms. Ruchy Sharma, Assistant Professor, has been appointed, was not a backlog post. But, after having carefully perused the other documents available on record especially replies having been filed by the respondent-State as well as Commission, we are afraid that the aforesaid contention made by the Director Higher Education of H.P. is correct. The Commission vide advertisement No.X/2007, dated 24.11.2007, specifically advertised two posts for physically handicapped ortho, which were backlog posts.

23. Leaving everything aside, it is ample clear from Annexure P-6 i.e. interview letter sent to the petitioner that post of lecturer (College cadre) in commerce, class-I (Gazetted) was a backlog post reserved for physically handicapped persons of H.P. in the pay scale of Rs.8000-13500/- in the Department of Higher Education, H.P. It would be profitable to reproduce Annexure P-6 issued by the H.P. Public Service Commission herein:-

From

The Secretary,H.P. Public Service Commission.

To

Mrs. Ruchy Sharma, D/o late Sh. S.K.Sharma, C/o Kumar Traders, Talwara Road,Daulatpur Chowk, Tehsil Amb, District Una H.P.177204

Subject Recruitment to the post(s) of Lecturer (College Cadre) Commerce, Class-1 (Gazetted) backlog posts reserved for Physically Handicapped persons of H.P. in the pay scale of Rs.8000-13500/- in the Department of Higher Education, H.P.

Sir/Madam,

With reference to your application for the above mentioned post(s) your are advised to appear before the interview board on 30.7.2009 at 9:15 AM in the office of the Himachal Pradesh Public Service Commission at Nigam Vihar, Shimla-171002

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24. Consequently, in view of the detailed discussions made hereinabove, we see no illegality and infirmity in the impugned judgment passed by the learned Single Judge, which is apparently based upon the correct appreciation of the facts as well as law and as such same is required to be upheld.

25. Accordingly, the impugned judgment is upheld and appeal is dismissed. Pending application(s), if any, shall also stand(s) disposed of.

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

Shri Ram Transport Finance Company Limited .... Petitioner
Versus
Ranjeet Singh .... Respondent

CMPMO No.442 of 2016
Decided on : May 12, 2017

Arbitration and Conciliation Act, 1996- Section 8- An agreement for loan-cum-hire purchase was executed between the parties- plaintiff filed a suit for declaration and injunction for claiming that the money be not charged from him in excess of the contract- defendant filed an application under Section 8 of Arbitration and Conciliation Act, which was dismissed by the Trial Court after holding that serious allegations of fraud and misrepresentation were made and it would not be proper to refer the matter to the Arbitrator – held that parties had agreed to the terms with regard to payment and interest – the page wherein the rate of interest and equated monthly installments were mentioned is signed not only by the borrower but also by the guarantor – the payment was made continuously for two years – when serious allegations of fraud are made, which constitute a criminal offence and require extensive evidence, the matter may be tried by the Civil Court- however, mere allegations of fraud are not sufficient to decline the reference- order set aside and the application allowed- matter referred to the Arbitrator in accordance with the agreement.

(Para- 6 to 13)

Cases referred:

N. Radhakrishnan vs. Maestro Engineers and others, 2010 (1) SCC 72
A. Ayyasamy vs. A. Paramasivam and others, 2016 (10) SCC 386
Abdul Kadir Shamsuddin Babere vs. Madhav Prabhakar Oak and another, AIR 1962 SCC 406

For the Petitioner : Mr. Ashwani Kaundal, Advocate.
For the Respondent : Mr. Malay Kaushal, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice (oral)

In terms of order dated 1.9.2016, passed by Civil Judge (Senior Division), Bilaspur, District Bilaspur, H.P., in CMA No.198/6 of 2016/2015 (Civil Suit No.116/1 of 2015), titled as *Shriram Transport Finance Company Limited vs. Ranjeet Singh*, application under Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act'), stands dismissed.

2. Certain facts are not in dispute:- (a) On 12.4.2013, an agreement for loan-cum-hire purchase of vehicle, came to be executed by the plaintiff, Ranjeet Singh (respondent herein) with defendant, Shri Ram Transport Finance Company Limited (petitioner herein). In terms of the agreement, plaintiff continued to pay the monthly installments for a period of two years (approximately); (b) sometime in the month of September, 2015, plaintiff filed a suit for declaration and injunction, praying for an order of restrain against the defendant, to the effect that the nature of the agreement be not changed and money allegedly recovered in excess, in terms of the agreement, be not recovered from the plaintiff. Also, in the alternative, plaintiff be not dispossessed from the suit property, purportedly mortgaged as a security towards the transaction.

3. With these admitted facts, on behalf of the plaintiff, it is contended that on the asking of the defendant, he signed the agreement on the dotted line, without agreeing to or understanding the terms thereof. Also, relevant clauses of the agreement were left blank. However, such contention is vehemently opposed by the defendant.

4. Upon receipt of summon in the suit, defendant filed an application under Section 8 of the Act, which stands dismissed in terms of the impugned order, for the following reasons:-

(i) Plaintiff's suit revealed serious allegations of fraud and misrepresentation.

(ii) It would not be in the interest of justice to refer the parties to arbitration.

(iii) It would be open for the defendant to take recourse to the provisions of Sub Section 3 of Section 8 of the Act.

5. Having heard learned counsel for the parties, as also perused the record, so made available, during the course of hearing, this Court is of the considered view that the Court below, committed grave illegality in dismissing the defendant's application. The order passed is not based on correct interpretation of the statutory provisions, as also, application of principles of law laid down by the apex Court. The Court ought to have decided the application on the basis of factual matrix, rather than concluding, by presumption, disputed facts of allegations of fraud and mis-representation to be true.

6. Bare perusal of the agreement reveals that parties had mutually agreed to the terms with regard to the payment of interest. The page, where the rate of interest and equated monthly installments, is specified, though filled in by hand, but then it is signed not only by the borrower but also the guarantor. Noticeably, agreement came to be executed in the year 2013 and without any denial or objection, plaintiff continued to pay the installments in consonance with the mutually agreed terms and the amount specified therein, till the filing of the suit.

7. The alleged threats of the vehicle being taken away forcibly, is an issue which requires adjudication, but prima facie in the absence of any written protest, no Court can pre-suppose existence of such fact.

8. Significantly, most recently the apex Court, while re-visiting its earlier decision in *N. Radhakrishnan vs. Maestro Engineers and others,* 2010 (1) SCC 72, in *A. Ayyasamy vs. A. Paramasivam and* others, 2016 (10) SCC 386, has elaborately discussed as to what would be the meaning of expression 'fraud' for the purpose of deciding an application of instant nature, so filed under the provisions of Section 8 of the Act. The Court proceeded to further discuss the type of cases which would be non arbitrable. It clarified that when a case involves serious allegations of fraud, the dicta laid down in *Abdul Kadir Shamsuddin Babere vs. Madhav Prabhakar Oak and another*, AIR 1962 SCC 406, needs to be considered and applied by the Court. But then, mere allegations of fraud in the pleadings by one party against the other cannot be a ground to hold that the matter is incapable of settlement by arbitration and should be decided by the civil Court. Further allegations of fraud should be such that they are serious and in normal course may also constitute criminal offence but also are complex and the decision of such issues demands extensive evidence for which the civil Court should appear to be more appropriate forum than the arbitral Tribunal. The Court cautioned that the party in default may adopt a convenient mode of avoiding the process of arbitration by simply using the device of making the allegations of fraud and pleading that the issue of fraud be decided by a civil Court. In fact, they did not stop there, but went ahead to hold that:-

> "45.2 Allegations of fraud are not alien to ordinary civil courts. Generations of judges have dealt with such allegations in the context of civil and commercial disputes. If an allegation of fraud can be adjudicated upon in the course of a trial before an ordinary civil court, there is no reason or justification to exclude such disputes from the ambit and purview of a claim in arbitration. The parties who enter into commercial dealings and agree to a resolution of disputes by an arbitral forum exercise an option and express a choice of a preferred mode for the resolution of their disputes. The parties in choosing arbitration place priority upon the speed, flexibility and expertise inherent in arbitration adjudication. Once parties have agreed to refer disputes to arbitration, the court must plainly discourage and discountenance litigative

strategies designed to avoid recourse to arbitration. Any other approach would seriously place in uncertainty the institutional efficacy of arbitration. Such a consequence must be eschewed." *(Emphasis supplied)*

9. Now in the instant case, save and except, for mere pleading, at this stage, prima facie, there is nothing to establish the element of fraud/ misrepresentation on the part of the defendant. In any event, such fact is required to be established by leading evidence and the arbitral Tribunal is precluded from adjudicating such fact based on the evidence, documentary or ocular, which the parties may produce.

10. The trial Court committed a grave error in dismissing the application. The order is perverse, illegal and erroneous. Hence, the Court below erred in coming to the conclusion that based on the averments made in the plaint, the element of fraud/misrepresentation stood established on record.

11. Also, for the very same reason, the Court erred in holding that interest of justice lies with the continuance of the suit. In fact, parties themselves chose a forum where adjudication, undoubtedly, would be quick and speedy. As such, interest of justice would be the other way.

12. The application, so filed under sub-section 1 of Section 8 of the Act, cannot be rejected merely for the reason that the applicant has a remedy under sub-section 3 of the said Section. In fact it confers a right upon a party for continuance of both the proceedings. But then it would only be applicable upon the party choosing to resort to such remedies. Hence, the Court below also erred in coming to such conclusion.

13. For all the aforesaid reasons, impugned order dated 1.9.2016, passed by Civil Judge (Senior Division), Bilaspur, District Bilaspur, H.P., in CMA No.198/6 of 2016/2015 (Civil Suit No.116/1 of 2015), titled as *Shriram Transport Finance Company Limited vs. Ranjeet Singh*, is quashed and set aside. Petition is allowed and the dispute, *inter se* parties, is referred to the arbitration in terms of the Clause 15 of the Agreement.

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

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

Smt. Santosh Sharma ....Petitioner.
Versus
Chaman Lal Jindal ...Respondent.

Cr. MMO No. 138 of 2017
Judgment reserved on : 04.05.2017.
Date of decision: May 12, 2017.

Code of Criminal Procedure, 1973- Section 482-A complaint was filed against the petitioner that he had sold immovable property after assuring the purchaser that property was free from all encumbrances and litigation etc.- the purchaser came to know subsequently the property was not free from encumbrances and a compromise was effected regarding the same before the Court – the petitioner sought the quashing of the complaint – held that the petitioner had an intention to cheat the purchaser and the complaint cannot be quashed at this stage- petition dismissed.

(Para-5 to 18)

Cases referred:

State of Madhya Pradesh vs. Awadh Kishore Gupta, (2004) 1 SCC 691
Amit Kapoor versus Ramesh Chander and another (2012) 9 SCC 460

C.P. Subhash vs. Inspector of Police Chennai and others (2013) 11 SCC 599

For the Petitioner : Mr. Sunil Chauhan, Advocate.
For the Respondent : Nemo.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

This petition under Section 482 Cr.P.C. read with Article 227 of the Constitution seeks quashing of order dated 12.8.2016 whereby the learned Magistrate has taken cognizance of the offence under Section 420 IPC pursuant to the criminal complaint made by the respondent to this effect.

2. The brief facts of the case are that in the complaint filed by the respondent, it was alleged that being a non-agriculturist, he after seeking permission from the Government had purchased immoveable property comprised in Khasra Nos. 378, 379, 380 and 381, Kitas 4 at Mauza Kasumpti, Shimla-9 measuring 1926 sq.ft. on 12.09.2002 for a consideration of Rs. 5,50,000/- (hereinafter referred to as the 'property'). The complainant was assured at the time of sale that the property was free from all encumbrances and litigation etc., and a specific clause was also incorporated in the sale deed vide Clause No.4, which reads thus:

> *"4. That the seller assures the purchaser that the property hereby sold is free from all injunctions, litigation charges, claim, mortgage, litigation etc. and the second party/seller has subsisting right to sell, transfer and convey the same".*

3. However, the complainant was shocked to receive summons from the Court of learned Senior Sub Judge of the application dated 07.08.2003 filed for execution of a compromise decree. This execution had been filed at the instance of one Smt. Uma Devi and others against the complainant and the petitioner. It was then that after conducting inquiry, it transpired that the property was not free from all encumbrances as alleged. In fact, the petitioner had filed a suit for possession of the premises comprised in Khasra No. 379 against Smt. Uma Devi and her children, who were residing in the same as tenants (hereinafter referred to as 'tenants'). The suit was compromised in terms whereof the tenants were to hand over the vacant and peaceful possession of the premises to the petitioner in question on or before 30.6.1995 and also to pay the admitted arrears of rent amounting to Rs. 7650/-, out of which Rs. 300/- were to be paid on or before 31.1.1995 to the petitioner and the remaining amount alongwith the rent from 1.1.1995 was to be paid till the premises is vacated on or before 31.12.1995. The petitioner was to let out these premises to the tenants after its re-construction within a period of one year from the date of handing over of its vacant possession by the tenants to her. As the premises had not been delivered to the tenants, they accordingly filed execution petition on 15.9.1997.

4. It is on the aforesaid allegations that the respondent filed a complaint claiming therein that the petitioner had deliberately and intentionally in order to cheat the respondent, who is an old rustic man never apprised him about the existence of the compromise and had dishonestly induced the respondent to purchase the property by representing the property to be free from all encumbrances and litigation etc. This intention to cheat the respondent was there even at the time when the sale of the property was entered into.

I have heard Mr. Sunil Chauhan, learned counsel for the petitioner and gone through the material placed on record.

5. Section 415 of the Indian Penal Code reads thus:

> "415.***Cheating.***—*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". **Explanation.**—A dishonest concealment of facts is a deception within the meaning of this section."*

6. The offence of cheating is defined under Section 415 of IPC to mean:

(i) There is an inducement of a person by deceiving him fraudulently or dishonestly to deliver any property to any person or to consent that any person shall retain any property;

(ii) when a person is induced intentionally to do or omit to do anything which he would not do or omit to do if he was 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, and;

(iii) dishonest concealment of facts amounts to deception.

7. The parameters for quashing proceedings in criminal complaint or FIR are well known. If there are triable issues, the Court is not expected to go into the veracity of the rival versions but where on the face of it, the criminal proceedings are abuse of Court's process, quashing jurisdiction can be exercised.

8. In ***State of Madhya Pradesh vs. Awadh Kishore Gupta, (2004) 1 SCC 691***, Hon'ble Supreme Court culled out the following principles for exercise of power under Section 482 of the Code:-

"(i) To give effect to an order under the Code.

(2) To prevent abuse of the process of court.

(3) To otherwise secure the ends of justice.

(4) Court does not function as a court of appeal or revision.

(5) Inherent jurisdiction under Section 482 though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the Section itself.

(6) It would be an abuse of process of court to allow any action which would result in injustice.

(7) In exercise of the powers court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts t abuse of the process of court.

(8) When no offence is disclosed by the complaint, the court may examine the question of fact.

(9) When exercising jurisdiction under Section 482 of the Code, the High Court would not ordinarily embark upon an inquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it acquisition would not be sustained-That is the function of the trial Judge.

(10) Section 482 is not an instrument handed over to an accused to short-circuit a prosecution and bring about its sudden death.

(11) It would not be proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premises arrive at a conclusion that the proceedings are to be quashed.

(12) If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same.

(13) When an information is lodged at the police station and an offence is registered, then the mala fides of the informant would be of secondary importance-

It is the material collected during the investigation and evidence led in Court which decides the fate of the accused person-The allegations of mala fides against the informant are of no consequence and cannot be itself be the basis for quashing the proceedings."

9. In **Amit Kapoor** versus **Ramesh Chander and another (2012) 9 SCC 460,** the Hon'ble Supreme Court laid down the principles to be considered for proper exercise of jurisdiction, particularly with regard to quashing criminal proceedings, particularly, the charge either in exercise of jurisdiction under Section 397 or Section 482 and same are summarized as follows:-

"1. Though there are no limits of the powers of the Court under Section 482 of the Code but the more the power, the more due care and caution is to be exercised in invoking these powers. The power of quashing criminal proceedings, particularly, the charge framed in terms of Section 228 of the Code should be exercised very sparingly and with circumspection and that too in the rarest of rare cases.

2. The Court should apply the test as to whether the uncontroverted allegations as made from the record of the case and the documents submitted therewith prima facie establish the offence or not. If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic ingredients of a criminal offence are not satisfied then the Court may interfere.

3. The High Court should not unduly interfere. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge.

4. Where the exercise of such power is absolutely essential to prevent patent miscarriage of justice and for correcting some grave error that might be committed by the subordinate courts even in such cases, the High Court should be loath to interfere, at the threshold, to throttle the prosecution in exercise of its inherent powers.

5. Where there is an express legal bar enacted in any of the provisions of the Code or any specific law in force to the very initiation or institution and continuance of such criminal proceedings, such a bar is intended to provide specific protection to an accused.

6. The Court has a duty to balance the freedom of a person and the right of the complainant or prosecution to investigate and prosecute the offender.

7. The process of the Court cannot be permitted to be used for an oblique or ultimate/ulterior purpose.

8. Where the allegations made and as they appeared from the record and documents annexed therewith to predominantly give rise and constitute a 'civil wrong' with no 'element of criminality' and does not satisfy the basic ingredients of a criminal offence, the Court may be justified in quashing the charge. Even in such cases, the Court would not embark upon the critical analysis of the evidence.

9. Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction, the Court is concerned primarily with the allegations taken as a whole whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice.

10. It is neither necessary nor is the court called upon to hold a fullfledged enquiry or to appreciate evidence collected by the investigating agencies to find out whether it is a case of acquittal or conviction.

11. Where allegations give rise to a civil claim and also amount to an offence, merely because a civil claim is maintainable, does not mean that a criminal complaint cannot be maintained.

12. In exercise of its jurisdiction under Section 228 and/or under Section 482, the Court cannot take into consideration external materials given by an accused for reaching the conclusion that no offence was disclosed or that there was possibility of his acquittal. The Court has to consider the record and documents annexed therewith by the prosecution.

13. Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the Court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage. The Court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed prima facie.

14. Where the charge-sheet, report under Section 173(2) of the Code, suffers from fundamental legal defects, the Court may be well within its jurisdiction to frame a charge.

15. Coupled with any or all of the above, where the Court finds that it would amount to abuse of process of the Code or that interest of justice favours, otherwise it may quash the charge. The power is to be exercised ex debito justitiae, i.e. to do real and substantial justice for administration of which alone, the courts exist. {Ref. State of West Bengal & Ors. v. Swapan Kumar Guha & Ors. [AIR 1982 SC 949]; Madhavrao Jiwaji Rao Scindia & Anr. v. Sambhajirao Chandrojirao Angre & Ors. [AIR 1988 SC 709]; Janata Dal v. H.S. Chowdhary & Ors. [AIR 1993 SC 892]; Mrs. Rupan Deol Bajaj & Anr. v. Kanwar Pal Singh Gill & Ors. [AIR 1996 SC 309; G. Sagar Suri & Anr. v. State of U.P. & Ors. [AIR 2000 SC 754]; Ajay Mitra v. State of M.P. [AIR 2003 SC 1069]; M/s. Pepsi Foods Ltd. & Anr. v. Special Judicial Magistrate & Ors. [AIR 1988 SC 128]; State of U.P. v.O.P. Sharma [(1996) 7 SCC 705]; Ganesh Narayan Hegde v.s. Bangarappa & Ors. [(1995) 4 SCC 41]; Zundu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque & Ors. [AIR 2005 SC 9]; M/s. Medchl Chemicals & Pharma (P) Ltd. v. M/s. Biological E. Ltd. & Ors. [AIR 2000 SC 1869]; Shakson Belthissor v. State of Kerala & Anr. [(2009) 14 SCC 466]; V.V.S. Rama Sharma & Ors. v. State of U.P. & Ors. [(2009) 7 SCC 234]; Chunduru Siva Ram Krishna & Anr. v. Peddi Ravindra Babu & Anr. [(2009) 11 SCC 203]; Sheo Nandan Paswan v. State of Bihar & Ors. [AIR 1987 SC 877]; State of Bihar & Anr. v. P.P. Sharma & Anr. [AIR 1991 SC 1260]; Lalmuni Devi (Smt.) v. State of Bihar & Ors. [(2001) 2 SCC 17]; M. Krishnan v. Vijay Singh & Anr. [(2001) 8 SCC 645]; Savita v. State of Rajasthan [(2005) 12 SCC 338]; and S.M. Datta v. State of Gujarat & Anr. [(2001) 7 SCC 659]}.

16. These are the principles which individually and preferably cumulatively (one or more) be taken into consideration as precepts to exercise of extraordinary and wide plenitude and jurisdiction under Section 482 of the Code by the High Court. Where the factual foundation for an offence has been laid down ,the courts should be reluctant and should not hasten to quash the proceedings even on the premise that one or two ingredients have not been stated or do not appear to be satisfied if there is substantial compliance of the requirements of the offence."

10. In ***C.P. Subhash vs. Inspector of Police Chennai and others (2013) 11 SCC 599***, it was once again reiterated by the Hon'ble Supreme Court that where complaint prima facie makes out commission of offence, High Court in ordinary course should not invoke its powers to quash such proceedings, except in rare and compelling circumstances and it was observed as under:-

"[7] The legal position regarding the exercise of powers under Section 482 Cr.P.C. or under Article 226 of the Constitution of India by the High Court in relation to

pending criminal proceedings including FIRs under investigation is fairly well settled by a long line of decisions of this Court. Suffice it to say that in cases where the complaint lodged by the complainant whether before a Court or before the jurisdictional police station makes out the commission of an offence, the High Court would not in the ordinary course invoke its powers to quash such proceedings except in rare and compelling circumstances enumerated in the decision of this Court in State of Haryana and Ors. v Ch. Bhajan Lal and Others, 1992 Supp1 SCC 335.

8. Reference may also be made to the decision of this Court in Rajesh Bajaj v. State, NCT of Delhi, 1999 3 SCC 259where this Court observed:

> *"...If factual foundation for the offence has been laid down in the complaint the Court should not hasten to quash criminal proceedings during investigation stage merely on the premise that one or two ingredients have not been stated with details. For quashing an FIR (a step which is permitted only in extremely rare cases) the information in the complaint must be so bereft of even the basic facts which are absolutely necessary for making out the offence."*

9. To the same effect is the decision of this Court in State of Madhya Pradesh v. Awadh Kishore Gupta, 2004 1 SCC 691where this Court said:

> *"11...The powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. High Court being the highest Court of a State should normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. Of course, no hard and fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceeding at any stage. It would not be proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premises, arrive at a conclusion that the proceedings are to be quashed. It would be erroneous to assess the material before it and conclude that the complaint cannot be proceeded with. In proceeding instituted on complaint, exercise of the inherent powers to quash the proceedings is called for only in a case where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of the inherent powers under Section 482 of the Code "*

10. Decisions of this Court in V.Y. Jose and Anr. v. State of Gujarat and Anr., 2009 3 SCC 78and Harshendra Kumar D. v. Rebatilata Koley etc., 2011 3 SCC 351reiterate the above legal position."

11. Thus, what can be considered to be settled on the basis of the exposition of law by the Hon'ble Supreme Court is that while exercising its jurisdiction under Section 482 of the Code, High Court has to be both cautious as also circumspect. This power is to be used sparingly and only for the purpose of preventing abuse of the process of any Court or otherwise to secure ends of justice. Whether a complaint/FIR/charge-sheet etc. discloses a criminal offence or not depends upon the nature of facts alleged therein.

12. Mr. Sunil Chauhan, learned counsel for the petitioner would vehemently argue that the order passed by the learned Magistrate is illegal and vitiated on the ground that there is lack of averment on the complaint with regard to the offence regarding cheating and, therefore, the proceedings before the learned Magistrate should be quashed and set-aside as has been prayed for in the instant petition.

13. Adverting to the contentions raised by the petitioner, it would be noticed that specific allegations of cheating have been made in the complaint as would be evidently clear from the averments made in paragraphs 18 to 21 thereof and the relevant portions reads as under:

> *"18. That the accused by deceiving the complainant with fraudulent and dishonest intentions sold the property to the complainant without disclosing the factum of litigation and compromise decree pending between her and the tenants. The complainant would not have purchased the property if the fact of litigation and compromise decree would have disclosed to him by the accused. The act of not disclosing this important fact has caused damage and harm to the complainant in mind, reputation and property.*
>
> *19. That the accused cheated the complainant dishonestly and the complainant was induced by the accused to purchase the property by representing that the property is free from all encumbrances and litigation etc. The intention to cheat the complainant was there at the time of the sale as the property was sold to complainant by deception.*
>
> *20. That the measure of the cheating orchestrated by the accused persons is made out in the facts and circumstances stated hereinabove. It will not be out of order to submit here that the accused persons have deliberately and intentionally concealed the factum of Annexure P-2 from the complainant alongwith the fact of the civil suit of the year 1993 qua the property which the accused persons have sold for a due consideration to the complainant. This very fact has been duly admitted and acknowledged by the accused persons in Annexure P-6, in which accused had specifically averred that the complainant was never aware about the pendency of the civil suit and Annexure P-2. It would be appropriate to submit here that the accused was under a bounden duty to apprise the complainant about the existence of the civil suit of 1993 and Annexure P-2 either before the purchase of the property by the complainant or at least at the time of the purchase of the property by the complainant.*
>
> *21. That the accused persons therefore have deliberately and intentionally in order to cheat the complainant, who is an old rustic man never apprised the complainant about the existence of Annexure P-2 and, therefore, have positively made themselves criminally liable for committing offences of cheating."*

14. Thus, on the basis of the aforesaid allegations, it cannot be said that the basic ingredients of cheating have not been made out.

15. For an offence of cheating, it must be proved that:

(i) The complainant has been induced fraudulently or dishonestly and

(ii) by reason of such deception, the complainant has not done or omitted to do anything he would not do or omit to do if he was not deceived or induced by the accused.

16. Confronted with this position, learned counsel for the petitioner would vehemently argue that at best, a case of civil wrong is made out for which the respondent would essentially have to take resort to civil remedy and, therefore, criminal proceedings cannot be maintained and deserves to be quashed.

17. It is true that a given set of facts may make out a civil wrong and as also criminal offence and only because a civil remedy may be available to the complainant that itself cannot be

a ground to quash a criminal proceeding. The real test in the aforesaid case is as to whether the allegation in the complaint discloses criminal offence or not.

18. In the present case, there is enough material available on record to show that at the very inception there was an intention on part of the petitioner to cheat the respondent and thus, the same cannot be quashed at this stage.

19. Having said so, I find no merit in this petition and the same is accordingly dismissed, so also the pending application.

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

Smt. Beena & Ors. ... Appellants
Versus
Parbhat Bhushan & others ... Respondents

RSA No. 205 of 2004
Date of decision:15.05.2017

Specific Relief Act, 1963- Section 38- Plaintiffs filed a civil suit for injunction and possession pleading that the room was handed over to the defendants on the undertaking that it would be vacated as and when required by the plaintiffs – defendants had forcibly blocked the staircase and they were not allowing the plaintiffs to use the same- hence, the suit for possession and injunction was filed–the suit was decreed by the Trial Court – an appeal was filed, which was allowed – held in thesecond appeal that Appellate Court had relied upon the report of the demarcation to hold that plaintiffs are in possession; hence, the plaintiffs are not entitled to possession – objections were filed against the report of the Local Commissioner- however, these objections were not decided by the Court – it was not permissible to rely upon the report of Local Commissioner without deciding the objections – appeal allowed- case remanded to the Appellate Court for fresh adjudication after deciding the objections filed against the report of the Local Commissioner. (Para-11 to 17)

For the appellants: Mr. Anand Sharma, Advocate.
For the respondents: Mr. N.K. Thakur, Senior Advocate with Mr. Divya Raj Singh, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. (Oral):

By way of this appeal, the appellant have challenged the judgment and decree passed by the Court of learned District Judge, Chamba, in Civil Appeal No. 46 of 2002 dated 12.01.2004, vide which learned Appellate Court while accepting the appeal filed by the present respondents, has set aside the judgment and decree passed by the Court of learned Senior Sub Judge, Chamba, in Civil Suit No. 59 of 1997 dated 13.05.2002, whereby learned trial Court had decreed the suit of the plaintiffs for possession qua the suit property i.e. room situated on Khasra No. 560/1.

2. Brief facts necessary for adjudication of the present case are that the appellants/plaintiffs, hereinafter referred to as the plaintiffs, filed a suit for possession and for mandatory injunction, inter alia, on the ground that they were owners in possession of the suit property i.e. room in the ground floor, situated over Khasra No. 560/1, Khata Khatauni No. 938/1226, Mohalla Ramgarh Chamba Town, as per jamabandi for the year 1990-91. The case of the plaintiffs was that at one stage they and defendants were co-sharers but subsequently

property was partitioned between the parties through a decree of the Civil Court which was passed in Civil Suit No. 172 decided on 07.06.1977 by the Court of learned Sub Judge, Chamba and after passing of the said decree, possession of the suit property was also obtained by the plaintiffs to the extent of their share. It was further the case of the plaintiffs that one room in the ground floor situated over Khasra No. 560/1 was handed over to the defendants on the undertaking that they would vacate the same as and when required by the plaintiffs. However, according to the plaintiffs, defendants had forcibly blocked the stair-case and were not allowing the plaintiffs to use the same. On this ground, plaintiffs filed the present suit for possession of room in the ground floor comprising Khasra No. 560/1 and restraining the defendants from blocking the entrance of stair-case to the plaintiffs.

3. The claim so put forth by the plaintiffs was contested by the defendants, who in their written statement took the stand that defendants were granted possession of one room in the ground floor and one room in the on the first floor comprised in Khasra No. 560/2 in the course of partition which took place between the parties and that defendants were in possession of the said room/property and no room comprised in Khasra No. 560/1 was in their possession as was alleged by the plaintiffs. It was further the case of the defendants that the room which was in the first floor over Khasra No. 560/2 was in possession of the plaintiffs who were supposed to hand over the same to the defendants.

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

1. Whether the room in the building in question was temporarily given by the plaintiffs to the defendants for their use and the defendants had undertaken to vacate the same as alleged? ...OPP
2. If issue No.1 is proved in the affirmative, whether the plaintiffs are entitled to the decree for possession of the room-cum-kitchen as alleged? ... OPP
3. Whether the plaintiffs are estopped from filing the suit by way of their act and conduct? ...OPD
4. Whether the suit is not maintainable in the present form? ... OPD
5. Whether the suit is within limitation? ...OPP
6. Whether the suit is bad for non-joinder of necessary parties? ... OPD
7. Whether the suit is properly valued for the purpose of court fee and jurisdiction? ... OPP
8. Relief.

5. On the basis of the evidence which was led by the respective parties before learned trial Court, the following findings were returned to the issues so framed by it:-

Issue No. 1: Yes.
Issue No. 2: Yes.
Issue No. 3: No.
Issue No. 4: No.
Issue No. 5: Yes.
Issue No. 6: No.
Issue No. 7: Yes.
Relief : The suit is decreed as per operative part of the judgment.

6. Accordingly, the suit so filed by the plaintiffs was decreed by learned trial Court for possession of the suit property consisting of a room in the ground floor of the building comprising Khasra No. 560/1. While decreeing the suit, it was held by learned trial Court that

statements of PW-1 and PW-5 demonstrated that room in the ground floor of the building comprising Khasra No. 560/1 was temporarily handed over by plaintiffs to defendants but subsequently defendants had failed to return back the possession of the same to the plaintiff. Learned trial Court held that the evidence on record demonstrated that the said room was not in possession of the plaintiffs but in fact was in possession of the defendants. On these basis after holding that room comprised in Khasra No. 560/1 in the ground floor was in possession of the defendants, learned trial Court granted a decree of possession qua the same in favour of the plaintiffs.

7. Feeling aggrieved by the said judgment and decree passed by learned trial Court, defendants preferred appeal.

8. Learned Appellate Court vide its judgment and decree dated 12.01.2004, set aside the judgment and decree passed by learned trial Court and allowed the appeal. While allowing the appeal so filed by the defendants, learned Appellate Court relied upon a report filed by the Local Commissioner who was appointed during the pendency of the appeal before learned Appellate Court. Learned Appellate Court also took into consideration the factum of it (learned District Judge) also having visited the spot. It was held by learned Appellate Court that the report of Local Commissioner demonstrated that the room in the ground floor over Khasra No. 560/1 was not in possession of the defendants but was in possession of the plaintiffs themselves. It was held by learned Appellate Court that as the room comprised in the ground floor over Khasra No. 560/1 was in possession of the plaintiffs themselves, they were not entitled for possession of the same. On these basis, learned Appellate Court set aside the judgment and decree passed by learned trial Court.

9. Feeling aggrieved, plaintiffs filed the present appeal, which was admitted on 27.08.2004 on the following substantial questions of law:-

1. Whether the learned Lower appellate Court could have appointed a commissioner to determine the possession of the parties, which is purely a judicial function to be determined only by the Court on the basis of the evidence oral and documentary led by the respective parties?
2. Whether the learned Lower Appellate Court after having visited the spot and becoming a witness to the same, should have decided the case?
3. Whether the learned Lower Appellate Court could have decide the case solely on the basis of the report of the local Commissioner?
4. Whether the Lower Appellate Court ought to have relied upon the plan (Tatima) prepared pursuant to the decree in Civil Suit No. 172 decided on 7.6.1987 for the exact location of the property in dispute and not the Tatima prepared by the Local Commissioner which admittedly was not in consonance and did not tally with the earlier Tatima?

10. I have heard learned counsel for the parties and have also gone through the records of the case as well as judgments passed by both learned Courts below.

11. A perusal of judgment passed by learned Appellate Court demonstrates that while allowing the appeal learned Appellate Court heavily depended upon the report filed by the Local Commissioner who demarcated the suit land during the pendency of the appeal i.e. Naib Tehsildar, Chamba. Para-13 of the judgment so passed by learned Appellate Court is quoted herein below:-

> "Thus demarcation of Khasra number 560/1 and 560/2 was essential and accordingly on the request of the parties, Naib Tehsildar, Chamba went on the

> spot and he demarcated the disputed room. In his demarcation report, he found that plaintiffs were already in possession of one room on the ground floor. This report is not challenged on any technical ground but only on the ground that when the Court had inspected the spot, the demarcation could not be carried out thereafter, but there is no law as the demarcation was found necessary to know the location of the disputed room. Once the Local Commissioner had given the report that the plaintiffs were already in possession of one room on the ground-floor over Khasra number 560/1, they could not be held entitled to the decree of possession of the said room."

12. A perusal of the said Para of the judgment passed by learned trial Court, demonstrates that it was held by learned Appellate Court that in his demarcation report Naib Tehsildar found plaintiffs to be in possession of one room on the ground floor. Learned Appellate Court also held that report of the Local Commissioner was not challenged on any technical ground but only on the ground that when the Court inspected the spot, the demarcation could not be carried out thereafter. Learned Appellate Court further held that once Local Commissioner had given the report that the plaintiffs were already in possession of one room on the ground floor over Khasra No. 560/1, they could not be held entitled for the decree of possession of the said room. While negating the plea of the present appellants that the commission could not have been ordered, it was held by learned Appellate Court that the commission was so ordered as it was found necessary to know the location of the disputed room and in law there was no bar that demarcation could not have been carried out by appointing of Local Commissioner.

13. In my considered view, there is an infirmity with the judgment and decree so passed by learned Appellate Court. I have already quoted Para-13 of the judgment passed by learned Appellate Court wherein it has been held by learned Appellate Court that the report so filed by the Local Commissioner was not challenged on any technical ground but only on the ground that when the Court had inspected the spot, the demarcation could not be carried out thereafter. However, a perusal of the records of learned Appellate Court demonstrates that detailed objections were filed against the report of Local Commissioner by the present appellants which were available at Page No. 127 of the record of learned Appellate Court. Record of learned Appellate Court further demonstrates that the objections so filed to the report of Local Commissioner have not been independently decided and without deciding the said objections, learned Appellate Court has adjudicated the appeal finally.

14. Record demonstrates that on 14.08.2003, learned Appellate Court passed the following order:-

> "Objections have been filed by Sh. H.N. Sharma, Adv. Copy supplied. For reply and consideration, to come up on 1.9.2003."

15. Thereafter, on 06.09.2003, the case was adjourned for arguments on Local Commissioner report as well as for final arguments. However, as I have already stated that there is no independent adjudication on the objections so filed by the present appellants against the report of the Local Commissioner.

16. In my considered view when a party had filed objections to the report of Local Commissioner, it was incumbent upon learned Appellate Court to have had first decided the objections so filed against the report of Local Commissioner before deciding the appeal. This is for the reason that in case either of the party was dissatisfied with the outcome of adjudication of the objections so filed against the report of the Local Commissioner, it had a right to assail the same before learned Appellate Court finally adjudicated upon the appeal. This opportunity has been curtailed by learned Appellate Court by not deciding the objections filed against Local Commissioner's report which in my considered view, prejudiced the case of the present appellants. In these circumstances, without further going into the merits of the adjudication of the case, the judgment and decree passed by learned Appellate Court is being set aside on this count alone and the case is remanded to learned Appellate Court with a direction that learned

Appellate Court shall first adjudicate upon the objections so filed by the present appellants against the report of Local Commissioner and thereafter, it shall decide the appeal on merits. Substantial questions of law are answered accordingly.

17. This appeal is allowed accordingly. Judgment and decree passed by learned Appellate Court in Civil Appeal No. 46 of 2002 dated 12.01.2004, are set aside and the matter is remanded back to learned Appellate Court with a direction to first decide the objections which were filed by the present appellants against the report of Local Commissioner and thereafter it shall adjudicate upon the appeal on the merits of the case. This Court has not gone into the veracity of the Local Commissioner's report or on the merits of the judgment and decree passed by learned trial Court. It is for learned Appellate Court to decide the objections so filed on the report of Local Commissioner as well as the appeal purely on the merits of the case. Parties through their learned counsel are directed to appear before learned Appellate Court on **19.06.2017**. No order as to costs. Miscellaneous applications pending, if any, also stand disposed of. Interim order, if any, also stands disposed of.

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

Smt. Leela Devi and others .....Appellants.

Vs.

Shri Virender Mahajan and another .....Respondents.

RSA No.: 299 of 2004
Date of Decision: 15.05.2017

Specific Relief Act, 1963- Section 38- Plaintiffs filed a civil suit for seeking injunction for restraining the defendants from interfering in their possession- it was pleaded that plaintiffs are owners in possession of the suit land and defendants were interfering with the same without any right to do so- the defendants pleaded that they were in possession since 13.2.1969 and had become owners by way of adverse possession- the suit was decreed by the Trial Court- an appeal was preferred, which was dismissed- held in second appeal thatownership of the plaintiffs was proved – defendants failed to prove the adverse possession- hence, the suit was rightly decreed by the Courts- appeal dismissed. (Para-11 to 14)

For the appellants: Mr. Surender Sharma, Advocate.
For the respondents: Mr. Anand Sharma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge*(Oral):*

By way of this appeal, the appellants have challenged the judgment and decree passed by the Court of learned District Judge, Chamba in Civil Appeal No. 60 of 2002, dated 24.04.2004, vide which learned appellate Court while dismissing the appeal filed by the present appellants, upheld the judgment and decree passed by the Court of learned Sub Judge 1st Class, Dalhousie in Civil Suit No. 45/93, dated 06.08.2002, whereby learned trial Court had decreed the suit of respondents/plaintiffs for possession of *Gair Mumkin* shop comprised in Khata Khatauni No. 44/55, bearing Khasra No. 434/64/1, out of Khasra No. 434/64, measuring 44 square yards, situated in Mohal Kaswa, Sihunta, Pargana Sihunta, Sub Tehsil Sihunta, Tehsil Bhattiyat, District Chamba, H.P.

2. Brief facts necessary for the adjudication of the present case are that respondents/plaintiffs (hereinafter referred to as "the plaintiffs") filed a suit praying for a decree of

permanent prohibitory injunction for restraining the defendants from interfering in their peaceful possession over the suit land comprised in Khata Khatauni No. 44/55, bearing Khasra No. 434/64/1, out of Khasra No. 434/64, measuring 44 square yards, situated in Mohal Kaswa, Sihunta, Pargana Sihunta, Sub Tehsil Sihunta, Tehsil Bhattiyat, District Chamba and in the alternative, suit for possession if defendants forcibly dispossessed them from the suit land during the pendency of the suit, on the grounds that the plaintiffs were owners in possession of the suit property over which there was a shop measuring 44 square yards denoted by Khasra No. 434/64/1. As per the plaintiffs, defendants were interfering in the ownership and possession of the plaintiffs over the land as well as shop, whereas the defendants were having no right whatsoever over the suit land. It was further the case of the plaintiffs that defendants who were clever and headstrong persons were threatening to raise construction over the suit land and thus were interfering in the peaceful possession of the plaintiffs and despite having been requested not to interfere by the plaintiffs, they were not resisting from interfering with the suit land. It was on these bases that the suit was filed by the plaintiffs.

3. The claim of the plaintiffs was contested by the defendants, who resisted the suit by stating in the written statement that it was not the plaintiffs, but the defendants who were in possession over the suit land and that the shop in issue in fact was constructed by the defendants. According to the defendants, the possession of the suit land was taken over by their father on 13.02.1969 and thereafter, he had constructed a shop over the same. Further, as per the defendants, as their possession over the suit land was open, peaceful and hostile as to the true owners, they had perfected their title by way of adverse possession. It was further the case of the defendants that as plaintiffs were not in possession over the suit land, hence they have no title over the same. It was further the case of the defendants that as plaintiffs were not in possession over the suit land, they were not entitled for any decree of injunction.

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

"1. Whether the plaintiffs are entitled to the relief of permanent injunction as prayed for? OPP

2. Whether the father of plaintiff No. 1 gave disputed land to defendant and he constructed a shop over it as alleged, if so its effect: OPD

3. Whether the defendant has become owner of suit property as alleged? OPD

1(A) Whether the LRs. can't change the stand taken up earlier by the original defendant? OPP

2(A) Whether the suit is time barred as alleged? OPD

2(B) Whether the plaintiffs are stopped from filing the present suit by their own act and conduct? OPD

2(c) Whether the defendants have become owner of the suit land by way of adverse possession and title of the plaintiffs has extinguished by way of afflux of time? OPD

4. Relief?

5. On the basis of evidence adduced by the respective parties in support of their respective claims, the following findings were returned by learned trial Court on the issues so framed:

"Issue No. 1 : Yes.

Issue No. 2: No.

Issue No. 3: No.

Issue No. 1(A): Not pressed.

Issue No. 2(A): No.

Issue No. 2(B):	*No.*
Issue No. 2(C):	*No.*
Relief:	*The suit of the plaintiffs is decreed as per operative part of the judgment.*

6. While decreeing the suit of the plaintiffs, it was held by the learned trial Court that it was evident from ocular as well as documentary evidence that it were the plaintiffs, who were owners over the suit land and that defendant was having no right, title or interest over the same. Learned trial Court also held that as far as ownership of the plaintiffs over the suit land was concerned, the same was not agitated even by the defendants in the written statement, but the case of the defendants was that they were in possession over the suit land and thus, no decree of injunction could be passed. By placing reliance upon Ex. PA and Ex. PB, learned trial Court returned the findings that it stood proved that plaintiffs were exclusive owners of the suit land. Learned trial Court also held that there was no evidence on record from which it could be inferred that the disputed land was given to defendant Bachitar Singh by the father of plaintiff No. 1 and thereafter the defendant had constructed a shop over the same. It was further held by the learned trial Court that as defendants had stated that they had perfected their title by way of adverse possession, therefore, onus to prove the same was upon the defendants and the defendants had miserably failed to prove that they had become owners of the shop in issue by way of adverse possession. It was further held by the learned trial Court that as the defendants were claiming to have had become owners of the suit land by way of adverse possession and as they had failed to prove their title over the suit land by way of adverse possession, they could not be deemed to be in possession over the suit land in the absence of a valid title. On these basis, learned trial Court decreed the suit for possession so filed by the plaintiffs.

7. In appeal, the judgment and decree so passed by the learned trial Court was upheld by the learned appellate Court. While disallowing the appeal so filed before it by the defendants, it was held by the learned appellate Court that it was settled law that in case a party was staking its claim over the suit land on the basis of adverse possession, then the onus to prove all the ingredients of adverse possession was on that party and in case that failed to establish the ingredients of adverse possession, then possession no matter howsoever long it may be, could not confer ownership. It was held by the learned appellate Court that in fact adverse possession means a hostile possession, express or implied in denial of the title of the true owner and in order to constitute adverse possession, the possession must be adequate in continuity, in publicity so as to show that it was adverse to the true owner. It was further held by the learned appellate Court that defendant did not produce any documentary evidence to prove that the suit property was given to his father by the father of plaintiff No. 1 and thereafter Bachiter Singh had constructed a shop over it. It was further held by the learned appellate Court that though defendant had produced DW-5 Karuna Sagar to prove bills Ex. D-1 to Ex.D-6, but the said witness had admitted that electricity meter was installed in the name of Bachiter Singh, i.e., father of the defendants only in the year 1993 and on these bases, it was held by the learned appellate Court that at the most these bills proved the possession of Bachiter Singh over the suit property and that too from the year 1993 onwards only, but still defendants had failed to prove that they had become owners of the suit land by way of adverse possession. On these bases, the appeal so filed by the defendants was dismissed by the learned appellate Court.

8. Feeling aggrieved, the appellants/defendants preferred this appeal, which was admitted by this Court on 26.10.2004 on the following substantial questions of law:

> *"1. Whether on the basis of pleadings made in the plaint, the two Courts below have committed an error of law in decreeing the suit of the plaintiff for possession when in the plaint there is no averment that after filing the original plaint the plaintiff has been dispossessed from the suit land/property?*
>
> *2. Whether writing Ex. DW7/A has been proved in accordance with law and it has been wrongly excluded from evidence by the learned District Judge which has important bearing on the result of the case?*

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

10. I will deal with both the substantial questions of law, on which this appeal was admitted independently.

Substantial Question of law No. 1:

1. Whether on the basis of pleadings made in the plaint, the two Courts below have committed an error of law in decreeing the suit of the plaintiff for possession when in the plaint there is no averment that after filing the original plaint the plaintiff has been dispossessed from the suit land/property?

11. A perusal of the plaint filed by the respondents/plaintiffs demonstrates that there was an alternative relief prayed for by the plaintiffs in the suit and that relief was for possession of the suit land in case during the pendency of the suit, the defendants were successful in ousting the plaintiffs from the suit land. The contention of the learned counsel for the appellants that both the learned Courts below have committed error of law in decreeing the suit of the plaintiffs for possession when in the plaint there was no averment that after filing of the plaint, the plaintiffs have been dispossessed from the suit property, is misconceived, because it is the very own case of the defendants that they were in possession over the suit land and according to the defendants, they were not only in possession over the suit land, but they had become owners of the same by way of adverse possession. The findings returned by the learned appellate Court to the effect that it stood established on record that Bachiter Singh though was in possession over the suit property, but his possession could be proved only from the year 1993 on wards, could not be proved to the contrary during the course of arguments by the learned counsel for the appellants. Learned counsel for the appellants also could not draw the attention of this Court to any material on record from which it could be inferred that defendants had been able to establish the ingredients of adverse possession.

12. Therefore, as there was an alternative prayer made for possession of the suit land by the plaintiffs and there were findings returned by both the learned Courts below to the effect that records demonstrated that it were the plaintiffs who were owners of the suit land and the possession over the same of the defendants without any title was of no significance, in this background of the matter, in my considered view, no error of law has been committed by both the learned Courts below in decreeing the suit for possession of the suit land in favour of the plaintiffs. This substantial question of law is answered accordingly.

Substantial Question of law No. 2:

2. Whether writing Ex. DW7/A has been proved in accordance with law and it has been wrongly excluded from evidence by the learned District Judge which has important bearing on the result of the case?

13. There are concurrent findings returned by both the learned Courts below to this effect that Ex. DW-7/A could not be proved in accordance with law by the defendants. In order to prove Ex. DW7/A, defendants examined Sh. Shreshat Kumar, who entered the witness box as DW-7, who as per the defendants had purportedly scribed the said document. It is a matter of record that during his deposition in the Court, DW-7 could not legally prove the same as the said document admittedly was not signed by him as is the mandate of law. Even otherwise, for the satisfaction of judicial conscious of this Court, it perused Ex. DW7/A and a perusal of the same demonstrated that the said document otherwise also is of no assistance to the defendants, as it cannot be inferred from the said document that it was the shop in dispute which is the reference point of this particular document.

14. In this background, in my considered view, it cannot be said that the conclusion arrived at by both the learned Courts below that defendants failed to prove Ex. DW7/A in accordance with law is a perverse conclusion. On the contrary, as the said document was not duly proved in accordance with law by the defendants, both the learned Courts below have rightly

held that as the said document was not legally proved, therefore, no benefit could be drawn from the same by the defendants. This substantial question of law is answered accordingly.

In view of the above discussion, as there is no merit in the present appeal, the same is dismissed, so also miscellaneous applications, if any.

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

State of Himachal Pradesh ...Appellant.
Versus
Bishan Dass and another ...Respondents.

Cr. Appeal No. 767 of 2008
Date of decision: 15.05.2017

Indian Penal Code, 1860- Section 451, 325 and 323 read with Section 34- Complainant was riding a scooter – V was driving a vehicle, which hit the scooter - the complainant narrated the incident to two other persons – complainant and those two persons went to the house of V, where the parents of V were present- mother of V started abusing the complainant- father of Vand two other persons gave beatings to the complainant – V and two other persons gave beatings to the complainant with iron rods and physical blows –accused were tried and acquitted by the Trial Court- held in appeal that no independent witness has stated that the scooter of the complainant was hit by the vehicle being driven by V- the version that complainant and two other persons went to the house of V, where they were abused was also not proved – a cross case has been filed against the complainant – complainant has not explained as to what he was doing in the under construction complex at the wee hours of night – the Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.(Para- 7 to 22)

Cases referred:
Sanwat Singh and others Vs. State of Rajasthan, AIR 1961 Supreme Court 715
Govindaraju alias Govinda Vs. State by Srirampuram Police Station and another (2012) 4 Supreme Court Cases 722

For the appellant: Mr. Vikram Thakur & Ms. Parul Negi, Deputy Advocate Generals.
For the respondent: Mr. Ramakant Sharma, Senior Advocate, with Ms. Soma Thakur,Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (Oral)**:**

By way of this appeal, the State has challenged the judgment passed by the Court of learned Judicial Magistrate 1st Class, Court No. III, Hamirpur in Police Challan No. 90-1-2000, dated 20.09.2008, vide which learned trial Court has acquitted the accused for commission of offences punishable under Sections 451, 325 and 323 read with Section 34 of the Indian Penal Code.

2. Case of the prosecution in brief was that statement of one Shri Parveen Katna (PW-3) was recorded under Section 154 of the Code of Criminal Procedure on 13.12.1999, in which he stated that on 12.12.1999 at around 7:30 p.m., while on his way from Heera Nagar to shopping complex of the committee, when he reached near Jai Bharat Furniture House on his Scooter No. HP-22-4446, one Vivek Sharma, son of Bishan Dass, who was driving his vehicle

bearing registration No. HP-22-9555 struck the said vehicle with his scooter. As per the complainant, thereafter he went to Himachal Builders, which shop was owned by Raj Kumar and was near the bus stand and narrated the said incident to Raj Kumar and Rakesh Kumar. All of them went to the house of Bishan Dass. Bishan Dass asked them to discuss the matter on the following morning, however, his wife started abusing them. Thereafter, Bishan Dass and two other persons started beating Rakesh Kumar on the road. This was followed by Vivek Sharma and two other persons also physically assaulting him in the second floor of a market complex with iron rods and physical blows. According to the complainant, he was saved by Piare Lal, Surinder and Pardeep.

3. On the basis of the statement of complainant, an FIR, i.e. FIR No. 209/99, dated 13.12.1999 was registered against the accused under Sections 279, 451 and 323 read with Section 34 of the Indian Penal Code. On the basis of said FIR, investigation was carried out. After completion of investigation, challan was filed in the Court and as a prima facie case was found against the accused, accordingly, they were charged for commission of offences punishable under Sections 451, 325 and 323 read with Section 34 of the Indian Penal Code, to which they pleaded not guilty and claimed trial.

4. Learned trial Court on the basis of material produced before it by the prosecution concluded that the prosecution had failed to prove its case against the accused beyond reasonable doubt and, as such, learned trial Court acquitted all the accused by giving them benefit of doubt. While arriving at the said conclusion, it was held by the learned trial Court that the genesis of the case of the prosecution was the statement of complainant Parveen Katna, as per whom, the vehicle of accused Vivek Sharma had struck his scooter, who thereafter went to the shop of Raj Kumar and then alongwith Rakesh Kumar and Raj Kumar went to the house of Bishan Dass, father of accused Vivek Sharma, where wife of accused Bishan Dass started abusing them and thereafter some persons who were outside the road initially started beating Rakesh Kumra, which was followed by the beating of the complainant also by accused Vivek Sharma and other persons. It was held by the learned trial Court that neither PW-2 nor PW-5, who as per the prosecution were eye witnesses, had supported the case of the prosecution. Learned trial Court also took note of the fact that in fact there was also a cross case pertaining to the same incident, which had been filed by the accused against the complainant. It was further held by the learned trial Court that the statements of prosecution witnesses demonstrated that there was involvement of complainant alongwith other persons, who had outnumbered the accused persons and in these circumstances, it was hard to believe the prosecution case that the accused were aggressors. Learned trial Court also expressed its doubts over the veracity of the factual story as was put forth by the complainant. On these bases, it was held by the learned trial Court that as the prosecution was not able to prove its case against the accused beyond reasonable doubt, the accused could not be convicted.

5. Feeling aggrieved by the said judgment, the State has filed this appeal.

6. I have heard the learned Deputy Advocate General as well as learned Senior Counsel for the respondent and have also gone through the records of the case and the judgment passed by the learned trial Court.

7. Naresh Kumar entered the witness box as PW-1 and he deposed about the shirt and Banyaan of the complainant, Ex. P-1 and Ex. P-2, being taken into possession in his presence. PW-2 Piar Singh, according to the prosecution, is an eye witness, who saw the occurrence of the alleged incident. However, a perusal of his statement demonstrates that he did not support the case of the prosecution and was declared as a hostile witness. Though he was subjected to lengthy cross-examination by the learned Public Prosecutor, however, nothing could be elicited from him by the learned Public Prosecutor to substantiate the case of the prosecution. This witness has categorically denied that the accused were physically assaulting the complainant, as was the case put forth by the prosecution.

8. Complainant entered the witness box as PW-3 and he deposed about the occurrence of the alleged incident starting from his scooter being hit by the vehicle being driven by accused Vivek Sharma and thereafter his going to the house of the accused alongwith Raj Kumar and Rakesh Kumar and initially them being abused by the mother of accused Vivek Sharma and thereafter, his being physically assaulted by the accused. In his cross-examination, he denied the suggestion that he had filed a false case against the accused to save himself from a cross case.

9. Surinder Singh entered the witness box as PW-4 and this witness has deposed that on 12.12.1999 at around10:30 p.m., he heard the cries of the complainant and then he and Piare Lal went to the spot where they saw four persons beating the complainant. This witness further deposed that after rescuing the complainant from the said persons, they took him to the hospital.

10. PW-5 Yatinder Sharma, who as per the prosecution was an eye witness, has also not supported the case of the prosecution and he was also declared as a hostile witness. This witness in his cross-examination by the learned Public Prosecutor has categorically denied that the complainant was physically assaulted by the accused.

11. Next relevant witness is PW-8 Dr. Dinesh Sharma, Medical Officer, PHC Nagwain, who has deposed that on 12.12.1999, he had medically examined the complainant at around 11:30 p.m., who was brought with alleged history of being beaten about ½ an hour back and certain injuries were found on the person of the complainant, which were both grievous and simple.

12. Investigating Officer of the case, Om Parkash Dhiman entered the witness box as PW-11. In his cross-examination, this witness admitted that a cross-case was registered against the complainant Parveen Katna and others, which was also investigated by him.

13. A perusal of the testimony of key prosecution witnesses demonstrates that there is no independent witness who saw the alleged accident of the scooter of the complainant with the vehicle of accused Vivek Sharma. Except the bald statement of the complainant, there is no cogent evidence on record from which it can be inferred that on the fateful evening, the scooter of the complainant was actually hit by a vehicle being driven by accused Vivek Sharma, as the prosecution wants this Court to believe.

14. Besides this, the factum of complainant having gone to the house of Bishan Dass alongwith Raj Kumar and Rakesh Kumar and there they being abused by wife of Bishan Dass, has also not been satisfactorily proved by the prosecution on record. The prosecution could have had proved the said fact from the testimony of Raj Kumar and Rakesh Kumar, who according to the complainant accompanied him to the house of Bishan Dass, but neither of the said two witnesses have been examined by the prosecution. Therefore, the contention of the complainant that after he went to the house of Bishan Dass with Raj Kumar and Rakesh Kumar, wife of Bishan Dass abused them and thereafter Rakesh Kumar was beaten up by Bishan Dass with the help of two other persons, remains unsubstantiated.

15. Now as far as the factum of the complainant having been beaten by accused Vivek Sharma with the help of other co-accused is concerned, it has come in the testimony of PW-4 that he allegedly saved the complainant from the clutches of the accused, who allegedly was being beaten by the accused in market complex and that too around 10:30 p.m. First of all, the prosecution has not been able to satisfactorily explain as to what was the complainant doing at such wee hours of the night in an under construction shopping complex. It is not as if the alleged incident occurred around 10:30 p.m., because according to the complainant, the incident took place at around 7:30 p.m. However, it is a matter of record, as is evident from the statement of Investigating Officer himself that a cross case has also been filed pertaining to the incident by the accused against the complainant. In these circumstances, when apparently there is no cogent evidence placed on record by the prosecution from which it could be inferred that the injuries which were received by the complainant were actually inflicted upon him by the accused, it

cannot be said that the judgment of acquittal returned in favour of the accused by the learned trial Court is a perverse judgment.

16. I have carefully gone through the judgment passed by the learned trial Court and a perusal of the same demonstrates that learned trial Court after taking into consideration the evidence placed on record of the prosecution and after a correct appreciation of the same, has returned the findings of acquittal in favour of the accused.

17. A three Judge Bench of the Hon'ble Supreme Court in **Sanwat Singh and others** Vs. **State of Rajasthan,** AIR 1961 Supreme Court 715 has held:

> *"9. The foregoing discussion yields the following results: (1) an appellate court has full power to review the evidence upon which the order of acquittal is founded; (2) the principles laid down in Sheo Swarup's case(1) afford a correct guide for the appellate court's approach to a case in disposing of such an appeal; and (3) the different phraseology used in the judgments of this Court, such as, (i) "substantial and compelling reasons", (ii) "good and sufficiently cogent reasons", and (iii) "strong reasons" are not intended to curtail the undoubted power of an appellate court in an appeal against acquittal to review the entire evidence and to come to its own conclusion; but in doing so it should not only consider every matter on record having a bearing on the questions of fact and the reasons given by the court below in support of its order of acquittal in its arriving at a conclusion on those facts, but should also express those reasons in its judgment, which lead it to hold that the acquittal was not justified."*

18. The Hon'ble Supreme Court in **Govindaraju alias Govinda** Vs. **State by Srirampuram Police Station and another** (2012) 4 Supreme Court Cases 722 has held that a benefit that has accrued to an accused by the judgment of acquittal can be taken away and he can be convicted on appeal, only when the judgment of the trial Court is perverse on facts or law. It has further been held by the Hon'ble Supreme Court that in appeal the judgment of acquittal should be interfered with only if upon examination of the evidence before it, the appellate Court is fully convinced that the findings returned by the learned trial Court are really erroneous and contrary to the settled principles of criminal law.

19. Coming to the facts of the prosecution case, in my considered view, in the present case, it cannot be said that the judgment passed by the learned trial Court is perverse either on facts or on law. The conclusions which have been drawn by the learned trial Court are in fact borne out from the records of the case and, therefore, as I have already said above, it cannot be said that the findings of acquittal returned by the learned trial Court are perverse findings nor it can be said that the findings so returned by the learned trial Court are erroneous or contrary to settled principles of criminal law.

Therefore, in view of the above discussion, as there is no merit in the present appeal, the same is accordingly dismissed.

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

Tulsi Ram ....Appellant-Defendant
Versus
Charan Dass ....Respondent-Plaintiff

Regular Second Appeal No.221 of 2006
Date of decision: 15.05.2017

Code of Civil Procedure, 1908- Order 2 Rule 2- Plaintiff filed a civil suit for possession against the defendant, which was decreed by the Trial Court- an appeal was filed, which was dismissed –

held in second appeal that an issue was framed by the Trial Court regarding the maintainability of the suit in view of the bar contained in Order 2 Rule 2 – a specific ground was taken before the Appellate Court that no specific finding was given by the Trial Court regarding this issue – it was obligatory for the Appellate Court to record a specific finding on this issue – appeal allowed- case remanded to Appellate Court with a direction to decide the appeal afresh.(Para-12 to 21)

Cases referred:

State of Rajasthan vs. Harphool Singh (Dead) through his LRs, (2000)5 SCC 652
Laliteshwar Prasad Singh vs. S.P. Srivastava, (2017)2 SCC 415
Santosh Hazari vs. Purushottam Tiwari, (2001)3 SCC 179
Shasidhar and others vs. Ashwini Uma Mathad and another, (2015)11 SCC 269

For the Appellant: Mr.Pawan Gautam, Advocate.
For the Respondent: Mr.Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

Instant Regular Second Appeal is directed against the judgment and decree dated 04.03.2006, passed by learned District Judge, Kangra at Dharamshala, H.P., in Civil Appeal No.102-I/XIII/2005, affirming the judgment and decree dated 06.06.2005, passed by Civil Judge(Junior Division), Indora, District Kangra, in Civil Suit No.195/01/04, whereby suit of the plaintiff for permanent prohibitory injunction was decreed.

2. Having regard to the nature of order this Court propose to pass in given facts and circumstances of the case, it may not be necessary to give detailed facts of the case, save and except, that respondent-plaintiff *(hereinafter referred to as 'plaintiff')* filed a suit for possession against the appellant-defendant *(hereinafter referred to as 'defendant')* in the Court of Civil Judge(Junior Division), Indora, District Kangra, H.P.

3. Learned Court below, on the basis of pleadings adduced on record by respective parties, framed following issues:-

"1. Whether the plaintiff is entitled to the relief of possession, as prayed for? OPP.

2. Whether the suit is not maintainable in the present form, as alleged? OPP.

3. Whether the suit is barred under Order 2 Rule 2 CPC, as alleged? OPP.

4. Whether the plaintiff has no cause of action to file the present suit? OPD.

5. Whether the plaintiff is estopped by his Act and conduct from filing the present suit? OPD.

6. Whether the suit is barred under Order 9 Rule 9 CPC ? OPD.

7. Whether the defendant has become owner of the suit land by way of adverse possession, as alleged? OPD.

8. Relief."

4. Subsequently, learned trial Court vide judgment dated 06.06.2005 decreed the suit of the plaintiff. Appellant-defendant, being aggrieved and dis-satisfied with the aforesaid judgment passed by learned trial Court, preferred an appeal in the Court of learned District Judge, Kangra at Dharamshala, which was dismissed, as a result of which judgment and decree passed by learned trial Court came to be upheld.

5. In the aforesaid background, appellant-defendant, by way of instant appeal, approached this Court praying therein for setting aside judgments and decrees passed by Courts below.

6. This Court vide order dated 11.10.2006 admitted the instant appeal on the following substantial question of law:-

> *"Whether the two Courts below have committed illegality in rejecting the plea of the appellant-defendant that the relief of possession claimed in the present case was barred, under Order 2 Rule 2 CPC?"*

7. Before this Court could advert to the merits of the case, Shri Pawan Gautam, learned counsel representing the appellant-defendant, while inviting the attention of this Court to the impugned judgment passed by learned first appellate Court, vehemently argued that learned first appellate Court has failed to take into consideration the issues involved in the present case while upholding the judgment and decree passed by learned trial Court. With a view to substantiate his aforesaid arguments, Mr.Gautam made this Court to travel through the judgment passed by learned trial Court to demonstrate that specific issue No.3 was framed by the learned trial Court with regard to maintainability of suit on account of provisions contained in Order 2 Rule 2 of the Code of Civil Procedure *(for short 'CPC')*.

8. Mr.Gautam also invited the attention of this Court to the grounds of appeal, taken by the appellant-defendant before the learned first appellate Court, to suggest that specific ground was raised with regard to mis-appreciation and mis-reading of provisions of CPC, as enshrined under Order 2 Rule 2 CPC and under Order 9 Rule 9 CPC. But, learned first appellate Court, while upholding the judgment of trial Court, has failed to take note of aforesaid specific ground raised by the appellant-defendant.

9. In this regard, Mr.Gautam, learned counsel for the appellant-defendant, invited the attention of this Court to the law laid down by Hon'ble Apex Court in ***State of Rajasthan vs. Harphool Singh (Dead) through his LRs, (2000)5 SCC 652***, to state that it was incumbent upon the learned first appellate Court, being last facts finding Court, to consider all the issues and then decide the same by assigning reasons.

10. Mr.Ajay Sharma, learned counsel representing the respondent-plaintiff, while supporting the impugned judgment passed by learned first appellate Court, stated that there is no illegality and infirmity in the impugned judgment and the same is based upon proper appreciation of evidence adduced on record by the respective parties. While refuting the aforesaid contention that no discussion having been made by learned first appellate Court on the issue of Order 2 Rule 2 CPC and Order 9 Rule 9 CPC, Mr.Sharma contended that there was no requirement to return specific finding qua the aforesaid issue by the first appellate Court, in view of specific findings returned by the trial Court below on the issue at hand. Mr.Sharma, further contended that earlier suit filed by the respondent-plaintiff was for mandatory injunction, whereas, subsequent suit was for possession and, as such, learned trial Court rightly decided the aforesaid issue in favour of the respondent-plaintiff. While concluding his arguments, Mr.Sharma, contended that otherwise also perusal of impugned judgment suggests that no submission, if any, was made with regard to provisions contained under Order 2 Rule 2 CPC and as such there was no occasion for learned first appellate Court to discuss and decide the same.

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

12. This Court, solely with a view to ascertain the genuineness and correctness of submissions having been made by Mr.Gautam, learned counsel representing the appellant-defendant, carefully perused the grounds of appeal filed by the appellant-defendant before the learned first appellate Court vis-à-vis judgment passed by learned first appellate Court, perusal whereof certainly suggests that learned first appellate Court, while upholding the judgment and decree passed by learned trial Court, failed to address itself to specific issue with regard to application of provisions of law as contained in Order 2 Rule 2 CPC, framed by learned trial Court below. If the judgment passed by learned first appellate court is read in its entirety, there is no discussion, if any, of the findings returned by learned trial Court qua issue No.3, wherein learned Court below held that suit, having been filed by the plaintiff-respondent, is not barred by Order 2 Rule 2 and Order 9 Rule 9 CPC.

13. True, it is, that there is no mention, if any, of submissions having been made by learned counsel representing either of the parties qua the aforesaid issue, but once specific plea with regard to Order 2 Rule 2 CPC was made by the appellant-defendant in the ground of appeal before learned first appellate Court, learned first appellate Court ought to have considered and decided the same by assigning the reasons.

14. It is well settled that first appeal is a valuable right of the parties and parties have right to be heard both on question of law as also on facts and the first appellate Court is required to address itself to all issues and decide the case by giving reasons in support of such findings. This Court is unable to find any reason much less cogent and convincing reasons assigned by the learned first appellate Court while upholding the findings returned by the learned trial Court. It is always open for the learned first appellate Court to take different view on question of facts after adverting to the reasons given by the trial Curt in arriving at findings in question. Court of first appeal must cover all important questions involved in the case and they should not be general and vague. Moreover, when first appellate Court reserves findings of trial Court, it is expected to record findings in clear terms, specifically stating therein, in what manner, reasoning of trial court is erroneous.

15. In the instant case, this Court after having carefully perused specific issue having been framed by the learned trial Court with regard to application of provisions contained in Order 2 Rule 2 CPC vis-à-vis impugned judgment passed by the learned first appellate Court, has no hesitation to conclude that learned trial Court has failed to address this issue while dismissing the appeal of the appellant-defendant, as a result of which a great prejudice has been caused to the appellant-defendant.

16. Hon'ble Apex Court in ***Laliteshwar Prasad Singh vs. S.P. Srivastava, (2017)2 SCC 415***, has specifically held that appellate Court is final Court of facts and as such its judgment must reflect application of mind and must record its findings supported by reasons. Hon'ble Apex Court in the aforesaid judgment, taking note of the earlier judgment passed in ***Santosh Hazari vs. Purushottam Tiwari, (2001)3 SCC 179,*** has held as under:

> *"13. An appellate court is the final court of facts. The judgment of the appellate court must therefore reflect court's application of mind and record its findings supported by reasons. The law relating to powers and duties of the first appellate court is well fortified by the legal provisions and judicial pronouncements. Considering the nature and scope of duty of first appellate court, in Vinod Kumar v. Gangadhar (2015) 1 SCC 391, it was held as under:-*
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> *"12. In Santosh Hazari v. Purushottam Tiwari (2001) 3 SCC 179, this Court held as under: (SCC pp. 188-89, para 15)*
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> > *"15. … The appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. … while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it."*
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> *The above view has been followed by a three-Judge Bench decision of this Court in Madhukar v. Sangram (2001) 4 SCC 756, wherein it was reiterated that sitting as a court of first appeal, it is the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings.*

13. In H.K.N. Swami v. Irshad Basith (2005) 10 SCC 243, this Court stated as under: (SCC p. 244, para 3) "3. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard both on questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. Unfortunately, the High Court, in the present case has not recorded any finding either on facts or on law. Sitting as the first appellate court it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording the finding regarding title."

14. Again in Jagannath v. Arulappa (2005) 12 SCC 303, while considering the scope of Section 96 of the Code of Civil Procedure, 1908, this Court observed as follows: (SCC p. 303, para 2)

15. Again in B.V. Nagesh v. H.V. Sreenivasa Murthy (2010) 13 SCC 530, this Court taking note of all the earlier judgments of this Court reiterated the aforementioned principle with these words: (SCC pp. 530-31, paras 3-5)

> *"3. How the regular first appeal is to be disposed of by the appellate court/High Court has been considered by this Court in various decisions. Order 41 CPC deals with appeals from original decrees. Among the various rules, Rule 31 mandates that the judgment of the appellate court shall state:*
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> > *(a) the points for determination;*
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> > *(b) the decision thereon;*
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> > *(c) the reasons for the decision; and*
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> > *(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.*
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> *4. The appellate court has jurisdiction to reverse or affirm the findings of the trial court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. Sitting as a court of first appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. (Vide Santosh Hazari v. Purushottam Tiwari (2001) 3 SCC 179, SCC p. 188, para 15 and Madhukar v. Sangram (2001) 4 SCC 756 SCC p. 758, para 5.)*
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> *5. In view of the above salutary principles, on going through the impugned judgment, we feel that the High Court has failed to discharge the obligation placed on it as a first appellate court. In our view, the judgment under appeal is cryptic and none of the relevant aspects have even been noticed. The appeal has been decided in an unsatisfactory manner. Our careful perusal of the judgment in the regular first appeal shows that it falls short of considerations which are expected from the court of first appeal. Accordingly, without going into the merits of the claim of both parties, we set aside the impugned judgment and decree of the High Court and remand the regular first appeal to the High Court for its fresh disposal in accordance with law."*

14. The points which arise for determination by a court of first appeal must cover all important questions involved in the case and they should not be general and vague. Even though the appellate court would be justified in taking a different view on question of fact that should be done after adverting to the reasons given by the trial judge in arriving at the finding in question. When appellate court agrees with the views of the trial court on evidence, it need not restate effect of evidence or reiterate reasons given by trial court; expression of general agreement with reasons given by trial court would ordinarily suffice. However, when the first appellate court reverses the findings of the trial court, it must record the findings in clear terms explaining how the reasonings of the trial court are erroneous."

17. In the case at hand, this Court, after having gone through the record made available, has no hesitation to conclude that learned first appellate Court, while dismissing the suit of the plaintiff, has failed to address specific issue raised by the appellant-defendant with regard to application of provisions contained in Order 2 Rule 2 CPC and as such matter needs to be decided afresh by the learned first appellate Court. This Court finds substantial force in the arguments of the learned counsel for the appellant-defendant that there is no attempt to appreciate the aforesaid ground of appeal raised by the appellant-defendant in his appeal and as such matter needs to be remanded back to the learned trial Court for deciding afresh. After having carefully examined the judgment passed by the learned first appellate Court, it can be safely concluded that the learned first appellate Court has failed to discuss the material issue, as stated above, and has passed cryptic order.

18. Reliance is also placed upon the judgment passed by the Hon'ble Apex Court in ***Shasidhar and others vs. Ashwini Uma Mathad and another, (2015)11 SCC 269,*** wherein the Hon'ble Court has held as under:-

"10. The powers of the first appellate Court, while deciding the first appeal under Section 96 read with Order XLI Rule 31 of the Code, are indeed well defined by various judicial pronouncements of this Court and are, therefore, no more res integra.

11. As far back in 1969, the learned Judge - V.R. Krishna Iyer, J (as His Lordship then was the judge of Kerala High Court) while deciding the first appeal under Section 96 of the CPC in Kurian Chacko vs. Varkey Ouseph, AIR 1969 Kerala 316, reminded the first appellate Court of its duty as to how the first appeal under Section 96 should be decided. In his distinctive style of writing and subtle power of expression, the learned judge held as under: (SCC Online Ker Paras 1-3)

"1. The plaintiff, unsuccessful in two Courts, has come up here aggrieved by the dismissal of his suit which was one for declaration of title and recovery of possession. The defendant disputed the plaintiff's title to the property as also his possession and claimed both in himself. The learned Munsif, who tried the suit, recorded findings against the plaintiff both on title and possession. But, in appeal, the learned Subordinate Judge disposed of the whole matter glibly and briefly, in a few sentences.

2. An appellate court is the final Court of fact ordinarily and therefore a litigant is entitled to a full and fair and independent consideration of the evidence at the appellate stage. Anything less than this is unjust to him and I have no doubt that in the present case the learned Subordinate Judge has fallen far short of what is expected of him as an appellate Court.

3. Although there is furious contest between the counsel for the appellant and for the respondent, they appear to agree with me in this observation..... "(Emphasis supplied)

12. This Court in a number of cases while affirming and then reiterating the aforesaid principle has laid down the scope and powers of the first appellate Court under Section 96 of the Code. We consider it apposite to refer to some of the decisions.

13. In Santosh Hazari vs. Purushottam Tiwari(2001)3 SCC 179, this Court held as under: (SCC pp 188-189)

> *15."".....the appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court.....while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it....."*

The above view has been followed by a three-Judge Bench decision of this Court in Madhukar & Ors. v. Sangram & Ors.,(2001) 4 SCC 756, wherein it was reiterated that sitting as a court of first appeal, it is the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings.

14. In H.K.N. Swami v. Irshad Basith,(2005) 10 SCC 243, this Court stated as under (SCC p. 244,para-3):

> *"3. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard both on questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. Unfortunately, the High Court, in the present case has not recorded any finding either on facts or on law. Sitting as the first appellate court it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording the finding regarding title."*

15. Again in Jagannath v. Arulappa (2005) 12 SCC 303, while considering the scope of Section 96 of the Code this Court observed as follows: (SCC pp. 303, para 2)

> *"2. A court of first appeal can reappreciate the entire evidence and come to a different conclusion....."*

16. Again in B.V Nagesh vs. H.V. Sreenivasa Murthy, (2010) 13 SCC 530, this Court taking note of all the earlier judgments of this Court reiterated the aforementioned principle with these words: (SCC pp.530-31, paras 3-5)

> *"3. How the regular first appeal is to be disposed of by the appellate court/High Court has been considered by this Court in various decisions. Order 41 CPC deals with appeals from original decrees. Among the various rules, Rule 31 mandates that the judgment of the appellate court shall state:*
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> *(a) the points for determination;*
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> *(b) the decision thereon;*
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> *(c) the reasons for the decision; and*
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> *(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.*

4. The appellate court has jurisdiction to reverse or affirm the findings of the trial court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. Sitting as a court of first appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. (Vide Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179 at p. 188, para 15 and Madhukar v. Sangram, (2001) 4 SCC 756 at p. 758, para 5.)

5. In view of the above salutary principles, on going through the impugned judgment, we feel that the High Court has failed to discharge the obligation placed on it as a first appellate court. In our view, the judgment under appeal is cryptic and none of the relevant aspects have even been noticed. The appeal has been decided in an unsatisfactory manner. Our careful perusal of the judgment in the regular first appeal shows that it falls short of considerations which are expected from the court of first appeal. Accordingly, without going into the merits of the claim of both parties, we set aside the impugned judgment and decree of the High Court and remand the regular first appeal to the High Court for its fresh disposal in accordance with law."

17. The aforementioned cases were relied upon by this Court while reiterating the same principle in State Bank of India & Anr. vs. Emmsons International Ltd. & Anr., (2011) 12 SCC 174. This Court has recently taken the same view on similar facts arising in Vinod Kumar vs. Gangadhar, 2015(1) SCC 391.

18. Applying the aforesaid principle to the facts of the case, we find that the High Court while deciding the first appeal failed to keep the aforesaid principle in consideration and rendered the impugned decision. Indeed, it is clear by mere reading of the impugned order quoted below: (Shasidhar case 2012 SCC Online Kar 8774).

"1.The appellants are defendants in the suit. The plaintiffs are the respondents. The respondents are the children of the 1st appellant born in the wedlock between 1st appellant and his divorced wife Smt. Uma Mathad. It is admitted fact that the 1st appellant has married the 2nd respondent after the divorce and in the wedlock he has two children and they are appellant Nos.3 and 4. The suit properties at item Nos.1 and 4 are admitted to be the ancestral properties. Item Nos.2 and 3 are the properties belonging to the mother of the 1st appellant and after her demise the said properties are bequeathed to the 1st appellant. Therefore, the said properties acquired the status of self-acquired properties.

2.The respondents filed a suit for partition. The parties are governed by Bombay School of Hindu Law. In view of the provisions of Hindu Succession Amendment Act of 2005, respondent Nos. 1 and 2 are entitled to a share as co-parceners in the ancestral properties. The wife who is the second appellant also would be entitled to a share in the partition. In that view, appellant Nos. 1 and 2 and respondent Nos.1 and 2 will have 1/4th share each in item Nos.1 and 4 of the suit properties.

3.The learned counsel for the appellants submitted that appellants 2 to 4 would not claim any independent share in items 1 and 4 of the suit properties, but they would take share in the 1/4th share allotted to their father.

4.In view of the said submissions, the appellant Nos.1 and 2 and respondent Nos.1 and 2 would be entitled to 1/4th share in item Nos.1 and 4 of the suit properties.

5.Accordingly, a preliminary decree to be drawn and the appeal and cross objections are disposed of in the terms indicated above."

19. In our considered opinion, the High Court did not deal with any of the submissions urged by the appellants and/or respondents nor it took note of the grounds taken by the appellants in grounds of the appeal nor took note of cross objections filed by the plaintiffs under Order XLI Rule 22 of the Code and nor made any attempt to appreciate the evidence adduced by the parties in the light of the settled legal principles and decided case laws applicable to the issues arising in the case with a view to find out as to whether the judgment of the trial Court can be sustained or not and if so, how, and if not, why?"

19. Consequently, in view of detailed discussion made hereinabove as well as salutary principles, as have been laid down by the Hon'ble Apex Court, this Court is of the view that learned first appellate Court has failed to discharge its obligation and accordingly without going into the merits of the claim of both the parties, impugned judgment passed by the learned first appellate Court is quashed and set aside and the case is remanded back to the first appellate Court with the direction to decide the same afresh in accordance with law.

20. However, it is made clear that while passing aforesaid judgment, this Court has not passed any order on the merits of the case and as such any observation made in the process of passing of this judgment may not be construed as opinion of the Court, especially qua the issues involved in the present controversy. The learned first appellate Court may decide the case afresh without being influenced by any of observation made hereinabove.

21. The parties through their respective counsel are directed to appear before the learned first appellate Court on ***2.6.2017***. Since the parties are litigating in the Courts of law since 2002, learned first appellate Court is expected to decide the matter within a period of three months from the date of passing of this judgment. The record of the learned trial Court be returned back forthwith to enable the learned first appellate Court to do the needful in terms of the instant judgment. Accordingly, the present appeal is disposed of alongiwith pending applications, if any.

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

Cr. MPs(M) No. 580 & 581 of 2017
Decided on: 16th May, 2017

1. Cr.MP(M) No. 580 of 2017:

Asha ....Petitioner.

Versus

State of Himachal Pradesh. ....Respondent.

2. Cr.MP(M) No. 581 of 2017:

Ravinder Kumar ....Petitioner.

Versus

State of Himachal Pradesh. ....Respondent.

Code of Criminal Procedure, 1973- Section 439- A FIR was registered against the petitioners for the commission of offences punishable under Sections 363, 366, 506, 120B of Indian Penal Code, 1860 and Section 18 of Prevention of Children from Sexual Offences, Act and Sections 9and 10 of the Prohibition of Child Marriage Act- petitioners pleaded that they were falsely impleaded in the case- they are not in a position to tamper with the prosecution witnesses- held that R to whom the prosecutrix was allegedly married has been released on bail- hence, the petitioners are entitled to bail as well- petition allowed and petitioners ordered to be released on furnishing personal and surety bonds of Rs.50,000/- subject to conditions.(Para-6 and 7)

For the petitioner(s) : Mr. K.B. Khajuria, Advocate.
For the respondent(s) : Mr. Pushpinder Jaswal, Dy. AG & Mr. Rajat Chauhan, Law Officer.
ASI Bikram Singh, I.O. Police Station Sadar, Chamba.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge*(oral).*

The present bail applications have been maintained by the petitioners under Section 439 of the Code of Criminal Procedure seeking their release in case FIR No. 74 of 2017, dated 18.03.2017, under Sections 363, 366, 506, 120B of Indian Penal Code, 1860 (hereinafter referred to as "IPC"), Section 18 of Prevention of Children from Sexual Offences, Act and Sections 9 and 10 of the Prohibition of Child Marriage Act, registered at Police Station Sadar, Chamba, District Chamba, H.P.

2. As per the petitioners, they are innocent and have been falsely implicated in the present case. They are residents of the place and neither in a position to tamper with the prosecution evidence nor in a position to flee from justice, so they may be released on bail.

3. Police report stands filed. As per the prosecution, on 18.03.2017 the prosecutrix (name withheld) got her statement recorded before the police under Section 154 Cr.PC., wherein she stated that on 04.03.2017, around 09:30 a.m., her aunty, Asha (petitioner in Cr.MP(M) No. 580 of 2017) telephoned her and asked to accompany her to Chamba. The prosecutrix accompanied her aunty to Chamba where petitioner, Asha, gave her two capsules, as she (prosecutrix) was ill, which she swallowed. Thereafter, petitioner, Aha, alongwith her *mami,* took the prosecutrix towards Sultanpur in a jeep like vehicle. As per the prosecutrix, she felt giddiness and she regained her consciousness at Pathankot Railway Station and she was boarded in a train. Thereafter, the prosecutrix regained her consciousness in a room at place called Gobindgarh Mandi. At that time, the petitioner (Asha), her *mami* and other relatives were present there. The prosecutrix asked them that why she was taken here, then they replied that they wanted to marry her. On this, the prosecutrix refused to get married, so she was locked in a room. The prosecutrix was thrashed and threatened, thus she yielded to the pressure exerted upon her and she finally agreed to marry one Rinku (co-accused), who is real brother of her aunty. On 11.03.2017 she was married with Rinku in a *Gurudwara.* Ravinder (petitioner in Cr.MP(M) No. 581 of 2017), who is elder brother of Rinku, was also present in the marriage. The prosecutrix, on 12.03.2017, escaped from there and met one Nisha, who alongwith other females, took her to police station. Thereafter, on 13.03.2017, Virnder Gupta @ Kaka, Ex. Pradhan, Subhash, Ward Member, Rakesh, Uncle and her brother took her to Chamba. As per the prosecution, due to fear she did not divulge the incident earlier. Police carried out the investigation and the prosecutrix was medically examined. Statements of the witnesses were also recorded. All the accused, involved in the commission of the crime, were arrested. Statement of the prosecutrix was also recorded under Section 164 Cr.P.C. During the course of investigation spot map was prepared and recoveries were made. As per the prosecution, the investigation in the case is complete and *challan* is under scrutiny. Lastly, the prosecution has prayed that the bail applications of the petitioners may be dismissed.

4. Heard. The learned counsel for the petitioners has argued that the petitioners are innocent and have been falsely implicated in the present case. He has further argued that the petitioners are residents of the place and neither in a position to tamper with the prosecution evidence nor to flee from justice. Investigation in the present matter is complete and nothing remains to be recovered at the instance of the petitioner. He has also argued that co-accused Rinku Thakur has already been enlarged on bail. Conversely, the learned Deputy Advocate General has argued that the petitioners have committed a serious offence and in case they are enlarged on bail they may threaten the prosecutrix and may also tamper with the prosecution evidence, so he prayed that the bail applications of the petitioners may be dismissed.

5. I have gone through the rival contentions of the parties and the police report in detail.

6. Manifestly, co-accused Rinku Thakur, to whom the prosecutrix was allegedly married, has already been enlarged on bail, on 25.04.2017, by Hon'ble Co-ordinate Bench of this Court. Keeping in view the facts that co-accused, Rinku Thakur, has already been enlarged on bail, the petitioners are residents of the place, they are neither in a position to tamper with the prosecution evidence nor to flee from justice and the fact that investigation in the case is complete and nothing remains to be recovered at the instance of the petitioners, the present is a fit case where the judicial discretion to admit the petitioners on bail is required to be exercised in their favour. Therefore, it is ordered that the petitioners be released forthwith on bail, on their furnishing personal bonds to the tune of `50,000/- (rupees fifty thousand only) each with one surety each in the like amount to the satisfaction of learned Trial Court, in case FIR No. 74 of 2017, dated 18.03.2017, under Sections 363, 366, 506, 120B IPC, Section 18 of Prevention of Children from Sexual Offences, Act and Sections 9 and 10 of the Prohibition of Child Marriage Act, registered at Police Station Sadar, Chamba, District Chamba, H.P. The bail is granted subject to the following conditions:

(i) That the petitioners will appear before the learned Trial Court as and when required.

(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.Copy *dasti.*

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

Joginder Singh & Others ....Appellants-Defendants

Versus

Smt.Lalita Devi ....Respondent-Plaintiff

Regular Second Appeal No.534 of 2006
Judgment Reserved on: 09.05.2017
Date of decision: 16.05.2017

Specific Relief Act, 1963- Section 5- Plaintiff filed a civil suit for possession of the suit land pleading that the same is owned by plaintiff and his daughter – defendants got themselves recorded in possession and thereafter took forcible possession taking advantage of wrong revenue entries- the defendants pleaded that they had become owners by way of adverse possession – the

suit was decreed by the Trial Court- an appeal was filed, which was dismissed- held in second appeal that husband of the plaintiff was recorded as owner in possession of the suit land – the names of the plaintiff and her daughter were recorded after his death – the names of the defendants were recorded in the column of possession but there is no order or remark explaining the entry in favour of the defendants- the Courts had rightly appreciated the evidence- appeal dismissed. (Para-11 to 24)

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

For the Appellants: Mr.Bhupender Gupta, Senior Advocate with Mr.Ajeet Jaswal, , Advocate.
For the Respondent: Ms.Nishi Goel, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

This Regular Second Appeal filed under Section 100 of the Code of Civil Procedure is directed against the judgment and decree dated 28.08.2006, passed by learned Additional District Judge-(I), Kangra at Dharamshala, District Kangra, H.P., in Civil Appeal No.51-N/04, affirming the judgment and decree dated 27.04.2004, passed by learned Civil Judge(Junior Division), Court No.1, Nurpur, District Kangra, H.P., whereby suit for possession having been filed by the respondent-plaintiff *(hereinafter referred to as the 'plaintiff')* was decreed.

2. Briefly stated facts, as emerged from the record, are that the plaintiff filed a suit for possession against the appellants-defendants *(hereinafter referred to as the 'defendants')* averring therein that land comprised in Khata No.33min, Khatauni No.67, Khasra Nos.471, 476, plots 2, measuring 0-14-06 hectares, situated in Mohal Madanpur, Mauza Pandred, Tehsil Nurpur, District Kangra, H.P. *(hereinafter referred to as the 'suit land')* is owned by her and her daughter Deepika and defendants have no right, title or interest over the same. Plaintiff further averred in the plaint that till October, 2000, she alongwith her daughter was in cultivating possession of the suit land from the time of their ancestors. As per plaintiff, prior to her possession over the suit land, her husband; namely; Brahmo was owner in possession of the suit land, who died on 23.5.1990, and after his death she and her daughter were continued to be in possession of the suit land till October, 2000. Plaintiff further alleged in the plaint that defendants during settlement operation got themselves recorded as *'Kabiz'* in the suit land in connivance with the settlement officials and taking undue advantage of this wrong entry of possession recorded in their favour, took forcible possession of the suit land on 25.10.2000 and started cultivating the same. Plaintiff further alleged that she has repeatedly asked the defendants to admit her claim in the suit land and handover its possession, but all in vain and as such she was compelled to file instant suit for possession.

3. Defendants, by way of written statement, refuted the aforesaid claim of the plaintiff on the ground of maintainability, *locus standi*, cause of action and limitation. Defendants further claimed that they are in possession of the suit land since November, 1982 continuously till date and as such they have become owners of the suit land by way of adverse possession in the month of November, 1994 during the life time of Shri Brahmo i.e. the husband of the plaintiff. Defendants further alleged that the plaintiff and her daughter are not owners of the suit land and they have no concern, whatsoever, with it. Rather, they are in continuous and uninterrupted possession of the suit land since November, 1982 and their possession is hostile to the interest of the plaintiff and therefore, they claimed right of the ownership by way of adverse possession of the suit land. Defendants also denied the possession of the plaintiff and her daughter over the suit land till October, 2000 and also denied the possession of the husband of the plaintiff over the suit land prior to 23.8.1990, when he expired. Defendants also contended that deceased Brahmo i.e. husband of the plaintiff had seen their possession over the suit land

since November, 1982 till his death i.e. 23.8.1990 and the settlement officials rightly recorded their possession over the suit land during the course of settlement. In the aforesaid background, defendants sought dismissal of the suit having been filed by the plaintiff.

4. It emerged from the record that no replication was filed and learned trial Court below, on the basis of pleadings of the parties, framed the following issues for determination:-

"1. Whether the plaintiff is entitled to possession of suit land, as prayed? OPP.

2. Whether suit is not maintainable? OPD.

3. Whether the plaintiff has no locus-standi to file the suit? OPD.

4. Whether the plaintiff has no cause of action to file the suit? OPD

5. Whether the suit is barred by limitation? OPD

6. Whether plaintiff is estopped from filing the present suit ? OPD.

7. Whether the defendants have become owners of suit land by way of adverse possession in November, 1999, as claimed? OPD

8. Relief"

5. Subsequently, learned trial Court, on the basis of pleadings as well as evidence adduced on record by respective parties, decreed the suit of the plaintiff for possession directing therein defendants to handover the vacant possession of the suit land as described hereinabove.

6. Defendants, being aggrieved and dissatisfied with the aforesaid judgment and decree passed by learned trial Court, preferred an appeal under Section 96 of the Code of Civil Procedure in the Court of learned Additional District Judge-(I), Kangra at Dharamshala, District Kangra, H.P. However, fact remains that appeal, having been preferred by the defendants, was dismissed, as a result of which judgment and decree passed by learned trial Court came to be upheld.

7. In the aforesaid background, defendants approached this Court by way of instant appeal praying therein for dismissal of the suit of the plaintiff after setting aside the judgment and decree passed by both the Courts below.

8. This Court vide order dated 04.12.2006 admitted the instant appeal on the following substantial questions of law:-

"1. Whether the Courts below had wrongly ignored the entries made during settlement in favour of the appellants?

2. Whether the suit of the plaintiff was not maintainable in the absence of Ms.Deepika D/O Shri Brahma who was not made a party?"

9. Before exploring answer to the aforesaid substantial questions of law, this Court deems it fit to deal with the arguments having been made by Mr.Bhupender Gupta, learned Senior Counsel, representing the appellants-defendants, that Court below wrongly decided the issues with regard to adverse possession as well as limitation. It may be noticed that plea of adverse possession as well as limitation having been taken by the defendants stood rejected by the Courts below for lack of evidence, as a result of which, plaintiff has been held to be owner in possession of the suit land on the basis of documentary evidence led on record by respective parties.

10. Mr.Bhupender Gupta, learned Senior Counsel, appearing for the appellants-defendants, vehemently argued that suit having been filed by the plaintiff is/was not maintainable because Ms.Deepika daughter of Shri Brahma, was not impleaded as a party. Mr.Gupta, while inviting the attention of this Court to the plaint having been filed by the plaintiff; namely; Smt.Lalita Devi, contended that it is the case of the plaintiff that she alongwith her daughter is owner and was in possession of the suit land from the time of their forefathers and as such Ms.Deepika was a necessary party to be impleaded for the adjudication of the case.

Substantial Question No.2:

11. This Court, with a view to explore answer to the substantial question of law No.2 as well as to ascertain the genuineness and correctness of the aforesaid submissions having been made by Mr.Gupta, learned Senior Counsel representing the appellants-defendants, carefully perused the pleadings adduced on record by the respective parties. True, it is, that the plaintiff; namely; Smt.Lalita Devi, in her plaint claimed that suit land is owned by her and her daughter Ms.Deepika. She has also stated that she alongwith her daughter is owner in possession of the suit land from the time of their forefathers and they have been cultivating the same till October, 2000 and have been taking all the benefits of the suit land. But, interestingly, perusal of written statement having been filed by appellants-defendants nowhere suggests that objection, if any, with regard to non-joinder of necessary parties was ever raised by the defendants before the trial Court. Careful perusal of written statement filed by the defendants suggests that defendants raised as many as six preliminary objections, while refuting the claim of the plaintiff, but there is no objection, if any, with regard to the non-impleadment of Ms.Deepika as a party in the case and as such, this Court sees substantial force in the arguments having been made by Ms.Nishi Goel, learned counsel representing the respondent-plaintiff, that no plea with regard to non-impleadment of Ms.Deepika can be allowed to be raised at this stage.

12. Ms.Nishi Goel, learned counsel appearing for the respondent-plaintiff, supported the judgments passed by both the Courts below and vehemently argued that no interference, whatsoever, is warranted in the present facts and circumstances of the case, especially in view of the fact that both the Courts below have meticulously dealt with each and every aspect of the matter. She also urged that scope of interference by this Court is very limited, especially when two Courts below have recorded concurrent findings on the facts as well as on law. In this regard, to substantiate her aforesaid plea, she placed reliance upon the judgment passed by Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,*** **(2015)4 SCC 264.**

13. To controvert the aforesaid submissions having been made by Ms.Nishi Goel, learned Senior Counsel representing the appellants-defendants, Mr.Gupta, while inviting the attention of this Court to the written statement having been filed by the appellants-defendants, vehemently argued that specific objection with regard to maintainability was raised by the defendants and as such Court below ought to have decided issue No.2 i.e. with regard to maintainability in favour of defendants, especially in view of non-impleadment of Ms.Deepika, who was necessary party for the adjudication of the case.

14. This Court, after having carefully perused the pleadings, especially, written statement having been filed by the defendants, finds no force in the aforesaid submissions of Mr.Gupta because there is no specific objection, if any, with regard to the non-impleadment of Ms.Deepika daughter of plaintiff, rather, defendants, while opposing the case of the plaintiff as projected in the plaint, claimed themselves to be in hostile, continuous and un-interrupted possession of the suit land till 1982 and claimed themselves to have become owners of the same by way of adverse possession in the month of 1994 i.e. during the life time of Shri Brahmo, predecessor-in-interest of the plaintiff.

15. This Court, after having carefully perused issue No.2, framed by trial Court below, is not persuaded to accept the aforesaid submissions having been made by Mr.Gupta, solely for the reason that onus to prove the same was upon appellants-defendants, but evidence led on record by the defendants nowhere suggests that defendants were able to point out that in what manner suit of the plaintiff is not maintainable. Rather, plaintiff, by way of leading cogent and convincing evidence, successfully proved on record that the defendants are causing interference in the suit land owned and possessed by her and her daughter and as such suit having been filed by her was rightly held to be maintainable. Otherwise also, no prejudice, whatsoever, has been caused to the defendants for non-impleadment of Deepika, who happened to be daughter of plaintiff.

16. At this stage, Mr.Gupta, contended that decree passed in favour of plaintiff may not be executable because suit of the plaintiff has been decreed, whereas, suit land has devolved upon plaintiff as well as her daughter, after the death of Brahmo. The aforesaid contention of Mr.Gupta has no merit because suit of the plaintiff has been decreed on the basis of averments contained in plaint, where she herself stated that she alongwith her daughter Ms.Deepika is the owner of the suit land after the death of her husband; meaning thereby that the plaintiff as well as her daughter Ms.Deepika both shall be entitled for possession of the suit land after passing of judgment and decree by learned trial Court. Substantial question of law No.2 is answered accordingly.

Substantial Question No.1:

17. Plaintiff, with a view to prove her case, as projected in the plaint, placed on record copy of Jamabandi for the year 1994-95 Ex.P-1, Missalhaquiat for the year 1982-83 Ex.P-2 and Jamabandi for the year 1972-73 Ex.P-3. Whereas, defendants placed on record documents Ex.D-1, copy of Jamabandi for the year 1999-2000, Ex.D-2 copy of Missalhaquiat for the year 1982-83 and Ex.D-3, copy of Jamabandi for the year 1977-78. Ex.P-3 clearly suggests that husband of the plaintiff was recorded as owner in possession of the suit land. Similarly, perusal of Ex.P-2 i.e. Missalhaquiat for the year 1982-83 suggests that name of husband of the plaintiff was recorded as owner qua the suit land, whereas names of defendants came to be recorded in the column of possession. It also emerged from Ex.P-1 i.e. Jamabandi for the year 1994-95 that name of the plaintiff alongwith her daughter came to be recorded in the column of ownership, whereas names of defendants were recorded in the column of possession qua suit land. Though perusal of Ex.P-1, Ex.P-2 i.e. Jamabandi for the year 1994-95 and Missalhaquiat for the year 1982-83 suggests that names of the defendants came to be recorded in the column of possession, but there is no order or remark, from where it could be inferred that under what capacity names of the defendants came to be recorded in the column of possession of the suit land. Defendants in their written statement have stated that their names came to be recorded in the column of possession qua the suit land during settlement, but this Court was unable to lay its hands to any document placed on record by defendants suggestive of the fact that entry was recorded during settlement operationand as such this Court sees no illegality and infirmity in the findings returned by the Courts below that entry of possession in favour of the defendants in the Jamabandies for the years 1982-83 and 1994-95 are wrong, illegal and without any basis. All the aforesaid Jamabandies, as have been discussed above, Ex.P-1, Ex.P-2 and Ex.P-3, clearly suggest that the name of plaintiff has been recorded as owner qua the suit land.

18. PW-1, Smt.Lalita Devi, categorically stated before the Court below that she is owner of the suit land and earlier her late husband was in possession of the same and after his demise she has been cultivating the suit land. It also comes in her statement that defendants came in illegal possession of the suit land. She also stated that despite several requests for possession, having been made by her to the defendants, she failed to deliver the same. True, it is, that in her statement she feigned ignorance regarding settlement, if any, took place during life time of her husband. Similarly, she stated that no application for correction of revenue entries was moved by her husband and even she did not move such application. But, if cross-examination, conducted on this witness, is seen carefully, no suggestion, whatsoever, was put to her that she and her husband were apprised by the defendants with regard to change in entries in favour of the defendants during settlement. Similarly, there is no suggestion put to the plaintiff that she or her husband were associated by settlement officials during settlement proceedings, where entries came to be recorded in the names of defendants on the basis of their possession over the suit land. There is nothing in the pleadings adduced on record by the defendants that they had dispossessed the plaintiff or her husband from the suit land because admittedly as per case set up by the defendants, husband of the plaintiff was in possession of the suit land till 1982-83. If, at all, the version put forth by the defendants is accepted to be correct that they came to be recorded in possession of the suit land during settlement proceedings held in 1982-83, defendants ought to have led evidence on record suggestive of the fact that after having been recorded in possession of the suit land, they dispossessed the plaintiff, who was

admittedly recorded as owner in possession of the suit land prior to entry made in favour of defendants in the year 1982-83. Since the entry, as recorded in the Missalhaquiat for the year 1982-83, Ex.P3, was without any basis and moreover husband of the plaintiff continued to be in possession of the suit land on the strength of revenue entry existing in his favour, as emerged from Ex.P3 Jamabandi for the year 1972-73, there was no occasion, whatsoever, for the plaintiff or her husband to move an application for correction of revenue record.

19. Defendant No.1 Pritam Chand, while deposing before Court below, claimed that they had taken possession of the suit land in the year 1982, which ultimately had ripened into ownership during November, 1994 by adverse possession. He further stated that neither the plaintiff nor her husband made any efforts to dispossess them. He also stated before the Court below that settlement official visited the village during the year 1982-83, but, admittedly, there is no mention, if any, with regard to order, if any, passed by settlement officer for change of revenue entry on the basis of their possession. Similarly, this Court was unable to find any mention/remark with regard to dispossession of the plaintiff or her husband from the suit land after recording of entry of possession in the names of defendants. This Court carefully perused the written statement, but there is no averment with regard to dispossession of the plaintiff or her husband from the suit land, who, admittedly, was recorded owner in possession of the suit land prior to entry made in favour of defendants in the year 1982-83, Ex.P2.

20. Similarly, neither there is any averment made in the written statement that husband of the plaintiff was associated by settlement officials during settlement proceedings allegedly took place in the year 1982-83 nor defendants specifically stated before the Court below that settlement officials had associated the husband of the plaintiff or plaintiff while recording entry of possession in their favour. Other witnesses adduced on record by the defendants have not supported the case of the defendants. DW-2 and DW-3 have also nowhere stated with regard to dispossession of the plaintiff from the suit land after 1982-83, i.e. when the names of defendants came to be recorded in the column of possession.

21. Apart from above, there is nothing in the statements of all the defendants witnesses from where it could be inferred that husband of the plaintiff or thereafter plaintiff was dispossessed by the defendants by doing some overt act. Hence, this Court, after having carefully perused the evidence led on record by the respective parties, has no hesitation to conclude that the plaintiff successfully proved on record that she and her daughter are owners of the suit land and defendants procured false and frivolous entry in their favour during the settlement and on the strength thereof wrongly dispossessed the plaintiff during October, 2000. Hence, this Court is not in a position to accept the submissions having been made by learned counsel that Courts below had wrongly ignored the entries made during the settlement in favour of the appellants, rather, this Court, after having carefully perused the record, is of the view that both the Courts below meticulously dealt with each and every aspect of the matter and rightly came to conclusion that defendants were not able to prove on record that on what basis entry of possession came to be recorded in their favour in the year 1982-83. Substantial question is answered accordingly.

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

> *"16. Based on oral and documentary evidence, both the courts below have recorded concurrent findings of fact that the plaintiffs have established their right in A schedule property. In the light of the concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for reappreciation of evidence. While so, the High Court proceeded to observe that the first plaintiff has earmarked the A schedule property for road and*

that she could not have full-fledged right and on that premise proceeded to hold that declaration to the plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. In our considered view, the High Court did not keep in view that the concurrent findings recorded by the courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained."(p.269)

23. 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 finding given on the issues framed by the trial Court below as well as specifically taken up by this Court to reach the root of the controversy appears to be based on correct appreciation of oral as well as documentary evidence.

24. Hence, in view of detailed discussion made hereinabove, this Court sees no illegality and infirmity in the judgments passed by both the Courts below. The judgment and decree passed by both the Courts below are upheld. The present appeal fails and is dismissed, accordingly.

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

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

National Insurance Company Ltd. ....Appellant
Versus
Smt. Rukmani & others ....Respondents.

FAO No. 136 of 2017
Decided on : 16.5.2017

Employees Compensation Act, 1923- Section 4- The deceased died in an accident involving a motor vehicle – a claim petition was filed, which was allowed by the Commissioner – it was contended in appeal that the deceased is the brother of the owner and it cannot be believed that he was hired as a driver by the owner- held that the evidence led before the Commissioner proved that the deceased was employed as a driver on a payment of Rs.7,000/- per month – simply because no record was maintained regarding the payment of wages cannot lead to an inference that this statement is not true – appeal dismissed- the order passed by the Commissioner upheld.

For the Appellant: Mr. Deepak Bhasin, Advocate.
For the Respondents: Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The instant appeal is directed against the order of 29.7.2016, rendered by the learned Commissioner, for Employee's Compensation, Solan, District Solan, H.P., while his exercising jurisdiction under the Employee's Compensation Act, whereby, he assessed compensation in a sum of Rs. 7,13,475/- upon the claimants/successors-in-interest of the deceased employee. The learned counsel for the insurer does not contest the fact of the claimants being dependents of deceased Nand Lal. Deceased Nand Lal suffered his demise, in an accident involving motor vehicle bearing No. HP14D-0115, whereon at the relevant time he was aboard its

driver seat. However, the learned counsel for the insurer contends that with deceased Nand Lal standing evidently related to the owner of the vehicle concerned, his being his brother, hence perse at the relevant time, there existing no subsisting valid contract of employment interse deceased with the owner of the vehicle, rather, he at the relevant time was driving the offending vehicle concerned, merely in a gratuitous capacity. For appreciating the worth of the aforesaid submission, it is befitting to make an interpretation of the relevant provisions of Section 3 of the Workmen's Compensation Act, provisions whereof stand extracted here-in-after:-

> "**3. Employer's liability for compensation** (1) If personal injury is caused to a workman by accident arising out of and in the course of his employment his employer shall be liable to pay compensation in accordance with the provisions of this Chapter :

The learned counsel for the insurer contends that perse with the deceased being related to the owner, with the latter evidently being his brother, hence in the deceased performing his avocations under his brother, it is to be concluded that he was not receiving any salary/wages in respect thereto. He also proceeds to contend that hence there exists no contract of employment inter-se the deceased and the owner. Consequently, he submits that the findings rendered on the relevant issue warranting interference. The aforesaid submissions addressed before this Court by the learned counsel for the insurer are to obtain strength from the evidence, which exists on record. The claimants' testify that their predecessor-in-interest was engaged by his brother as a driver upon the relevant vehicle. Also the claimants testify that in respect of the deceaseds' relevant employment under the owner of the vehicle, the latter was defraying to him wages/salary quantified in a sum of Rs. 7000/- per mensem. The aforesaid testifications of the claimants are corroborated by RW-1, the owner of the offending vehicle. Since a catena of verdicts pronounced by the Hon'ble Apex Court propagate the view that the mere existence of a close relation inter-se the deceased and the owner of the offending vehicle per-se not constraining a conclusion that no relationship of employer and employee existing amongst them. Consequently, the depositions of the claimants' that the deceased was employed as a driver upon the relevant vehicle by the owner of the vehicle concerned, also when they depose that in sequel to his employment, he was receiving wages in a sum of Rs. 7000/- per mensem, besides when the testifications of the claimants are corroborated by RW-1, the owner of the concerned vehicle, corollary thereof is qua the aforesaid testifications acquiring truth, also hence the relevant factum probandum acquiring sanctity. However, before proceeding to impute implicit sanctity to the aforesaid testifications, it is imperative "to detect" whether during the course of the counsel for the insurer holding RW-1 to cross-examination, his putting to him apposite suggestions, in display of his sharing with the deceased employee, the profits earned by him, by his operating a goods vehicle. Also forthright evidence in respect thereto comprised in the apposite income tax returns, filed by the owner, revealing that the latter was sharing with the deceased, the profits earned by his operating the relevant vehicle, as a transport vehicle, warranted adduction. However, the counsel for the insurer while holding of RW-1 cross-examination, has merely put suggestions to him, with a disclosure therein qua his not maintaining records with respect to his defraying wages to his deceased brother. However, the mere fact of RW-1, not maintaining records with respect to his defraying wages, to his deceased brother, would not constrain a conclusion that he was not defraying wages to his deceased brother. The reason for forming the aforesaid conclusion arises from the factum of the counsel for the insurer "not" from the Income Tax Department seeking adduction of the apposite returns filed before it, by the owner, with a display therein qua his defraying wages to his deceased brother. Consequently, a conclusion is earned that RW-1 was defraying wages to his deceased brother, in respect of his engaging him as a driver upon the relevant vehicle. Moreover, the further effect of the erection of the aforesaid conclusion, is, of its also dispelling the weight, if any, of non adduction by the owner of the relevant vehicle, of, the relevant records in respect of his defraying wages to his deceased brother. Concomitantly, the inevitable conclusion is that a subsisting contract of employment coming into being inter-se both. In addition, with the insurer also not concerting to adduce evidence, with respect to land owned by the deceased nor also leading evidence qua therefrom the deceased and his family members were earning an income. Whereas, adduction of the aforesaid evidence may

have given strength, to an inference, that with the deceased and his family members rearing an income from the relevant joint land holding also with a large part thereof, being, with consent of RW-1, hence reserved for the upkeep of the deceased and his family members, thereupon the deceased was gratuitously performing duties upon the offending vehicle. Non adduction of the aforesaid evidence also constrains this Court to conclude that the relevant contract of employment coming into being at the relevant time inter-se both. In aftermath, the appeal is dismissed in limini and the impugned order is maintained and affirmed. Pending application(s), if any, also stands disposed of.

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

Balak Ram Sharma ...Petitioner.

Versus

The Ex-Committee of Baghal Land Loosers Transport Co-operative Society Darlaghat and others. ...Respondents.

CMPMO No. 259 of 2016
Reserved on : 04.05.2017
Decided on: 17.5.2017

H.P. Co-operative Societies Act, 1968- Section 69- A complaint was filed against the Management Committee of the Society – an inquiry was made by District Audit Officer who observed that irregularities and violation had taken place – an inquiry was initiated, in which it was held that charges against the Society were proved – an order was passed holding that President and Members of the Management Committee had misutilised the funds and they were directed to pay a sum of Rs.9,05,363/- along with interest – an appeal was filed before the State Government and the case was remanded – notice was not issued to the petitioner, however, an order was passed- aggrieved from the order, the present writ petition has been filed- held that every quasi-judicial authority is supposed to act with fairness- it has to follow the principle of natural justice- the proceedings were initiated at the instance of the petitioner- he was arrayed as respondent No.4 in the writ petition before the High Court in which the order was passed to file an appeal before the Government- the petitioner was entitled to notice – hence, the order set aside with a direction to impart training to the Officers vested with adjudication power and authority in H.P. Judicial Academy.(Para-9 to 37)

Cases referred:

Cooper v. Wilson (1937) 2 KB 309 at p. 840

Varinder Kumar Satyawadi v. The State of Punjab AIR 1956 SC 153

Rattan Lal Sharma v. Managing Committee (1993) 4 SCC 10

Raghunath Mukhi v. Chakrapani Mukhi (Dead) and after him Musa Bewa, 1992 (1) Orissa LR 191

Satya Pal Anand v. State of Madhya Pradesh and another, reported in (2014) 7 SCC 244

Tara Chand & Ors. v. Virender Singh & Anr., 2015(149) All India Cases 823

For the petitioner: Mr. J. L. Bhardwaj, Advocate.

For the respondents: Mr. Sanjeev Bhushan, Sr. Advocate with Ms. Abhilasha Kaundal, Advocate, for respondent No. 2.

Mr. Neeraj K. Sharma, Deputy A.G., for respondents No. 3 to 6.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge

Ordinarily, this Court would have passed a short order in the matter allowing the writ petition as it isestablished on record that the petitioner was not afforded an opportunity of hearing before passing of the impugned order.

2. The circumstances impel upon this Court to state something more, as the mode and manner in which the orders have been passed by the authorities vested with quasi-judicial powers under the H.P. Co-operative Societies Act, 1968 (for short the 'Act') is not at all satisfactory and cannot, therefore, be countenanced.

3. At this stage, it would be necessary to advert to the facts leading to the filing of the instant petition invoking Article 227 of the Constitution of India. The petitioner had filed a complaint against the managing committee of respondent No. 2-society on 20.9.2012, which was got inquired into through the District Audit Officer by respondent No. 4-Assistant Registrar Co-operative Societies, Solan. The report was submitted to the Registrar, Co-operative Societies who, in turn, observed that the managing committee of the society had committed irregularities and violated the provisions of the Act, H.P. Co-operative Societies Rules, 1971 (for short the 'Rules) and Bye-Laws and acted in a manner, which was prejudicial and detrimental to the interest of the society and its members, as it had resulted in financial loss of the society. Accordingly, Registrar, Co-operative Societies vide order dated 21.3.2003 initiated an inquiry under Section 69 of the Act against the erring members of the managing committee and the officials of the society. The Block Inspector, Co-operative Societies, i.e. respondent No. 5, Kunihar was appointed to inquire into the alleged irregularities and submit fact finding report as per order dated 30.3.2013. Accordingly, respondent No. 5 conducted an inquiry and submitted his report to respondent No.4 on 4.1.2014, holding that the charges against the ex committee of respondent No. 2 stood proved.

4. After submission of the reports, the Registrar, Co-operative Societies, assigned the matter to the then Joint Registrar, Co-operative Societies (Credit) to take action under Section 69 (2) of the Act. The Joint Registrar, Co-operative Societies, passed an order on 7.10.2014, holding that the President of respondent No. 2 Society had utilized a sum of Rs. 84,250/- belonging to the Society for his own benefits and it was further found that the seven persons of the society who were members of the managing committee had mis-utilised the funds of the society and were accordingly directed to pay a sum of Rs.9,05,363/- alongwith upto date interest within a period of six months, failing which the amount was directed to be recovered as arrears of land revenue.

5. The society assailed the aforesaid order dated 7.10.2014 by approaching this Court by filing CMPMO No. 321 of 2014 and the same was disposed of vide order dated 21.3.2015 as being not maintainable as the order in question was appealable before the State Government. Consequently, society was directed to file an appeal before the State Government within a period of four weeks. However, in the meanwhile, the impugned order was ordered to be stayed.

6. Accordingly, respondent No. 1 filed an appeal before the State Government, which was allowed on 20.7.2015 and the matter was remanded back to the Joint Registrar, Co-operative Societies (Credit) with the direction to resume the proceedings under Section 69(2) of the Act afresh and pass an appropriate order after affording due opportunity of being heard to the parties concerned.

7. Upon remand, respondent No. 3 though issued notices to the members of the ex-committee but no such notice was issued to the petitioner which constrained him to make a representation on 31.3.2016, requesting respondent No. 6 to direct respondent No. 3 to associate the petitioner. However, before the representation was actually submitted, the respondent No. 3 had allegedly passed an order on 30.3.2016, which according to the petitioner has been antedated just to defeat the aforesaid representation. It is in this background that the petitioner has filed the instant petition seeking quashment of the order dated 30.3.2016, with further prayer

that respondent No. 3 be restrained from discharging quai-judicial functions henceforth and the matter be decided afresh after associating the petitioner.

8. Respondent No. 3 has opposed the petition by filing the reply wherein the factual matrix has not been denied but it is emphatically denied that the order dated 30.3.2016 has been antedated so as to defeat the right of the petitioner. As regards respondent No. 1, it has also not denied the factual matrix and the order passed by respondent No. 3 on 30.3.2016 has been fully supported by this respondent.

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

9. The obligation to act fairly on the part of quasi-judicial authority was evolved to ensure rule of law and prevent failure of justice. This doctrine is complementary to the principle of natural justice, which the quasi-judicial authorities are bound to observe. There can be no denying of the fact that the authorities constituted under the Act to adjudicate upon the disputes of the instant kind exercise quasi-judicial powers, which implies that a certain content of the judicial power of the State is vested in them when it is called upon to exercise such powers.

10. What is judicial and quasi-judicial was attempted to be defined in case ***Cooper v. Wilson (1937) 2 KB 309 at p. 840.*** The relevant quotation whereof reads thus:

> *"A true decision presupposes an existing dispute between two or more parties and then involves four requisites; (1) the presentation (not necessarily orally) of their case by the parties to the dispute;, (2) if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence. (3) If the dispute between them is a question of law, the submission of legal argument by the parties, and (4) a decision, which disposes of the whole matter by a finding upon the facts in dispute and application of the law of the land to the facts, so found, including where required a ruling upon any disputed question of law. A quasi-judicial decision equally presupposes an existing dispute between two or more parties and involves (1) and (2), but does not necessarily involve (3) and never involves (4). The place of (4) is in fact taken by administrative action, the charter of which is determined by the Minister's free choice."*

11. What then distinguishes the Court from quasi-judicial was succinctly explained by the Hon'ble Supreme Court in ***Varinder Kumar Satyawadi v. The State of Punjab AIR 1956 SC 153***, in the following terms:

> *"6 There has been considerable discussion in the Courts in England and Australia as to what are the essential characteristics of a Court as distinguished from a tribunal exercising quasi-judicial functions. Vide* ***1931 AC 275 (A), - R. v. London County Council', 1931-2 KB 215 (B); - 'Cooper vs. Wilson, 1937-2 KB 309 (C); - 'Huddart Parkar and Co. v. Moorehead', (1909) 8 CLR 330 (D); and – 'Rola Co. v. The Commonwealth, (1944) 69 CLR 185 (E)****. In this Court, the question was considered in some-fulness in* ***–'Bharat Bank Ltd. V. Employees of Bharat Bank Ltd', AIR 1950 SC 188 (F)****.*
>
> *It is unnecessary to traverse the same ground once again. It may be stated broadly that what distinguishes a Court from a quasi-judicial tribunal is that it is charged with a duty to decide disputes in a judicial manner and declare the rights of parties in a definitive judgment. To decide in a judicial manner involves that the parties are entitled as a matter of right to be heard in support of their claim and to adduce evidence in proof of it.*
>
> *And it also imports an obligation on the part of the authority to decide the matter on a consideration of the evidence adduced and in accordance with law. When a question therefore arises as to whether an authority created by an Act is a Court*

as distinguished from a quasi-judicial tribunal, what has to be decided is whether having regard to the provisions of the Act it possesses all the attributes of a Court."

12. As regards the principle of natural justice, it has to satisfy the twin test; firstly the person likely to be adversely affected by the action of the parties should be given notice to show cause or granted reasonable opportunities of being heard in consonance with the maxim *audi alterm partem.* Secondly, the order passed by the authorities should give reason for arriving at any conclusion showing proper application of mind. Any violation of either of these principles, consequently would render an order, particularly, quasi-judicial in nature invalid. Violation of principle of natural justice is violation of basic rule of law and would invite judicial chastisem.

13. However, this Rule is not without exception even though such exception would be extremely rare like the legislative scheme of the provisions of the statute suggest that the intent of the legislature is to take emergent action. In that event, subject to fulfillment of ingredients of an order of the provisions could be passed without pre-decisional hearing, an expeditious post decisional hearing may amount to substantial compliance with the basic rule of law, but that is not fact situation obtaining in the instant case.

14. In ***RattanLal Sharma v. Managing Committee (1993) 4 SCC 10***, the Hon'ble Supreme Court observed; natural justice is a procedural requirement of fairness and those whose duties is to decide must act justly and fairly. Normally it should hear the parties by granting them opportunities of adequate representation and they must state some reason in their final conclusion. This doctrine has been extended to statutory authority or tribunal exercising quasi-judicial function and now even to administrative authorities which can determine civil rights or obligations.

15. Adverting to the facts of the case, it would be noticed that it was at the instance of the petitioner that the inquiry against the members of the managing committee of respondent No. 2 society has been initiated. Not only this, even while filing CMPMO No. 321 of 2014 before this Court, the petitioner had been arrayed as respondent No. 4 and while relegating the members of the society to avail all the remedy by an appeal before the State Government, this Court passed the following orders:-

"The impugned order dated 7.10.2014 is appealable before the State Government. Consequently, the petitioner is directed to file appeal before the State Government within a period of four weeks. It is made clear that the question of limitation would not come in his way, since he is diligently pursuing the remedy before this Court.

2. The implementation and execution of the impugned order Annexure P-1, dated 7.10.2014 is stayed for four weeks. In the meantime, it shall be open to the petitioner to approach the appellate authority for interim relief. The appeal shall be decided within three months from the date of filing of appeal."

16. Thus, there was no reason or even occasion for respondent No. 3 to have not issued notice or associated the petitioner before passing the impugned order, after all he was the whistle blower in the case. Thus, the same cannot withstand judicial scrutiny and is accordingly set aside.

17. This Court is consciously not expressing any opinion on the merits of the order dated 30.3.2016, lest it causes any prejudice to either of the contesting parties.

18. However, the matter cannot be laid to rest here, particularly looking at the mode and manner in which respondent No. 3 has passed the order, which obviously cannot be countenanced.

19. It will be naive to mention that deciding the question of right, title and interest even in matter relating to co-operative societies involve complicated question, but nonetheless such power has been vested with the authorities under the Act. It has, therefore, to be accepted that such officers/authorities would be well equipped in law to factually adjudicate such question. Therefore, those entrusted or required to adjudicate such disputes should have studied

law or at least trained in law. A litigant entering into the precincts of the Court should have the trust and confidence that the person who sit on the chair as an adjudicator/Judge is competentto appreciate and understand matter having regard to his knowledge and capability and is adequately equipped to decide. For such litigants high sounding designation is not of much worth, and it is only his confidence and trust what matters. For often one comes across instances where orders patently show lack of rudimentary and fundamental knowledge of law. It has to be remembered that people who go before the authority, go there with feeling that they are going to get substantive and effective justice and they should not come back with the feeling that the adjudicating machinery prosecuted under the act is a mockery.

20. At this juncture, it shall be apt to refer to a Division Bench Judgment of Hon'ble High Court of Orissa in ***Raghunath Mukhi v. Chakrapani Mukhi (Dead) and after him Musa Bewa, 1992 (1) Orissa LR 191***, wherein it was observed as under:-

> [3] Under the scheme of the Act, the revisional authority being the highest forum in the hierarchy adjudicating questions of facts and law should be a substitute in reality and not theoretically. Law is respected and obeyed when the people have trust and faith in it. Law is made for the weal of the people. Hence, if the well being of the people is the object of the law, they should have trust not only in the contents of the law but also in its implementation by the agency entrusted therewith. If implementation is not commensurate with the object and purpose of the law, it fails to create confidence in the minds of the people and loses their trust. The result is disenchantment and chaos. It therefore behaves the implementing agency to implement the law not only in letter but also in spirit.
>
> [4] This prologue is considered warranted having regard to our perception of the implementation of the scheme of the Consolidation Act by the Government.
>
> [5] The consolidation authorities by the very nature of the jurisdiction vested in them are required to adjudicate civil right involving personal law and relating to immovable property and other civil rights. Even the questions that crop up and posed are of complicated nature. It, therefore, obligates the authorities to know the law before they assume and exercise jurisdiction to adjudicate in accordance with law and for the litigants, an ignorant judge is a devil's representative putting on the mask of an adjudicator. It is no doubt true that ail adjudicators and Judges are not learned in law in all its branches. Law is a vast ocean. Study for a lifetime even would not be enough to make it. But those who are required to adjudicate civil rights including personal and properly rights should have studied law or are trained in law. It is a trite saying that justice must not only be done, but seem manifestly to have been done. Hence a person involved in a civil dispute before he enters the precincts of the Court should have the trust and confidence that the person who sits on the chair as an adjudicator. Judge is competent to appreciate and understand matters having regard to his knowledge and capability and is adequately equipped to decide. For him high sounding designation is not of much worth, his confidence and trust are what matters. When the people make laws through their representatives for their happiness and well-being, they intend that the authorities under the Act who are being made substitutes of the Presiding Officers in the Civil Courts and the High Court should also be competent by virtue of their ability to function truly as substitutes. Otherwise, it will be a fraud on the peoples' intention. Therefore, as we have said, the psychological factor in the mind of the litigant is more important than how a is lis decided by the adjudicating authority. A person ignorant and innocent of law cannot create that trust nor is he capable of adjudicating by hearing both the sides. It is the duty of the Judge to utilise his own insight into law even where the parties have tumbled or failed. For adjudicating the lis in accordance with law to the best of his Judgment is his

responsibility and obligation. To decide to the best of his Judgment, he must be properly equipped in law to understand, appreciate and decide.

[6] Can one think of a highly eminent engineer or erudits Judge ignorant of human anatomy or surgery conducting operation on human body. It is unthinkable ; it is preposterous for someone not versed in surnery or anatomy of the body making an attempt. That is why specialities and super specialities abound. So also in the matter of administration of law, the person concerned should have the knowledge of law howsoever gathered-either by courses in college or otherwise or should be trained in law.

[7] To call upon an administrative officer howsoever eminent or competent he might be in his own field but who does not have the knowledge of law or is not trained in law or does not have the judicial aptitude and acumen, is akin to a Judge being called upon to conduct a surgical operation. Hence it follows that as a Judge or an engineer cannot be appointed as a Professor of Surgery or even as a surgeon so too a person unversed in law; ignorant in law should not be entrusted with the responsibility of adjudicating questions of law for, that would amount to breach of trust that the people imposed on the implementing agency. They intended that competent and worthy persons capable of adjudicating civil rights involving questions of law-simple and complicated-should be appointed as adjudicators.

[8] So far as the Assistant Consolidation Officer is concerned, it is a different matter. Matters in which parties come to an amicable settlement are disposed of by him. But where the parties differ and are out for a fight, do not the people expect that the referee, the Judge, the adjudicator should be competent ? Now coming to the question of referee if a person does not know the rules of the game of football, can he be a competent referee ? Should such a 'person be appointed as a referee ? So also in matters of adjudication under the Consolidation Act.

[9] We are constrained to dilate at length because of our experience in the High Court day after day, month after month and year after year in regard to matters arising under the Consolidation Act. Very often we find persons adjudicating know not even the rudiments of the laws and procedures. To appreciate questions of law presented by both the parties, it is necessary to appreciate, comprehend and then adjudicate. Therefore, to appreciate and comprehend, the adjudicator should know the fundamentals, the rudiments of law or must have been trained in law or must to have been involved in adjudication of legal matters for a number of years so as to clothe him with competence. We do not want to generalize because some Officers in the lower rung as well as at the highest level have displayed a good comprehension of the law and its application, and have brought to bear a judicial mind on matters in dispute but, as we said, the chair does not confer competence. It is the competence of the parson that confers dignity and trust on the chair.

[10] From our experience we can boldly say that while appointing the Commissioner or the revisional authority, the implementing agency, i. e., the Government, has not always kept this in mind. Law was not framed for the purpose of statistics. It was framed for the object and purposes depicted in the objects and reasons and the Preamble to the Act.

[11] The law may be inter vires but if it is implemented in a manner inconsistent with the objects and purpose, action could be challenged as ultra vires, as a fraudulent imposition. Hence appointment of an incompetent person to adjudicate legal matters can be challenged as ultra vires being contrary to the intendment.

> [12] No doubt jurisdiction is vested in this Court under Arts. 226 and 227 of the Constitution to set right injustice, mistakes in proceeding before the consolidation authorities. But it should be borne in mind that such jurisdiction is discretionary and is not a matter of right and is otherwise also circumscribed. Besides the more important question is ; Why should not the people have faith in the adjudication by the consolidation authorities but have to rush to this Court with their grievances. Faith and faith alone in the adjudicator is the paramount consideration.

21. Adverting to the facts of the case, it would be noticed that there is virtually no record of proceedings as is otherwise required and expected of an adjudicatory authority that has been maintained by respondent No. 3. The proceedings appear to have emanate from "*notices to the parties issued under the signatures of respondent No. 3 on 7.8.2015 directing them to appear before him on 16.9.2015 at 3:00 p.m."* whereas no such order appears on any of the order sheet(s).

22. As observed above, no notice was issued to the petitioner. The proceedings were conducted on 16.9.2015, 4.11.2015 and on 28.12.2015, when the matter is partly heard and thereafter fixed for 12.1.2016 for the final hearing. On 12.1.2016, the following order was passed:-

> "Arguments finally heard and relevant record examined. For orders on 16.2.2016 at 3:00 p.m."

23. However, no proceedings were thereafter held on 16.2.2016 and further even the order sheet of the said date is not maintained and abruptly the case is called on 30.3.2016, on which date the following order is passed:

> "30.3.2016 Case called.
>
> Present:: None
>
> The case on 16.2.2016 could not be heard due to the reason that the undersigned was busy in the personal interviews for Clerks in the H.P. State Co-operative Bank as one of the selecting authority member.
>
> Order announced today in an open court. Parties be intimated accordingly."

24. Apparently, the only explanation given by respondent No. 3 for not announcing his order on 16.2.2016 was that he was busy in personal interviews for Clerks in the H.P. State Co-operative Bank but he has categorically stated that he was to hear the matter on 16.2.2016 as is crystal clear from the order passed on 30.3.2016 (supra). Why then did he not choose to re-hear the parties is anybody's guess.

25. That apart, even if it is assumed and rather accepted that respondent No. 3 was busy in the personal interview as alleged even then there is no reason forthcoming as to why he did not announce the order on 16.2.2016.

26. Conducting judicial business does require certain amount of acumen and judicial discipline, the order sheets have to be maintained and must be self speaking, the files have to be properly indexed and paged and it is only then that credence is lent to such adjudicatory process, which are lacking in the instant case.

27. Notably, it is respondent No. 3, who in another case titled ***Manoj Kumar vs. ARCS, Dharamshala*** had on 4.8.2015, passed the following order:-

> "4.8.2015
>
> Present: Ms. Ashima Sharma, Advocate, vice for Rahul
>
> Mahajan for respondents No. 2 to 4.
>
> (2). Sh. Subhash Chand, Inspector for respondent No. 1.
>
> (3). Sh. Surinder Saklani, Counsel for the petitioner.

> Iam satisfied with the orders passed by the Hon'ble High Court of H.P. while allowing the period spent in pursuing the writ petition and condoning the same. Hence application under Sec. 5 of the Limitation Act is allowed. The case will come up for hearing on the issue of maintainability/argument as 24.09.2015 at 3:00 P.M."

28. The aforesaid order when assailed had compelled this Court to direct respondent No. 3 to remain personally present in the court after all he was no one to have commented upon or recorded his satisfaction on the order passed by this Court and it is only upon tendering of unconditional apology, the personal presence of respondent No. 3 had been dispensed with.

29. In the case of ***Satya Pal Anand v. State of Madhya Pradesh and another, reported in (2014) 7 SCC 244***, Hon'ble Supreme Court has held that the Registrars, Joint Registrars of the Co-operative Societies and other officials discharging quasi-judicial functions are supposed to be conscious of competing rights and decide issues justly, fairly and by legally sustainable orders. The State Government was directed to appoint suitable persons as Registrars, Joint Registrars, etc. commensurate with the functions exercised under scheme of State Cooperative Societies Act and it was observed as under:-

> 20. Having determined the question raised, we would like to emphasize the need for appointment of suitable persons not only as Registrar, Joint Registrar etc. but as Chairman and members of the tribunal as well. While discharging quasi-judicial functions Registrar, Joint Registrars etc. have to keep in mind that they have to be independent in their functioning. They are also expected to acquire necessary expertise to effectively deal with the disputes coming before them. They are supposed to be conscious of competing rights in order to decide the case justly and fairly and to pass the orders which are legally sustainable.
>
> 21. In this behalf, we would like to refer to judgment dated 3.9.2013 passed in the Review Petition (C) No.2309/2012 (**Namit Sharma case**). In that case, one unfortunate feature that was noted was that experience over the years has shown that the orders passed by Information Commissions have, at times, gone beyond the provisions of the Right to Information Act and that Information Commissions have not been able to harmonise the conflicting interests indicated in the preamble and other provisions of the Act. The reasons for this experience about the functioning of the Information Commissions could be either that the persons who do not answer the criteria mentioned in Sections 12(5) and 15(5) have been appointed as Chief Information Commissioner or that the persons appointed even when they answer the aforesaid criteria, they do not have the required mind to balance the interests indicated in the Act. It was therefore insisted that experienced suitable persons should be appointed who are able to perform their functions efficiently and effectively. In this behalf certain directions were given and one of the directions was that while making recommendation for appointment of CIC and Information Commissioners the Selection Committee must mention against name of each candidate recommended the facts to indicate his eminence in public life (which is the requirement of the provision of that Act), his knowledge and experience in the particular field and these facts must be accessible to the citizens as part of their right to information under that Act, after the appointment is made.
>
> 22. Taking clue from the aforesaid directions, and having gone through the similar dismal state of affairs expressed by the petitioner in the instant petition about the functioning of the cooperative societies, we direct that the State Government shall, keeping in mind the objective of the Act, the functions which the Registrar, Joint Registrar etc. are required to perform and commensurate with those, appointment of suitable persons shall be made. Likewise, having regard to the fact that the Chairman of the Tribunal is to be a judicial person,

namely, Former Judge of the High Court or the District Judge, we are of the opinion that for appointment of the Chairman and the Members of the Tribunal, the respondent-State is duty bound to keep in mind and follow the mandate of the Constitution Bench judgment of this Court in **R.Gandhi (supra)**. Thus, for appointment of the Chairman and Members of the Tribunal, the selection to these posts should preferably be made by the Public Service Commission in consultation with the High Court."

30. The aforesaid judgment alongwith host of other judgments was taken note of by a Co-ordinate Bench of this Court (Justice Rajiv Sharma,J.) in CMPMO No. 421 of 2014, titled ***Tara Chand & Ors. v. Virender Singh & Anr., 2015(149) All India Cases 823,*** decided on 19.3.2015 and it was observed as under:-

"13. This Court is of the considered view that the Assistant Collector or Collector, Commissioner and Financial Commissioner (Appeals), must have the requisite legal background to adjudicate the matters under the H.P. Land Revenue Act, 1953. They determine the valuable rights of the parties. The quasi judicial authorities are also required to take notice of the facts and thereafter to apply the law. The adjudication by the revenue authorities has certain trappings of the Court as well.

14. Their lordships of the Hon'ble Supreme Court in the case of **Thakur Jugal Kishore Sinha vrs. The Sitamarhi Central Co-operative Bank Ltd. and another, reported in AIR 1967 SC 1494**, have held that the Assistant Registrar discharging functions of Registrar under S. 48 read with S. 6 (2) of Bihar and Orissa Co-operative Societies Act is a Court. Their lordships have held a under:

"11. It will be noted from the above that the jurisdiction of the ordinary civil and revenue courts of the land is ousted under s. 57 L4 Sup. Cl/67-12 of the Act in case of disputes which fell under S. 48. A Registrar exercising powers under S. 48 must therefore be held to discharge the duties which would otherwise have fallen on the ordinary civil and revenue courts of the land. The Registrar has not merely the trappings of a court but in many respects he is given the same powers as are given to ordinary civil courts of the land by the Code of Civil Procedure including the power to summon and; examine witnesses on oath, the power to order inspection of documents, to hear the parties after framing issues, to review his own ,order and even exercise the inherent jurisdiction of courts mentioned in s. 151 of the Code of Civil Procedure. In such -a case, there is no difficulty in holding that in adjudicating upon a dispute referred under s. 48 of the Act, the Registrar is to all intents and purposes a court discharging the same functions and ,duties in the same manner as a court of law is expected to do.

20. It was sought to be argued that a reference of a dispute had to be filed before the Registrar and under sub-s. 2(b) of s. 48 the Registrar transferred it for disposal to the Assistant Registrar and therefore his position was the same as that of a nominee under the Bombay Co-operative Societies Act. We do not think that contention is sound merely because sub-s. (2) (c) of s. 48 authorises the Registrar to refer a dispute for disposal of an arbitrator or arbitrators. This procedure was however not adopted in this case and we need not pause to consider what would have been the effect if the matter had been so transferred. The Assistant Registrar had all the powers of a Registrar in this case as noted in the delegation and he was competent to dispose of it in the same manner as the Registrar would have done. It is interesting to note that under r. 68 sub-r. (10) of the Bihar and Orissa Cooperative Societies Rules, 1959 :

"In proceedings before the Registrar or arbitrator a party may be represented by a legal practitioner."

In conclusion, therefore, we must hold that the Assistant Registrar was functioning as a court in deciding the dispute between the bank and the appellant and Jagannath Jha."

15. Their lordships of the Hon'ble Supreme Court in the case of **Union of India vs. R. Gandhi President, Madras Bar Association & connected matter, reported in (2010) 11 SCC 1**, have held that so far as technical members are concerned, mere experience in civil service, is not enough and to be technical members of tribunals, persons concerned should be persons with expertise in the area of law concerned or allied subjects and mere experience in civil service cannot be treated as technical expertise in the area of law concerned. Their lordships have further held that the rule of law can be meaningful only if there is an independent and impartial judiciary to render justice. An independent judiciary can exist only when persons with competence, ability and independence with impeccable character man the judicial institutions. Their lordships have held a under:

"106. We may summarize the position as follows:

(a) A legislature can enact a law transferring the jurisdiction exercised by courts in regard to any specified subject (other than those which are vested in courts by express provisions of the Constitution) to any tribunal.

(b) All courts are tribunals. Any tribunal to which any existing jurisdiction of courts is transferred should also be a Judicial Tribunal. This means that such Tribunal should have as members, persons of a rank, capacity and status as nearly as possible equal to the rank, status and capacity of the court which was till then dealing with such matters and the members of the Tribunal should have the independence and security of tenure associated with Judicial Tribunals.

(c) Whenever there is need for `Tribunals', there is no presumption that there should be technical members in the Tribunals. When any jurisdiction is shifted from courts to Tribunals, on the ground of pendency and delay in courts, and the jurisdiction so transferred does not involve any technical aspects requiring the assistance of experts, the Tribunals should normally have only judicial members. Only where the exercise of jurisdiction involves inquiry and decisions into technical or special aspects, where presence of technical members will be useful and necessary, Tribunals should have technical members. Indiscriminate appointment of technical members in all Tribunals will dilute and adversely affect the independence of the Judiciary.

(d) The Legislature can re-organize the jurisdictions of Judicial Tribunals. For example, it can provide that a specified category of cases tried by a higher court can be tried by a lower court or vice versa (A standard example is the variation of pecuniary limits of courts). Similarly while constituting Tribunals, the Legislature can prescribe the qualifications/eligibility criteria. The same is however subject to Judicial Review. If the court in exercise of judicial review is of the view that such tribunalisation would adversely affect the independence of judiciary or the standards of judiciary, the court may interfere to preserve the independence and standards of judiciary. Such an exercise will be part of the checks and balances measures to maintain the separation of powers

and to prevent any encroachment, intentional or unintentional, by either the legislature or by the executive.

108. The Legislature is presumed not to legislate contrary to rule of law and therefore know that where disputes are to be adjudicated by a Judicial Body other than Courts, its standards should approximately be the same as to what is expected of main stream Judiciary. Rule of law can be meaningful only if there is an independent and impartial judiciary to render justice. An independent judiciary can exist only when persons with competence, ability and independence with impeccable character man the judicial institutions. When the legislature proposes to substitute a Tribunal in place of the High Court to exercise the jurisdiction which the High Court is exercising, it goes without saying that the standards expected from the Judicial Members of the Tribunal and standards applied for appointing such members, should be as nearly as possible as applicable to High Court Judges, which are apart from a basic degree in law, rich experience in the practice of law, independent outlook, integrity, character and good reputation. It is also implied that only men of standing who have special expertise in the field to which the Tribunal relates, will be eligible for appointment as Technical members."

16. In the case of State of Gujarat and another vrs. Gujarat Revenue Tribunal Bar Association and another, reported in (2012) 10 SCC 353 , their lordships of the Hon'ble Supreme Court have held that where there is a lis between the two contesting parties and a statutory authority is required to decide such dispute between them, such an authority may be called as a quasi-judicial authority i.e. a situation where, (a) a statutory authority is empowered under a statute to do any act; (b) the order of such authority would adversely affect the subject; and (c) although there is no lis or two contending parties, and the contest is between the authority and the subject; and (d) the statutory authority is required to act judicially under the statute, the decision of the such authority is a quasi-judicial decision. Their lordships have held as under:

"18. Tribunals have primarily be en constituted to deal with cases under special laws and to hence provide for specialised adjudication alongside the courts. Therefore, a particular Act/set of Rules will determine whether the functions of a particular Tribunal are akin to those of the courts, which provide for the basic administration of justice. Where there is a lis between two contesting parties and a statutory authority is required to decide such dispute between them, such an authority may be called as a quasi-judicial authority, i.e., a situation where, (a) a statutory authority is empowered under a statute to do any act (b) the order of such authority would adversely affect the subject and (c) although there is no lis or two contending parties, and the contest is between the authority and the subject and (d) the statutory authority is required to act judicially under the statute, the decision of the said authority is a quasi judicial decision. An authority may be described as a quasi-judicial authority when it possesses certain attributes or trappings of a 'court', but not all. In case certain powers under C.P.C. or Cr.P.C. have been conferred upon an authority, but it has not been entrusted with the judicial powers of the State, it cannot be held to be a court.

21. The present case is also required to be examined in the context of Article 227 of the Constitution of India, with specific reference to the 42nd Constitutional Amendment Act 1976, where the expression 'court' stood by itself, and not in juxtaposition with the other expression used therein, namely, 'Tribunal'. The power of the High Court of judicial

superintendence over the Tribunals, under the amended Article 227 stood obliterated. By way of the amendment in the sub-article, the words, "and Tribunals" stood deleted and the words "subject to its appellate jurisdiction" have been substituted after the words, "all courts". In other words, this amendment purports to take away the High Court's power of superintendence over Tribunals. Moreover, the High Court's power has been restricted to have judicial superintendence only over judgments of inferior courts, i.e. judgments in cases where against the same, appeal or revision lies with the High Court. A question does arise as regards whether the expression 'courts' as it appears in the amended Article 227, is confined only to the regular civil or criminal courts that have been constituted under the hierarchy of courts and whether all Tribunals have in fact been excluded from the purview of the High Court's superintendence. Undoubtedly, all courts are Tribunals but all Tribunals are not courts.

22. The High Court's power of judicial superintendence, even under the amended provisions of Article 227 is applicable, provided that two conditions are fulfilled; firstly, such Tribunal, body or authority must perform judicial functions of rendering definitive judgments having finality, which bind the parties in respect of their rights, in the exercise of the sovereign judicial power transferred to it by the State, and secondly such Tribunal, body or authority should be the subject to the High Court's appellate or revisional jurisdiction.

23. In **S.P. Sampath Kumar v. Union of India, AIR 1987 SC 346**, this Court held that, in the Central Administrative Tribunal (hereinafter referred to as the 'CAT'), the presence of a judicial member was in fact a requirement of fair procedure of law, and that the administrative Tribunal must be presided over in such a manner, so as to inspire confidence in the minds of the people, to the effect that it is highly competent and an expert body, with judicial approach and objectivity and, thus, this Court held that the persons who preside over the CAT, which is intended to supplant the High Court must have adequate legal training and experience. This Court further observed that it was desirable that a high- powered committee, headed by a sitting Judge of the Supreme Court who has been nominated by the Chief Justice of India to be its Chairman, should select the persons who preside over the CAT, to ensure the selection of proper and competent people to the office of trust and help to build up its reputation and accountability. The Tribunal should consist of one Judicial Member and one Administrative Member on any Bench.

24. In **L. Chandra Kumar v. Union of India & Ors., AIR 1997 SC 1125**, this Court held that the power of judicial review of the High Court under Article 226 of the Constitution of India, being a basic feature of the Constitution cannot be excluded. In this context, the Court held:

"88....It must not be forgotten that what is permissible to be supplanted by another equally effective and efficacious institutional mechanism is the High Courts and not the judicial review itself....." The Court further observed that the creation of this Tribunal is founded on the premise that, specialised bodies comprising of both, well trained administrative members and those with judicial experience, would by virtue of their specialised knowledge, be better equipped to dispense speedy and efficient justice. The contention that the said Tribunal should consist only of a judicial member was rejected, and it was held that such a

direction would attack the primary grounds of the theory, pursuant to which such Tribunals were constituted.

25. **In V.K. Majotra & Ors. v. Union of India & Ors., AIR 2003 SC 3909**, this Court reversed the judgment of the Allahabad High Court wherein, direction had been issued that the Vice-Chairman of the CAT could be only a retired Judge of the High Court, i.e., a Judicial Member and that such a post could not be held by a Member of the Administrative Service, observing that such a direction had put at naught/obliterated from the statute book, certain provisions without striking them down.

26. A Constitution Bench of this Court in **Statesman (Private) Ltd. v. H.R. Deb & Ors., AIR 1968 SC 1495**, examined the provisions of Sections 7(3)(d) and g(1) of the Industrial Disputes Act, 1947, which contain the expression 'judicial office', and held that a person holds 'judicial office' if he is performing judicial functions. The scheme of Chapters V and VI of the Constitution deal with judicial office and judicial service. Judicial service means a separation of the judiciary from the executive in public services. The functions of the labour court are of great public importance and are quasi-judicial in nature, therefore, a man having experience of the civil side of the law is more suitable to preside over it, as compared to a person working on the criminal side. Persons employed performing multifarious duties and, in addition, performing some judicial functions, may not truly fulfil the requirement of the statute. Judicial office thus means, a fixed position for the performance of duties, which are primarily judicial in nature.

27. In **Kumar Padma Prasad v. Union of India & Ors., (1992) 2 SCC 428**, this Court held that the expression, `judicial office' in the generic sense, may include a wide variety of offices which are connected with the administration of justice in one way or another. The holder of a judicial office under Article 217(2)(a), means a person who exercises only judicial functions, determines cases inter- se parties and renders decisions in purely judicial capacity. He must belong to the judicial services disciplined to hold the dignity, integrity and independence of the judiciary. The Court held that `judicial office' means a subsisting office with a substantive position, which has an existence independence from its holder.

.....

33. During the course of arguments before the High Court, learned Additional Advocate General had conceded that the judgments and orders passed by the Tribunal can be challenged under Article 227 of the Constitution. Thus, it has been conceded before the High Court that the High Court has supervisory control over the Tribunal, to the extent that it can revise and correct the judgments and orders passed by it. In such a fact-situation, the consultation/concurrence of the High Court, in the matter of making the appointment of the President of the Tribunal is required.

34. The object of consultation is to render the consultation meaningful to serve the intended purpose. It requires the meeting of minds between the parties involved in the process of consultation on the basis of material facts and points, to evolve a correct or at least satisfactory solution. If the power can be exercised only after consultation, consultation must be conscious, effective, meaningful and purposeful. It means that the party

must disclose all the facts to other party for due deliberation. The consultee must express his opinion after full consideration of the matter upon the relevant facts and quintessence."

31. The very object of Constitution of adjudicatory authorities under the Act in the scheme of administrative justice was to provide an additional and speedy forum of adjudication. It is, therefore, of utmost importance to ensure that these authorities work in a proper, effective and efficacious manner while exercising their powers to hear and dispose of quasi-judicial matters, which require some basic knowledge of law. While making decisions, such authorities must not lack judicious approach.

32. The adjudicatory authorities under the Act make decisions about fundamental issues, which affect the rights of the parties and are treated as final unless challenged. It is, therefore, very critical that these authorities make fair decisions and must possess some basic knowledge of law as they have a sacrosanct duty to administer justice.

33. The adjudicatory authorities are conferred with the discretion to adjudicate upon quasi-judicial matters and such discretion is governed by the maxim "*discretio est discerner per lagan quid sit justum*" (discretion consists in knowing what is just in law). Discretion in general is the discernment of what is right and proper. It denotes knowledge and prudence that discernment which enables a person to judge critically of what is correct and proper, united with caution, to discern between falsity and truth, between shadow and substance, between equity and colourable glosses and pretences and not to do according to will and private affections or ill-will. It has to be done according to rules of reasons and justice, not according to private opinion. It has to be done according to law and not humour. It is not be arbitrary, vague and fanciful but legal and regular.

34. Understandably, the State could come up with a defence that it does not have the requisite number of officers who are well equipped in the field of law or have legal trainingand legal acumen, however, that by itself cannot be an excuse for playing havoc with the valuable rights of the litigants.

35. Incidentally, this Court was faced with somewhat identical situation in **Cr.MMO No. 277 of 2016**, **titled *Pankaj Mahajan vs. State of Himachal Pradesh***, decided on 26.4.2017, regarding the implementation of the Food Safety and Standards Act, 2006, wherein also the authorities were totally ill-equipped and lacked of basic knowledge of the provisions of the Act, constraining this Court to direct the authorities responsible for the enforcement of the Act to undergo training at the H.P. Judicial Academy.

36. As the position in the instant case is no better or different, therefore, the Secretary, Cooperative Societies to the State is directed to take up the issue of training with the Director, H.P. Judicial Academy and thereafter draw up a calendar for imparting regular training to the officers vested with the adjudicatory powers and authority under the Act. Let, a copy of this order be supplied to the Secretary, Cooperative Societies for the State and to the Director, H.P. Judicial Academy, for compliance.

37. It is established that respondent No. 3 is not alone in the band-wagon amongst the authorities conferred with the adjudicatory powers who has exhibited lack of judicial approach and necessary expertise to effectively deal with the dispute coming before him and at the same time has been totally unconscious of the competing rights in order to decide the case justly and fairly and to pass the order which are legally sustainable. Therefore, in the given circumstances, it will neither be fair or even prudent to accede to the request of the petitioner to restrain respondent No. 3 from discharging quasi-judicial function. At the same time, the Secretary (Cooperative Societies) as also the Registrar of Cooperative Societies have to ensure that the judgment rendered by the Hon'ble Supreme Court in ***Satya Pal Anand case (supra)***, is complied with in its letter as also spirit.

38. The petition is disposed of in the aforesaid manner leaving the parties to bear their own costs.

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

Fina Dass .....Petitioner.
Versus
Vinod Kumar .....Respondent.

Cr. Revision No. 236 of 2016.
Date of decision: 17.5.2017.

Negotiable Instruments Act, 1881- Section 138- A complaint was filed against the accused for the commission of anoffence punishable under Section 138 of N.I. Act- accused was tried and convicted by the Trial Court- an appeal was preferred, which was also dismissed- held in revision that the returning memo was received on 2.1.2013 and 3.1.2013- legal notice was received by the accused on 12.1.2013 but the complaint was filed on 23.1.2013 before the expiry of 15 days- it is not permissible to file the complaint prior to the expiry of 15 days as such the complaint is premature and is liable to be quashed and set aside- revision allowed – judgments passed by the Courts set aside. (Para- 3 to 6)

Case referred:
Yogendra Pratap Singh vs. Savitri Pandey and another (2014) 10 SCC 713

For the Petitioner : Mr. K. B. Khajuria, Advocate.
For the Respondent : Mr. V.S. Rathore, Advocate.

The following judgment of the Court was delivered:

***Tarlok Singh Chauhan, Judge*(Oral).**

This revision is directed against the judgment passed by learned Additional Sessions Judge, Shimla, Camp at Rohru on 18.6.2016 in Criminal Appeal No. 11-R/10 of 2014 whereby he upheld the judgment passed by learned Judicial Magistrate 1st Class, Court No. II, Rohru, District Shimla, H.P. on 23.9.2013/21.10.2013 in Case No. 26-3 of 2013 and convicted and sentenced the petitioner to undergo simple imprisonment for one month and to pay a sum of Rs. 1,00,000/- as compensation under Section 138 of the Negotiable Instruments Act, 1881 (for short Act).

2. Bereft of any unnecessary detail, it is not in dispute that the complainant received a returning memo on 2.1.2013 and on 3.1.2013 he issued legal notice under the Act which was received by the accused only on 12.1.2013, but the complaint came to be filed on 23.1.2013 i.e. before the expiry of 15 days.

3. The moot question, therefore, is whether an offence under Section 138 of the Act can be said to have been committed when the period provided for under Section 138 Clause (c) of the proviso has not expired.

4. Section 138 of the Act, reads thus:

> ***"138 Dishonour of cheque for insufficiency, etc., of funds in the account.*** — *Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is*

returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment fora term which may be extended to one year (w.e.f. 6.2.2003).

Provided that nothing contained in this section shall apply unless—

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, [20] [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.— For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability."

5. Somewhat similar issue came up before the three Judges Bench of the Hon'ble Supreme Court in ***Yogendra Pratap Singh vs. Savitri Pandey and another (2014) 10 SCC 713*** and in paras 35 and 36 of the judgment, it was held as under:

"35. *Can an offence under Section 138 of the NI Act be said to have been committed when the period provided in clause (c) of the proviso has not expired? Section 2(d) of the Code defines 'complaint'. According to this definition, complaint means any allegation made orally or in writing to a Magistrate with a view to taking his action against a person who has committed an offence. Commission of an offence is a sine qua non for filing a complaint and for taking cognizance of such offence. A bare reading of the provision contained in clause (c) of the proviso makes it clear that no complaint can be filed for an offence under Section 138 of the NI Act unless the period of 15 days has elapsed. Any complaint before the expiry of 15 days from the date on which the notice has been served on the drawer/accused is no complaint at all in the eye of law. It is not the question of prematurity of the complaint where it is filed before expiry of 15 days from the date on which notice has been served on him, it is no complaint at all under law. As a matter of fact, Section 142 of the NI Act, inter alia, creates a legal bar on the Court from taking cognizance of an offence under Section 138 except upon a written complaint. Since a complaint filed under Section 138 of the NI Act before the expiry of 15 days from the date on which the notice has been served on the drawer/accused is no complaint in the eye of law, obviously, no cognizance of an offence can be taken on the basis of such complaint. Merely because at the time of taking cognizance by the Court, the period of 15 days has expired from the date on which notice has been served on the drawer/accused, the Court is not clothed with the jurisdiction to take cognizance of an offence under Section 138 on a complaint filed before the expiry of 15 days from the date of receipt of notice by the drawer of the cheque.*

36. A complaint filed before the expiry of 15 days from the date on which notice has been served on drawer/accused cannot be said to disclose the cause of action in terms of clause (c) of the proviso to Section 138 and upon such complaint which does not disclose the cause of action the Court is not competent to take cognizance. A conjoint reading of Section 138, which defines as to when and under what circumstances an offence can be said to have been committed, with Section

142(b)of the NI Act, that reiterates the position of the point of time when the cause of action has arisen, leaves no manner of doubt that no offence can be said to have been committed unless and until the period of 15 days, as prescribed under clause (c) of the proviso to Section 138, has, in fact, elapsed. Therefore, a Court is barred in law from taking cognizance of such complaint. It is not open to the Court to take cognizance of such a complaint merely because on the date of consideration or taking cognizance thereof a period of 15 days from the date on which the notice has been served on the drawer/accused has elapsed. We have no doubt that all the five essential features of Section 138 of the NI Act, as noted in the judgment of this Court in Kusum Ingots & Alloys Ltd. vs. Goverdhan Das Partani (2000) 7 SCC 183 and which we have approved, must be satisfied for a complaint to be filed under Section 138. If the period prescribed in clause (c) of the proviso to Section 138 has not expired, there is no commission of an offence nor accrual of cause of action for filing of complaint under Section 138 of the NI Act."

6. The aforesaid exposition of law makes it evidently clear that the complaint under the Act filed before the expiry of 15 days is pre-mature and cannot be treated as a legally constituted complaint in the eyes of law. Therefore, the proceedings initiated on the basis of such complaint are liable to be quashed and set-aside.

7. Resultantly, there is merit in this petition and the same is accordingly allowed and the judgment dated 18.6.2016 passed by learned Additional Sessions Judge, Shimla, Camp at Rohru in Criminal Appeal No. 11-R/10 of 2014 affirming the judgment passed by learned Judicial Magistrate 1st Class, Court No. II, Rohru, District Shimla, H.P. on 23.9.2013/21.10.2013 in Case No. 26-3 of 2013 whereby the petitioner has been convicted and sentenced to undergo simple imprisonment for one month and to pay a sum of Rs. 1,00,000/- as compensation under Section 138 of the Act, is set-aside.

The revision stands disposed of in the aforesaid terms.

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

CWP No.319 of 2017 alongwith COPC No.96 of 2017
Date of Decision: May 17, 2017

CWP No.319/2017
M. Alexander ...Petitioner.
versus
Union of India and others ...Respondents.
COPC No.96/2017
M. Alexander ...Petitioner.
Versus
Sanjeev Gandhi ...Respondent.

Constitution of India, 1950- Article 226- Petitioner, a foreign national, applied for extension of visa, which was rejected – a notice was issued by Superintendent of Police to the petitioner to exit India – the petitioner filed a writ petition seeking the extension and quashing the quit notice- held that as per Foreigners Act, a foreigner cannot enter into India or remain in India unless authorized to do so by the Central Government- stay in India beyond the prescribed period is a penal offence –the petitioner had changed his residence thrice and no intimation was given to the Government which is a violation of Foreigners Act and the Rules framed thereunder- the Court has no authority or jurisdiction to extend the period of limitation- petition dismissed.

(Para-2 to 46)

Cases referred:
Sarbananda Sonowal v. Union of India and another, (2005) 5 SCC 665
Mohd. Khalil Chisti v. State of Rajasthan, (2013) 2 SCC 563
Jet Ply Wood (P) Ltd. and another v. Madhukar Nowlakha and others, (2006) 3 SCC 699
O. Konavalov v. Commander, Coast Guard Region and others, (2006) 4 SCC 620

For the Petitioner	:	Mr. Abhimanyu Rathor, Advocate, in the Writ Petition as also COPC.
For the Respondents	:	Mr. Shrawan Dogra, Advocate General, with Mr. Anoop Rattan, Mr. Varun Chandel, Additional Advocates General and Mr. J.K. Verma, Deputy Advocate General, for the respondents-State in Writ Petition as also respondent in COPC. Mr. Ashok Sharma, Assistant Advocate General, with Ms Sukarma, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice

The moot question, which arises for consideration, is as to whether the petitioner, who is a foreign national, with rejection of his application for extension of visa, and service of notice of exist, has any right to continue to stay in India, for pursuing litigation and taking care of an allegedly ailing citizen of India, of whom, he claims to be the adoptive father. Further, as to whether this Court has jurisdiction to authorize such stay.

2. At the threshold, we may record that petitioner's application dated 17.1.2017, for extension of visa, stands denied (rejected) by the Ministry of Home Affairs, Government of India, New Delhi and pursuant thereto, Superintendent of Police-cum-Foreigners Registration Officer, has now issued a fresh notice dated 16.5.2017, in the following terms:

> "I am directed to inform you vide Ministry of Home Affairs referral reply received on 16-05-2017, you Alexander Masovianus, USA national, holder of passport no.710945816 dated 09.03.2007 valid upto 08.03.2017, bearing X-Visa valid up to 31-12-2016 (multiple entry) presently residing Rock view cottage, Bhagsu Road, P.O. Mcleodgang Tehsil Dharamshala, Kangra, HP (.) As 03 exit notices dated: 04-01-2017, 12-01-2017 & 14-02-2017 have already been served upon you, but you always taken undue advantage of liberal procedure of this country to prolong stay in India and causing inconvenience and harassment to Government official and civilians (.) Your request for X-Visa extension rejected by MHA and Exit Permitted to you (.) In view of above, as on date your Visa stands expired and your stay in India, henceforth, will be treated illegal (.) Therefore, you are directed to arrange your flight ticket by tomorrow and exit India to your native country **within twelve hours,** otherwise strict legal action will be initiated against you for contravening provisions of "The Foreigner Act, 1946"."

3. We are informed by the learned Advocate General that petitioner has yet not complied with the same and that the authorities have taken all consequential actions, so stipulated under the law.

4. On 28.2.2017, petitioner filed the instant Writ Petition, praying that:

> "i) Issue a writ of *mandamus* directing Respondent Authorities to correct the clerical error currently subsisting in the existing validity of the last renewal period of the latest X Visa, wherein the period of extension duly paid for was two

(2) years as opposed to the erroneous extension period of 1 year 8 months actually given, in accordance with the procedure established by law;

ii) Issue a writ of *mandamus* directing Respondent Authorities to duly provide Petitioner renewed annual extension of X Visa in accordance with the procedure established by law, as the overall validity of the X visa continues to subsist to the year 2020, and as justified by the performance of their public duly without bias, prejudice or *Mala fide* against Petitioner keeping in mind the sacred mandate incumbent upon Respondent Authorities as public servants to the citizens and non-citizens alike, as enshrined in the Constitution of India;

iii) Issue a writ of *certoriari* directing the quashing of the three Leave India Notices arbitrarily issued to Petitioner, as stated hereinbefore."

On his asking, on 1.3.2017, this Court passed the following interim order:

"…….

CMP No.1068 of 2017

Notice in the above terms. Objections be filed within two weeks. In the meantime and subject to the objections, the respondents are restrained from harassing the petitioner with a further direction that the petitioner be not pushed back.

……."

which, however on 12.5.2017, was vacated in the following terms:

"Mr.Ashok Sharma, learned Assistant Solicitor General of India, states that in view of response filed by respondents No.2 and 3 no response is required to be filed on behalf of respondent No.1.

Rejoinder to the reply filed on behalf of the respondents, if any, be filed within three days.

Having heard learned counsel for the parties, at length, prima facie, we are in agreement with the submissions made by learned Advocate General that our interim order dated 1st March, 2017, needs to be vacated.

We are of the considered view that serious allegations against the petitioner for having violated the domestic law stands levelled by individuals as also the State. Even statutory Rules have not been complied with. Prima facie, we find no documentary evidence authorizing the petitioner's stay in India beyond 31st December, 2016. Whether with mere deposit of visa extension fee, petitioner is automatically entitled to stay in India, beyond the period of authorization, is what we are called upon to decide by the petitioner. However, prima facie, we are of the view that considering the notices dated 4.1.2017 (Annexure P-7) and 12.1.2017 (Annexure P-8), so issued by the Superintendent of Police Cum-Foreigners Registration Officer, District Kangra at Dharamshala, pursuant to order rejecting the petitioner's request for extension of visa, so passed by Ministry of Home Affairs, petitioner's plea is totally untenable in law. His request of validation of his visa upto 24.4.2017 (Annexure P-6) was not only belated but not pursued any further. In any event, even such date stands expired. As such, we forthwith vacate our interim order dated 1st March, 2017, reserving liberty to the respondents-State to take all appropriate actions, in accordance with law.

List on 17th May, 2017."

5. We firstly proceed to examine the relevant statutory provisions, i.e. The Foreigners Act, 1946 (hereinafter referred to as Act); The Foreigners Order, 1948 (Order 1948);

Registration of Foreigners Act, 1939 (The Registration Act); and the Registration of Foreigners Rules, 1992 (referred to as Registration Rules).

6. Section 2(a) of the Act defines a "foreigner" to mean a person who is not a citizen of India.

7. Sub-section (1) of Section 3 empowers the Central Government to make provision for prohibiting, regulating or restricting entry or departure of foreigners into or from India. Sub-section (2) of the said Section, enables passing of orders providing that a foreigner shall not enter India or **shall enter India only by such time** or such route or place, subject to observance of such conditions on arrival, as may be prescribed. By virtue of clause (c) of the said sub-section, Central Government is **empowered to order that the foreigner shall not remain in India.** The amount for incurring expense for the maintenance till the time of his removal is to be defrayed from the resources at the disposal. By virtue of clause (e), the authority may impose conditions, which may be prescribed or satisfied, including requiring a foreigner to reside in a particular place; impose restrictions on his movement.

8. Clause (g) of sub-section (2) of Section 3 specifically empowers the Central Government to make provision for arrest, detention or confinement of a foreigner.

9. The burden of proving as to whether a person is or not a foreigner, by virtue of Section 9, is upon such person.

10. Power of delegation is provided under Section 12 and Section 11 empowers the delegatee, to exercise the same, also authorizing any Police Officer to take steps and use such force, as may, in his opinion, be reasonably necessary for securing compliance of any order or direction given under or pursuant to the provisions of the Act or preventing or rectifying any breach thereof. Sub-section (3) of Section 11 confers power, deeming in nature, upon any person acting in exercise thereof, a right of access to any land or other property whatsoever.

11. Section 14 specifically provides that whosoever remains in any area in India, for a period exceeding than so prescribed in the visa, shall be punished with a term which may extend to five years and also pay fine. In fact, Section 13 specifically provides that in the event of failure to comply with the directions contained in the order, the offence shall be deemed to have been committed.

12. The Registration Act empowers the Central Government to frame Rules, requiring any foreigner, entering India, to report his presence to the prescribed authority. The Rules framed thereunder also mandate the foreigners to register themselves with the Police Officer by submitting forms and furnishing proof of residence etc.

13. In *Sarbananda Sonowal v. Union of India and another,* (2005) 5 SCC 665, the apex Court, while dealing with the constitutional validity of the Illegal Migrants (Determination by Tribunals) Act, 1983 (IMDT Act), itself clarified that fundamental right of a foreigner is confined only to the extent of applicability of Article 21 of the Constitution of India, specifically for life and liberty, and not conferring any right to live and stay in India, as enshrined under Article 19(1)(e) of the Constitution, which right is conferred only upon a citizen of India.

14. Further, principles of law with regard to (a) right (s) of a foreign national, (b) duty of the State to expel an alien, and (c) what would be due process of law in dealing with an alien, stands elaborately discussed and principles enunciated in the said report, which, with profit, we extract as under:

> "74. We consider it necessary here to briefly notice the law regarding deportation of aliens as there appears to be some misconception about it and it has been argued with some vehemence that aliens also possess several rights and the procedure for their identification and deportation should be detailed and elaborate in order to ensure fairness to them.

75. In Introduction to International Law by j. G. Starke (1st Indian reprint 1994) in chapter 12 (page 348) , the law on the points has been stated thus: -

> "Most states claim in legal theory to exclude all aliens at will, affirming that such unqualified right is an essential attribute of sovereign government. The courts of great Britain and the United States have laid it down that the right to exclude aliens at will is an incident of territorial sovereignty. Unless bound by an international treaty to the contrary, States are not subject to a duty under international law to admit aliens or any duty thereunder not to expel them. Nor does international law impose any duty as to the period of stay of an admitted alien."

Like the power to refuse admission this is regarded as an incident of the State's territorial sovereignty. International law does not prohibit the expulsion en masse of aliens (page 351). Reference has also been made to Article 13 of the International Covenant of 1966 on Civil and Political Rights which provides that an alien lawfully in the territory of a State party to the Covenant may be expelled only pursuant to a decision reached by law, and except where compelling reasons of national security otherwise require, is to be allowed to submit the reasons against his expulsion and to have his case reviewed by and to be represented for the purpose before the competent authority. It is important to note that this Covenant of 1966 would apply provided an alien is lawfully in India, namely, with valid passport, visa etc. and not to those who have entered illegally or unlawfully. Similar view has been expressed in oppenheim's International Law (Ninth Edn. 1992 - in paragraphs 400, 401 and 413). The author has said that the reception of aliens is a matter of discretion, and every state is by reason of its territorial supremacy, competent to exclude aliens from the whole or any part of its territory. In paragraph 413 it is said that the right of states to expel aliens is generally recognized. It matters not whether the alien is only on a temporary visit, or has settled down for professional business or any other purposes on its territory, having established his domicile there. A belligerent may consider it convenient to expel all hostile nationals residing or temporarily staying within its territory; although such a measure may be very harsh on individual aliens, it is generally accepted that such expulsion is justifiable. Having regard to Article 13 of the international Covenant on Civil and Political Rights, 1966, an alien lawfully in a state's territory may be expelled only in pursuance of a decision reached in accordance with law.

76. In *Rex v. Bottrill*, 1947 1 KB 41, it was said that the king under the Constitution of United Kingdom is under no obligation to admit into the country or to retain there when admitted, any alien. Every alien in the United Kingdom is there only because his presence has been licensed by the King. It follows that at common law the King can at will withdraw his license and cause the Executive to expel the alien, whether enemy or friend. For holding so reliance was placed on *Attorney-General for Canada v. Cain*, 1906 AC 542, where Lord Atkinson said: -

> "One of the rights possessed by the Supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the state, at pleasure, even a friendly alien, especially if it considers his presence in the state opposed to its peace, order, and good government, or to its social or material interests."

In *Chae Chan Ping v. United States*, 130 US 581, the United State Supreme Court held:

> "The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the constitution, the right to its exercise at any time when, in the judgment of the Government, the interests of the country require it, cannot be granted away or restrained on behalf of any one. The powers of Government are delegated in trust to the United states, and are incapable of transfer to any other parties. They cannot be abandoned or surrendered. Nor can their exercise be hampered, when needed for the public good, by any considerations of private interest. The exercise of these public trusts is not the subject of barter or contract."

This principle was reiterated in *Fong Yue ting v. United States*, 149 US 698, where the court ruled: -

> "The Government of each State has always the right to compel foreigners who are found within its territory to go away, by having them taken to the frontier. This right is based on the fact that, the foreigner not making part of the nation, his individual reception into the territory is matter of pure permission, of simple tolerance, and creates no obligation. The exercise of this right may be subjected, doubtless, to certain forms by the domestic laws of each country; but the right exists none the less, universally recognized and put in force.
>
> **********
>
> The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty or property, without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application."

77. In *Nishimura Ekiu v. United States*, 142 US 651, it was adjudged that, although Congress might, if it saw fit, authorize the courts to investigate and ascertain the facts upon which the alien's right to land was made by the statutes to depend, yet Congress might entrust the final determination of those facts to an executive officer, and that, if it did so, his order was due process of law and no other tribunal, unless expressly authorized by law to do so, was at liberty to re-examine the evidence on which he acted, or to controvert its sufficiency. Thus according to United States Supreme Court the determination of rights of an alien even by Executive will be in compliance of due process of law.

78. In *Louis De Raedt v. Union of India*, (1991) 3 SCC 554, the two foreign nationals engaged in missionary work had come to India in 1937 and 1948 respectively with proper documents like passport and visa etc. and were continuously living here but by the order dated 8th July, 1987 their prayer for further extension of the period of stay was rejected and they were asked to leave the country by 31st July, 1987. They then challenged the order by filing a writ petition. This Court held that the power of the Government of India to expel foreigners is absolute and unlimited and there is no provision in the constitution fettering its discretion and the executive government has unrestricted right to expel a foreigner. So far as right to be heard is concerned, there cannot be any

> hard and fast rule about the manner in which a person concerned has to be given an opportunity to place his case.
>
> 79. In *State of Arunachal Pradesh v. Khudi Ram Chakma*, 1994 Supp(1) SCC 615, following *Louis De Raedt* (supra), it was held that the fundamental right of a foreigner is confined to article 21 for life and liberty and does not include the right to reside and stay in this country, as mentioned in Article 19 (1) (e) , which is applicable only to the citizens of the country. After referring to some well-known and authoritative books on International Law it was observed that the persons who reside in the territories of countries of which they are not nationals, possess a special status under International Law. States reserve the right to expel them from their territory and to refuse to grant them certain rights which are enjoyed by their own nationals like right to vote, hold public office or to engage in political activities. Aliens may be debarred from joining the civil services or certain profession or from owning some properties and the State may place them under restrictions in the interest of national security or public order. Nevertheless, once lawfully admitted to a territory, they are entitled to certain immediate rights necessary to the enjoyment of ordinary private life. Thus, the Bangladeshi nationals who have illegally crossed the border and have trespassed into Assam or are living in other parts of the country have no legal right of any kind to remain in India and they are liable to be deported."(Emphasis supplied).

15. Having noticed the law, we now proceed to apply the principles to the attending facts.

16. A reading of the record reveals that petitioner, who is a citizen of United States of America, in the year 2009, came to India, on a tourist visa, which was valid upto 26.4.2010. On 15.4. 2010, he got himself registered with the Office of Foreigners Registration Officer, Shimla. Thereafter, he came to Dharamshala and on 25.10.2011, got himself registered in the Office of Foreigners Registration Officer, Dharamshala. Since then he has continued to stay in and around Dharamshala, including McLeodganj.

17. It is a matter of record that petitioner's visa came to be extended only till the year 2015, when a decision was taken by the Ministry of Home Affairs, calling upon him to leave India. Such decision dated 9.3.2015 was duly acted upon by the delegatee, the authorized Officer, i.e. the Superintendent of Police, who called upon the petitioner to leave India. The notice was not acted upon in view of the authority acceding to the petitioner's request of extending visa, which was so done upto 31.12.2016. Such order dated 24.4.2015 (Annexure P-4), stipulated as under:

> "Special Endorsement:
>
> HIS TOURIST VISA WAS CONVERTED INTO XVISA BY MHA VIDE MHA ID NO.1326/F-2-10. FURTHER EXTENSION WILL BE GIVEN ON PRESENTATION OF VALID MEDICAL DOCUMETNS OF THE PATIENT HE IS TAKING CARE."

18. Record reveals, for there is no other document, even prima facie, suggesting anything to the contrary, that till 28.12.2016, petitioner did not submit any record or agitate the issue of the period of extension being short, when vide his written request (Annexure P-6), he requested the authorities to correct the "clerical error", which had crept in the passing of the order, for his visa ought to have been extended upto 24.4.2017 and not 31.12.2016, for the only reason that "fee" stood deposited by him for a period of "two years".

19. Presumably, even though no decision thereupon was taken by the authorities, yet petitioner continued to stay in India even beyond 31.12.2016. Consequently, notices dated 4.1.2017 (Annexure P-7) & 12.1.2017 (Annexure P-8) came to be issued by the authorized Officer, i.e. the Superintendent of Police-cum-Foreigners Registration Officer, District Kangra at Dharamshala, asking him to arrange for his ticket and leave India (within five days from the last notice), failing which proceedings under the Act would be initiated.

20. Petitioner responded to the same, by way of reply dated 16.1.2017 (Annexure P-10), requesting for extension of his visa for the reason that (i) his presence was required to take care of his ailing adopted son (undisclosed person), and (ii) he had to pursue (a) a case pending before this Court, (b) participate in the investigation in relation to FIR No.4/2015, 55/2015 & 93/2014, registered at different Police Stations of District Kangra, Himachal Pradesh.

21. Also, on 16.2.2017 (Annexure P-12), he made a request to allow him to continue to reside in India on "humanitarian grounds".

22. At this juncture, one may only observe that even though response to the petition came to be filed by the State on 23.3.2017, despite opportunities being afforded on 23.3.2017, 27.4.2017 and 12.5.2017 and the matter being heard-in-part on 11.5.2017, no rejoinder was filed and only on 11.5.2017, an affidavit, stating that petitioner had developed an "unbreakable bond" of "filial and parental piety" with Mr. Virraj Sorhvi, an Indian National, of whom he had become "*de facto* guardian" and an "adoptive parent", which fact came to be acknowledged even by the Ministry of Home Affairs, in allowing him to remain in India for last 12 years, as such, he may be permitted to continue to reside in India. Also, his current type 'X' visa was valid upto 24.4.2020, a right accruing with mere deposit of visa fee. A thumb marked affidavit, allegedly sworn by the mother of Mr. Virraj Sorhvi is also placed on record.

23. From the response so filed by the State, it is quite apparent that after his visit to Dharamshala, petitioner changed his residence thrice, intimation whereof was never furnished to the Office of the Foreigners Registration Officer, thus violating the provisions of the Registration Act and Rules framed thereunder.

24. Allegedly, petitioner has been abusing his liberty, for ever since his arrival in Dharamshala, there are complaints of his causing disturbance and annoyance to the local public. He did not pay rent to the landlords, whose premises he had been occupying. On the contrary, for vacating the rented accommodation, he had been extorting money. Well these are allegations and complaints and counter complaints came to be lodged, both against and by the petitioner. Further, not only did he fail to disclose in detail, the identity of Mr. Virraj Sorhvi, but also did not furnish particulars of the nature of current ailment or produce any medical record subsequent to the year 2008.

25. Emphatically, it is pointed out that petitioner had chosen to reside, rather continuously, at McLeodganj, and that too, within a radius of one kilometer from the personal residence of His Holiness the Dalai Lama. We find, the Superintendent of Police, District Kangra, on an affidavit, to have expressed his reservation about the petitioner's presence in the area, also for the reason that there are vital military establishments in the area. The Officer is categorical that petitioner's act and conduct has rendered his presence, physical in nature, at McLeodganj, to be undesirable. His chequered history of litigation is an apprehension in that regard.

26. Quite apparently, petitioner failed to disclose the places of his residence. No doubt, he was stationed at McLeodganj, but then continued to change his residence, particulars whereof never came to be disclosed. Police complaints stand registered against the petitioner for non-payment of rent and causing nuisance to the house owners.

27. Mr. Virraj Sorhvi is the biological son of one Sona Devi, daughter of Shri Nandram, widow of late Shri Ganga Ram Nagar, resident of village Sorha, Tehsil Islamnagar, District Badaun, Uttar Pradesh, which fact is evident from a photocopy of an affidavit, annexed by the petitioner with his affidavit dated 9.5.2017. Now significantly, neither from this affidavit nor from any other document, it can be inferred that after 2008, this person had received any medical treatment either at Dharamshala or anywhere else in the State of Himachal Pradesh. Why would a person, a resident of Uttar Pradesh, who met with a motor vehicle accident at Kurukshetra (Haryana), choose to reside at McLeodganj (Himachal Pradesh), remains undisclosed. He is certainly not under any medical care or advice at McLeodganj. It is also not that there is none else in his family to look after him. Be that as it may, fact of the matter being

that today petitioner has no right to stay. His visa stood expired and lastly on 16.5.2017 he has been asked to leave India.

28. When confronted with the aforesaid fact situation, in order to establish his right of continuing to stay any further in India, learned counsel invited our attention to the following decisions rendered by the apex Court in: *Mohd. Khalil Chisti v. State of Rajasthan,* (2013) 2 SCC 563; *Jet Ply Wood (P) Ltd. and another v. Madhukar Nowlakha and others,* (2006) 3 SCC 699; *O. Konavalov v. Commander, Coast Guard Region and others*, *(2006) 4 SCC 620*; and *Sarbananda Sonowal (supra)*.

29. We are afraid, this Court has no authority or jurisdiction to confer any such right upon the petitioner. In an equitable jurisdiction, this Court is to adjudicate and decide such of those rights of all living beings, emanating from international treaties, Constitution or Statutes. The law enunciated in *Sarbananda Sonowal (supra)* is clear. Only a citizen of this country, and other authorized person, has a right to stay in India. And certainly petitioner cannot be said to be a person so authorized under the provisions of either Municipal Laws or International Covenants.

30. Applying the statutory provisions to the attending facts and circumstances, the only conclusion which one can arrive at is that petitioner's presence in India, subsequent to the expiry of his visa and the period so prescribed in the notice, is not lawful. Visa, which stood expired on 31.12.2016 (Annexure P-4), never came to be extended, for there is nothing on record that any valid medical documents of the patient of which the petitioner was taking care of, ever came to be presented to the relevant authorities. It is not a case of clerical error, as is so projected by the petitioner. The order is specific.

31. Law does not provide for automatic renewal of visa, much less with the deposit of fee. In the instant case, fee deposited is by way of a challan, for which no prior authorization or sanction was obtained. Even with regard to deposit of fee, as is so evident from the affidavit of the Superintendent of Police, one finds that petitioner did not pay the fee, in terms of the prescribed schedule. There would be a shortfall of approximately 120 dollars for each year, i.e. from the year 2011 to 2016. Whether it would be so or not is otherwise immaterial.

32. Be that as it may, what weighed with the Court in the passing of interim order dated 1.3.2017, was the pendency of petitioner's application (Annexure P-6) and now with the rejection of the same, petitioner has no right to continue to remain on the soil of this nation beyond 31.12.2016. Assuming that his grievance, so agitated in terms of Annexure P-6, was genuine, what is unexplainable is as to why he waited to agitate his grievance till 28.12.2016, for after all the alleged clerical error took place on 24.4.2015, the date on which visa came to be extended (Annexure P-4).

33. Assuming hypothetically that the authority had committed an error, in any case, we are well past 24.4.2017, the period for which petitioner had himself sought extension, in terms of such request.

34. Firmly, we are of the view that Officers of the State showed restraint in not exercising their powers, statutory in nature, so stipulated under Sections 11 and 14 of the Act. Enough opportunity was afforded and indulgence shown to the petitioner for leaving the country by affording reasonable time.

35. There is no Rule which prescribes automatic extension of visa. Thus petitioner's prayer (ii) cannot be allowed.

36. We may only observe that allegations of bias, prejudice and malafide are absolutely vague and unspecific, with regard to time, manner, place and person. To the contrary, we rather find the authorities to have acted with due caution and always exercised restraint.

37. Law does not authorize a foreigner, so defined under the Act, to remain on the soil of this country any moment longer than the period so authorized, in accordance with law, be it for whatever purpose.

38. Undoubtedly, law postulates the respondents-authorities to take action, which, in our considered view, in right earnestness, stands taken in asking the petitioner to leave the country. Thus, the impending action cannot be said to be perverse, illegal or arbitrary.

39. *O. Konavalov (supra)* only reiterates some of the principles enunciated in *Sarbananda Sonowal (supra).* We do not find the decision rendered in *Jet Ply Wood (supra)*, to be applicable at all.

40. Similarly reliance upon *Mohd. Khalil Chisti (supra)*, is of no assistance for, as is evident from Para-6 of the report, the decision is rendered in the peculiar facts and circumstances, not to be treated as a binding precedent.

41. By way of this petition, Court is neither called upon nor is required to monitor the investigation. It is for the authorities to consider, in whatsoever capacity (complainant or an accused) presence of petitioner would be secured, either during the course of investigation of criminal complaint(s) or trial, if any. This Court does not form or express any opinion with regard thereto.

42. Further, Virraj Sorhvi is not a minor. Petitioner, for whatever reason may have unbreakable bond, be it "filial" or for "parental piety" or otherwise, with the said person, but then the welfare State has mechanism of taking care of its citizens, even those who are living either in pecuniary or destitution. Noticeably, for whatever reason, petitioner has also not chosen to take him to his native country. We clarify that we have not gone into the antecedents of Virraj Sorhvi.

43. Neither does the Constitution nor the statute confers any right upon a foreigner to endlessly remain on the soil of this country, save and except under the procedure established by law, for pursuing any litigation or conferring any love or affection on an Indian national.

44. We also do not find the acts of the respondents-officials to be contumacious in any manner.

45. As such, in view of the aforesaid, we find no merit in the Writ Petition, which is accordingly dismissed.

In view of the dismissal of the Writ Petition, to put quietus to the matter, we also dispose of the Contempt Petition. Pending application(s), if any, also stand disposed of.

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

State of H.P. and another ...Appellants

Versus

Hari Singh and others ...Respondents

RFA No. 125 of 2005
Date of decision: 17/05/2017

Land Acquisition Act, 1894- Section 18- Reference Court awarded the compensation @ Rs.60,000/- per bigha uniformly with respect to all the categories of land after placing reliance upon a sale deed by means of which 3-14 bighas of land was sold for a consideration of Rs.2,40,317/- - aggrieved from the award, the present appeal has been filed – held that the land sold by means of exemplar sale deed is located in close proximity to acquired land – the sale deed

was executed 10 years prior to the acquisition – the price must have escalated since the date of execution of the sale deed- the purpose of acquisition was common and therefore, the uniform assessment of compensation cannot be faulted – appeal dismissed.(Para-2 to 8)

For the appellants: Mr. Vivek Singh Attri, Dy. A.G.
For the respondents: Mr. R.K.Bawa, Sr. Advocate with Mr. Jeevesh Sharma, Advocate for respondent No.1.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral):

The instant Regular First Appeal is directed against the impugned award recorded by the learned Reference Court in Reference Petition No. 17-S/4 of 1999 whereby he determined with respect to the land(s) brought to acquisition compensation at the rate of Rs.60,000/- per bigha. The aforesaid compensation amount was uniformly assessed with respect to all the categories of the land, as stood brought to acquisition. Also the learned Reference Court added thereon all the statutory benefits. The learned Reference Court while assessing a uniform rate of compensation qua diverse categories of land, had made reliance upon Ext.PA, exhibit whereof comprises a sale deed with respect to lands located at Chak-Chopal, wherein land holding an area of 3-14-0 bighas is displayed to be sold for a sale consideration of Rs.2,40,317/- Consequently, the market value withrespect to one bigha is held in a sum of Rs. 64,950/- However, for determining whether imputation of reliance thereupon was legally tenacious, it is imperative to bear in mind whether the aforesaid land borne in Ext.PA, satiating the twin parameters. (a) its standing located in close proximity to the lands brought to acquisition (b) the execution of sale deed comprised in Ext.PA occurring in close proximity vis.a.vis the apposite notification whereunder the acquired land(s) were hence brought to acquisition.

2. With PW-1 and PW-2 respectively in their testifications communicating that the location whereon the land, borne in Ext.PA is located, is in close proximity to Chak-Bodhna, wherein the acquired land is located also theirs deposing that no sale deed with respect to the lands occurring in Chak-Bodhna existing on record, enhances an inference, especially when the aforesaid testifications borne in their respective examinations in chief, remained unshattered during the course of theirs being subjected to an exacting cross-examination, that hence with the owners satisfying the legally enjoined parameter of lands borne on Ext.PA being located in close proximity to the lands brought to acquisition, hence imputation of reliance thereupon being tenable.

3. Be that as it may, the sale deed comprised in Ext.PA is evidently executed on 22.02.1989 whereas the notification whereunder the apposite lands of the land owner(s) were brought to acquisition, is issued almost 10 years thereafter. Consequently, with execution of Ext.PA occurring much prior to the issuance of the apposite notification, whereunder the lands of the land owners were brought to acquisition, hence when obviously some escalation is bound to occur with respect of the price of lands held in Chak Bodhna or in Chak-Chopal, “whereas” in respect thereof, no claim was espoused by the land owners either before the learned Reference Court nor before this Court, hence the Court is constrained to not escalate the market value of the lands borne in Ext.PA, for hence enhancing compensation amount determined under the impugned award, rather this Court is constrained to conclude that hence with the land owners, evidently satisfying the parameter(s) of proximity occurring inter se execution of Ext.PA vis.a.vis issuance of the apposite notification, in sequel, reliance upon Ext.PA is also tenable.

4. The learned Additional District Judge, Shimla while pronouncing the award in Land Reference Petition No.17-S/4 of 1999 wherefrom the instant appeal has arisen, had as displayed by a incisive perusal of the relevant rendition also as evincible from the evidence, as

exists hereat, meted reverence to all the relevant factors enjoined to be borne in mind whereupon he allowed the reference petition preferred therebefore by the aggrieved landowners, wherein they assailed the insufficiency of the compensation amount as assessed qua their lands by the Land Acquisition Collector. Moreover, in the learned Addl. District Judge, meteing deference to the relevant evidentiary material while assessing compensation qua the lands of the aggrieved land owners, he has hence not wandered astray from the trite principles of law.

5. The reliance as placed by the learned Reference Court upon the relevant material in display of the lands of the landowners as brought to acquisition holding the monetary value as enumerated therein, also does not suffer from any fallacy arising from his infracting the relevant parameters held in judicial pronouncements qua the relevant material as stood relied upon, holding vis-à-vis the lands brought to acquisition (a) proximity from time angle and (b) proximity from location angle vis-à-vis the land brought to acquisition. Consequently, the reliance as stood placed by the learned Addl. District Judge, on the relevant material pronouncing upon the market value borne by the land(s) of the landowners, as brought to acquisition hence does not suffer from any inherent fallacy.

6. The learned Addl. District Judge had interfered with the award rendered by the learned Land Acquisition Collector wherein he had assessed varying rates of compensation qua contradistinct categories of land. Contrarily, the learned Addl. District Judge had assessed uniform rates of compensation amount qua diverse categories of land. In the learned Addl. District Judge assessing uniform rate of compensation qua diverse categories of land, hence his proceeding to set-aside the award of the Land Acquisition Collector concerned, who had assessed diverse rates of compensation, for contradistinct categories of land, he had anvilled his relevant assessment upon a verdict of this Court rendered in a case titled as Gulabi Vs. State of H.P., AIR 1998 HP (DB), wherein it is mandated qua uniform rates of compensation being assessable qua lands brought to acquisition, irrespective of their varying classifications, conspicuously when the purpose qua the lands as stand brought to acquisition is common to each category of land. In aftermath, when the purpose for acquiring the lands of the land owners is common to varying categories of lands hence contradistinctivity in their respective classification(s) also the contradistinctivity in their monetary, hence pales into insignificance. In sequel, the assessment of a uniform rate of compensation for all categories of lands is both just and expedient.

7. Consequently, the award of the learned Additional District Judge, Shimla, in Land Reference Petition No.17-S/4 of 1999 assessing a uniform rate of compensation qua diverse categories of land does not suffer from any infirmity.

8. The submission addressed before this Court by the learned Deputy Advocate General that the learned Reference Court in infraction of the apposite Harbans Singh's Formula, on application whereof, the Collector concerned had correctly assessed Rs.14,820/- as compensation with respect to the apple plants existing on the acquired land, hence assessing compensation of Rs.1,34,380/- in respect thereto, infraction whereof constraining this Court to, to the above extent, modify the impugned award, is rejected for the reason that (a) the claimant has examined PW-4 Prem Singh who, had for the reason that the aforesaid formula was prepared in the year 1966 whereas with immense time elapsing since then upto the relevant lands being acquired hence testifed its entailing an obvious escalation to occur in the relevant rates prescribed in the aforesaid formula besides with PW-4 Sh.Prem Singh, testifying that the fruit bearing trees existing on the acquired land warranting escalation of compensatory rates held in respect thereto, since the coming into being of Harbans Singh's Formula upto the date of acquisition of land. Consequently, the unrebutted deposition of PW-4 Prem Singh is accepted also hence the relevant assessment of compensation made on its anvil, warrants no interference.

9. In sequel, the instant appeal is dismissed. All pending applications also stand disposed of. No costs.

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

State of Himachal Pradesh .....Petitioner
Versus
Baldev Parkash and another .....Respondents.

Cr. Appeal No. 610 of 2008
Decided on : 17/05/2017

Indian Penal Code, 1860- Section 323, 380, 452 and 506 read with Section 34- Complainant and accused were running shops in Chintpurani adjacent to each other – the accused, his son and servant entered into the shop of complainant and gave beatings to the complainant and his son- the accused also removed Rs.3,000/- from his cash box - the accused were tried and convicted by the Trial Court- an appeal was preferred, which was allowed- held that independent witnesses were not associated by the prosecution and interested witnesses were associated, which made the prosecution case suspect – the recovery of stick was not made pursuant to any disclosure statement and cannot be relied upon- recovery of the cash was not established – Appellate Court had rightly reversed the judgment- appeal dismissed.(Para-9 to13)

For the petitioner: Mr. Vivek Singh Attri, Dy. Advocate General.
For the Respondents: Mr. Ajay Kumar, Sr. Advocate with Mr. Dheeraj Vashist, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal stands directed against the judgement recorded by the learned Sessions Judge, Una, whereby he reversed the findings of conviction pronounced upon the accused by the learned Addl. Chief Judicial Magistrate, Amb.

2. The brief facts of the case are that the complainant lodged a report with the police to the effect that he is running a Parshad shop in main bazaar, Chintpurni. Accused Baldev Parkash also runs a shop adjacent to his shop. On 14.10.2002 at about 7.30 am, complainant Mehar Chand and his son Rajiv Sharma opened their shop. At about 1.30 p.m accused Baldev Parkash, his son Ganesh Dutt and his servant Vinod Kumar entered the shop of Mehar Chand armed with sticks and gave beatings to Mehar Chand and Rajiv Sharma. Rajiv Sharma suffered injuries on his head and Mehar Chand also suffered injuries on his person. According to the complainant, accused Vinod Kumar also removed Rs.3000/- from his cash box in the shop. It is also asserted that they were rescued by Subhash Chand and Rinku. The case was investigated by HC Rachhpal Singh who after completing all codal formalities and on conclusion of the investigation into the offences, allegedly committed by the accused, prepared the challan and filed it in the Court.

3. A charge stood put to the accused by the learned trial Court for theirs committing offences punishable under Sections 323, 380, 452 and 506 read with Section 34 IPC to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 11 witnesses. On closure of prosecution evidence, the statements of the accused under Section 313 of the C.P.C., were recorded in which they pleaded innocence and claimed false implication. They did not choose to lead any defence evidence.

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

6. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned Sessions Judge, standing not based on a proper appreciation of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation by it of the material on record. Hence, he contends qua the findings of acquittal warranting reversal by this Court, in the exercise of its appellate jurisdiction and theirs standing replaced by findings of conviction.

7. The learned counsel appearing for the respondents has with considerable force and vigour contended qua the findings of acquittal recorded by the Sessions Court standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

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

9. The testifications' of the complainant/victims and also of the eye witnesses to the ill-fated occurrence, corroborates the version qua the occurrence embodied in F.I.R. Ext.PW-8/A. Their respective testifications' hence do not suffer from any taint of their improving upon or embellishing their respective previous statements recorded in writing rather when their testifications are also bereft of any stains of any inter se contradictions occurring in their respective testifications, hence their testifications warranted imputation of credence. However, the learned Sessions Judge, had dispelled the vigour of their testifications, on the ground of the Investigating Officer concerned "not" joining as eye witnesses to the occurrence, the owner(s) of shopslocated in close proximity to the site of occurrence, rather his joining PW-1 and PW-4, as purported eye witnesses to the occurrence, whose testimonies palpably acquire a taint of interestedness, arising from the fact of theirs holding acquaintance with the complainants/victim. However, the aforesaid reason as assigned by the learned Sessions Judge for pronouncing a judgement of acquittal upon the accused, may not acquire any vigour, as mere interestedness of any ocular witnesses to the occurrence, would not per se constrain a conclusion that their relevant testified ocular versions, hence warranting disimputation of credence "unless" the defence had during the course of subjecting each of them to cross-examination "unearthed" from their echoings, with respect to theirs being unavailable at the site of occurrence. However, despite the aforesaid witnesses standing subjected to the rigour of an exacting cross-examination, their respective versions qua the occurrence revealed in their respective examinations-in-chief, remained unshattered. Consequently, the defence failed to establish that they were unavailable at the site of occurrence, at the relevant time of its taking place. Hence, onscore aforesaid, it is difficult to accept the reasons assigned by the learned Sessions Judge that their respective versions qua the occurrence is incredible, arising from the factum of theirs holding leanings vis-à-vis the accused and that hence the Investigating Officer concerned was enjoined, to, by associating as eye witnesses thereto, the owners of shops located in proximity to the site of occurrence, who however would have lent a truthful impartisan ocular version qua the occurrence, omission whereof begetting an apt inference qua the Investigating Officer conveying in his apposite report, a coloured unbelievable version qua the occurrence. However, the genesis of the prosecution version, does beget a stain of untruthfulness, significantly when one of the co-accused Baldev Prakash is evidently a witness in a case registered under Section 376 IPC against the complainant PW-1. The aforesaid evident fact of co-accused Baldev Prakesh standing cited as a witness against the victim/complainants "does" when construed alongwith the Investigating Officer, omitting to associate as eye witnesses to the occurrence, shopkeepers holding commercial establishments in close proximity to the site of occurrence rather his associating PW-2 and PW-4 as purported eye witnesses to the occurrence, who however hold leanings via-a-vis the victims/complainant, arising from the factum of theirs holding a close acquaintance with them, hence garners an inference that a stained/coloured version qua the occurrence being embodied in the apposite F.I.R. Also a stained version qua it standing testified by the victims/complainant also by purported eye witnesses thereto who deposed as PW-2 and PW-4 in respect thereto.

10. The learned Deputy Advocate General has contended that the MLC borne on Ext.PW-9/A, exhibit whereof stands proven by PW-9 also with the latter in his testification deposing that the injuries reflected therein being causeable by user of Dandas, recovered under Memo Ext.PW-1/B, hence ought to constrain a conclusion that dehors infirmity, if any, gripping, the testifications of the victims besides of PW-2 and PW-4, yet the prosecution succeeding in establishing the charge.

11. The mere factum of proof of injuries comprised in Ext.PW-9/A by the latters' author also his testifying that their occurrence on the respective persons of the victims/complainant being sequelable by user of Danda Ext.PW-1/B, does not per se enhance any conclusion that the prosecution has succeeded in proving that dandas Ext.P-1 and P-2, were used by co-accused concerned, for delivering blows on the respective persons of the victims/complainant. Contrarily with for reasons assigned above, the effect of the inference aforestated that the testifications of PW-2 and of PW-4 acquire a pervasive taint of veracity, is construed with the prosecution also "not" for reasons assigned hereafter hence proving the factum of recovery of Ext.P-1 and Ext.P-2 the respective Dandas besides recovery of stolen cash worth Rs.3000/-, being effectuated in a legally efficacious manner, would rather boost an inference that the prosecution has contrived to falsely implicate the accused (a) The recitals embodied in Ext.PW-1/B, make a disclosure qua the complainant handing over dandas to the Investigating Officer concerned. However, therein there is no reflection qua the date whereon he handed over Dandas to the Investigating Officer rather at the end of Ext.PW-1/B the Investigating Officer makes an endorsement qua the aforesaid mode of handing over the Dandas occurring on 14.10.2002. Since Ext.PW-1/B was throughout, in the custody of the Investigating Officer concerned hence, he at the end of Ext.PW-1/B, appears to have recorded an endorsement qua his preparing Ext.PW-1/B, on 14.10.2002, whereas for obtaining a firm conclusion therefrom qua its being prepared on 14.10.2002 by the Investigating Officer concerned, an apposite recital was enjoined to be embodied therein also the signatories thereto were enjoined, to, under their respective signatures occurring therein make an endorsement qua its standing prepared on 14.10.2002. However, the aforesaid relevant endorsements do not visibly occur in Ext.PW-1/B. Hence, it is to be concluded that the Investigating Officer concerned, through sheer contrivance introducing Dandas as purported weapons of offence, with user whereof, the co-accused inflicted injuries on the person of victims/complainant. Moreso when with respect to the date of preparation of Ext.PW-1/B neither PW-1 nor PW-4 makes any unequivocal apposite communication. (b) Even otherwise, Dandas Ext.P-1 and P-2 are the incriminating pieces of evidence against the accused respondents. Normally recovery of any weapon of offence, has to occur within the domain of Section 27 of the Indian Evidence Act, provisions whereof stand extracted hereinafter:

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

wherein for any effectuation of recovery of any weapon of offence at the instance of the accused by the Investigating Officer concerned to hence acquire statutory vigour, enjoins the Investigating Officer concerned to, preceding his making the relevant recoveries, record a disclosure statement of the accused concerned. However, the Investigating Officer neither within the precincts of Section 27 of the Indian Evidence Act recorded a disclosure statement, of any of the accused concerned nor he proceeded to subsequent thereto effect the relevant recoveries. Contrarily he, for reasons aforestated inefficaciously/fictitiously prepared Ext.PW-1/B, by recording a recital therein qua the victims/complainants handing over Dandas to him. The aforesaid incriminating piece(s) of evidence against the accused, stand canvassed by the learned Deputy Advocate General to be not warranting disimputation of credence nor also it being open for this Court to discard their probative vigour, as the accused after using them left them at the site of occurrence, whereafter they fled therefrom. Hence, he contends that the victims/complainant proceeded to

handover the dandas to the Investigating Officer concerned. He also proceeds to contend that since the Investigating Officer concerned 'not' within the domain of Section 27 of the Indian Evidence Act effectuating their recovery hence there was no legal necessity cast upon him to obey its mandate nor hence on its mandate standing infringed, would give any capital to the accused. However, the aforesaid submission warrants rejection, as the aforesaid manner of effectuation of recovery of purported weapon(s) of offence, appears to be made by the Investigating Officer concerned, by his, actively circumventing themandate of the Section 27 of the Indian Evidence Act, whereas with the aforesaid weapons of offence comprising the incriminating pieces of evidence also when with respect of recovery thereof apt provisions are encapsulated in the relevant Indian Evidence Act, hence he was enjoined to for dispelling arousal of suspicion with respect to the relevant recovery, hence revere the mandate thereof rather than his proceeding to engineer an ingenious method, to proceed to make recovery of weapon(s) of offence in the manner he did under memo Ext.PW-1/B. Consequently, with this Court concluding that recovery of Dandas not holding any vigour, it is apt to conclude that the prosecution has failed to establish that the Dandas were used by the accused concerned, to inflict blows on the victims/complainants.

12. Be that as it may, the vigour of Ext.PW-1/D whereunder recovery of cash holding worth Rs.3000/- stood purportedly effectuated, recovery whereof is disclosed to occur on co-accused Baldev Parkash handing over the sum of Rs.3000/- at police chowki, is also to be tested. In case this Court concludes that Ext.PW-1/D is fictitiously prepared, then the entire genesis of the prosecution version comprised in F.I.R. would stand shattered. Ext.PW-1/D does not echo the date of its preparation. The accused came to be arrested on 14.10.2002 hence when during the course of the custodial interrogation of the accused concerned, the Investigating Officer concerned could well have elicited a confession, with respect to his hiding or concealing a sum of Rs.3000/-, allegedly stolen by him from the cash box of the victim/complainant yet he appears to have not elicited the aforesaid confession from the accused, rather he appears to have engineered the preparation of Ext.PW-1/D. Consequently, it is difficult to accept the communications occurring therein, especially with co-accused concerned being arrested on the date of occurrence, yet his proceeding to walk upto the Chowki and handing over Rs.3000/- to the Investigating Officer. In aftermath, it appears that with critical inveracity gripping the preparation of Ext.PW-1/D, no reliance can be placed thereupon.

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

14. In view of the above, I find no merit in this appeal, which is accordingly dismissed. In sequel, the impugned judgement is affirmed and maintained. Record of the learned trial Court be sent back forthwith.

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

Brij Lal (since deceased) through his legal heirs ....Appellants/Plaintiffs.

Versus

Satya Devi and others ....Respondents/Defendants.

RSA No. 142 of 2008.
Reserved on : 09.05.2017
Decided on : 18th May, 2017.

Specific Relief Act, 1963- Section 34 and 38- Plaintiff filed a civil suit pleading that he had become owner by way of adverse possession- the defendants were interfering with the suit land- hence, the suit was filed for seeking declaration and injunction- the suit was decreed by the Trial Court- an appeal was filed, which was allowed and the decree of the Trial Court was set aside- held in second appeal that the plea of adverse possession can only be taken in defence and a suit cannot be instituted on the basis of the same- the Appellate Court had rightly allowed the appeal – appeal dismissed.(Para-7 to11)

For the Appellants: Mr. T.S. Chauhan, Advocate.

For the Respondents: Mr. Ajay Kumar, Senior Advocate with Mr. Dheeraj K. Vashist, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal stands directed by the appellants/plaintiffs against the verdict recorded by the learned First Appellate Court, whereby, it reversed the judgment and decree of the learned trial Court, whereby, the latter Court had decree the suit of the plaintiffs.

2. Briefly stated the facts of the case are that a suit for declaration and permanent prohibitory injunction was filed by the plaintiff against the defendants and proforma respondent on the allegations that on 15.06.1973, he had encroached upon the suit land measuring 3-9 bighas, comprising khasra No.1172/1043, 1168/1041, 1162/1038, Khata No. 185/155, Khatoni No. 221, situated in village Changer Talai, Pargna Bachhretu, Tehsil Jhandutta, District Bilaspur, H.P. by cultivating it, cutting grass from its portion and putting thorny bushes on its boundary. Since then, he has been in continuous, open and peaceful possession of it and that his possession was never objected by the defendants or anybody else, who were in the knowledge of the same. In this way, he has acquired the right of ownership by virtue of adverse possession. It was further averred that on 30.07.2000, the defendants openly threatened to dispossess him from the suit land despite repeated requests, but of no avail. Against this back drop a prayer was made for declaration that the plaintiff has been owner in possession of the suit land by virtue of adverse possession and that revenue entries showing the defendants to be owner(s) in possession of the same are wrong and further to restrain the defendants permanently from causing interference, in any manner, in the possession of the plaintiff over the suit land.

3. The defendants contested the suit and filed written statement, wherein, they have taken preliminary objections qua maintainability of the suit, cause of action, locus standi, estoppel and valuation of the suit. On merits, it was denied that the plaintiff has been in possession of the suit land. In fact, the suit land has been in the ownership and possession of the defendants and that the revenue entires are correct as per factual position. It was also denied that on 15.06.1973, the plaintiff encroached upon the suit land. Since, he has not been in possession of the suit land, no question arises of his having acquired title by way of adverse possession.

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

1. Whether the plaintiff has become owner of the suit land by way of adverse possession, as alleged?OPP.

2. Whether revenue entries in the name of defendants are wrong, as alleged?OPP

3. Whether the plaintiff is entitled for the relief of declaration?OPP.

4. Whether the plaintiff is entitled for the relief of permanent prohibitory injunction, as prayed for ?OPP.

5. Whether the suit is not maintainable, as alleged ?OPD
6. Whether the plaintiff has no cause of action, as alleged?OPD
7. Whether the plaintiff is estopped from filing the suit?OPD
8. Whether the suit has not been properly valued, as alleged?OPD.
9. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiffs/appellants herein. In an appeal, preferred therefrom by the defendants/respondents before the learned First Appellate Court, the first Appellate Court allowed the appeal and reversed the findings recorded by the learned trial Court.

6. Now the plaintiffs/appellants herein have instituted the instant Regular Second Appeal before this Court assailing the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on 11.08.2008, this Court, admitted the appeal instituted by the plaintiffs/appellants against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial question of law:-

a) Whether the impugned judgment and decree is a result of misreading and misinterpretation of evidence and statements of PW-1 and DW1?

Substantial question of Law No.1.

7. The plaintiff had averred in the plaint that he had commenced his possession upon the suit land on 15.06.1973. However, absence of pointed pleadings, cast in the plaint nor elucidations occurring in the plaint qua the true owners against whom the plaintiff rears an espousal that he, with an animus possidendi commencing possession of the suit land in the year 1973, besides evidence in respect thereto being also amiss, constrained the learned First Appellate Court to draw a conclusion, that with the "trite rubric", for the plaintiff obtaining success in his plea, of his since 1973 upto the date of the institution of the suit, with an animus possedendi holding possession of the suit land, hence, his acquiring prescriptive title thereto, "comprised" in the factum of his pleading besides proving the true owner against whom his apposite assertion of acquisition of title by adverse possession is espoused in the suit to be hence accomplished, whereas, it evidently remaining unaccomplished, that his suit warranting dismissal. The aforesaid conclusion formed by the learned trial Court does not suffer from any fallibility, conspicuously, when the length and duration of possession of the plaintiff upon the suit land is per se not sufficient, to erect a firm conclusion that hence the plaintiff holds possession of the suit land with the requisite animus possedendi besides when the plaintiff's endeavour to seek a declaratory decree, of his ripening, his title by prescription, arising from his completing the statutorily enjoined period of time, commencing from 1973 upto the institution of the suit "also enjoined" him to with specificity plead the name of the true owner against whom, he rears his pleadings, "whereas", want of pleadings in respect thereto beside concomitantly non adduction of evidence in respect thereto, necessarily foments an inference that the essential rubric aforesaid standing not pleaded nor proven by cogent evidence. In aftermath, the dismissal of the suit of the plaintiff by the learned First Appellate Court does not warrant any interference.

8. The learned trial Court, had depended upon the testimony of DW-1 Smt. Satya Devi, wherein,she had admitted the factum of the plaintiff holding possession of the suit land from the year 1973, hence, it decreed the suit of the plaintiff. However, the learned First Appellate Court, had concluded that her testimony does not garner the necessary strength, for enhancing the apposite plea of the plaintiff, significantly, when she was in the year 1973 not married to Ram Prakash, hence, her testimony that the plaintiff held possession of the suit land in the year aforesaid, does not beget any inference qua its holding any credibility. Also assumingly, if the testimony of DW-1 that the plaintiff commenced possession of the suit land in the year 1973 is credible, yet credibility thereof stands eroded by the fact, of a display occurring in her testimony that the plaintiff after taking possession of the suit land in the year 1973, his holding possession thereof only for two years, whereafter the possession of the suit land being

held by the defendants. The latter part of the testification of DW-1, garners support from Ex.PA, exhibit whereof is the jamabandi with respect to the suit land, wherein a display occurs of the defendants/respondents being owners-in-possession of the suit land. The aforesaid display occurring in Ex. PA, enjoys a presumption of truth, presumption of truth whereof enjoyed by Ex.PA though is rebuttable, yet no evidence either cogent or of immense strength, stands adduced by the plaintiff, to dislodge the prima facie truth enjoyed by the relevant display occurring in Ex. PA. Consequently, with the pleadings of the plaintiff being wholly astray from the basic rubric, of the names of the owners against whom the plea of adverse possession is asserted with respect to the suit land, warranting occurrence therein nor any evidence in respect thereto standing adduced besides when the oral testification of the plaintiff's witnesses, emanates from persons whose lands are located remotely from the disputed suit property also when both are unable to name the true owner of the suit land, hence, oral testifications of the plaintiff's witnesses is extremely fragile, for constraining this Court to conclude that theirs hence dislodging the presumption of truth enjoyed by the relevant displays occurring in Ex.PA.

9. Be that as it may, the rearing of the plea of adverse possession by the plaintiff with respect to the suit land also his endevouring to prove that by elapse of the statutorily prescribed period commencing from 1973 upto the date of institution of the suit, his prolonged possession ripening into prescriptive title vis-a-vis the suit land, is a plea which has been pronounced in a catena of verdicts rendered by the Hon'ble Apex Court, to be a plea unavailable for espousal by the plaintiff rather it being a plea available for espousal only by the defendant. Consequently, with the plaintiff standing interdicted by a catena of judicial verdicts to rear a plea qua his acquiring title by adverse possession with respect to the suit land, hence, thereupon, also the suit of the plaintiff warrants dismissal.

10. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court is based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court has not excluded germane and apposite material from consideration. Consequently, the substantial question of law is answered in favour of the defendants/respondents and against the plaintiff(s)/appellants.

11. In view of above discussion, the present Regular Second Appeal is dismissed. In sequel, the judgment and decree rendered by the learned first Appellate Court in Civil Appeal No. 6 of 2007 is maintained and affirmed. All pending applications also stand disposed of. No order as to costs. Records be sent back.

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

Kiran Kumar and others .....Appellants/Plaintiffs.

Versus

Sh. Mohd. Ansari (since deceased) through his legal heirs and others .....Respondents/Defendants.

RFA No. 109 of 2004.
Reserved on : 19th April, 2017.
Decided on :18th May, 2017.

Specific Relief Act, 1963- Section 5- Plaintiffs filed a civil suit for possession pleading that A, the previous owner, had executed a Will in favour of his grandsons S and R, defendant No.2- they sold the property to V after the death of A and were left with no share - a gift deed was executed by defendant No.2 in collusion with S- V died in a motor accident and was survived by the plaintiffs- the defendants pleaded that the sale deed was fictitious, as the property was mortgaged with H.P. Financial Corporation, which sold the land on failure to pay the mortgaged amount to

D – D sold the property to S and R, as per the agreement- the gift deed was validly executed – the suit was dismissed by the Trial Court– held in appeal that S had sold 17 Biswas of land to V as an owner and as power of attorney holder of R– R and S were left with the land- the subsequent gift deeds and sale deeds were regarding the remaining portion of the land- appeal dismissed.

(Para-9 to 13)

For the Appellants: Mr. Rajnish K. Lal, Advocate.

For Respondents No.1(a) to 1(c): Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate.
Other respondents already proceeded against ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiffs/ appellants herein instituted, a suit against the defendants, claiming therein a decree, for possession of land comprised in khasra Nos.691, 692, 693, 694 and 696, measuring 783.39 square meters, situated in village Shamsherpur, Paonta Sahib as well as a decree for damages of Rs.1,80,000/- with costs of the suit. The suit of the plaintiffs stood dismissed by the learned trial Court. The plaintiffs/appellants standing aggrieved by the impugned verdict, hence, concert to assail it, by preferring an appeal therefrom before this Court.

2. Briefly stated the facts of the case are that one Amar Nath was the owner of the suit property at village Shamsherpur, Paonta Sahib and also at other places. Sh. Amar Nath was having one son Shri Ram Parkash and a daughter. Sh. Amar Nath executed his last will on 31.3.1984, which was duly registered with Sub Registrar, Dehradun on 3.4.1984, vide which he bequeathed his property in favour of his grand sons Suresh Kumar and Ramesh Kumar, defendant No.2. After the death of Shri Amar Nath, necessary mutation of inheritance was attested in favour of Suresh Kumar and Ramesh Kumar. After the attestation of mutation, both the brothers, namely, Suresh Kumar and Ramesh Kumar started selling the property. Ramesh Kumar, defendant No.2 has appointed Suresh Kumar as his General Power of Attorney and he authorised him to make any alienation by way of sale or otherwise. Ramesh Kumar and Suresh Kumar sold the land comprised in khasra No.221/144/1, measuring 17 biswas, situated in village Shamsherpur, Paonta Sahib through, registered sale deed of 25.4.1987 in favour of Smt. Veena Sharma wife of Suresh Kumar for consideration of Rs.15000/- and also delivered the possession at he spot. Smt. Veena Sharma purchased the property as shown in the sale deed and tatima attached with the sale deed. Defendant No.2, Ramesh Kumar knowing that his brother Suresh Kumar already sold 17 biswas of land in favour of Smt. Veena Sharma, taking undue advantage of non incorporation of the sale deed in the revenue record, procured a gift deed dated 11.11.1987, which was duly registered in the office of Sub Registrar, Paonta Sahib. On the basis of which Suresh Kumar obtained 9 biswas of land from Suresh Kumar. According to the plaintiffs Suresh Kumar and Ramesh Kumar had already sold the entire 17 biswas of land and nothing was left, but he got the gift deed created and registered on 11.11.1987. The gift deed has no value in the eye of law as Suresh Kumar was not in possession of 9 biswas of land, hence, he is not entitled to transfer the same. The plaintiffs have further alleged that the defendant No.2 in collusion with Suresh Kumar committed fraud by executing the gift deed, which is of no consequence. Smt. Veena Sharma died in a motor vehicle accident on 18.11.2000 and the plaintiffs have succeeded to her estate. After death of Veena Sharma, the plaintiffs have come to know about the fraud which the defendant No.2 has committed in collusion with Suresh Kumar. Defendant No.2 executed a sale deed of 16.03.1988 in favour of defendant No.1 for 10 biswas of land for a total consideration of Rs.49,000/- Another sale deed of 17.03.1988 was also executed in respect of remaining 7 biswas of land in favour of one Ayaz Ahmed for total consideration of Rs.20,000/-. According to the plaintiffs, defendant No.1 as well as Ayaz Ahmed were knowing that the land has already been purchased by Smt. Veena Sharma, who was in possession, hence, the subsequent sale deeds in favour of Ayaz Ahmed and defendant No.1 are the result of fraud. Smt. Veena Sharma, who purchased the suit property remained in possession through out. Ayaz

Ahmed has released 7 biswas of land in favour of defendant No.1 The plaintiffs have further alleged that defendant No.1 has taken the possession of the suit property and the plaintiffs are not deprived from its profit and they are entitled for damages at the rate of Rs.5000/- per month for the last 3 years and they claimed the damages to the tune of Rs.1,80,000/-. The plaintiffs have further alleged that after the death of Veena Sharma, they inherited her estate and they are entitled to seek relief. Hence, the suit.

3. The original defendants contested the suit and filed separate written statements. Defendant No.1 in his written statement taken preliminary objections inter alia, maintainability, bad for non joinder and mis joinder of necessary parties, locus standi, estoppel, collusion inter se plaintiffs and defendant No.2 and that the suit is liable to be dismissed with special costs under Section 35-A of the Code of Civil Procedure and cause of action. On merits, defendant No.1 has admitted the contents of paras No.1 and 2 of the plaint as also admitted the part of para No.3 of the plaint. It is averred that neither defendant No.2 nor Suresh Kumar were the owners in possession of the suit property and thus they are ot entitled to execute the General Power of Attorney. It is further alleged that the sale deed of 24.4.1987 is fictitious which was never acted upon as the property of S/Shri Suresh Kumar and Ramesh Kumar was mortgaged with H.P. Financial Corporation in July, 1977 for a loan of Rs.49,000/-, which they have taken for installing oil mill in the name and style of M/s Bharthari Oil Mills, Shamsherpur. Both Ramesh Kumar and Suresh Kumar, failed to pay the loan installments, as such, the HPFC took over the suit property and auctioned the same, which was pruchased by one Daljeet Kumar of Sehjadpur House, Ambala City, Haryana FOR Rs. One lac. The property was resold by Daljeet Kumar to Suresh Kumar and Ramesh Kumar as per agreement executed. According to defendant No.1, as Suresh Kumar was not having valid title on 26.4.1987, hence, he was not entitled to execute any document in favour of Veena Sharma. He has also denied the raising of any construction of residential house by Smt. Veena Sharma, as is evident from the loan discharge certificate dated 10.03.1987 and other documents executed by Daljeet Kumar on 4.12.1987. Defendant No.1 has denied that the gift deed dated 11.11.1987 is illegal and wrong which was allegedly executed by Suresh Kumar in favour of Ramesh Kumar. They have also denied the succession of Veena Sharma by the plaintiffs. Defendant No.1 has admitted that defendant No.2, has executed the sale deed in favour of Mohd. Ansari, defendant No.1 and another sale deed of 7 biswas executed in favour of Ayaz Ahmed. He has admitted that Ayaz Ahmed has relinquished his rights in the property measuring 7 biswas in favour of defendant No.1, as per release deed dated 31.10.1997. All the plaintiffs including Veena Sharma and defendant No.2 were living in separate premises known as S.K. Steel. The defendant No.1 has purchased the suit property after making necessary inquiries from the Halqua Patwari, who issued the non encumbrance certificate which was duly countersigned by the Tehsildar, Paonta Sahib. The plaintiffs, Veena Sharma, Suresh Kumar and Defendant No.2 at that time did not disclose any alleged defect in the title of S/Shri Suresh Kumar and Ramesh Kumar. He has denied the remaining contents of the plaint and prayed for the dismissal of the suit.

4. Defendant No.2 has filed separate written statement supporting the case of the plaintiffs. He has stated that gift deed was executed by Smt. Veena Sharma in his favour to the extent of 9 biswas. The gift deed was duly registered in the office of Sub Registrar, Paonta Sahib. The gift deed of 9 biswas land was given by Smt.Veena Sharma to him out of her free will on account of the prevailing circumstances of the family. He has admitted that he sold 10 biswas of land to defendant No.1 and 7 biswas to Shri Ayaz Ahmed as per sale deed dated 16.03.1988 and 17.03.1988 respectively. According to him, he acquired 9 biswas of land through gift deed which was executed by Veena Sharma in his favour and remaining 8 biwas being his share in the property. He has denied the remaining contents of the plaint and prayed for dismissal of the suit.

5. The plaintiffs/appellants herein filed replication to the written statement of defendant/respondent No.1, wherein, they denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the plaintiffs are entitled for the possession of suit property comprised in Kh. NO. 691 to 694 and 696, measuring 783.39 sq. meters situated in VillageShamsherpur, Tehsil Paonta Sahib, as alleged? OPP

2. Whether the sale deed executed by defendant No.2 in favour of defendant No.1is a result of fraud, if so, its effect?OPP

3. Whether the gift deed dated 11.11.1987 executed by Suresh Kumar in favour of Ramesh Kumar is a result of fraud and mis-representation, if so, its effect?OPP

4. Whether the suit is properly valued for thepurpose of court fees and jurisdiction?OPP

5. Whether the plaintiffs have no locus standi to file the present suit?OPD-1

6. Whether the suit is bad for non joinder and mis-joinder of necessary parties?OPD-1

7. Whether the suit is barred by limitation?OPD-1

8. Whether the plaintiffs are estopped by their act, conduct and acquiescence to file the present suit?OPD-1

9. Whether the plaintiffs have no cause ofaction to file the present suit?OPD-1

10. Whether the defendant No.1 has become owner in possession of the suit property on the basis of sale deed executed by defendant No.2 on 4.12.1984 as alleged? OPD-1

11. Whether the defendant No.1 is bonafide purchaser of the suit property for valuable consideration, as alleged?OPD-1

12. Whether the defendant No.1 has become owner of the suit property by way of adverse possession?OPD-1

13. Relief.

7. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiffs/appellants herein.

8. Now the plaintiffs/appellants herein, have instituted the instant Regular First Appeal before this Court, for assailing the findings recorded by the learned trial Court in its impugned judgment and decree.

9. The pertinent issues whereon an adjudication is warranted are issues No. 2, 3, 11 and 12. In making a pronouncement upon the aforesaid issues, it is to be borne in mind, that under a general power of attorney executed by Ramesh Kumar, defendant No.2, the latter constituted one Suresh Kumar, as his attorney for making alienation(s) through sale deeds, of properties delineated therein. In sequel to the execution of a general power of attorney aforesaid, validity whereof remains unchallenged, Suresh Kumar under a registered deed of conveyance borne on Ex. P-1, alienated the suit property vis-a-vis one Veena Sharma, deed of conveyance whereof stood executed besides registered on 25.04.1987. However, despite the aforesaid alienation occurring under Ex. P-1, upon one Veena Sharma, Suresh Kumar subsequently proceeded to vis-a-vis Ramesh Kumar execute a gift deed, borne on Ex.P-4, purportedly with respect to the suit property also purportedly with respect to the property purportedly borne on Ex.P-1. Visibly, hence, one Suresh Kumar, the duly constituted general power of attorney of Ramesh Kumar, making under Ex. P-1 a purported valid/lawful alienation of the suit property vis-a-vis Veena Sharma, he was apparently barred to, subsequently with respect to the property carried in Ex.P-1, proceed to vis-a-vis Ramesh Kumar execute a gift deed, borne on Ex.P-4. However, Ex. P-4, would be construable to be gripped with a stain of invalidity, only when with

the property alienated thereunder also evidently standing borne in Ex.P-1. Whereas, in case the apt evidence carries a display, that the property alienated by Suresh Kumar, the duly constituted GPA of Ramesh Kumar, for the relevant purpose of his making alienations of their jointly held shares, in the undivided property borne in khasra number 221/144 " not" holding any affinity with the property previously alienated under Ex. P-1 or an incisive perusal of the relevant evidence making a disclosure that after the execution of Ex. P-1, an apt subtraction from the area jointly held by both in the undivided lands/properties, revealing, his yet holding a residual alienable interest therein, thereupon, gift deed borne on Ex. P-4 would not lose its validity. Moreover, concomitantly, the alienation effected by Ramesh Kumar under Ex. D-1 would also not lose its validity.

10. In determining the aforesaid facet, it is imperative to allude to the fact that under Ex.P-1, land borne on khasra No.221/144/1, measuring 17 biswas, stood alienated by Suresh Kumar, the duly constituted GPA of Ramesh Kumar vis-a-vis one Ms. Veena Sharma. The aforesaid alienation is not only with respect to his share in the aforesaid khasra number but also is with respect to the share therein of Ramesh Kumar. The aforesaid reflections borne in Ex. P-1 when considered with the fact of Suresh Kumar under Ex.P-4 "alienating" his 1/6 share held in an area measuring 2 bighas 13 biswas, borne on khasra No. 221/144 "to" his brother Ramesh Kumar besides the jamabandi appended to Ex.P-1, revealing that the total land borne on khasra number 221/144 is held in an area of 6 bighas 19 biswas, does visibly hold the effect of the share held by Suresh Kumar in khasra No.221/144, share whereof he alienated under Ex.P-1, hence, "not" comprising the one with respect to which he executed Ex.P-4. The reason for forming the aforesaid conclusion ensues from the fact of when at the time contemporaneous to the execution of Ex. P-1, on an apt subtraction being made vis-a-vis the total joint land held by both the aforesaid, land whereof finds its display in the jambandi appended to Ex. P-1, its revealing that yet a residual alienable interest therein vis-a-vis Suresh Kumar, hence, remaining intact, thereupon, there occurs no conflict inter se the land depicted in Ex. P-1 vis-a-vis the land depicted in Ex.P-4. Consequently, with no overlapping occurring vis-a-vis the land with respect to which Ex.P-1 stood executed inter se Suresh Kumar and Veena Sharma, vis-a-vis Ex. P-4, which stood executed by Suresh Kumar upon his brother Ramesh Kumar, hence, enhances an inference that both exhibits Ex. P-1 and Ex.P-4 holding binding force besides validity. Moreover, excepting bald pleadings with respect to occurrence of overlapping(s) of lands borne on Ex. P-1 and on Ex. P-4, no firm evidence to substantiate them stands adduced also the aforesaid inference as erected by this Court remains unconcerted to be repulsed by the appellants. Therefore, the pleaded factum probandum remain unproven.

11. Now, it is to be determined whether the alienation effected by Ramesh Kumar under Ex. D-1 on 16.3.1988 upon one Muhhamad Shafi Ansari, son of Shri Fakir Muhhamad Ansari is or not with respect to property borne on Ex.P-1, also it is to be determined whether the property alienated under Ex. D-1 by Ramesh Kumar vis-a-vis one Muhhamad Shafi Ansari (since deceased) is or is not in conflict with the recitals carried in Ex.P-4. Since, this Court has already determined that there occurs no concurrence with respect to the lands alienated respectively under Ex.P-1 and Ex.P-4, hence, reiteratedly this Court is enjoined to determine whether the execution of Ex.D-1 is with respect to land, wherein, the vendor thereof yet held a lawful alienable title. Ex.P-4 makes a disclosure that with respect to 1/6 share of Ramesh Kumar also with respect to 1/6 share of Suresh Kumar, the latter holding title upon land comprised in Khasra no.221/144. Now the aforesaid recitals borne in Ex.P-4 also find reflection in Ex. D-1. Consequently, with the enunciation(s) occurring at page -2 of Ex. D-1, displaying that the share in khasra No. 221/144 of Ramesh Kumar, standing constituted in an area of 17 biswas, when visibly do not suffer from any falsity nor suffers from theirs begetting conflict either with Ex. P-1 and with Ex.P-4. Conspicuously also with after execution of Ex. P-4, the residual alienable title constituted in an area of 17 biswas, continuing to remain vested in Ramesh Kumar, 17 biswas whereof stood alienated under Ex.D-1, hence, begets an inference that the alienation made under Ex. D-1 by Ramesh Kumar was with respect to land/property wherein he held a lawful alienable title. In aftermath, with Ramesh Kumar hence holding a ripened valid

title with respect to land measuring 17 biswas borne on khasra No. 221/144, he was capacitated to under a registered of conveyance borne on Ex. D-1, convey a valid title upon its vendee. The further corollary of the aforesaid, is that it not being either necessary to delve into evidence in display of defendant No.1 (since deceased) being a bonafide purchaser for a valuable consideration of the properties borne on Ex. D-1 nor also it is imperative to pronounce an adjudication qua probative worth thereof.

12. The learned counsel appearing for the appellants has proceeded to make a submission, that with one Daljeet Kumar purchasing the suit property, in an auction held by the Himachal Pradesh Financial Corporation, auction whereof was conducted for facilitating the H.P. Financial Corporation to realize a loan of 49,000/- which Ramesh Kumar and Suresh Kumar, borrowed therefrom, for installing an Oil Mill in the name of M/s Bharthari Oil mills, Shamsherpur, hence, unless evidence stood adduced in display of Daljeet Kumar, making under a registered deed of conveyance, a lawful alienation thereof also unless firm evidence stood adduced, in display of the alienation made by Daljeet Kumar upon Suresh Kumar and Ramesh Kumar, occurring prior to the execution of Ex. P-1, Ex.P-4 and Ex. D-1, thereupon, would render the latter exhibits to lose their validity. To carry forward his submission, he alluded to Ex. Px also to Ex. D-5, exhibits whereof do not reflect that one Daljeet Kumar, the owner of the suit property "making" under a registered deed of conveyance executed vis-a-vis Ramesh Kumar and Suresh Kumar, "any alienation" in respect thereto, hence, Ex. P-4 and Ex. D-1 executed subsequent thereto, do not prima facie enjoy their apposite legal solemnity. The aforesaid submission, though holding pin pointed accuracy yet before imputing forthright vigour thereto, it is also imperative to allude, to Ex. Px. Ex. Px stood executed on 10.07.1986 by Daljeet Kumar, he therein articulates qua his not only receiving the entire sale consideration from Suresh Kumar and Ramesh Kumar, with respect to the suit property, besides he also echoes therein qua his handing over possession thereof to the aforesaid. Since, the authorship of Ex. Px, remains not contested, consequently all the displays occurring therein hold tenacity. In sequel, the counsel for the appellant contends that even if the aforesaid Daljit Kumar not contesting his authoring Ex. Px, contest whereof would be comprised in his instituting a suit against Suresh Kumar and against Ramesh Kumar with respect to the property reflected therein, whereas evident, absence of institution of any apposite suit by aforesaid Daljeet Kumar, cannot facilitate the defendants to mobilize any strength therefrom, qua hence the statutory benefit of the doctrine of part performance, embodied in the provisions of Section 53-A of the Transfer of Property Act (hereinafter referred to as the Act), being ensuable vis-a-vis them, especially when it is available for its apt leveraging by the defendants only as a shield or in defence. Reiteratedly, its benefit is hence not ensuable vis-a-vis Suresh Kumar and Ramesh Kumar, significantly when they evidently do not rear it, in defence in a suit instituted against them by Daljeet Kumar. Provisions of Section 53-A of the Transfer of Property Act stand extracted hereinafter:-

> "**53A Part performance**.- Where any person contract to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,
>
> and the transferee has in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,
>
> and the transferee has performed or is willing to perform his part of the contract,
>
> then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

13. The aforesaid leveraging, of the statutory benefits contemplated in Section 53-A of the "Act" would yet also ensue with respect to Suresh Kumar and Ramesh Kumar, for the reasons that (a) though in a catena of verdicts, the statutory benefit embodied in Section 53-A of the Act. is propounded therein to be canvassable, as a defence, by the transferee, in a suit instituted by the transferor against the transferee, however, evidently with no suit standing instituted by Daljeet kumar against Ramesh Kumar and Suresh Kumar, wherein, he challenges his authoring Ex. Px, hence, it would be unjust to rigidly insist that the diktat of a catena of judicial verdicts, propagating therein, the ensual of the benefit of the doctrine of part performance enshrined in Section 53-A of the Act, accruing only with respect to defendants also only when it is reared as a defence in a suit reared by the transferor, significantly when the excepting principle vis-a-vis the domain of Section 53-A of the Act is comprised in ; (b) the transferor(s) under Ex.P-1, Ex.P-4 and Ex. D-1 being Suresh Kumar and Ramesh Kumar, both brothers in the undivided suit property, property whereof they acquired under a testamentary disposition executed respectively in their favour by their father, hence, theirs within the ambit of Section 53-A holding an ill right, if any, hereat besides an ill locus standi hereat, as transferors respectively of Ex.P-1, Ex. P-4 and Ex. D-1, to ill challenge them, whereas, in their respective life times theirs omitting to throw any ill challenge(s) upon the aforesaid exhibits, hence, in sequel, the successors in interest respectively of one Suresh Kumar and one Ramesh Kumar, the relevant transferors in the aforesaid relevant exhibits, do not hold any right rather they stand debarred from enforcing any right upon the respective transferees in respect of properties mentioned in Ex. P-4 and Ex. D-1 ; (c) the fact of non alienation through a registered deed of conveyance, of properties borne in Ex. Px, would also not erode the play of the diktat of Section 53-A of the Act, given with pronouncement(s) occurring therein, of Daljeet Kumar receiving from both Suresh Kumar and Ramesh Kumar, the entire sale consideration with respect to property borne on Ex. Px, fact whereof stands corroborated by recitals occurring in Ex. Px, authorship of both exhibits aforesaid remains not contested, hence, with Suresh Kumar and Ramesh Kumar, within the ambit of Section 53A of the Act, taking possession from Daljeet Kumar "of" the property reflected in Ex. Px also with the entire sale consideration in respect thereto standing received by Daljeet Kumar from them, hence, constrains an inference that the recitals embodied in Ex. Px and Ex. D-5, even if, both are unilaterally executed hence attracting the sequel, that yet a valid subsisting contract of transfer with respect to property displayed in Ex. Px, hence, occurring inter se Daljeet Kumar vis-a-vis Suresh Kumar and Ramesh Kumar also the relevant contract of transfer being fully carried into performance. Momentum to the aforesaid inference is marshalled by the fact of the recitals occurring therein not standing eroded by none of the contesting parties not leading Daljeet Kumar into the witness box. Consequently, when the best evidence for eroding the veracity of the recitals occurring in the aforesaid exhibits remains unadduced, the communications occurring therein acquire conclusivity. Corollary whereof is that the entire gamut of the principle(s) embodied in Section 53-A of the Act warranting attraction with respect to the property borne in Ex. Px. Further consequence whereof, is despite Daljeet Kumar "not" executing a registered deed of conveyance with respect to the suit property, want thereof not dispelling the validity of Ex. Px and D-5, significantly when both attract thereon the principle of part performance embodied in Section 53-A of the Act, hence, with the non obstante clause occurring therein "saving transfers" not completed in the manner prescribed by law, rendered unnecessary the execution by Daljeet Kumar, of a registered deed of conveyance with respect to the suit property vis-a-vis Ramesh Kumar and Suresh Kumar. Predominantly, with Ex. Px standing tendered into evidence by the plaintiffs, they are concomitantly estopped from making any submission that it does not fall within the ambit of Section 53-A of the Act also with hence theirs despite holding knowledge with respect of Ex. Px, theirs not rearing any plea that it does not fall within the ambit of Section 53-A of the Act also estops their counsel to contend that it does not attract the principle of part performance embedded in Section 53-A of the Act. Moreover, with Ex. Px standing executed prior to Ex. P1, thereupon also the appellants are

estopped to throw any challenge that it falls outside the ambit of Section 53-A of the Act, more so, when they hence would invalidate Ex. P-1.

14. In view of the above discussion, the present Regular First Appeal is dismissed and the impugned judgment and decree is maintained and affirmed. All pending applications also stand disposed of. No order as to costs.

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

Madho Ram .....Appellant/Plaintiff.
Versus
Durga Ram & others .....Respondent/Defendants.

RSA No. 93 of 2006.
Reserved on : 02.05.2017.
Decided on : 18th May, 2017.

Specific Relief Act, 1963- Section 34 and 38- Plaintiff filed a civil suit for declaration and permanent prohibitory injunction pleading that S was joint owner in possession of the suit land- he had executed a Will bequeathing half share in favour of M and D and remaining half share in favour of his widow – the share of the widow was to revert to M and D in equal share on the death of widow – defendants No.1 to 3 got a Will of the widow registered in their favour and mutation was also attested on the basis of the said Will- the defendants threatened to interfere with the suit land – hence, the suit was filed for seeking the relief – the defendants pleaded that A had pre-existing right of maintenance – the land was given to her in recognition of that right and she became the owner of the property- she had executed the will in her sound disposing state of mind- hence, it was prayed that the suit be dismissed- the Trial Court decreed the suit – an appeal was filed, which was allowed and the decree of trial Court was set aside- held in second appeal that the Will executed by S conferred life estate in favour of his widow –life estate in lieu of maintenance would enlarge into absolute right under Section 14 (2) of Hindu Succession Act- Appellate Court had wrongly appreciated the evidence – appeal allowed. (Para-8 to 15)

Cases referred:

Shivdev Kaur (dead) by Lrs. and others versus R.S. Grewal, (2013)4 SCC 636,

Ramji Gupta and another versus Gopi Krishan Agarwal (dead) and others, (2013)9 SCC 438

Sadhu Singh versus Gurdwara Sahib Narike and others, (2006)8 SCC 75

Vaddeoboyina Tulasamma and others versus Vaddeboyina Sesha Reddi (dead) by L.Rs., AIR 1977 SC 1944

Palchuri Henumkayamma versus Tadikamalla Kotlingam (D) by LRs and others, AIR 2001 SC 3062

For the Appellant: Mr. Ramakant Sharma, Senior Advocate with Mr. Devyani Sharma, Advocate.
For the Respondents: Mr. N.S. Chandel, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiff instituted a suit against the defendants for declaration and for permanent prohibitory injunction. The suit of the plaintiff stood decreed by the learned trial Court. In an appeal carried therefrom by the aggrieved defendants before the learned First

Appellate Court, the latter Court allowed the appeal of the defendants whereupon it dismissed the suit of the plaintiff. The plaintiff/appellant standing aggrieved by the impugned rendition recorded by the learned First Appellate Court, hence, concerts to assail it, by preferring an appeal therefrom before this Court.

2. Briefly stated the facts of the case are that one Sarwan alias Sarwan Dutt was joint owner in possession of land comprising in khata/khatoni No. 8/8, 10/10, 11/11, 12/12 to 15, situated in village Khaswin. Said Sarwan had executed a Will dated 16.01.1981, whereby, he had bequeathed ½ share of his property in favour of Madho Ram and Durga Dutt and remaining ½ share in favour of his widow Smt. Ajudhya Devi till her life time. On her death, her ½ share was to be reverted back to Madho Ram and Durga Dutt in equal share. It is further alleged that Smt. Ajudhya Devi was not absolute owner of the suit land and as such she was not competent to alienate the same by executing a Will. Said Smt. Ajudhya Devi had not executed any Will in favour of defendants Nos.2 and 3, out of defendants No.1 to 3, in connivance with Assistant Collector 1st Grade, Ghumarwin, got a Will of Smt. Ajudhya Devi registered and thereafter mutation No.208 of 17.03.1994 was illegally attested qua the suit land in favour of defendants No.2 and 3. In the month of May, 1994, the defendant had threatened to dispossess the plaintiff from the suit land. Thus, the plaintiff had sought a decree for possession that the plaintiff and defendant No.1 be declared owners in possession of the suit land and that the Will of Smt. Ajudhya Devi and mutation No.208 of 17.03.1994, in favour of defendants Nos. 2 and 3 be declared wrong and illegal with a consequential relief of permanent injunction for restraining the defendants from interfering exceeding share of defendant No.1 in the suit land and claiming share of Smt. Ajudhya Devi and in the alternative a decree for possession.

3. The defendants contested the suit and filed written statement, wherein, they have taken preliminary objections qua maintainability of the suit, cause of action, locus standi, estoppel, valuation of the suit and limitation . On merits, they had averred that Smt. Ajudhya Devi being widow of Sarwan was already having a pre-existing right to maintenance in the suit land and she was given the suit land by Sarwan in lieu of her maintenance and thus Smt. Ajudhya Devi was absolute owner of the suit land. It was further pleaded that Smt. Ajudhya Devi was competent to alienate the suit land in faovur of defendants Nos. 2 and 3. Said Smt. Ajudhya Devi had executed a valid Will of 27.05.1992 in favour of defendants No. 2 and 3. On the basis of said Will of 27.05.1992, the defendants No. 2 and 3 had inherited the suit land and consequently mutation dated 17.03.1994 was legally attested in the names of defendants Nos. 2 and 3. In nutshell the defendants refuted the case of the plaintiff and they prayed for dismissal of the suit with costs.

4. The plaintiff/appellant herein filed replication to the written statement of the defendants/respondents wherein, he denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the plaintiff is entitled for relief of declaration and permanent prohibitory injunction as prayed?OPP.

2. Whether in the alternative the plaintiff is entitled for possession?OPP

3. Whether the suit is not maintainable in the present form?OPD

4. Whether the plaintiff is estopped to file the suit by his act and conduct?OPD

5. Whether Smt. Ajudhya was having pre-existing right of maintenance over the property of her father-in-law?OPD.

6. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiff/appellant herein. In an appeal, preferred therefrom by

the defendants/respondents 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 plaintiff/appellant herein, has instituted the instant Regular Second Appeal before this Court wherein he assails the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on 17.03.2006, this Court, admitted the appeal instituted by the plaintiff/appellant against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether the appellate Court erred in not appreciating the provisions of sub -section (2) of Section 14 of the Hindu Succession Act, 1956?

b) Whether the first appellate Court erred in holding that Ajudhia Devi had pre-existing rights of maintenance?

Substantial questions of Law No.1 and 2.

8. Under a testamentary disposition executed by Sarwan, testamentary disposition whereof is comprised in Ex. P-1, he bequeathed a life time interest in his estate upon one Ajudhiya Devi. Consequently, Sarwan, the deceased testator hence made a restricted besides a limited grant upon his wife Smt. Ajudhiya Devi. Sarwan predeceased Ajudhiya. The aforesaid Ajudhiya under her testamentary disposition comprised in Ex.DW2/A, bequeathed her estate, which she derived from her predeceased husband, upon the defendants. The validity of the testamentary disposition made by Ajudhiya under Ext. DW2/A, whereunder she bequeathed her estate upon the defendants, is challenged by the plaintiff. The challenge made with respect to the aforesaid testamentary disposition executed by Ajudhiya, is anchored upon the factum, of, with hers under Ex.P-1 acquiring a limited/restricted grant with respect to the estate of her predeceased testator husband, she was hence, disempowered to during her life time, hence, execute Ex.DW2/A, whereunder she bequeathed her estate upon the defendants. Even though, formidable evidence has erupted in display of the propounders of Ex.DW2/A, hence, begetting satiation of the statutory parameters enshrined in Section 63 of the Indian Succession Act. Even though, thereupon, this Court would be constrained to conclude that the propounders of Ex.DW2/A proving the factum of it standing validly and duly executed, nonetheless, any conclusion qua cogent proof standing adduced with respect to Ex.DW2/A, hence standing proven to be duly and validly executed, would not hold any prevalence, in the light of this Court, hereinafter concluding that with Ajudhiya Devi, the executor of Ex.DW2/A , in making its execution, “hers” given the conferment of a restricted or a limited grant upon her by her pre-deceased testator husband under the latter's testamentary disposition comprised in Ex.P-1, hence, being concomitantly, disabled to execute Ex.DW2/A.

9. Ex. P-1 stood executed on 16.1.1981, hence, the execution of Ex.P-1 occurred subsequent to the coming into force of the Hindu Succession Act (hereafter referred to as the Act). However, in making a determination, whether the apposite recitals occurring in Ex.P-1, with candid voicings therein, of its testator constituting Ajudhiya Devi as his legatee, yet with a rider that she would hold only a life time interest or a restricted grant in the properties mentioned therein, hence, warrant attraction thereon, of the provisions of sub-section (2) of Section 14 of the Hindu Succession Act, 1956 (hereinafter referred to as the Act), entails this Court to make their interpretation, for hence applying them thereon. The relevant provisions of Section 14 of the Hindu Succession Act read as under:

> **“14. Property of a female Hindu to be her absolute property**.- (1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.
>
> Explanation.- In this sub-section, “property” includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after the marriage, or by her own skill or exertion, or by

purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as *stridhana* immediately before the commencement of this Act.

(2). Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil Court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property."

10. The learned counsel appearing for the appellant/plaintiff, has contended with vigour that the provisions of sub-section (1) of Section 14 of the Act along with its explanation holding no play also their relevant clout, upon the apposite recitals borne in Ex. P-1 standing wholly effaced, "by" a specific statutory provision borne in sub-section (2) of Section 14 of the Act, whereunder, there occurs a specific mandate, that any property obtained under a Will, with a categorical prescription therein, that its bestowment upon the apposite legatee, being restricted or limited during his/her life time, conspicuously also with its mandate hence prevailing upon the preceding sub section thereto, given the opening words thereof "nothing contained therein in sub section (1)", hence, also denuding the vigour of sub-section (1) of Section 14 of the Act. In aftermath, he contends that with the play of the provisions of sub section (1) of Section (14) along with its explanation, when stand statutorily excluded with respect to property received by a legatee under the relevant testamentary disposition, with a prescription therein that he or she holds thereon only a life time interest, hence for reiteration, he contends that the apposite recitals borne in Ex.P-1, whereunder the apposite grant as bestowed upon the legatee, is restricted to her life time, warranting vindication. He also contends that with the aforesaid restrictive grant, made upon the legatee, under Ex. P-1, acquiring statutory validation from the mandate occurring in sub-section (2) of Section 14 of the Act , hence, Ajudhiya Devi, the legatee under Ex. P-1, was statutorily barred from making a testamentary disposition comprised in Ex. DW2/A. He hence contends that Ex.DW2/A is amenable to a construction, that it holds no legal binding force upon the rights of the plaintiffs in the suit property. In making the aforesaid submission, the learned counsel appearing for the plaintiff/appellant has relied upon a judgment of the Hon'ble Apex Court reported in a case titled as ***Shivdev Kaur (dead) by Lrs. and others versus R.S. Grewal, (2013)4 SCC 636***, the relevant paragraphs whereof occurring at serial Nos. 10 to 16 stand extracted hereinafter:-

"10. Section 14 of the Act 1956 reads as under:

"14. Property of a female Hindu to be her absolute property. (1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

(2) Nothing contained in sub- section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property."

(Emphasis added)

The aforesaid statutory provisions provide for conversion of life interest into absolute title on commencement of the Act 1956, however, sub-section (2) carves out an exception to the same as it provides that such right would not be conferred where a property is acquired by a Hindu female by way of gift or under a Will or any other instrument prescribing a restricted estate in that property.

11. In Mst. Karmi v. Amru & Ors., AIR 1971 SC 745, a similar issue was considered by this Court and after examining the contents of the Will came to the conclusion that where a woman succeeded some property on the strength of a Will, she cannot claim any right in those properties over and above what was given to her under that Will. The life estate given to her under the Will would not become an absolute estate under the provisions of the Act 1956 and, thus, such a Hindu female cannot claim any title to the suit property on the basis of the Will executed in her favour. (See

also: Navneet Lal v. Gokul & Ors., AIR 1976 SC 794; and Jagan Singh (Dead) Through LRs. v. Dhanwanti & Anr., (2012) 2 SCC 628).

12. In Sadhu Singh v. Gurdwara Sahib Narike & Ors., AIR 2006 SC 3282, this Court again considered the issue, held as under:

"When he thus validly disposes of his property by providing for a limited estate to his heir, the wife or widow has to take it as the estate falls. This restriction on her right so provided, is really respected by the Act. It provides in Section 14(2) of the Act, that in such a case, the widow is bound by the limitation on her right and she cannot claim any higher right by invoking Section 14(1) of the Act. In other words, conferment of a limited estate which is otherwise valid in law is reinforced by this Act by the introduction of Section 14(2) of the Act and excluding the operation of Section 14(1) of the Act, even if that provision is held to be attracted in the case of a succession under the Act. Invocation of Section 14(1) of the Act in the case of a testamentary disposition taking effect after the Act, would make Sections 30 and 14(2) redundant or otiose. It will also make redundant, the expression "property possessed by a female Hindu" occurring in Section 14(1) of the Act. An interpretation that leads to such a result cannot certainly be accepted. Surely, there is nothing in the Act compelling such an interpretation. Sections 14 and 30 both have play. Section 14(1) applies in a case where the female had received the property prior to the Act being entitled to it as a matter of right, even if the right be to a limited estate under the Mitakshara law or the right to maintenance.(Emphasis added)

13. Shri Verma, learned counsel for the appellant placed a very heavy reliance on the judgment of this Court in Balwant Kaur & Anr. v. Chanan Singh & Ors., AIR 2000 SC 1908, contending that a destitute Hindu daughter if acquires such a right, it would stand crystallised in absolute title. There is a complete fallacy in his argument. In the said case, this Court held that all the clauses of the Will must be read together to find out the intention of the testator. The court held:

> "…This is obviously on the principle that the last clause represents the latest intention of the testator. It is true that in the earlier part of the Will, the testator has stated that his daughter Balwant Kaur shall be the heir, owner and title-holder of his entire remaining moveable and immovable property but in the later part of the same Will he has clearly stated that on the death of Balwant Kaur, the brothers of the testator shall be the heirs of the property. This clearly shows that the recitals in the later part of the Will would operate and make Appellant 1 only a limited estate-holder in the property bequeathed to her."
>
> (Emphasis added)

14. Thus, in view of the above, the law on the issue can be summarised to the effect that if a Hindu female has been given only a "life interest", through Will or gift or any other document referred to in Section 14 of the Act 1956, the said rights would not stand crystallised into the absolute ownership as interpreting the provisions to the effect that she would acquire absolute ownership/title into the property by virtue of the provisions of Section 14(1) of the Act 1956, the provisions of Sections 14(2) and 30 of the Act 1956 would become otios. Section 14(2) carves out an exception to rule provided in sub- section (1) thereof, which clearly provides that if a property has been acquired by a Hindu female by a Will or gift, giving her only a "life interest", it would remain the same even after commencement of the Act 1956, and such a Hindu female cannot acquire absolute title.

15. Whether person is destitute or not, is a question of fact. The expression 'destitute' has not been defined under the Act 1956 or under the Code of Criminal Procedure, 1973, or Code of Civil Procedure, 1908. The dictionary meaning is "without resources, in want of necessaries". A person can be held destitute when no one is to support him and is found wandering without any settled place of abode and

without visible means of subsistence. In the instant case, no factual foundation has ever been laid by the appellant before the courts below in this regard. In such a fact-situation, the issue does not require consideration.

16. All the courts have taken a consistent view rejecting the claim of the appellant of having acquired an absolute title. We do not see any cogent reason to interfere with the concurrent findings of facts. Appeals lack merit and are accordingly dismissed."

(p..640-641)

11. A reading of the aforesaid relevant paragraphs of the aforesaid citation, make a candid communication "of" sub-section (2) of Section 14 of the Act, standing engrafted, as an exception to the principle embodied in sub-section (1) thereto, hence, its mandate "cannot" stand either undermined nor hence, the conferment of a restricted estate upon the apposite legatee being construable to hold no statutory vigour nor the restrictive grant made upon the relevant legatee, hence, facilitating any inference of it being overlookable nor as a corollary, the relevant restricted grant conferred upon the legatee, bolstering any inference that it is construable, under sub section (1) of Section 14 of the Act, to be conferring an absolute dominion upon the legatee, with respect to the properties acquired by her under the relevant testamentary disposition. The aforesaid view propounded by the Hon'ble Apex Court in ***Shivdev Kaur's case (supra)*** *also* finds reiteration in its another decision in a case titled ***as Ramji Gupta and another versus Gopi Krishan Agarwal (dead) and others*** reported in ***(2013)9 SCC 438,*** the relevant paragraphs No.13 and 14 whereof stand extracted hereinafter:-

"13. We have considered the rival submissions made by the learned counsel for the parties, and perused the record.

14. In Shivdev Kaur v. R.S. Grewal, (2013)4 SCC 636 this Court dealt with the issue of Section 14(2) of the 1956 Act and held: (SCC p.641, para 14)

"14. Thus, in view of the above, the law on the issue can be summarised to the effect that if a Hindu female has been given only a 'life interest', through will or gift or any other document referred to in Section 14 of the 1956 Act, the said rights would not stand crystallised into the absolute ownership as interpreting the provisions to the effect that she would acquire absolute ownership/title into the property by virtue of the provisions of Section 14(1) of the 1956 Act, the provisions of Sections 14(2) and 30 of the 1956 Act would become otiose. Section 14(2) carve out an exception to the rule provided in sub-section (1) thereof, which clearly provides that if a property has been acquired by a Hindu female by a will or gift, giving her only a 'life interest", it would remain the same even after commencement of the 1956 Act, and such a Hindu female cannot acquire absolute title." (p.443)

12. Similarly, the Hon'ble Apex Court in its judgment reported in a case titled as ***Sadhu Singh versus Gurdwara Sahib Narike and others, (2006)8 SCC 75*** has enunciated an akin view, the relevant paragraphs No. 5, 11 and 12 whereof stand extracted hereinafter:-

"5. In case on hand, since the properties admittedly were the separate properties of Ralla Singh, all that Isher Kaur could claim dehors the will, is a right to maintenance and could possibly proceed against the property even in the hands of a transferee from her husband who had notice of her right to maintenance under the Hindu Adoptions and Maintenance Act. No doubt, but for the devise, she would have obtained the property absolutely as an heir, being a Class I heir. But, since the devise has intervened, the question that arises has to be considered in the light of this position. (p.83)

11. On the wording of the section and in the context of these decisions, it is clear that the ratio in V. Tulasamma Vs. V. Shesha Reddi (supra) has application only when a female Hindu is possessed of the property on the date of the Act under semblance of a right, whether it be a limited or a pre-existing right to maintenance in

lieu of which she was put in possession of the property. The Tulasamma ratio cannot be applied ignoring the requirement of the female Hindu having to be in possession of the property either directly or constructively as on the date of the Act, though she may acquire a right to it even after the Act. The same is the position in Raghubar Singh Vs. Gulab Singh (supra) wherein the testamentary succession was before the Act. The widow had obtained possession under a Will. A suit was filed challenging the Will. The suit was compromised. The compromise sought to restrict the right of the widow. This Court held that since the widow was in possession of the property on the date of the Act under the will as of right and since the compromise decree created no new or independent right in her, Section 14(2) of the Act had no application and Section 14(1) governed the case, her right to maintenance being a pre-existing right. In Mst. Karmi Vs. Amru & Ors. [AIR 1971 SC 745], the owner of the property executed a will in respect of a self-acquired property. The testamentary succession opened in favour of the wife in the year 1938. But it restricted her right. Thus, though she was in possession of the property on the date of the Act, this Court held that the life estate given to her under the will cannot become an absolute estate under the provisions of the Act. This can only be on the premise that the widow had no pre-existing right in the self-acquired property of her husband. In a case where a Hindu female was in possession of the property as on the date of the coming into force of the Act, the same being bequeathed to her by her father under a will, this Court in Bhura & Ors. Vs. Kashi Ram [(1994) 2 SCC 111], after finding on a construction of the will that it only conferred a restricted right in the property in her, held that Section 14(2) of the Act was attracted and it was not a case in which by virtue of the operation of Section 14(1) of the Act, her right would get enlarged into an absolute estate. This again could only be on the basis that she had no pre-existing right in the property. In Sharad Subramanyan Vs. Soumi Mazumdar & Ors. [JT 2006 (11) SC 535] this Court held that since the legatee under the will in that case, did not have a pre-existing right in the property, she would not be entitled to rely on Section 14(1) of the Act to claim an absolute estate in the property bequeathed to her and her rights were controlled by the terms of the will and Section 14(2) of the Act. This Court in the said decision has made a survey of the earlier decisions including the one in Tulasamma. Thus, it is seen that the antecedents of the property, the possession of the property as on the date of the Act and the existence of a right in the female over it, however limited it may be, are the essential ingredients in determining whether sub-Section (1) of Section 14 of the Act would come into play. What emerges according to us is that any acquisition of possession of property (not right) by a female Hindu after the coming into force of the Act, cannot normally attract Section 14(1) of the Act. It would depend on the nature of the right acquired by her. If she takes it as an heir under the Act, she takes it absolutely. If while getting possession of the property after the Act, under a devise, gift or other transaction, any restriction is placed on her right, the restriction will have play in view of Section 14(2) of the Act.

12. When a male Hindu dies possessed of property after the coming into force of the Hindu Succession Act, his heirs as per the schedule, take it in terms of Section 8 of the Act. The heir or heirs take it absolutely. There is no question of any limited estate descending to the heir or heirs. Therefore, when a male Hindu dies after 17.6.1956 leaving his widow as his sole heir, she gets the property as class I heir and there is no limit to her estate or limitation on her title. In such circumstances, Section 14(1) of the Act would not apply on succession after the Act, or it has no scope for operation. Or, in other words, even without calling in aid Section 14(1) of the Act, she gets an absolute estate. (p.85 & 86)

13. The learned counsel appearing for the defendants/respondents has contended that with the explanation accompanying sub-section (1) of Section 14 of the Act, holding a

contemplation that when a female Hindu possesses property, property whereof is acquired by her from husband either on or before the commencement of the Hindu Succession Act, 1956, in lieu of maintenance or arrears of maintenance, hers in the manner aforesaid, holding the relevant properties does attract vis-a-vis the relevant properties, the mandate of sub-section (1) of Section 14 of the Act, wherein a contemplation occurs, that the aforesaid mode of holding of possession of property by a female Hindu being construable to be, hers holding it as full owner thereof and not as a limited owner, contemplation whereof also warranting attraction, with respect to the apposite recitals occurring in Ex. P-1. He proceeds to contend that the conferment of a limited grant, under Ex.P-1, by the deceased testator husband upon the legatee/his surviving spouse being per se construable to be in lieu of maintenance or arrears of maintenance, hence, the mandate sub-section (1) of Section 14 of the Act warranting attraction thereon. In making the aforesaid submission, the learned counsel appearing for the defendant has relied upon a decision of the Hon'ble Apex Court in a case titled as ***Vaddeoboyina Tulasamma and others versus Vaddeboyina Sesha Reddi (dead) by L.Rs.*** reported in ***AIR 1977 SC 1944.*** However, the graphic gross distinctivity inter se the factual scenario prevalent in the afore referred citation vis-a-vis the factual matrix prevailing hereat does visibly surge forth, distinctivity whereof, is encapsulated in the eminent fact of the Hon'ble Apex Court in its verdict pronounced in the aforesaid case, standing seized with a compromise arrived at inter se the parties at lis therein, whereunder certain properties stood allotted to the aggrieved spouse, in lieu of maintenance also in respect thereto a limited interest stood created upon the aggrieved. Moreover, in the relevant compromise therein, it was envisaged that on demise of the aggrieved, the properties allotted to her being reverted to the legal heirs of her predeceased husband. Consequently, also in the aforesaid case, the relevant compromise occurred prior to the coming into force of the Hindu Succession Act also it is apparent on a close circumspect reading of the aforesaid decision, that Tulsma, who received the relevant properties under the relevant compromise, compromise whereof evidently occurred prior to coming into force of Hindu Succession Act, had continued to retain the properties even after coming into force of the Hindu Succession Act. Consequently, the Hon'ble Apex Court had concluded that the mandate of the explanation accompanying sub-section (1) of Section 14 of the Act standing attracted, significantly, when, it is contemplated therein that when any property, upto and after the commencement of the Act, is possessed by a female Hindu, property whereof is acquired by her before or after commencement of the Act, significantly, also when acquisition thereof, is evidently, in lieu of maintenance or arrears of maintenance, bringing forth hence a statutory conclusion of hers being construable to be its full owner and not its limited owner, dehors any restriction or fetters being imposed upon the relevant grant in sequel whereto she holds possession of the properties. However, contradistinctively in the instant case, the legatee under Ex.P-1, exhibit whereof comprises the testamentary disposition executed by the deceased testator “after” the coming into force of the “Act”, whereunder he bestowed a restrictive besides a limited grant upon the apposite legatee, with respect to the property embodied therein. Hence, though a restrictive grant is made upon the legatee of Ex.P-1, or even if, the grant is limited to her life time hence it may be amenable to an inference that it is in lieu of maintenance or arrears of maintenance. However, the aforesaid coinage occurring in the explanation accompanying sub-section (1) of Section 14 of the Act, has its limited play only with respect to the provisions of sub-section (1) of Section 14 of the Act. Obviously, when the opening phrase of sub-section (2) of Section 14 of the Act, is couched in the coinage “nothing contained in sub-section (1)”, thereupon with sub-section (2) of Section 14 of the Act “sapping”, the vigour of the provisions of both sub-section (1) of Section 14 of the Act also of the explanation accompanying it, wherein a phrase “in lieu of maintenance or arrears of maintenance” occurs, rather with the mandate of sub-section (2) of Section 14 of the Act hence with explicitly, ousting the play of sub-section (1) of Section 14 of the Act, with respect to a restrictive grant made under a Will upon a Hindu widow also its mandating that the restrictive grant made upon an apposite legatee, enjoining imputation of reverence thereto. Imperatively hence even if a restrictive grant is conferred upon the legatee of Ex.P-1 also even if it may rear an inference, of it being construable to be in lieu of maintenance or arrears of maintenance, yet when as aforestated, with the aforesaid coinage occurring only in the explanation accompanying

sub-section (1) of Section 14 of the Act, play whereof is statutorily eroded by sub-section (2) of Section 14 of the Act, thereupon the apposite recitals borne in Ex.P-1, whereunder a restrictive or life time estate is conferred upon the legatee constituted thereunder, warrants imputation of reverence thereto.

14. The learned counsel appearing for the defendants/respondents also relied upon a judgment of the Hon'ble Apex Court reported in a case titled as ***Smt. Palchuri Henumkayamma versus Tadikamalla Kotlingam (D) by LRs and others, AIR 2001 SC 3062,*** hence, "seeks attraction" upon the apposite recitals borne on Ex.P-1, the mandate of sub-section (1) of Section 14 of the Act. However, with the pronouncement recorded by the Hon'ble Apex Court, in the aforesaid decision standing recorded with respect to a "Will" executed "prior" to the coming into force of the Hindu Succession Act, whereas the contentious Will borne in Ex.P-1 stands executed subsequent to the coming into force of the Act aforesaid, hence, the aforesaid visible fact, hence, brings to the fore, an apparent distinctivity inter se the facts of the case in hand vis-a-vis the factual matrix prevailing in the case relied by the learned counsel appearing for the defendants. Contrarily also when the contentious Will borne on Ex. P-1, is apparently executed after coming into force of the Act hence when as aforestated sub-section (2) of Section 14 of the Act, stands concluded by this Court to be attracted vis-a-vis Ex.P-1, hence, the judgment relied upon by the learned counsel appearing for the defendants, when, hence is distinguishable, it is of no avail to him for his carrying forward his submission that the provision of sub-section (1) of Section 14 of the Act along with its explanation, is hereat attracted.

15. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court is 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. Consequenlty, both the substantial questions of law are answered in favour of the plaintiff/appellant and against the defendants/respondents.

16. In view of above discussion, the present Regular Second Appeal is allowed. In sequel, the judgement and decree rendered by the learned first Appellate Court in Civil Appeal No. 265/13 of 2004/2000 is quashed and set aside. Consequently, the judgment and decree rendered by the learned Senior Sub Judge, Bilaspur, District Bilaspur, H.P. in case No. 40-1 of 1998/94 is maintained and affirmed. All pending applications also stand disposed of. No order as to costs. Records be sent back.

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

Ravinder Kumar .....Appellants/plaintiffs.

Versus

Smt. Rani Devi and others .....Respondents.

RSA No. 638 of 2007
Reserved on : 11.05.2017.
Decided on :18th May, 2017.

Specific Relief Act, 1963- Section 34 and 38- Plaintiffs filed a suit for seeking declaration and injunction pleading that they are in possession of the suit land as mortgagee and have become owners by efflux of time– the suit was dismissed by the Trial Court- an appeal was filed, which was dismissed- held in second appeal that the mortgage was a usufructuary mortgage and the mortgagee has a right to redeem the mortgage at any time – the Courts had rightly decided the suit – appeal dismissed. (Para-7 to11)

Case referred:
Singh Ram (dead) through legal representatives versus Sheo Ram and others, (2014)9 SCC 185

For the Appellants: Mr. Ajay Sharma, Advocate.
For Respondents No. 1: Mr. Bhupinder Gupta, Senior Advocate with Mr. Ajeet Jaswal, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal is directed against the concurrently recorded verdicts by the learned Courts below, whereby, they dismissed the suit of the plaintiffs, wherein, they, with respect to the suit land claimed against the defendants relief of declaration along with consequential relief of permanent prohibitory injunction.

2. The brief facts of the case are that the plaintiffs claim that they are in possession of the land measuring 0-24-97 hectare comprised in khata No.42, khatauni No. 47, situated in Mohal Moin, Mauza Gangot, Tehsil Dehra, District Kangra as fully detailed in the head note of the plaint as mortgagees for more than 30 years and has become owners of this land by way of afflux of time. According to them, the suit land was mortgaged with the grand father of the plaintiffs and performa defendants by the husband of the deceased defendant No.1 vide mutation No.2703/2704 dated 14.5.1913 and since then the predecessor-in-interest of the plaintiffs and performa defendants are coming in possession of this land as mortgagees. They are thus mortgagees in possession of the suit land for more than 30 years and as such they have become owners of this land by way of afflux of time. However, defendant No.1 taking undue advantage of the revenue entries existing in her favour is trying and threatening to receive compensation in respect of the suit land acquired by S.D.O. (C)-cum- Land Acquisition Collector, Dehra for construction of Bus Stand without any right, title or interest therein. Hence the suit.

3. Defendant No.1 contested the suit and filed written statement, wherein, she has taken preliminary objection qua maintainability, cause of action, and non joinder of necessary parties. On merits, she has denied if her husband had mortgaged the suit land with the predecessor-in-interest of the plaintiffs and performa defendants. In the alternative she has pleaded that if mortgage is proven the same was usufructuary and the plaintiffs cannot become owners of the suit land. She has, therefore, prayed for dismissal of the suit.

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

1. Whether the plaintiffs are entitled for declaration, as prayed for? OPP

1-A. Whether the plaintiffs along with proforma defendants have become owners by afflux of time being mortgagees for more than 30 years of the land in dispute, as alleged? OPP

1-B. If mortgage is proved, whether the plaintiffs cannot become owners as the mortgage is usufructuary and the plaintiffs and their predecessors have enjoyed the usufruct of the land in more than the amount of mortgage, as alleged?OPD-1

2. Whether the plaintiffs are entitled for the relief of injunction?OPP.

3. Whether the suit is not maintainable in the present form? OPD.

4. Whether the plaintiffs are estopped by their acts and conduct?OPD

5. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiffs/appellants herein. In an appeal, preferred therefrom by the plaintiffs/appellants before the learned First Appellate Court, the latter Court dismissed the appeal and affirmed the findings recorded by the learned trial Court.

6. Now the plaintiffs/appellants herein, have instituted the instant Regular Second Appeal before this Court, 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 16.05.2008, this Court, admitted the appeal instituted by the plaintiffs/appellants against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether courts below mis-read and mis appreciated the provisions of H.P. Debut Reduction Act, 1976, thereby non suiting the plaintiffs, as such, vitiated the impugned judgment and decrees?

b) Whether courts below mis-read and mis-appreciated Section 27 of the Limitation Act and contrary findings returned by the Courts below in law being unsustainable are liable to be quashed and set aside?

c) Whether the impugned judgments and decrees being contrary to the provisions of Order 20, Rule 5 of the Code of Civil Procedure stand vitiated and liable to be quashed and set aside?

Substantial questions of Law No.1 and 2:

7. Under mutation No.2703/2704 of 14.05.1913, a usufructuary mortgage with respect to the suit property was created by the predecessor-in-interest of defendant No.1, upon the predecessor-in-interest of the plaintiffs and performa defendants. Since, the mortgagor or his predecessors-in-interest within 30 years elapsing since 14.05.1913, hence, failed to redeem the suit land, thereupon, the plaintiffs and performa defendants were constrained to espouse a claim qua theirs by efflux of time becoming owners of the suit property. Consequently, on score aforesaid an apposite declaratory decree, with respect to the suit property, was claimed by the plaintiffs and the performa defendants. However, defendant No.1, in his pleadings, constituted a defence that with the mortgage created with respect to the suit property falling within the ambit of "usufructuary mortgage", whereupon, the mandate of Section 62 of the Transfer of Property Act (hereafter referred to as the Act), provisions whereof stand extracted hereinafter, visibly operate also with the provisions embodied therein clothing the mortgagor with a right to redeem the mortgaged property, on his begetting compliance with the mandate of clauses (a) and (b) of Section 62 of the Act. Consequently, the counsel for the contesting defendant No.1, espouses that when no forthright best evidence surges forth in display, of satiation of the mandate of clause (b) of Section 62 of the Act, hence, the mandate of clause (a) thereto holds sway. In sequel, it is espoused that when the substantive provisions of Section 62 of the Act, foist a right in the mortgagor to redeem the mortgaged property, on his meteing compliance either with the mandate of clause (a) or with the mandate of clause (b) of Section 62 of the Act, whereas, hence with evidence with respect to satiation of the mandate of clause (b) remaining unadduced, hence, the mandate of clause (a) operating, wherein, the mortgagor is vested with a right to redeem the mortgaged property, as and when the mortgaged amount is paid by him to the mortgagee. Provision of Section 62 of the Act read as under:

> ***"62. Right of usufructuary mortgagor to recover possession***.- In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property together with the mortgage deed and all documents relating to the mortgaged property which are in the possession or power of the mortgageee-
>
> (a) where the mortgagee is authorized to pay himself the mortgage money from the rents and profits of the property, - when such money is paid;
>
> (b) where the mortgagee is authorized to pay himself from such rents and profits or any part thereof a part only of the mortgage money, when the term (if any) prescribed for the payment of the mortgage money has expired and the mortgagor pays or tenders to the mortgagee the mortgage money or the balance thereof or deposits it in court hereinafter provided."

In aftermath, the learned counsel for the contesting defendant urges that the right to redeem the mortgage property continuing uptill the mortgage amount is paid to the mortgagee. Also the accrual of cause of action for redeeming the suit property commencing from the day of making

payment of the mortgage money by the mortgagor to the mortgagee, in respect of liquidation whereof, no specific time is prescribed. Therefore, he contends that the mortgagor has a right to at any time liquidate the mortgage money. The aforesaid contention canvassed by the counsel for the contesting defendant, is anvilled upon a judgment of the Hon'ble Apex Court reported in ***(2014)9 SCC 185 titled as Singh Ram (dead) through legal representatives versus Sheo Ram and others***, the relevant paragraphs No. 21 and 22 whereof stand extracted hereinafter:-

> "21. We need not multiply reference to the other judgment. Reference to the above judgments clearly spell out the reasons for conflicting views. In cases where distinction is usufructuary mortgagor's right under Section 62 of the TP Act has been noted, right to redeem has been held to continue till the mortgage money is paid for which there is no time limit while in other cases right to redeem has been held to accrue on the date of mortgage resulting in extinguishment of the right of redemption after 30 years.
>
> 22. We, thus, hold that special right of usufructuary mortgagor under Section 62 of the TP Act to recover possession commences in the manner specified therein i.e. when mortgage money is paid out of rents and profits or partly out of rents and profits and partly by payment or deposit by the mortgagor. Until then, limitation does not start for the purposes of Article 61 of the Schedule to the Limitation Act. A usufructuary mortgagee is not entitled to file a suit for declaration that he had become an owner merely on the expiry of 30 years from the date of the mortgage. We answer the question accordingly." (p.210)

8. Before proceeding to apply the mandate of the Hon'ble Apex Court held in ***Singh Ram's case (supra)***, it is imperative to determine, the crucial factum probandum, appertaining to the genre of the mortgage created with respect to the suit property. In resting the aforesaid fact, want of a specific denial by the contesting defendant, with respect to creation of mortgage with respect to the suit property, under mutation No. 2703/2704 of 14.05.1913, fosters inference that the contesting defendant hence admitting the validity of mutation No. 2703/2704, whereunder a mortgage with respect to the suit property was created by the predecessor-in-interest of the contesting defendant upon the predecessor-in-interest of the plaintiffs and performa defendants. The further fact of the plaintiffs and the performa defendants holding possession of the suit property, is rested, by an affirmative suggestion put to PW-1 by the learned counsel for the contesting defendant while his holding him to cross-examination, wherein, an echoing is held of the suit land being mortgaged with possession in the year 1912 by Ganga Dass with Sohan, suggestion whereof evinced a reply in the affirmative. Consequently, the putting of the aforesaid affirmative suggestion to PW-1 by the counsel for the defendant while holding him to cross-examination and its evincing from him an apposite affirmative response thereto, tantamounts to his acquiescencing qua the mortgagee(s) concerned holding possession of the suit property, from the date of the recording of mutation Nos. 2703/2704, besides with Ex. P-1 to P-5 making a display of the mortgagee(s) concerned holding possession of the suit properly, displays whereof occurring wherein when remain undislodged by adduction of potent evidence, hence, the relevant reflections therein with respect to the mortgagees concerned holding possession of the mortgaged property, hence, acquire conclusivity. In aftermath, it has to be inevitably concluded, that the relevant mortgage created with respect to the suit property falling within genre of usufuctuary mortgage. Consequently, the mandate of Section 62 of the Transfer of Property Act hence operated, thereon, also the mandate of the Hon'ble Apex Court held in ***Singh Ram's case (supra)***, wherein, the relevant paragraphs unequivocally make a forthright pronouncement, that the mortgagee merely on elapse of 30 years from the date of creation of mortgage in his favour by the mortgagor, yet not holding any right to file a suit against the mortgagor, claiming therein that he has by efflux of time become owner of the mortgaged property rather the mortgagor holding a right to redeem the mortgaged property, on his meteing compliance with the provisions embodied either in clause (a) or in clause (b) of Section 62 of the Act. Consequently, it is concluded that the mandate of clause (a) of Section 62 of the Act, is attracted vis-a-vis the facts of the case at hand, hence, with the mortgagor holding a right to redeem the mortgaged property, on

his defraying the mortgaged amount to the mortgagee, in respect of defrayment whereof "no" period is prescribed, leading hence to an inference that the mortgagor within the ambit of clause (a) of Section 62 of the Act holding a right to "any time" liquidate the mortgage money vis-a-vis the mortgagee. Consequently, as and when such liquidation occurs, therefrom, the apposite period of limitation commencing or the cause of action accruing vis-a-vis the mortgagor for his therefrom instituting a suit for begetting redemption of the mortgaged property.

9. The learned counsel appearing for the plaintiffs/appellant has contended that the aforesaid ratio decidendi propounded by the Hon'ble Apex Court in ***Singh Ram's case (supra)*** does not apply to the facts of the case at hand. However, he is unable to adduce on record any demonstrable material for leveraging his contention, hence, his contention is rejected.

10. Be that as it may, the suit of the plaintiffs stood instituted in the year 1991 whereat the mandate of the provisions of H.P. Debt Reduction Act came into force. With the statutory provisions held in the H.P. Debt Reduction Act, leveraging a fresh cause of action vis-a-vis the mortgagor for his hence seeking redemption of the mortgaged property, besides the availment by him of the statutory right created thereunder being comprised in his instituting an application or his filing a civil suit after coming into force of the H.P. Debt Reduction Act. Moreover, with the mandate of the aforesaid legislative enactment, standing declared to be holding, an overriding effect on any other law also upon the provisions of Section 27 of the Limitation Act, in sequel, with attraction vis-a-vis the suit of the plaintiffs, the mandate of the aforesaid legislative enactment, thereupon, hence, with therein, the diktat of the provisions of Section 27 of the Limitation Act stand excluded, begets an inference, that for facilitating the underlying purpose of the aforesaid legislative enactment, comprised in its foisting, a right in the mortgagor to beget redemption of the mortgaged property "at any time", hence also begetting a further corollary, that the apposite legislative enactment granting a fresh opportunity to the mortgagor to redeem the suit property. Consequently, within its ambit, it is open to the contesting defendant to at any time avail of the remedies prescribed thereunder vis-a-vis her. In sequel for facilitating the contesting defendant to avail the aforesaid remedy it would not be befitting to decree the suit of the plaintiffs.

10. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court as also by the learned trial Court are based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court have not excluded germane and apposite material from consideration. Accordingly, the substantial questions of law No.1 and 2 are answered in favour of the respondent/contesting defendant and against the appellants. However, substantial question of law No.3 is not pressed by the learned counsel appearing for the appellants for any order being recorded thereon, hence, is answered as not pressed.

11. In view of above discussion, the present Regular Second Appeal is dismissed. In sequel, the judgments and decrees rendered by both the learned Courts below are maintained and affirmed. All pending applications also stand disposed of. No order as to costs.

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

State of H.P. & Others ....Appellants

Versus

Dharam Singh ....Respondent

LPA No.256 of 2011

Date of decision: 18.05.2017

Constitution of India, 1950- Article 226- Petitioner was appointed as beldar on daily wage basis in animal husbandry department- his services were regularized in the year 2007 – he retired in the year 2009 on attaining the age of 58 years – the petitioner pleaded that he should have been regularized from the date of appointment as beldar with all consequential benefits – the decision to reduce the age of superannuation was taken in the year 2001 after the appointment of the petitioner and would not apply to him- he filed a writ petition, which was allowed by the writ Court- held in appeal that High Court had already decided in ***CWP No. 5749 of 2010*** titled ***Lachhi Ram Versus State*** that a person appointed as workman before 2001 was entitled to continue until the age of 58 years – however, the judgment was reviewed and it was held that those workmen who were regularized in service after 10.5.2001 are entitled to continue only until the age of 58 years – the writ court had placed reliance upon the judgment of ***Lachhi Ram***, which was subsequently reviewed- the judgment passed by writ court quashed and set aside.

(Para- 8 to 13)

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

For the Respondent: Mr.Bhuvnesh Sharma, Advocate.

The following judgment of the Court was delivered:

Per Sandeep Sharma,J.:

Present appeal is directed against the judgment dated 7.12.2010, passed by learned Single Judge of this Court in CWP No.2661 of 2009, whereby the writ petition filed by the petitioner-respondent *(hereinafter referred to as the 'writ petitioner')* was allowed, *(for short 'impugned judgment').*

2. While passing the impugned judgment, the learned Single Judge has directed the appellants-respondents *(hereinafter referred to as the 'appellants-State')* to re-engage the writ petitioner immediately, however, he has not been held entitled to any arrears for the period from 29th August, 2009, on which date he was retired, to the date of passing of judgment i.e. 7.12.2010, as he had not worked during this period.

3. In nutshell, case of the writ petitioner was that he was appointed as Beldar on daily waged basis in the year 1996 in Animal Husbandry Department and his services were regularized in the year 2007. It has been averred by the writ petitioner that he was retired on 29.8.2009, on completing the age of 58 years. It has been pleaded by the petitioner that he should be considered for regularization from the date of his engagement as daily waged Belder, i.e. 7.10.1996, with all consequential benefits and further he should be retired from service on completion of age of 60 years, because the age of retirement was reduced from 60 years to 58 years in the year 2001 or say after his initial appointment in the year 1996 and hence the decision did not affect him. The writ petitioner also prayed for issuance of direction that he be given all pensionary benefits after attaining the age of 60 years.

4. Appellants-State, by way of filing reply to the writ petition, stated that the writ petitioner was engaged on daily wage basis and that his services were regularized in the year 2007, on the basis of notification dated 18.6.2007, issued by the State Government.

5. Perusal of impugned judgment suggests that learned Single Judge, on the basis of aforesaid pleadings as well as judgment passed by Division Bench of this Court in ***CWP No.5749/2011, titled: Lachhi Ram vs. State of H.P. and Others, decided on 25th October, 2010,*** held that the writ petitioner is entitled to continue to serve up to the age of 60 years and accordingly directed the appellants-State to re-engage the writ petitioner immediately. Learned Single Judge, while holding the writ petitioner entitled to remain in service up to the age of 60 years, denied him arrears for the period from 29th August, 2009, on which date he was retired to

the date of passing of judgment as he had not worked during this period. Learned Single Judge further directed the appellants-State to grant pensionary and retrial benefits to the writ petitioner, when he retires on attaining the age of 60 years in accordance with rules, instructions and scheme, if any, of the Government and further held that, while calculating qualified service for the purpose of pension and other retrial benefits, period from 29.8.2009 to the date of judgment i.e. 7.12.2010 shall also be counted.

6. Appellants-State, being aggrieved and dis-satisfied with the impugned judgment passed by learned Single Judge of this Court, preferred the instant appeal.

7. Mr.J.K. Verma, learned Deputy Advocate General, while inviting the attention of this Court to the impugned judgment, vehemently argued that same is not sustainable in the eyes of law and, as such, same deserves to be quashed and set aside. Mr.Verma also invited the attention of this Court to the judgment dated 30th May, 2012, passed in ***Civil Review No.72 of 2011, titled: State of H.P. & Others vs. Lachhi Ram***, to demonstrate that judgment passed in ***CWP No.5749 of 2010, titled: Lachhi Ram vs. State of H.P. & Others***, was subsequently reviewed by the Division Bench of this Court and as such impugned judgment passed by learned Single Judge deserves to be quashed and set aside.

8. After having gone through the impugned judgment passed by learned Single Judge, it is ample clear that petition having been filed by the writ petitioner came to be decided in the light of judgment passed by Division Bench of this Court in ***Lachhi Ram's*** case *supra*, wherein admittedly, persons appointed as workmen on or before 10th May, 2001, were held entitled to remain in service up to the age of 60 years, but judgment dated 30th May, 2012, passed by Division Bench in Civil Review No.72/2011, having been filed by appellants-State, suggests that the judgment dated 25.10.2010, passed in ***Lachhi Ram's*** case *supra,* was recalled. It would be profitable to reproduce hereinbelow judgment passed by Division Bench in Civil Review filed by appellants-State:-

> ***"The respondent State and others in the judgment dated 25.10.2010, in CWP No. 5749 of 2010, has come up in review. It is pointed out that an inadvertent error has crept in, in the judgment whereby this Court has granted continuance of the writ petitioner up to 60 years, based on the Circular. It is submitted that the amendment introduced under FR 56 could not be brought to the notice of this Court and hence the inadvertent error. As per the amendment, those workmen who have been regularized in service after 10.5.2001, are entitled to continue only up to the age of 58 years. This crucial aspect has not been considered in the judgment. Therefore, the review petition is allowed. Judgment dated 25.10.2010 in CWP 5749 of 2010 is recalled."***

9. Division Bench, while allowing Review Petition, has categorically held that amendment introduced under FR 56 could not be brought to the notice of this Court at the time of passing of ***Lachhi Ram's*** case *supra*, as a result of which, inadvertent error crept in the judgment, whereby Court allowed the writ petitioner to be continued in service up to the age of 60 years. Division Bench of this Court specifically held that as per amendment, those workmen who have been regularized in service after 10.5.2001, are entitled to continue only up to the age of 58 years.

10. In the instant case, as clearly emerged from the record as well as impugned judgment passed by learned Single Judge, services of writ petitioner were regularized on the basis of scheme notified by the Government in the year 2007 and as such he could not be allowed to remain in service up to the age of 60 years.

11. It may be noticed that by way of aforesaid amendment as introduced under FR 56, workmen, who were regularized in service after 10.5.2001, were held entitled to continue only up to the age of 58 years, but fact remains that aforesaid amendment had come into existence

prior to passing of judgment in ***Lachhi Ram's*** case *supra*. Had aforesaid amendment come to the notice of Division Bench, while passing judgment in ***Lachhi Ram's*** case *supra*, writ petitioner in that case would not have been allowed to continue till the age of 60 years.

12. Consequently, in view of the aforesaid discussion, we have no hesitation to conclude that the judgment passed by learned Single Judge deserves to be quashed and set aside. Accordingly, the appeal is allowed and the judgment passed by learned Single Judge is quashed and set aside. All interim orders are vacated and all the miscellaneous pending applications are disposed of.

13. However, before parting, we wish to observe that since case of the writ petitioner was only considered and decided in the light of judgment passed in ***Lachhi Ram's*** case *supra* and no findings qua grounds raised in the petition were returned, writ petitioner is always at liberty to agitate his claim before appropriate Forum in accordance with law.

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

Bed Ram ....Plaintiff/Applicant

Versus

Manmohan Malhotra & others ....Defendants/ Non-applicants

OMP No. 310 of 2016 in
Civil Suit No.41 of 2014
Order reserved on 3.5.2017.
Date of Decision 19th May, 2017

Code of Civil Procedure, 1908- Order 6 Rule 17- An application for amendment of plaint was filed pleading that the applicant had engaged well qualified and experienced counsel - when the counsel was changed, it was found that there was some error in the plaint- the respondent pleaded that no reason was assigned as to why the amendment could not be applied prior to the commencement of trial- held that the basic principle of law of procedure is that no proceedings should be allowed to be defeatedon the mere technicalities – the procedure is meant to facilitate administration of justice and not to defeat it – the Court can allow the plaintiff to amend the plaint for seeking the compensation for breach of contract- application allowed.(Para- 20 to 30)

Cases referred:

Pankaja and another vs. Yellappa, (2004)6 SCC 415
Vidyabai and others vs. Padmalatha and another, (2009)2 SCC 409
Ghanshyam Dass and others vs. Dominion of India and others, (1984)3 SCC 46
B.K.Narayana Pillai vs. Parameswaran Pillai and another (2000)1 SCC 712
Tilak Raj vs. Baikunthi Devi (dead) by LRs (2010)12 SCC 585
Banwari Lal vs. Balbir Singh (2016) 1 SCC 607
Westarly Dkhar and others vs. Sehekaya Lynghod (2015)4 SCC 292

For the Plaintiff/Applicant: Shri N.K. Sood, Sr. Advocate with Mr.Aman Sood, Advocate.

For Defendants/Non-applicants: Mr.Neeraj Gupta, Advocate for defendants/non-applicants No. 1 and 2 and Mr.K.D. Sood, Sr.Advocate with Ms.Shilpa Sood,Advocate, for defendants/non-applicants No. 3 and 4.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

This application has been filed by plaintiff seeking amendment in paras 6, 8 and in prayer clause of the plaint.

2. In para 6, amount of Rs.1,82,72,000/- and 67,10,000/- is sought to be replaced by Rs.52,80,000/- and 22,20,000/- respectively. In the end of para 6, it is proposed to be added that defendants No. 3 and 4 have paid an amount to defendants No. 1 and 2 and Smt. Nirmla Malhotra more than the amount depicted as value of sale deed as per prescribed circle rate in sale deeds under reference.

3. In the end of para 8 and in prayer clause, alternative plea and prayer for passing a decree for recovery of earnest money along with interest has been proposed to be incorporated.

4. It is stated that despite due care and diligence, figures of amount proposed to be substituted and plea for granting alternative relief could not be incorporated in plaint by plaintiff. As per plaintiff, he had approached a well qualified and experienced Advocate and submitted all papers for his consideration, who best of his ability and knowledge had drafted plaint and filed suit as he considered to be appropriate for redressal of grievance of plaintiff.

5. It is submitted that it is a fact that during pendency of suit, plaintiff changed his counsel who, for the first time, had appeared in this case on 1.10.2015 and on next date of hearing i.e. on 29.10.2015 issues were framed, whereafter an application filed by defendant, for framing additional issue, remained pending till 31.3.2016. After framing additional issue on 31.3.2016, the case was ordered to be listed for recording evidence on behalf of plaintiff and it was only thereafter, while going through record of the case and preparing list of witnesses, it transpired that there was inadvertent incorrect narration of facts relating to sale consideration with respect to sale deeds No. 2311 and 2312 dated 24.11.2012 executed by defendants No. 1 and 2 in favour of defendants No. 3 and 4 regarding suit land and also that additional alternative relief, for which plaintiff would otherwise be entitled in facts and circumstances, was ommitted to be incorporated in the plaint.

6. It is also submitted on behalf of plaintiff that though, in present case, trial has commenced on framing of issues, but same is at the initial stage as evidence of plaintiff is yet to commence and therefore, there is no legal impediment for allowing the application as proposed amendment is necessary not only for just, effective and complete adjudication and but also for final determination of real controversy involved in case and to avoid multiplicity of litigation. It is also claimed that proposed amendment of plaint, though is material, but shall not be changing or altering the nature of lis between the parties nor will it cause any prejudice to defendants.

7. Lastly it is submitted that on account of omission of another counsel earlier representing plaintiff, correct figure of amount and alternative relief could not be pleaded despite due diligence and care on the part of plaintiff as plaintiff depends upon expertise opinion for pleadings and claiming relief.

8. Learned counsel for the plaintiff submits that case of plaintiff falls in exception carved out in proviso of Rule 17 of Order 6 of CPC as it is evident from facts of the case that inspite of due diligence the plaintiff could not raise the matter before commencement of trial.

9. Learned counsel for the plaintiff also submits that on the first page of sale deeds in question, two values of sale deeds have been mentioned. One is value of sale deed as per prescribed circle rate and another is value of sale deed i.e. amount of consideration which is claimed to be paid to seller and it appears that inadvertently, at the time of filing the suit, instead of value of sale consideration mentioned in sale deed, value of sale deed as per prescribed circle rate has been mentioned in plaint and therefore, amendment sought for replacing amount of sale deed value is, in fact, correction of amount, as per documents on record.

10. It is also submitted on behalf of plaintiff that power to award compensation under Section 21 of Specific Relief Act 1963, for desisting from performance of contract, can be exercised by Court only in case such compensation is claimed by plaintiff and this Section permits incorporation of prayer for such compensation in plaint at any stage by allowing the plaintiff to amend the plaint. Reliance has also been put upon provision of Section 21 (5) of Specific Relief Act, 1963, wherein proviso provides that where plaintiff has not claimed any compensation in plaint, the Court shall, at any stage of proceedings, allow him to amend the plaint, on such terms as may be just, for including a claim for such compensation.

11. Learned Senior counsel for the plaintiff states that amendment has to be related back to the date of filing of suit and in present case agreement to sell was executed on 18.8.2012 and suit was filed on 9.7.2014 i.e. within two years of execution of agreement and thus, though cause of action for claiming relief of compensation has to arise on denial of execution of agreement but even, in any case, if it is to be taken from date of filing of suit then also amendment seeking recovery of earnest money in alternative in suit is within limitation as suit was filed within two years after execution of agreement.

12. It is also contended that even if proposed amendment for alternative relief is to be related with date of filing of application for amendment, then also, the application was filed on 21.7.2016 and as per agreement dated 18.8.2012, last date for executing the sale deed in pursuance to the said agreement was 30.11.2013, on which date defendants No. 1 and 2 failed to turn up for execution of Registry and application for amendment has been filed on 21.7.2016 i.e. within three years from date of cause of action to claim the alternative relief i.e. from 30.11.2013, on failure of defendants No. 1 and 2 to execute the sale deed on that date in pursuance to agreement as limitation period is to commence from the date of refusal to act upon the agreement or last date in agreement fixed for execution of sale deed.

13. Learned counsel for plaintiff, in alternative, relying upon pronouncement of the Apex Court in ***Pankaja and another vs. Yellappa, (2004)6 SCC 415*** submits that time barred claim can also be permitted by way of amendment in plaint. Further relying upon judgment of Apex Court in ***Vidyabai and others vs. Padmalatha and another, (2009)2 SCC 409***, it is also submitted that amendment of pleading can be allowed even after commencement of trial, if conditions precedent for it that inspite of due diligence, the parties could not have raised the matter before commencement of trial, is satisfied. He submits that in peculiar facts and circumstances of the present case, there is no lapse or lack of due diligence on the part of plaintiff and he exercised requisite prudence of ordinary litigant for filing the suit and claiming the relief in plaint.

14. Mr. Neeraj Gupta, Advocate, contesting application on behalf of defendants No. 1 and 2, submits that so far as the amendment to figure of amount and corresponding addition, related thereto in para 6 of plaint is concerned, the same is not opposed. However, he contends that incorporation of the plea of alternative relief in plaint is not permissible under law. It is submitted that counsel was changed prior to framing of issues and issues were framed on 29.10.2015 and application for framing additional issues, filed on behalf of defendants, listed for first time on 3.12.2015, was decided on 31.3.2016, but application for amendment was filed on 31.7.2016. Therefore change of counsel by plaintiff is also not a justifiable ground for seeking amendment in plaint at this stage as the plaintiff as well as his counsel has failed to act with due diligence and care which was mandatory on their part. According to him, change of counsel is no ground for seeking amendment as the counsel representing plaintiff now, is conducting the case before framing of issues i.e. since 1.10.2015 and thereafter an application filed by defendants for framing additional issues was adjudicated and decided on 31.3.2016 and no application for amendment was preferred till July 2016 even after changing the counsel in the year 2015. He submits that nature of suit is specific performance of agreement and grant of alternative relief is discretion of Court, which cannot be claimed as a matter of right and plaintiff had engaged the counsel for filing the suit either for execution of sale deed or refund of earnest money and as such

no plea for refund of amount was taken. Therefore, at this stage proposed amendment incorporating alternative relief is not permissible.

15. It is argued that plea of due diligence and care on the part of plaintiff and ommission to incorporate plea and prayer of alternative relief by counsel representing the plaintiff earlier, is also not born out from contents of application filed for amendment and he urges that submissions made on behalf of plaintiff are not based upon pleadings of the application and the application is also lacking material particulars with respect to wrong, imperfect or ill-advise on the part of counsel and in case where two reliefs are available to plaintiff and only one relief is pressed in plaint then other relief will be deemed to have been abandoned and once plaintiff has chosen to file suit claiming one relief only and not chosen to assert another claim, he will be precluded from incorporating another claim at this stage after commencement of trial particularly in view of mandatory provisions of Order 6 Rule 17 CPC prohibiting plaintiff from carrying out such amendment in plaint.

16. It is submitted that plea of alternative claim is not legal plea and therefore, it cannot be incorporated in plaint beyond limitation period and execution of sale deeds by defendants No. 1 and 2 was well within knowledge of plaintiff at the time of filing of suit and he was having option to claim the alternative plea, but plaintiff opted not to claim the said relief and now he is not entitled for amendment in question as it is against the principle related to amendment of pleadings.

17. It is also submitted that case law cited by plaintiff clearly lays down that there would be liberal approach in amendment of written statement but rigours for amending the plaint are hard. Change of Advocate cannot be a valid change of circumstances to seek amendment in plaint. It is alleged that plaintiff has not come with clean hands to Court and his pleadings are vague in nature.

18. Learned counsel for defendants No. 3 and 4, besides adopting the arguments addressed on behalf of defendants No. 1 and 2, submits that plaintiff is not entitled to proposed amendment for incorporating plea of alternative relief in view of provisions of Order 2 Rule 2 CPC, as plaintiff has failed to include the whole claim in plaint at the time of filing the suit and for omission to do so, he has to be considered to have abandoned the claim being sought to be incorporated by way of proposed amendment.

19. In rebuttal, learned counsel for plaintiff submits that in case plea of counsel for defendants No. 3 and 4 is accepted, then provisions of Order 6 Rule 17 CPC will be redundant as in such eventuality amendment in plaint even prior to commencement of trial for addition of relief will be impossible.

20. I have considered the pleadings on record as well as arguments advanced by learned counsel for the parties. In my opinion, Order 2 Rule 2 CPC and Order 6 Rule 17 CPC operate in different, distinct, and separate fields. Order 2 Rule 2 prohibits filing of subsequent suit for claiming a relief on the same cause of action on the basis of which earlier suit was filed omitting to claim the relief in said suit without leave of Court to sue for such relief in subsequent suit. Whereas, Order 6 Rule 17 CPC provides right to either party to alter or amend his pleadings, which may be necessary for the purpose of determining the real question in controversry between the parties, subject to limitation provided in this provision itself. Pleadings also include the relief claimed in plaint and therefore subject to conditions precedent, plaintiff has a right to amend the claim during pendency of suit. Thus, plea taken by counsel for defendants No. 3 and 4 that in view of Order 2 Rule 2 CPC plaintiff is not entitled to amend the prayer clause for seeking alternative relief for its omission in original plaint, is not sustainable.

21. It is settled law that Courts exist to dispense justice. Technicalities of law should not be permitted to hamper the Courts in adjudication of justice between the parties. Basic principle of law of procedure is that no proceedings in a Court of law should be allowed to be defeated on mere technicalities and provisions of law, part of adjective law dealing with procedure alone, must be interpreted in a manner so as to subserve and advance the cause of justice rather

than to defeat it. Procedure is meant only to facilitate the administration of justice not to defeat the same and Court should not bind itself by shackles of technicalities. ***(See: Ghanshyam Dass and others vs. Dominion of India and others, (1984)3 SCC 46, B.K.Narayana Pillai vs. Parameswaran Pillai and another (2000)1 SCC 712, Tilak Raj vs. Baikunthi Devi (dead) by LRs (2010)12 SCC 585, & Banwari Lal vs. Balbir Singh (2016) 1 SCC 607).***

22. It is also settled law that procedural norms, technicalities and procedural law evolve after years of emprical experience and to ignore them or to give them short shrift inevitably defeats justice, but at the same time, Courts in every case are not bound by letter of CPC, rather expected to exercise discretion in accordance with spirit of CPC to do substantial justice to the parties. ***(See: Westarly Dkhar and others vs. Sehekaya Lynghod (2015)4 SCC 292)***

23. Dominant purpose to allow amendment is to minimise litigation and in case omission or commission by party in pleadings, sought to be amended, is because of sufficient cause, party should be permitted to amend his pleadings including prayer clause but definitely subject to limitation provided in the provisions for amendment itself.

24. In present case, though trial has commenced but evidence is yet to be recorded. In view of Section 21 of Specific Relief Act 1963, plaintiff has a right to amend the plaint for awarding compensation for breach of contract at any stage of proceedings as proviso of Sub-section 5 of Section 21 states that where the plaintiff has not claimed any such compensation in plaint, the Court 'shall', at any stage of proceedings, allow him to amend the plaint, on such terms as may be just, for including a claim for just decision. Limitation of Proviso of Rule 17 of Order 6 CPC is to be read with provisions of Section 21 of Specific Relief Act and by giving harmonious construction to these provisions, plaintiff is entitled for amendment in prayer clause for claiming compensation for breach of contract.

25. Amendment for replacing amount of sale deed value is not opposed by defendants. Even otherwise it is a curable bonafide mistake occurred due to mention of two values on first page of sale deed(s). Such mistakes, clerical in nature, should be allowed to be rectified for subserving cause of justice.

26. As per submissions made on behalf of plaintiff, the reliefs sought to be added in plaint, appear to be within limitation. Even otherwise, in case defendants claim that relief is time barred then this disputed issue will be a subject matter of trial. In such eventuality, defendants have every right to raise the said issue in suit itself and in case the relief is found to betime barred, the same can be disallowed at the time of final decision.

27. Change of counsel may not be a valid ground always for justifying amendments in plaint in every case and also at any stage of suit. In present case, it is not only the change of counsel which weighed for allowing the application for amendment but the provisions of Section 21 of Specific Relief Act and also dependency of plaintiff on expert i.e. Advocate for pleadings related to prayer for relief available to him under law are also the reasons for which present application deserves to be allowed. Plaintiff is not seeking an amendment in the facts for declaration, disclosure or correctness of which he is primarily responsible. Here is a relief which was necessary to be incorporated for complete and final decision of the case but was omitted to be prayed for by counsel at the time of filing the suit.

28. Further, suit has yet commenced but at the initial stage. It is no where stated in plaint that plea for refund of amount was ever abandoned by plainitff. More so, abandonment of relief would have been subject matter of subsequent suit. Therefore, omission to claim compensation for breach of contract at the time of filing of plaint is not a valid ground to reject the application of amendment for incorporating the said reliefs at this stage.

29. Plaintiff approached an experienced counsel, narrated his grievances and submitted his papers to him, who prepared the plaint. There is no lapse in exercising due diligence and care on the part of plaintiff. Plaintiff is not an expert and he depended for pleadings

on exerptise of his counsel. Even otherwise the amendment sought to rectify error or mistake in plaint is neither fraudulent nor malafide but based on bonafide reasons coupled with right to amend the plaint available under Section 21 of Specific Relief Act. The proposed amendment is not going to change the nature of suit and also it will not take away any right of defendants causing prejudice to their interest or resulting into loss of right of their defence. Recording of evidence has not started yet and it is not a case where defendants cannot be placed in same position, had the plaintiff originally filed plaint correctly.

30. For aforesaid reasons, I am of the view that inspite of due diligence, there is mistake in mentioning correct value of sale deed and also omission to claim alternative relief and therefore, prayer for amendment of plaint, as sought, deserves to be allowed. Therefore, application is allowed. Amendment in plaint, as prayed for, is permitted. Amended plaint filed along with application is taken on record. Application stands disposed of.

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

Geeta Nand ...Petitioner
Versus
Bharat Sanchar Nigam Limited ...Respondent

CWP No. 8652 of 2010 alongwith
CWP Nos.8653, 8654 and 8655 of 2010.
Date of decision: 19.05.2017

Constitution of India, 1950- Article 226- The petitioner remained engaged as daily rated mazdoors with BSNL since November, 1995 till 23.8.1996- their services were dispensed with – Labour Court on references held that services of the petitioners were terminated in violation of Section 25-F of the Act and the termination was illegal and unjustified – reinstatement was denied but compensation of Rs.25,000/- was ordered to be paid to each of the petitioners- however, in case of K, another workman, reinstatement with all service benefits was allowed- BSNL filed a writ petition in case of K, which was dismissed- LPA and SLP were also dismissed – held that the case of the petitioner is similar to K – hence, the compensation enhanced to Rs.3 lac from Rs.25,000/-.(Para-12 to 18)

Cases referred:

Transport Corporation of India Vs. Employees' State Insurance Corpn. and another, (2000) 1 SCC 332
Delhi Gymkhana Club Limited Vs. Employees' State Insurance Corporation, (2015) 1 SCC 142
Union of India and another Vs. Surendra Panday, (2015) 13 SCC 625
Royal Western India Turf Club Limited Vs. Employees' State Insurance Corporation and others (2016) 4 SCC 521)
Senior Superintendent Telegraph (Traffic), Bhopal Vs. Santosh Kumar Seal and other (2010) 6 SCC 773
Bharat Sanchar Nigam Limited Vs. Man Singh (2012) 1 SCC 558
Assistant Engineer Rajasthan Development Corporation and another Vs. Gitam Singh (2013) 5 SCC 136

For the petitioner (s) in all petitions : Mr. Pawan Gautam, Advocate.
For the respondent No.1 in all petitions : Mr. Ashok Sharma, Senior Advocate with Ms. Sukarma, Advocate.
For the respondent No. 2 : None.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge (Oral)

Since common questions of law and facts are involved in these petitions, hence are taken up together for hearing and are being disposed of by a common Judgment.

2. Admitted facts of the case are that petitioner(s) alongwith one Krishan Kumar, remained engaged as daily rated mazdoors with Bharat Sanchar Nigam Limited (here-in-after referred to as 'BSNL') since November, 1995 to 23.08.1996. Thereafter their services were dispensed with. On raising demand under the Industrial Disputes Act (here-in-after referred to as 'the Act') by petitioner(s) as well as Krishan Kumar appropriate authority referred the matter for adjudication of Industrial Dispute to Central Government Industrial Tribunal-cum-Labour Court, Chandigarh (here-in-after referred to as 'Labour Court') by framing following reference:-

> *"Whether the action of the management of Distt. Manager Telecom, Mandi in terminating the services of Shri Geeta Nand w.e.f. 24.8.96 without any notice and payment of retrenchment compensation is illegal and unjustified? If so, to what relief the concerned workman is entitled to and from which date"?*

3. Labour Court, in all references held that services of petitioner(s) and Krishan Kumar were terminated in violation of provisions of Section 25-F of the Act and as such their termination was illegal and unjustified.

4. In case of petitioner(s), Labour Court rejected their claim of reinstatement but awarded a compensation of Rs.25,000/- to each of them for their illegal and unjustified retrenchment, however in case of Krishan Kumar, vide award dated 17.01.2007 (Annexure P-6), Labour Court directed his reinstatement with all service benefits except back wages.

5. Against award directing reinstatement of Krishan Kumar, BSNL filed CWP No. 297/2008 in the High Court of Himachal Pradesh which was dismissed on 13.12.2011. LPA No.78/2012 preferred by BSNL was also dismissed by the High Court on 12.6.2012.

6. BSNL had preferred Special Leave Petition No. 37585/2012 in Civil Appeal No. 6272 of 2014 titled Bharat Sanchar Nigam Limited Vs. Krishan Kumar decided on 7th July, 2014, the Apex Court did not consider it appropriate to direct BSNL to reinstate workman after long lapse of time and in lieu of reinstatement, awarded compensation of Rs.3.00 lakhs to Krishan Kumar. Order passed by the Apex Court, placed on record by learned counsel for petitioner reads as under:-

> "*Leave granted.*
>
> *Heard learned counsel for the parties.*
>
> *Regard being had to the facts and circumstances of the case, we do not think it appropriate to direct reinstatement after such a long lapse of time. However, the appellant shall give compensation of Rs.3 lakhs to the respondent. We have been apprised at the bar that a sum of Rs.2 lakhs has been deposited before the Registry of this Court. The same amount shall be paid to the respondent along with interest accrued thereon. Apart from the said sum, a further sum of Rs.1 lakh shall be paid to the respondent within a period of six weeks hence. With the aforesaid modification, the appeal stands disposed of. There shall be no order as to costs".*

7. In case of petitioner(s) so far as the petitioner(s) are concerned, BSNL, accepting findings of Labour Court that termination is in violation of provisions of the Act, did not assail the award passed by the Labour Court rather, had offered payment of Rs.25,000/- each to petitioners.

8. In instant petition(s), petitioner(s) have assailed award passed by Labour Court whereby their plea for reinstatement was rejected and only a compensation of Rs.25,000/- to each petitioner was awarded for their retrenchment in violation of provisions of the Act. These

petition(s) have been filed claiming parity with Krishan Kumar, seeking direction to their reinstatement with all service benefits as were granted by Labour Court to Krishan Kumar.

9. BSNL had not assailed award passed by Labour Court in favour of petitioner(s) rather it had offered payment of amount of compensation i.e. Rs.25000/- awarded by Labour Court to petitioner (s) in compliance of impugned award.

10. Learned counsel for petitioner(s) submits that though for illegal and unjustifiable retrenchment in violation of the Act, petitioner(s) are entitled for reinstatements alongwith consequential benefits including back wages but in view of order passed by the Apex Court in Civil Appeal No. 6272 of 2014, petitioner(s) will be satisfied in case BSNL is directed to pay compensation to them for their illegal and unjustifiable retrenchment as has been awarded by the Apex Court in case of Krishan Kumar in identical facts and circumstances.

11. Mr. Ashok Sharma, Senior Advocate, under instructions of Ms. Sukarma Sharma, Advocate, submits that compensation granted in Krishan Kumar's case is highly excessive and even the Apex Court has not followed the same course in its subsequent pronouncements and compensation of Rs.3.00 lakhs to a workman who had served hardly for 240 days with BSNL is not entitled for such a huge amount of compensation. He submits that amount of compensation awarded by Labour Court is just and fair and does not warrant any interference of this Court and the petitioner(s) are not entitled for anything more than that.

12. Claim of reinstatement of petitioner(s) rests upon the decision in case of Krishan Kumar. Now Krishan Kumar's case has been decided finally by the Apex Court wherein direction to reinstatement stands set aside and he has been held entitled only for a compensation of Rs.3.00 lakhs for his illegal and unjustified retrenchment. Present petition(s) are also squarely covered by the pronouncement of Apex Court passed in Krishan Kumar's case.

13. In a beneficial legislation, a liberal interpretation has to be adopted. Industrial Disputes Act is a welfare legislation and is required to be interpreted so as to ensure extension of benefits to the employees and not to deprive them of the same which are available under the Act. When two views are possible on its applicability to a given set of employees, that view which furthers the legislative intention should be preferred to the one which would frustrate it. ***(See Transport Corporation of India Vs. Employees' State Insurance Corpn. and another, reported in (2000) 1 SCC 332, Delhi Gymkhana Club Limited Vs. Employees' State Insurance Corporation, (2015) 1 SCC 142, Union of India and another Vs. Surendra Panday, (2015) 13 SCC 625 and Royal Western India Turf Club Limited Vs. Employees' State Insurance Corporation and others (2016) 4 SCC 521).***

14. This Court is not oblivious that the Apex Court in numerous matters has held that normally in case of illegal and unjustifiable termination of service reinstatement of workman should be directed. However it is also settled that in appropriate cases keeping in view the facts and circumstances of each case including the time gap between termination and decision of the dispute, the court can award just and fair compensation in lieu of reinstatement and in fact, the Apex Court, in case of Krishan Kumar followed the same course. ***(See Senior Superintendent Telegraph (Traffic), Bhopal Vs. Santosh Kumar Seal and other (2010) 6 SCC 773, Bharat Sanchar Nigam Limited Vs. Man Singh (2012) 1 SCC 558 and Assistant Engineer Rajasthan Development Corporation and another Vs. Gitam Singh (2013) 5 SCC 136).***

15. The case of petitioner(s) is not only similar but identical to the case of Krishan Kumar who was also engaged alongwith petitioner(s) in the same telecom circle and also terminated alongwith them on one and the same day. Plea of excessive amount of compensation is not also sustainable for the reason that the Apex Court in the identical facts and circumstances has awarded compensation of Rs.3.00 lakhs to one out of the five workmen engaged and terminated together. Award of lesser amount of compensation in subsequent cases can also be no ground for granting lesser compensation to petitioner(s) than Krishan Kumar as amount of compensation may differ in different cases in the given facts and circumstances of those cases. Compensation in each case is to be determined on the basis of merit of that case.

16. In instant case one, out of five identical workmen in identical situation, has been awarded a compensation of Rs.3.00 lakhs by the Apex Court in the month of July 2014, 3 years earlier to date. Therefore, I find no reason to award lesser compensation to petitioner(s).

17. In view of above discussion claim of petitioner(s) for reinstatement is rejected, however amount of compensation awarded to them is enhanced from Rs.25,000/- to Rs.3.00 lakhs each which shall be paid by BSNL to petitioner(s) latest by 31st July, 2017. Needless to say any amount paid by BSNL and received by petitioner(s) in compliance of direction of Labour Court shall be deducted from Rs.3.00 lakhs. On failure to make payment on or before 31st July, 2017, petitioner(s) shall also be entitled for interest @ 6% per annum from the date of filing of the petition(s) in this Court.

18. Writ petition(s) are disposed of in above terms. Pending application(s), if any, also stand disposed of. No order as costs.

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

Chand Rani & another .....Petitioners.

Versus

Ram Lal (deceased) through Kamla Thakur. ....Respondent.

CMPMO No. 117 of 2017
Decided on : 22.5.2017

Indian Evidence Act, 1872- Section 73- The signatures of the plaintiff were sent for comparison to CFSL and a report was issued that comparison cannot be carried out with the help of supplied specimen and admitted signatures- plaintiff has died and it is not possible to get his specimen signatures- hence, the documents ordered to be sent to CFSL, Hyderabad for comparison – the order of Trial Court set aside. (Para-1 and 2)

For the petitioners: Mr. Desh Raj Thakur, Advocate.
For the respondent: Mr. Sanjeev Kuthiala, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

In pursuance to the learned trial Court allowing an application preferred before it, by the defendant/counter claimant for sending the disputed signatures of the plaintiff for comparison by the hand writing expert with the plaintiff's admitted signatures, the CFSL concerned, on hence receiving the relevant writings of the plaintiff, proceeded to purvey its report, the relevant portion whereof is extracted hereinafter:-

> "It has not been possible to reach at any conclusion regarding authorship or otherwise of the disputed signatures in the red enclosed portions stamped & marked Q1 to Q7 in comparison with the supplied standard writings and signatures in the red enclosed portions similarly stamped & marked S1 to S4 and A1 to A7 for the manifest reasons that the supplied admitted signature marked A7 appended on last page of statement dated 27.11.2002 of PW1 i.e. Sh. Ram Lal is in English Capital letters whereas rest of the supplied admitted English signatures as well as supplied specimen English signatures are in cursive English writings except admitted signature marked A6 and specimen signatures marked S3 & S4 which are in Hindi whereas all the questioned signatures are in

> English, as such, the signatures marked A6, A7, S3 and S4 are not found to be suitable for an effective comparison with the supplied questioned signatures. Further, on inter-se comparison of supplied admitted signatures marked A1 to A5 and specimen signatures marked S1 & S2 it appears that the specimen signatures are too simplified and also appears to be hastily written, therefore, resulting into difficulty in studying and inter-se examination of commonly occurring letters & their combinations between both sets of signatures before correctively considering them as suitable & sufficient standard signatures of Sh. Ram Lal. As such, the supplied specimen and admitted signatures do not collectively constitute suitable and sufficient standards for the purpose of effective scientific comparison with disputed signatures."

Wherein it obviously showed its inability to pronounce a firm opinion qua the common or the variant authorship of the disputed and the admitted documents. It appears that the CFSL, Shimla despite being possessed with the admitted writings of the plaintiff, occurring on the mortgage deed of 1985, execution whereof hence is in contemporanity with the disputed/contentious execution of other documents by him, did not either proceed to hold its comparison with the relevant disputed signatures nor it made a firm order with respect to the common or the variant authorship of the disputed/admitted hand writings of the plaintiff, rather it was led to seek elicitation of such further admitted hand writings of the plaintiff, holding contemporanity with the purported execution by him of contentious/disputed documents. Since it is submitted at the Bar, that the plaintiff is no longer surviving, hence it is obviously not possible to get his specimen hand writings besides with more than 30 years' elapsing since the purported execution of the relevant documents by the plaintiff, elapse of immense time whereof, not rendering it possible for the LRs of the plaintiff or for the defendant, to elicit the admitted writings of the deceased plaintiff appertaining to the period when the execution of his admitted writings borne on the mortgage deedhence occurred. Consequently, when the aforesaid admitted writings of the plaintiff occurring on the mortgage deed, appear to be his singularly available admitted hand writings, hence when they also hold contemporanity with the relevant disputed writings, therefore, in view of the aforesaid untenable inability expressed by CFSL Shimla, it is deemed fit to re-send them to the CFSL Hyderabad for enabling it to after its making their relevant comparison, its making an opinion qua their variant or common authorship by the plaintiff.

2. The learned counsel for the defendant has contended that the learned trial Court, holds an empowerment under the provisions of Section 73 of the Indian Evidence Act to suo moto make comparison of the disputed hand writings of the plaintiff with his admitted hand writings, hence this Court ought not to proceed to make an order for re-sending to the hand writing expert concerned, the relevant documents for their interse comparison by him. However, the aforesaid submission cannot be accepted, given with evidently the hand writing expert at the CFSL concerned, for reasons set forth in his report declining to make a firm opinion with respect to the authoring of the disputed documents, by the plaintiff, hence with the expert concerned, declining to furnish his opinion on the admitted/disputed writings of the deceased plaintiff, it would be legally unbefitting for the learned Court to hence enter upon their inter-se comparison, by relying upon the provisions of Section 73 of the Indian Evidence Act, which stands extracted hereinafter:-

> "73. Comparison of signature, writing or seal with others admitted or proved.—In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing, or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing, or seal has not been produced or proved for any other purpose. The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

1[This section applies also, with any necessary modifications, to finger-impressions.]"

Conspicuously also when the afore extracted provisions, though predominantly empower the Court concerned, to make the relevant comparison yet when the relevant comparison would occur, only on its directing the persons concerned present in the Court to write certain words/figures in its presence. In other words, when the power vested in the Court concerned would arise on satiation of the sine qua none spelt therein, comprised in the the person concerned whose authoring of relevant words/figures are disputed, is present in the Court concerned, for purveying his signatures and writings to it, whereupon, only their apt comparison can be tenably made by the court concerned. However, since the plaintiff is no longer surviving, he cannot be directed by the Court concerned to submit before it, his specimen signatures, writings or figures, nor hence the Court concerned, can within the ambit of Section 73 of the Indian Evidence Act, proceed to compare them with the disputed writings of the plaintiff. Consequently, the aforesaid reason assigned by the learned trial Court for declining relief to the petitioner herein, is ridden with a gross legal frailty. The petition is allowed. Impugned order is set aside. The pending application(s), if any, stand disposed of.

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

Dev Raj alias Raj and another ..Appellant.
Versus
State of Himachal Pradesh ..Respondent.

Cr. Appeal No. 75 of 2005.
Decided on : 22/05/2017

Indian Penal Code, 1860- Section 326, 447 and 307- PW-1 and her father are in possession of the disputed land for more than 20 years- PW-1 and V were cutting the grass when the accused trespassed into the land and asked them not to cut the grass – the accused started beating them on their refusal- PW-1 shouted for help on which husband of PW-1 and his brother arrived at the spot – the accused also gave beatings to them – accused R inflicted multiple injuries on the head and right side of the neck of the husband of the PW-1 with Gupti – the accused were tried and convicted by the Trial Court- held in appeal that there are contradictions in the testimonies of witnesses in the Court and the version recorded by the police- PW-3did not support the prosecution version and was declared hostile – the statement under Section 27 was not recorded prior to effecting recovery – all these factors made the prosecution version doubtful- appeal allowed and accused acquitted. (Para-7 to 15)

For the Appellant: Mr. Anand Sharma, Advocate.
For the Respondent: Mr. Vivek Singh Attri, Dy. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The instant appeal stands directed against the impugned judgement of conviction pronounced upon the appellants herein besides is directed against the sentence(s) pronounced upon them for theirs committing offences punishable under Sections 326, 447 and 307 of the IPC.

2. The brief facts of the case are that Smt. Jamna Devi and her father had been in possession of the land in dispute for more than 20 years. They had been cutting grass from the

land. On 7.11.1997 PW-1 Jamna Devi alongwith her Jethani Veena Devi had been cutting the grass for the last 1-2 days, the accused persons tress-passed into their Ghasni and asked them not to cut grass. On her refusal, they started beating her and PW-1 Jamna Devi cried for help. Her husband Shri Roop Lal PW-4 and his brother Shri Manohar Lal, PW-5 reached the spot from their houses and the accused persons started giving beatings to them also. Accused Ram Lal alias Ramo took Gupti from Dev Raj, accused and inflicted multiple injuries with Gupti on the head and right side of the neck of her husband . Accused Ram Lal inflicted multiple injuries on the person of Shri Manohar Lal. Veena Devi cried for help and PW-3 Shri Jagdish and PW-11 Shri Roshan Lal rushed to the spot. PW-1 Jamna Devi made statement to the police Ext.PW-1/A which was recorded by PW-13 Nanak Ram, Head Constable, on which F.I.R was recorded. After completing all codal formalities and on conclusion of the investigation into the offences, allegedly committed by the accused challan was prepared and filed in the Court.

3. A charge stood put to the convicts/appellants herein, by the learned trial Court, for theirs committing offences punishable under Sections 326, 447 and 307 IPC to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 17 witnesses. On closure of prosecution evidence, the statements of the accused under Section 313 of the Code of Criminal Procedure, were recorded in which they pleaded innocence and claimed false implication. However, they chose to lead evidence in defence.

5. The accused persons stand aggrieved by the findings of conviction recorded upon them by the learned trial Court, for theirs committing offences punishable under Sections 326, 447 and 307 IPC. The learned counsel appearing for the accused has concerted to vigorously contend qua the findings of conviction recorded by the learned trial Court standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of conviction warranting reversal by this Court, in the exercise of its appellate jurisdiction and theirs being replaced by findings of acquittal.

6. On the other hand, the learned Deputy Advocate General appearing for the State has with considerable force and vigour, contended qua the findings of conviction recorded by the Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating any interference rather meriting vindication.

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

8. PW-1 who lodged F.I.R. borne on Ext. PW-1/A, has testified in corroboration with respect to the recitals borne therein. Her testification occurring in her examination in chief remains uneroded of its veracity despite hers facing the ordeal of an exacting cross-examination. The prosecution for corroborating the version qua the incident, testified by PW-1, had led into the witness box PW-2, PW-3, PW-4 and PW-5 all purported ocular witnesses to the occurrence. In case the testifications of all the aforesaid purported ocular witnesses to the occurrence are “not” in bereft of any stain of any intra se contradictions besides when they contradict the testification of PW-1 or in case their respective testifications are in gross detraction of the version qua the occurrence embodied in F.I.R. Ext.PW-1/A, thereupon this Court would be constrained to disimpute credence to the version qua the occurrence testified by PW-1 also it would be constrained to construe that the testifications of ocular witnesses to the occurrence are ridden with a stain of theirs improving upon besides embellishing upon the version borne on Ext.PW-1/A.

9. PW-2, as apparent on a reading of his testification, occurring in his examination in chief, had arrived at the site of occurrence subsequent to its taking place thereat, hence he cannot be construed to be communicating an ocular version with respect to the incident. Consequently when he did not eye witness, the fact of accused Dev Raj “with” user of knife/gupti recovered under memo Ext.PW-1/D hence stabbing the victims, resultantly he is defacilitated to

efficaciously depose with respect to the user of Gupti on the person of victim Ram Lal, by accused Dev Raj. In sequel, his testification does not support the charge against accused Dev Raj. Moreover, PW-2 in his testification has deposed that the accused persons pelted stones on the complainant besides he deposed that hence with user thereof also with user of sticks, injuries standing inflicted on the person of the complainant/victims. However, the aforesaid testification occurring in the examination in chief of PW-2, is in stark contradiction also is in gross embellishment upon the version qua the occurrence initially recorded in Ext.PW-1/A, wherein there is no enunciation qua the accused pelting stones at the complainant nor any communication occurs therein that the accused with sticks wielded by him, hence inflicted injuries on the person of the victims/complainant. His testimony hence qua the occurrence when is amenable to a construction of it standing stained with a vice of gross contradiction vis-à-vis the initial version qua the occurrence borne on Ext.PW-1/A. In sequel, it holds no creditworthiness. Also concomitantly recovery of two sticks under memos Ext.PW-1/B loose their efficacy. The testimony of PW-3 another purported ocular witness qua the occurrence also does not hold any aura of credibility, significantly when he during the course of his examination in chief, did not support the version qua the occurrence borne on Ext.PW-1/A. However, even though he was permitted to be cross-examined by the PP concerned, on his being declared hostile, yet during the course of his cross-examination, the learned PP has not been able to make any elicitation from him, whereupon this Court would be constrained, to dispel the effect of, his in his examination in chief reneging from his previous statement recorded in writing, rendering hence the effect of his not supporting the prosecution case to remain intact.

10. PW-4 in his examination in chief, in blatant contradiction with the apposite recitals occurring in the apposite F.I.R. borne in Ext.PW-1/F, has disclosed that the accused persons had torn the clothes of the women/victims. The clothes of the women/victims Jamna and Veena, were respectively taken into possession under memo Ext.PW-1/C, memo whereof is proven by PW-1. However, neither the aforesaid testification occurring in the examination-in-chief of PW-4 nor recovery of clothes respectively of Jamna and Veena under memo Ext.PW-1/C, holds any vigour for this Court being constrained to pronounce an order of conviction upon the accused conspicuously when as aforesaid he has embellished besides improved upon the initial version qua the occurrence borne on Ext.PW-1/A, wherein the aforesaid fact remains unrecorded. Consequently, also it appears that PW-4 was unavailable at the site of occurrence when it took place thereat, thereupon his testification wherein he purveys a purported ocular account of the occurrence, is bereft of any aura of credibility. Aggravation to the aforesaid inference, is aroused by his in his cross-examination, making a disclosure qua Jamna and Veena alone holding a capacity, to depose with respect to the persons who had caused injuries to them, wherefrom it is to be concluded that the entire communications occurring in his examination in chief, wherein he ocularly ascribes an incriminatory role to the accused, suffering from a vice of incredibility. Likewise, also the testification of PW-5 when he alike PW-4 deposes qua the accused persons begetting tearings of the clothes of the women/victims, hence suffers from an alike infirmity hence likewise is stained with an alike infirmity of incredibility.

11. The testification qua the occurrence occurring in the examination in chief of PW-11 also an eye witness to the occurrence, is in its entirety effaced, by his in his cross-examination admitting a suggestion put to him by the learned defence counsel, that in his presence none caused injury to any member of the complainant party. Even though this Court has dispelled the vigour of the testifications of the purported eye witnesses to the occurrence, nonetheless the sole testification of the complainant qua the occurrence, cannot be robbed of its strength, yet when the Investigating Officer concerned, did not construe it befitting to lead her alone into the witness box, for hers hence corroborating the version qua the occurrence embodied in Ext.PW-1/A, rather his proceeding to associate for reasons aforestated invented witnesses qua the ill-fated occurrence, necessarily hence coaxes this Court to conclude that he had, by introducing invented witnesses to the occurrence, hence made a concert to, by obviously resorting to a stratagem, ensure success of the prosecution case also it begets an inference that he had even in Ext.PW-1/A proceeded to record a slanted version qua the occurrence.

12. Even though recovery memo Ext.PW-1/B is proven to beget effectuation of recovery thereunder of the items divulged therein. However, the recovery thereunder of clothes respectively of Jamna and Veena under Ext.PW-1/C, cannot leverage any conclusion that perse thereupon the genesis of the prosecution version hence being firmly proven. Significantly when for reasons aforestated, with the complainant not making in Ext.PW-1/A any communication therein qua during the course of the ill fated occurrence, the clothes of either Veena or Jamna, standing torn by any of the accused concerned.

13. The victims/injured under respective MLCs occurring on Ext.PW-16/A to Ext.PW-16/D, proven by PW-16 doctor D.R.Sehgal, pronounce therein that during the course of the ill-fated occurrence, the complainant/victims sustaining injuries. However, merely on anvil of the testification of PW-16, the prosecution cannot contend that it has succeeded in proving the charge against the accused, given this Court hereinabove concluding that the testifications of the purported ocular witnesses, to the occurrence being bereft of any aura of credibility. Also the testification of the complainant who permitted the Investigating Officer to introduce ocular witnesses to the occurrence, who, however are invented witnesses thereto hence is rendered to be ingrained with a vice of falsity.

14. Be that as it may, the prosecution was enjoined, with an obligation, to relate the user of Gupti by accused Dev Raj by its proving that its recovery at the instance of accused Dev Raj, stood efficaciously effectuated by the Investigating Officer, by the latter hence revering the mandate of Section 27 of the Indian Evidence Act. The Investigating Officer concerned, stood enjoined with a dire legal necessity "to prior to" effectuating recovery of the relevant weapon of offence, his during the course of holding the accused to custodial interrogation hence recording the disclosure statement of the accused, holding unfoldments therein qua the place of its concealment or hiding by him, necessity whereof stands cornered within the domain of Section 27 of the Indian Evidence Act, 1872, provisions whereof stand extracted hereinafter also therein it stands propounded qua thereupon, an admissible besides a relevant custodial confessional statement of the accused assuredly making its emergence, in sequel whereto the subsequent recovery of the weapon of offence, at the instance of the accused, would hold immense evidentiary clout, contrarily when without preceding thereto, the apposite statutorily warranted custodial confessional disclosure statement of the accused remained unrecorded, thereupon any bald recovery of any weapon of offence by the investigating Officer at the instance of the accused, would be hence wholly naked nor would it be construable to be an admissible besides a relevant piece of incriminatory evidence vis-à-vis the accused, significantly when the mandate of law warrants effectuation of the relevant recovery, at the instance of the accused not under a composite recovery memo rather warrants recording prior thereto, an admissible custodial disclosure statement of the accused. In other words, the recording of a disclosure statement of the accused by the Investigating officer prior to his effectuating, any recovery at the instance of the accused, is preemptory, its embodying the custodial confessional statement of the accused, omission to record whereof renders inconsequential besides inadmissible any recovery under a naked bald recovery memo.

15. PW-8 though proves Ext.PW-8/C, a purported demarcation report with respect to the site of occurrence, with an articulation therein of the relevant site being not owned by the accused, yet thereupon the charge of criminal trespass is not sustained, as in his cross-examination he acquiesces that he did not associate the accused at the time of his holding demarcation of the relevant site, thereupon Ext.PW-8/C is of no consequence.

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

In view of above discussion, the appeal is allowed and the impugned judgment rendered by the learned Sessions Judge, Bilaspur is set aside qua convicts Dev Raj and Ram Lal.

The appellants/accused are acquitted of the offences charged. The fine amount, if any, deposited by the accused are ordered to be refunded to them. Personal and surety bonds are cancelled and discharged.

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

Smt.Parvati Devi & Others ....Appellants-Defendants
Versus
Inder Singh & Others ....Respondents-Plaintiffs

Regular Second Appeal No.310 of 2005
Date of decision: 22.05.2017

Specific Relief Act, 1963- Section 34- Plaintiffs filed a civil suit for declaration that they have ½ share in the land while the defendants and F have 1/4th share – the entry in the name of the defendants regarding the ½ share is incorrect – the defendants were never inducted as tenants on the suit land – the suit was decreed by the Trial Court – an appeal was filed, which was dismissed- held in second appeal that the defendants pleaded that after the death of P his share was inherited by H and F in equal share – the defendants are the daughters and sons of H –name of predecessor-in-interest of the plaintiffs was recorded as owner in possession as Hissedar along with predecessor-in-interest of the defendants- names of defendants were recorded on the basis of NakalRapatRoznamacha- however, no statement was made by the owner nor any signatures/thumb impression was taken – the process for recording change was not followed – the Courts had properly appreciated the evidence – appeal dismissed.(Para-10 to 20)

Cases referred:
Tulsa Singh vs. Agya Ram and Others, AIR 1994 HP 167
Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264

For the Appellants: Mr.G.R. Palsra, Advocate.
For the Respondents: Mr.Lakshay Thakur, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

This appeal has been filed by the appellants-defendants against the judgment and decree dated 30.04.2005, passed by the learned Additional District Judge, Mandi, H.P., affirming the judgment and decree dated 28.10.2003, passed by learned Civil Judge(Junior Division), Chachiot at Gohar, District Mandi, H.P., whereby the suit filed by the respondents--plaintiffs has been decreed.

2. Brief facts of the case, as emerged from the record, are that the respondents-plaintiffs *(herein after referred to as the `plaintiffs'),* filed a suit for declaration stating therein that the land comprised in Khata Khatauni No.11/13, Khasra Nos.29, 33, 36, 40 and 42, kittas 5, measuring 0-17-18 bighas in Mohal Mahogi/553, Pargana Ghati-Aad, Sub Tehsil Balichowki, District Mandi, H.P. has been recorded in the joint ownership of the plaintiffs, defendants and one Smt.Fagni widow of Poushu. It is averred by the plaintiffs that they have ½ share on the land, whereas defendants and Fagni have 1/4th share each over the same. It is further averred by the plaintiffs that Fagni has since been expired and her estate has been succeeded by the defendants in equal shares and in this manner the defendants have become owners to the extent of half share in the suit land. It is further averred that the defendants are shown to be in Hissadari possession to the extent of half share. It is also averred by the plaintiffs that the

defendants are shown to be in possession as non-occupancy tenants qua the share of the plaintiffs, which entry is wrong, illegal and without any lawful order. It is further averred by the plaintiffs that the defendants or their predecessors-in-interest were never inducted as tenants on the suit land. It is also averred by the plaintiffs that they only came to know about the wrong revenue entries in the month of May, 2001, when the defendants disclosed this fact before A.C. Ist Grade, Tehsil Chachiot and the said partition application was dismissed by the Court on 27.6.2001, which order is illegal and inoperative in the eye of law. In the aforesaid background the plaintiffs filed a Civil Suit for declaration before the learned trial Court.

3. Defendants, by way of filing written statement, refuted the claim of the plaintiffs on the ground of maintainability, limitation, jurisdiction, *locus standi*, cause of action and estoppel. On merits, it is averred by the defendants that they have became owners in possession over the suit land by operation of H.P. Tenancy and Land Reforms Act, 1972 *(hereinafter referred to as the 'Tenancy Act')* and plaintiffs have got no right, title or interest in the suit property. It is also averred by the defendants that they have inherited the share of Smt.Fagni and that their predecessors were tenants under the predecessors of the plaintiffs and by operation of law they have become owners of the share of the plaintiffs, as such, the revenue entries are correct. Defendants, while denying all other allegations, prayed for the dismissal of the suit.

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

"1. Whether the Revenue entries showing defendants as non-occupancy tenants are wrong and illegal, as alleged? OPP

2. If Issue No.1 is decided in affirmative, whether plaintiff is entitled to joint possession of the suit land as alleged? OPP.

3. Whether suit of the plaintiff is not maintainable as alleged? OPD

4. Whether the plaintiffs are estopped by their act and conduct to file the present suit? OPD.

5. Whether the suit of the plaintiff is barred by limitation? OPD

6. Whether this court has no jurisdiction to entertain and try the present suit? OPD.

7. Whether the plaintiff has no cause of action and locus standi to file the present suit? OPD.

8. Whether the suit of the plaintiff have not been properly valued for the purpose of Court fee and jurisdiction? OPD.

9. Relief".

5. Learned trial Court vide judgment and decree dated 28.10.2003 decreed the suit of the plaintiffs and held that the revenue entries, showing the defendants as non-occupancy tenants and on the basis of which they have become owners in possession to the extent of share of plaintiffs, are wrong, illegal, null and void and not binding upon the rights of the plaintiffs. Plaintiffs are also held to be in joint possession of the suit land.

6. Feeling aggrieved and dissatisfied with the aforesaid judgment and decree passed by the learned trial Court, whereby suit filed by the plaintiffs was decreed, appellants-defendants filed an appeal under Section 96 of the Code of Civil Procedure *(for short `CPC')* in the Court of learned Additional District Judge, Mandi, who, vide impugned judgment and decree dated 30.04.2005, dismissed the appeal preferred by the defendants by affirming the judgment and decree passed by the learned trial Court. In the aforesaid background, the present appellants-defendants filed this Regular Second Appeal before this Court, details whereof have already been given above.

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

"(1) Whether both the lower courts have mis-read, mis-interpreted and mis-construed the oral as well as documentary evidence of the parties especially

Ex.DW1/A, DW1/D, DW1/F and the oral evidence of the parties, which has materially prejudiced the case of the appellants?

2. Whether the Civil Court has no jurisdiction where the relationship of landlord and tenant has been denied?

3. Whether the Respondents/Plaintiffs have miserably failed to rebut the presumption of truth attached to the revenue entry?"

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

9. Keeping in view the text and nature of the substantial questions of law reproduced here-in-above, this Court would be taking up all the questions together for consideration.

10. While exploring answer to the aforesaid substantial questions of law, this Court had an occasion to carefully peruse the pleadings as well as evidence adduced on record, more particularly, Ex.DW-1/A, Ex.DW-1/D, Ex.DW-1/E and Ex.DW-1/F, perusal whereof certainly not persuade this Court to accept the arguments having been made by Shri G.L. Palsra, learned counsel representing the appellants-defendants, that learned Court below, while decreeing the suit of respondents-plaintiffs, has mis-read, mis-interpreted and mis-construed oral as well as documentary evidence led on record by the respective parties. Rather, this Court, after having gone through the entire material made available on record, is of the view that both the Courts below have dealt with each and every aspect of the matter meticulously and after proper appreciation of evidence suit of plaintiffs has been decreed. Defendants, while refuting the claim put forth by the respondents-plaintiffs in the suit, heavily placed reliance upon Ex.DW-1/A, Ex.DW-1/D, Ex.DW-1/F and Ex.DW-1/E to prove on record that after death of Shri Poushu,his share was inherited by Smt.Hima and Smt.Fagni in equal shares. Present appellants-defendants are daughters and sons of Smt.Hima daughter of Poushu. Plaintiffs-respondents claimed themselves to be recorded in joint ownership of the suit land alongwith defendants and one Smt.Fagni widow of Poushu. Plaintiffs, while claiming themselves to be owners to the extent of half share of the suit land, specifically claimed that defendants and Fagni have 1/4th share each over the land. Plaintiffs further conceded that after death of Fagni, defendants succeeded her share in equal shares and as such they became owners to the extent of ½ share of the suit land. However, plaintiffs being aggrieved with the entry recorded in the revenue record showing defendants to be in possession as non-occupancy tenants, qua the shares of the plaintiffs, filed suit in question. Whereas, defendants claimed before Courts below that they have become owners in possession of the suit land by operation of Tenancy Act and as such plaintiffs have no right, title or interest in the suit property. Defendants further claimed that they inherited the share of Smt.Fagni and their predecessors-in-interest were tenants under the predecessors-in-interest of the plaintiffs and as such by way of operation of law they have become owners of the share of the plaintiffs and as such revenue entries in their favour have rightly been recorded. It clearly emerge from the revenue record placed on record by respective parties that prior to the year 1979, name of predecessor-in-interest of plaintiffs was recorded in the revenue record as owner in possession as *Hissedar* alongwith predecessor-in-interest of defendants. Further perusal of Missalhaquiat Ex.DW-1/A, Jamabandi for the year 1974-75, Ex.DW-1/D and Jamabandi for the year 1974-75, Ex.PA clearly suggests that predecessor-in-interest of the plaintiffs was recorded as owner in possession qua the suit land. However, subsequently, on the basis of Nakal Rapat Roznamcha prepared on 18.10.1979 i.e. Ex.DW-1/E, name of defendants came to be recorded as non-occupancy tenants in Kharif 1979-80. Perusal of Ex.DW-1/E suggests that the same was prepared by the then Halqua Patwari, but neither there is any reference of statement made by owners nor there is any sign or thumb impression either of owners or tenants. Similarly, there is no mention with regard to person, if any, was present on spot when Halqua Patwari prepared aforesaid document Ex.DW-1/E, on the basis of which, defendants came to be recorded as non-occupancy tenants during Khasra Girdivari from 10.4.1976 to 1.10.1980.

11. True, it is, that change was made during Khasra Girdavari, which was effected on the basis of Nakal Rapat Roznamcha, but no evidence worth the name has been led on record by the appellants-defendants with regard to procedure adopted by the Halqua Patwari, while preparing Rapat Roznamcha Ex.DW-1/E, hence, this Court finds substantial force in the arguments having been made by Mr.Lakshay Thakur that mandatory instructions issued by the Government from time to time, while effecting change in revenue record, was not followed by the Patwari Halqua, while effecting change in the revenue record. It also emerge from the record that before effecting change in revenue record, on the basis of Nakal Rapat Roznamcha Ex.DW-1/E, no inquiry, if any, was conducted as per the instructions issued by the Government from time to time. Had Authority concerned, conducted inquiry, predecessor-in-interest of the plaintiffs would have got reasonable opportunity to present his case.

12. Apart from above, this Court is also in agreement with arguments having been made by Mr.Lakshay Thakur, learned counsel representing the respondents-plaintiffs, that Patwari had no authority in law to order correction in the revenue record and as such no reliance could be placed upon Ex.DW-1/E. ***(See: Tulsa Singh vs. Agya Ram and Others, AIR 1994 HP 167),*** wherein it has been specifically held that procedure/instructions from Government from time to time are required to be followed while effecting change in the revenue entry in Khasra Girdavari. It clearly emerge from the record that the respondents-plaintiffs had filed partition proceedings against the appellants-defendants at Tehsil Chachiot in the year 1980, wherein defendants, while refuting the claim of the plaintiffs, had taken specific plea that they are in possession of the share of the plaintiffs by way of adverse possession.

13. Careful perusal of Ex.P-2 i.e. reply having been filed by the defendants to the application for partition proceedings pending before Assistant Collector Ist Grade, Thunag, Camp at Chachiot, clearly belies the stand adopted by the defendants in the present suit, wherein admittedly they claimed themselves to have been inducted as non-occupancy tenants over the suit land by the plaintiffs. In the reply, having been filed before Assistant Collector Ist Grade, defendants have specifically claimed that the plaintiffs-applicants are neither the owners nor in possession and land in dispute is in peaceful, open, continuous and hostile possession of the defendants since the time of their forefathers to the knowledge of the plaintiffs and they have acquired title by adverse possession. There is no mention, if any, of induction of their predecessor-in-interest as tenant by the predecessor-in-interest of respondents-plaintiffs. Hence this Court sees/finds no illegality and infirmity in the findings returned by the Courts below that defendants were never inducted as non-occupancy tenants qua the suit land by predecessor-in-interest of the plaintiffs.

14. Un-disputably, it is well settled that legal presumption of truth is attached to the latest entry of the revenue record of right, but such presumption of truth is rebuttable in case latest entries are found to be incorporated without any basis.

15. In the instant case, as has been discussed above, entries, as contained in Khasra Girdavari Ex.PW-3/A, came to be recorded during 10.4.1976 to 1.10.1980, reflecting therein the names of defendants as non-occupancy tenants on the basis of certified copy of Nakal Rapat Roznamcha dated 18th October, 1979. It has already been discussed/deliberated in detail hereinabove that Patwari had no authority to order for correction in revenue record, moreover, defendants were unable to prove on record that Nakal Rapat Roznamcha dated 18.10.1979 Ex.DW-1/E was entered by authorized officer that too after following procedure/instructions issued by the Government from time to time. Since defendants failed to prove latest entry recorded in their favour on the strength of Ex.DW-1/E i.e. Rapat Roznamcha dated 18.10.1979, presumption of truth, if any, attached to such entries, stood automatically rebutted.

16. It remained undisputed before the Courts below that respondents-plaintiffs had filed proceedings against the defendants before Assistant Collector Ist Grade, wherein in the year 2001, defendants claimed themselves to be non-occupancy tenants qua the share of plaintiffs, while placing reliance upon Ex.PW-3/A Khasra Girdavari, wherein he came to be recorded as non-occupancy tenant on the basis of Ex.DW-1/E Nakal Rapat Roznamcha dated 18.10.1979.

Since defendants specifically claimed themselves to have acquired the status of owners with the operation of the Tenancy Act, respondents-plaintiffs rightly filed a suit laying therein challenge to the entries showing defendants to be non-occupancy tenants qua the share of the plaintiffs. Hence, this Court sees no force in the arguments of Shri G.R. Palsara, learned counsel representing the appellants-defendants that Civil Court had no jurisdiction, especially when defendants had denied relationship of landlord and tenant. Plaintiffs were well within their rights to lay challenge by way of Civil Suit to the revenue entries, which admittedly came to be recorded on the basis of Ex.DW-1/E, Nakal Rapat Roznamcha, which was prepared without any authority and without associating the predecessor-in-interest of the plaintiffs.

17. Otherwise also, if for the sake of arguments, it is presumed that Ex.DW-1/E had any legal force, even then entries, as contained in Jamabandi, wherein defendants have been reflected occupying the status of *"Bhasha Hra Parta Malkan",* meaning thereby that tenants are/were paying land revenue of the share of the owners to the State Government, nowhere accord the status of non-occupancy tenant to the defendants. Aforesaid status, as referred in the Jamabandi, *"Bhasha Hra Parta Malkan",* reflecting the defendants to be non-occupancy tenants qua the suit land itself disqualify the defendants to enjoy the status of tenant under the plaintiffs qua the suit land because there is no entry of payment of rent by them to the plaintiffs. Entry of payment of land revenue to the State that too qua the share of owners shall not make the defendants qualified to occupy the status of tenants under the landlord qua the suit land.

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

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

19. 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.

20. Hence, in view of detailed discussion made hereinabove, this Court sees no illegality and infirmity in the judgment passed by both the Courts below. The judgment and decree passed by both the Courts below are upheld. The present appeal fails and is dismissed, accordingly.

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

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

RSA No. 516 of 2008 a/w RSA No.517 of 2008
Date of Decision: 22.05.2017

RSA No. 516 of 2008

Ram Lok .....Appellant.
Vs.
Amar Singh and others .....Respondents.

RSA No. 517 of 2008

Ram Lok .....Appellant.
Vs.
Amar Singh and others .....Respondents.

Specific Relief Act, 1963- Section 34 and 38- Plaintiffs filed a civil suit seeking declaration and injunction pleading that the suit land is owned by the plaintiffs and the entries in the revenue record are incorrect – the defendant is interfering with the suit land and has constructed a thatched roof chhan a few months ago- plaintiffs had obtained decree against R, whose name was reflected in the revenue record- defendant had filed an application before Land Reforms Officer, who had passed a wrong order – the suit was decreed by the Trial Court –an appeal was filed, which was dismissed – held in second appeal thatplaintiffs had sought the relief of possession in the alternative- the defendant pleaded an exchange and adverse possession in the alternative – plaintiffs are proved to be the owners of the suit land – exchange and adverse possession were not proved – the Courts had rightly decreed the suit – appeal dismissed.(Para-17 to19)

For the appellant(s): Mr. J.R. Poswal, Advocate.
For the respondents: Mr. Ramakant Sharma, Senior Advocate, with Mr. Basant Thakur, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)* **:**

As both these appeals arise out of the common judgment passed by the Court of learned Additional District Judge, Solan, Camp at Nalagarh, in Civil Appeal No. 10-NL/13 of 2008, dated 10.06.2008 and Cross Appeal No. 22-NL/13 of 2008, dated 10.06.2008, therefore, the same are being decided by a common judgment.

2. Brief facts necessary for the adjudication of the present case are that respondents/plaintiffs (hereinafter referred to as "the plaintiffs") filed a suit for declaration with consequential relief of injunction and in the alternative for a decree of possession on the grounds that the suit land comprised in Khewat/Khatauni No. 2 min/4, Khasra No. 181, measuring 7 biswas, situated in Village Kalyanpur, Pargana Gullarwala, Tehsil Nalagarh, District Solan, H.P. was owned by them. According to the plaintiffs, in the column of possession of jamabandi for the year 1995-96, name of one Rattan Singh, son of Shingaroo was mentioned and in column No. 9 of jamabandi, it was reflected *"Bila Lagan Bavja Tabadla Hamra Aabadi"*, which entries as per the plaintiffs were incorrect. It was further the case of the plaintiffs that said 0-7 biswas of land was being reflected as Gair Mumkin Aabadi, which was incorrect and only one thatched roof *'Chhan'* was there on said land to the extent of 0-0-8 biswansi, whereas the remaining land was open, which was possessed by the plaintiffs. According to the plaintiffs, area measuring 0-6 biswa was open, but the said land was in front of *Aabadi* of defendant and the said defendant was causing interference in 0-6 and ½ biswas land and on 0-0-8 biswas of land where a thatched roof '*Chhan'* stood constructed by defendant a few months back. It was further mentioned in the plaint that plaintiffs had previously filed a Civil Suit No. 84/1 of 2001 against one Shri Rattan Singh, which

was decided on 07.11.2002, in which they had successfully challenged revenue entries which were being reflected in favour of Rattan Singh. According to the plaintiffs, said suit was decreed in their favour vide judgment and decree dated 07.11.2002, vide which, learned Court had held the plaintiffs to be owners in possession of the suit land and Rattan Singh was restrained by a decree of permanent injunction from asserting or claiming any right, title and interest over the same. As per the plaintiffs, defendant was grandson of Shingaroo, whereas Rattan Singh was son of Shingaroo and thus, the defendant and Rattan Singh were related to each other as the defendant was his nephew and the factum of judgment and decree having been passed in favour of the plaintiffs in Civil Suit No. 84/1 of 2001 was very much in the knowledge of the defendant. It was further mentioned in the plaint that defendant had filed an application before Land Reforms Officer (Tehsildar), Nalagarh, which was decided on 19.12.2002 by Tehsildar on the basis of a report of Field Kanungo, Changar and by making the said report of Field Kanungo Changar his base, Tehsildar had passed an order dated 19.12.2002 ordering correction of revenue record in favour of Ram Lok and against the plaintiffs and had also passed an order in this regard in favour of Ram Lok. According to the plaintiffs, Tehsildar had erred in construing the report of the Field Kanungo to be a correct report, whereas neither Kanungo who had prepared said report was ever examined before Tehsildar nor any opportunity of his cross-examination was afforded to the plaintiffs. As per the plaintiffs, as the application was filed for correction of jamabandi, the same in fact was even not maintainable before the Tehsildar. On these bases, it was stated by the plaintiffs that the order so passed by Tehsildar, Nalagarh, dated 19.12.2002 was wrong, illegal, inoperative, ineffective and null and void. As per the plaintiffs, they were in possession of the suit land, over which one thatched roof *'Chhan'* stood constructed by defendants over 0-0-8 biswansi of land some time back after the Tehsildar had passed his order on 19.12.2002. It was further mentioned in the plaint that as the suit land was in front of Aabadi houses of defendant, the defendant may take advantage of absence of plaintiffs from the village and may occupy vacant portion, however, since plaintiffs were owners, plaintiffs were also entitled for the possession, if the possession of the plaintiffs could not be proved over the suit land either at the time of filing of the suit or thereafter. On these bases, the suit was filed by the plaintiffs praying for the following reliefs:

> "(i) That the plaintiffs may kindly be declared as owners in possession of the suit land as detailed in para-1 of the plaint.
>
> (ii) That the defendant may kindly be restrained permanently from claiming any right, title and interest or taking forcible possession or changing the nature and character of the suit land in any manner whatsoever.
>
> (iii) In the alternative, decree for possession may kindly be passed in favour of the plaintiffs and against the defendant."

3. The suit so filed by the plaintiffs was resisted by the defendants, who in their written statement took the stand that father of the plaintiffs Sita Ram was in possession of area in front of his A*badi* and in the *Aabadi deh* which had come to the share of Maghi Singh, father of the defendant in partition. It was further the case of the defendant that they were using the suit land for tethering the cattle by constructing a 'Chhan' thereon and thereafter defendant had separated from joint family in the year 1980 and 0-4 biswas of suit land had fallen to the share of defendant and since then, defendant was in possession of the same as its owner, who was living in the 'Chhan', which was having a bath room as well as a compound. It was further the case of the defendant that he had become owner of 0-4 biswas of the suit land by way of surrender of rights by predecessors of the plaintiffs. In alternative, defendant stated that he had perfected his title over the suit land by way of adverse possession, as his possession over the same was hostile and to the knowledge of the plaintiffs, who had not objected to the same since November, 1980. Further as per the defendants, Assistant Collector, 2nd Grade had rightly passed order dated 19.12.2002, which had attained finality as it had not been challenged by way of any appeal or revision etc. It was further the case of the defendant that the entries in the name of Rattan Singh qua the suit land were wrong and illegal and decree, if any, passed in favour of the plaintiffs and

against Rattan Singh was not binding upon the defendant. On these bases, defendant resisted the claim of the plaintiffs.

4. By way of replication, the plaintiffs reiterated their stand and denied the submissions made in the written statement.

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

"1. Whether the plaintiffs are owners in possession of the suit land, as alleged? OPP

2. Whether the plaintiffs are entitled for the relief of injunction, as prayed?

3. Whether the plaintiffs are also entitled for alternative decree for possession?

4. Whether the suit of the plaintiffs is not maintainable? OPD

5. Whether the suit of the plaintiffs is bad for non-joinder of necessary parties, as alleged? OPD

6. Whether the plaintiffs are estopped to file the present suit by their act, conduct and acquiescence? OPD

7. Whether the defendant is owner in possession of 0-4 biswas of land out of suit land by way of surrender of rights by predecessor of the plaintiffs? OPD

8. Whether defendant has become owner of suit land by way of adverse possession as alleged? P¦D

8A Whether order passed by Tehsildar on dated 19.12.2002 is wrong, illegal, inoperative, ineffective, null and void, as alleged?

9. Relief.

6. On the basis of evidence adduced by the respective parties in support of their respective claims, the following findings were returned by learned trial Court on the issues so framed:

"Issue No. 1:	*Yes.*
Issue No. 2:	*Yes.*
Issue No. 3:	*Infructuous.*
Issue No. 4:	*No.*
Issue No. 5:	*No.*
Issue No. 6:	*No.*
Issue No. 7:	*No.*
Issue No. 8:	*No.*
Issue No. 8A:	*Yes.*
Relief:	*The suit of the plaintiffs is decreed as per operative portion of the judgment.*

7. Learned trial Court vide its judgment and decree dated 07.12.2007 decreed the suit of the plaintiffs to the effect that they were declared as owners of the land comprised in Khewat/Khatauni No. 2 min/4, bearing Khasra No. 181, situated in area of village Kalyanpur, Pargana Gullarwala, Tehsil Nalagarh, Distt. Solan, H.P. and by way of consequential relief, defendant was permanently restrained from interfering in the possession of the plaintiffs over 6 ½ biswas of land. While partly decreeing the suit of the plaintiffs, it was held by the learned trial Court that plaintiffs had categorically pleaded in para-1 of the plaint that defendant had encroached over 8 biswansi of suit land by raising one thatched roof 'Chhan' and was causing interference in 0-6 and ½ biswas of land. Learned trial Court held that jamabandi for the year

1961-62 Ex. P2 demonstrated that father of the plaintiffs was owner in possession of the suit land and said entry remained in force up till 1970-71, which was evident from jamabandi Ex. P-7. Learned trial Court also held that in the year 1975-76, Rattan Singh was recorded as *Gair Marusi* over the suit land and the said entry was challenged by way of Civil Suit No. 84/1 by the present plaintiffs, which suit of the plaintiffs was decreed and they were declared owners in possession qua the suit land. Learned trial Court also took note of the fact that in the suit so filed by the plaintiffs, challenge was laid to order of Tehsildar, Nalagarh, dated 19.12.2002. It was held by the learned trial Court that defendant Ram Lok in his examination-in-chief had claimed his possession over 4 biswas of land by way of exchange, which exchange as per him took place between his predecessor-in-interest Maghi Singh and Sita Ram, father of the plaintiffs, however, the said witness in his cross-examination had a different story.Learned trial Court also took note of the fact that said witness had admitted that no mutation of exchange was ever attested and sanctioned and he had expressed his inability to depose that from whom his father had exchanged the suit land. Learned trial Court also took note of the fact that Kanungo Krishan Chand, whose report was made the basis of order dated 28.08.2001 by Tehsildar was examined as a witness by the defendant as DW-4 and this witness had admitted that plaintiffs were owners of the suit land and that they were not present at the time of his spot inspection. On these bases, it was held by the learned trial Court that report Ex. PW4/A prepared by the Kanungo was far away from reality and in such circumstances, order dated 19.12.2002 passed by the Tehsildar was not sustainable in the eyes of law, as admittedly Tehsildar had not verified the fact of possession of the defendant over the suit land before passing the said order. Learned trial Court further went on to hold that though plaintiffs in para-1 of the plaint had categorically pleaded that defendant had encroached upon 8 biswansi of suit land by raising one thatched roof 'Chhan', but he had not claimed any possession of the said land. Learned trial Court held that no doubt in the alternative, plaintiffs had prayed for a decree of possession, but no evidence had been adduced by the plaintiffs that defendant had encroached upon the suit land during the pendency of the main suit. It also held that the plaintiff had not prayed for vacant possession of 8 biswansi. Accordingly, learned trial Court while holding that the plaintiffs were owners of the suit land and that order passed by Tehsildar, dated 19.12.2002 was not sustainable in the eyes of law, declared the plaintiffs to be owners in possession over the suit land, but it further held that as far as 8 biswansi of land was concerned, plaintiffs could not claim possession over the same.

8. On the issue of adverse possession, it was held by the learned trial Court that defendant had claimed his possession over that part of the suit land, which was in his possession by way of adverse possession, but he had miserably failed to lead any cogent evidence to prove that he had perfected his possession over the suit land by way of adverse possession. Learned trial Court also held that defendant had taken plea of exchange of the part of the suit land which was in his possession, which took place according to the defendant between his predecessor-in-interest and the predecessor-in-interest of the plaintiffs. It was held by the learned trial Court that the said two pleas, i.e., of exchange and adverse possession were in fact mutually destructive to each other and in case defendant was in possession of part of the suit land on the basis of exchange, then his possession could not be open, hostile and peaceful. Learned trial Court also held that no doubt defendant could take more than one pleas, but it was also equally settled that mutually destructive pleas cannot and should not be taken and claim should be based on one plea only. On these bases, it was held by the learned trial Court that defendant had failed to prove that he had perfected his title over part of the suit land by way of adverse possession.

9. Against the judgment and decree so passed by the learned trial Court, defendant had filed Civil Appeal No. 10-NL/13 of 2008, whereas plaintiffs filed Cross-appeal No. 22-NL/13 of 2008.

10. Learned appellate Court while dismissing the appeal so filed by the defendants, allowed the Cross-appeal filed by the plaintiffs. It was held by the learned appellate Court that learned trial Court had erred in denying the relief of possession over part of the suit land in favour of the plaintiffs by ignoring that there was an alternative prayer made by the plaintiffs for

possession of the suit land, if the same was found in possession of the defendant. It was held by the learned appellate Court that keeping in view the fact that there was an alternative prayer of possession made by the plaintiffs, the said relief could be granted in their favour, especially when the Court had come to the conclusion that the suit land was owned by the plaintiffs and a part of the same was in possession of the defendant and defendant had failed to prove that he had perfected his title over the same by way of adverse possession.

11. Learned appellate Court also held that as plaintiffs had succeeded in establishing that they were owners of the suit land and that on some part of the suit land, defendant had raised some construction and further as defendant had not been able to prove his right, title and interest over the suit land and had failed to establish the factum of his possession having been perfected by way of adverse possession, learned trial Court had erred while refusing the relief of possession qua portion of the suit land over which construction had been raised by the defendant. Learned appellate Court held that as plaintiffs had proved themselves to be owners of the land, therefore, owner on the basis of title could seek possession in case other party had not become owner by way of adverse possession. On these bases, learned appellate Court while upholding the part of the decree which was passed by the learned trial Court in favour of the plaintiffs and while dismissing the appeal so filed by the defendant, allowed the Cross-appeal filed by the plaintiffs and modified the judgment and decree passed by the learned trial Court by holding that the plaintiffs were entitled for decree for permanent prohibitory injunction restraining the defendant from interfering over the suit land and that plaintiffs were also entitled for possession of the constructed portion after demolition of the structure raised thereon.

12. Feeling aggrieved by the dismissal of his appeal and the Cross-appeal of plaintiffs having been allowed by the learned appellate Court, defendant has filed these two appeals.

13. Both these appeals were admitted by this Court on 27.08.2009 on the following substantial question of law:

> *"Whether the judgment and decree passed by the learned lower Appellate Court is sustainable in the eyes of law in view of the fact that since there is no prayer in the plaint for possession, demolition of structure and for mandatory injunction by the plaintiffs in the prayer clause of the suit and no evidence have been adduced by the plaintiffs to the effect that they have been dis-possessed by the defendant during the pendency of the suit?*

14. Mr. J.R. Poswal, learned counsel appearing for the appellant has argued that the judgments and decrees passed by both the learned Courts below were not sustainable in the eyes of law, as both the learned Courts below had erred in not appreciating that the plaintiffs had not made any prayer for grant of decree for possession and demolition of structure and for mandatory injunction and thus, the relief which was granted by the learned Courts below in favour of the plaintiffs was beyond the relief prayed for in the plaint and further both the learned Courts below had erred in not appreciating that the plaintiffs had not placed on record any evidence to the effect that they were dispossessed from the suit land by the defendant during the pendency of the suit. Mr. Poswal further argued that both the learned Courts below had also erred in not appreciating that the evidence led by the plaintiffs to support their case was rather in contradistinction to what was the stand taken by them in their plaint. It was further urged by Mr. Poswal that both the learned Courts below have also failed to appreciate that in view of the provisions of Order 7 as are contemplated in the Code of Civil Procedure, the reliefs which had been granted by the learned Courts below in favour of the plaintiffs could not have been granted. No other point was urged.

15. Mr. Ramakant Sharma, learned Senior Counsel appearing for the respondents by drawing the attention of this Court to the pleadings of the parties, has argued that as the suit of the plaintiffs was based on title, they could have been granted a decree for possession if the Courts found that the land in dispute was in possession of a party who was not having a superior title to that of the land owner. Mr. Sharma has further argued that even otherwise, the grounds

taken for assailing the judgment and decree passed by the learned trial Court were erroneous as pleadings demonstrated that the plaintiffs had prayed for decree for possession as well as a decree for permanent injunction. It was further submitted by Mr. Ramakant Sharma that factum of the plaintiffs being owners of the suit land was concurrently decided in their favour by both the learned Courts below, so also the factum of the defendant having failed to prove that he had become owner of the suit land by way of adverse possession. Mr. Ramakant Sharma also submitted that it had also come in the statement of DW-4, the concerned Kanungo, who was examined by the defendant that the suit land in fact was owned by the plaintiffs and further they were not present at the spot when the demarcation was conducted. Mr. Ramakant Sharma further argued that in fact a perusal of the judgment and decree passed by the learned appellate Court demonstrated that the conclusions arrived at by the learned appellate Court were duly borne out from the records of the case and thus, there was neither any perversity nor any illegality in the findings so returned by the learned appellate Court. It was further submitted by Mr. Ramakant Sharma that as there was no merit in the appeals, the same be dismissed.

16. I have heard the learned counsel for the parties and have also gone through the records of the case as well as the judgments and decrees passed by the learned Courts below.

17. A perusal of the plaint so filed by the plaintiffs before the learned Court below demonstrated that the suit filed by the plaintiffs was for "declaration with consequential relief of permanent injunction and also in the alternative suit for possession". A perusal of the plaint further demonstrates that there are clear and unambiguous pleadings to the effect that over a portion of the suit land, after the order was passed by Tehsildar on 19.12.2002, defendant had constructed a thatched roof 'Chhan'. In para-2 of the plaint, it has been specifically mentioned by the plaintiffs that plaintiffs being owners were entitled to possession even if the possession of the plaintiffs was not proved over the suit land at the time of filing of the suit or even before it, as they in their capacity as owners of the suit land were entitled for possession of the same. The reliefs prayed for in the suit are also being quoted hereinbelow for ready reference:

> "(i) That the plaintiffs may kindly be declared as owners in possession of the suit land as detailed in para-1 of the plaint.
>
> (ii) That the defendant may kindly be restrained permanently from claiming any right, title and interest or taking forcible possession or changing the nature and character of the suit land in any manner whatsoever.
>
> (iii) In the alternative, decree for possession may kindly be passed in favour of the plaintiffs and against the defendant."

18. A harmonious reading of the plaint establishes that there was a prayer made for possession, though in the alternative, and it was also mentioned in the plaint that the plaintiffs were entitled for possession of the suit land, even if it stood proved that they were not in possession of the same either at the time of filing of the suit or before it. In the relief clause also, plaintiffs have categorically prayed for an alternative decree for possession. Now, simultaneously when we also peruse the written statement so filed by the defendant, it is evident from the reading of the same that though the defendant had tried to justify his possession over 0-4 biswas of suit land on the ground that this portion of suit land had come in his possession by virtue of an exchange, which had taken place between his father Magi Singh and the father of the plaintiffs, however, in the alternative, it was mentioned in the written statement that the defendant had become owner of the suit land by way of adverse possession as his possession over the same was hostile and to the knowledge of plaintiffs as the same was without any objection of the owner since November, 1980. Records of the case demonstrate that there was a specific issue framed by the learned trial Court as to whether the defendant had perfected his title over the suit land by way of adverse possession or not and the said issue stood decided against the defendant. Findings returned to this effect by the learned trial Court have not been disturbed by the learned appellate Court. Both the learned Courts below have concurrently held the plaintiffs to be owners of the suit land. Both the learned Courts below have concurrently held that it was only a portion of the suit land over which a thatched roof 'Chhan' stood constructed by the defendant after the

order so passed by the Tehsildar dated 19.12.2002, which order in fact stood quashed by the learned trial Court, which finding returned by the learned trial Court has also been upheld by the learned appellate Court. Therefore, in these circumstances, when the factum of the plaintiffs being owners of the suit land has been concurrently held in their favour and against the defendant by both the learned Courts below, when the factum of defendant not being able to prove his title over the suit land has been held against him by both the learned Courts below, when there is expressly a relief prayed for possession of the suit land though in alternative, so made in the plaint by the plaintiffs, there is no infirmity in the judgment and decree passed by the learned appellate Court whereby it has partly modified the judgment and decree passed by the learned trial Court and held the plaintiffs entitled for decree for permanent prohibitory injunction restraining the defendant from the suit land and also for possession of the constructed portion after demolition of the structure raised thereon. Besides this, I may add that during the course of arguments, learned counsel for the appellants even otherwise could not demonstrate from the records as to what was the infirmity with the judgment and decree passed by the learned trial Court in favour of the plaintiffs, which stood assailed by the defendant before the learned first appellate Court. As plaintiffs had filed a suit for declaration with consequential relief of injunction and also for possession in the alternative, decree so passed in their favour by the learned appellate Court is completely justified in the eyes of law. Substantial question of law is answered accordingly.

19. In view of the discussion held above, as there is no merit in these appeals, the same are dismissed, so also miscellaneous applications, if any. No order as to costs.

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

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

Versus

Surender Kumar .....Respondent.

Cr. Appeal No. 258 of 2011.
Reserved on : 10th March, 2017
Decided on: 22nd May, 2017

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of650 grams charas – he was tried and acquitted by the Trial Court- held in theappeal that Trial Court had placed reliance upon the judgment of **Sunil Vs. State of H.P., Latest HLJ, 2010 (HP) 207**but the said judgment was overruled in **State of H.P. Vs. Mehboob Khan, 2014 Cr. L.J., 705 (F.B.)-** Report of Chemical Examiner specifically stated about the presence of tetrahydrocannabinol and cystolithichair, which proved that the sample was of the charas – the recovery was effected from a bag and there was no requirement of complying with Section 50of N.D.P.S. Act- efforts were made to associate independent witness but no one joined- the official witnesses had supported the prosecution version and their testimonies were corroborated by the documents – the link evidence was proved – non-production of the seal will not make the prosecution case doubtful – the defence version was not probable – the prosecution has succeeded in proving his case beyond reasonable doubt- appeal allowed- accused convicted of the commission of offence punishable under Section 20 of N.D.P.S. Act.(Para-12 to 33)

Cases referred:

Sunil Versus State of H.P. and its connected matters, Latest HLJ 2010 (HP) 207
State of Himachal Pradesh versus Mehboob Khan, 2014, Cr. L.J. 705, (FB)
Kulwinder Singh and another vs. State of Punjab, (2015) 6, Supreme Court Cases, 674

State of Rajasthan versus Parmanand and another (2014) 5 SCC 345
Yashihey Yobin and another versus Department of Customs, Shillong (2014) 13 Supreme Court Cases 344
Makhan Singh versus State of Haryana, (2015) 12 SCC 247

For the appellant : Mr. D.S. Nainta & Mr. Virender Verma, Addl. A.G.
For the Respondent : Mr. Ajay Kochhar, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

Learned Special Judge (Presiding Officer, Fast Track Court), Solan, District Solan vide judgment dated 15.2.2011 passed in case No. 17FTC/7 of 2009, while arriving at a conclusion that there is no compliance of the provisions contained under Section 50 of the Narcotic Drugs and Psychotropic Substances Act, hereinafter referred to as 'the Act', nor cogent and reliable evidence produced by the prosecution to show that the contraband allegedly recovered from the respondent, hereinafter referred to as the accused, was charas and also that the evidence available on record is contradictory in nature, has acquitted the accused of the charge framed against him under Section 20 of the Act.

2. The legality and validity of the impugned judgment has been questioned on the grounds *inter alia* that cogent and reliable evidence produced by the prosecution has been appreciated by learned trial Judge in a slip shod and perfunctory manner and as a result thereof, based its findings on hypothesis, surmises and conjectures. The reasoning given by learned trial Court while acquitting the accused of the charge is manifestly unrealistic, unreasonable and also unsustainable. The present being a case of recovery of the charas from the bag the accused was carrying on his right shoulder, therefore, Section 50 of the Act was not applicable in the present case. Also that learned Court below has erroneously ignored the reports of chemical examiner Ex.PW-10/E and Ex.PW-10/F because in view of the presence of tetrahydrocannabinol (THC) in the sample sent for analysis, the same was that of charas. Also that learned Court below should have not discarded the prosecution evidence having come on record by way of testimony of constable Surender Singh PW-1, HC Yadav Chand PW-2 and the I.O. Santosh Thakur, PW-11, who all were present on the spot during the course of search and seizure conducted there. The acquittal of the accused in the case in hand is stated to be in utter disregard of the evidence having come on record by way of their testimonies. There being no material contradiction nor any omission in the prosecution evidence, learned trial Court has erroneously given weightage to the admissions such as the seal used for sealing the parcels containing the recovered charas and sample parcels not produced in evidence and failure to associate independent witnesses etc. etc.

3. The facts of the case in a nut-shall are that PW-11 ASI Santosh Thakur accompanied by PW-1 Constable Surinder Singh, PW-2 HC Yadav Chand and PW-3 Naresh Kumar vide Rapat Rojnamcha Ex.PW-11/A left police Station, Solan at 9.00 p.m. in search of a proclaimed offender towards Ghundidhar, Pajo, Shamti, Jatoli side. The police went upto Marridin Factory. On way back, when reached near Kali Mata temple, Shamti at 10.30 p.m. the accused was noticed coming on foot from opposite direction. He was holding a bag on his right shoulder. On seeing the police party, he turned back and tried to flee away. He, however, was overpowered and apprehended by the police there. On inquiry about his antecedents, he disclosed his name and address etc.

4. PW-1 Constable Surender Singh and PW-2 HC Yadav Chand were associated as independent witnesses. Since the I.O. PW-11 suspected that the accused may be in possession of some narcotic drugs or psychotropic substances, therefore, he was apprised that the search of his bag and person is required. The accused was also apprised that if he wants to give his search to a gazetted officer or the magistrate that is his legal right. The consent memo Ex.PW-2/A was

reduced into writing. The accused, however, opted for his search to be conducted by the police official present there. It is thereafter, PW-11 opened the bag Ex.P-1, the accused was carrying on his right shoulder. In one of the portion of the said bag, Towel Ex.P-5, Jean Pants Ex.P-6, T-Shirt Ex.P-7 were recovered. In other portion of the bag one polythene bag Ex.P-8 was found kept. On opening the bag Ex.P-8, brown colour substance in the shape of stick was recovered. The I.O. on the basis of his experience as well as by way of its smell has identified the same to be charas. The identification memo Ex.PW-1/D, was prepared in this regard. Constable Devender Kumar was asked to arrange for weights and scale. He brought the same. The recovered charas when weighed was found 650 grams. PW-11 has resorted to sealing and sampling process in the presence of the official witnesses, he associated to witness the search and seizure. After separating 50 grams charas from the recovered bulk for sample, i.e. 25-25 grams each, the remaining bulk i.e. 600 grams was sealed in a parcel of cloth with seal having impression 'S'. The parcels were also sealed with the same seal. The seal was handed over to PW-2 Yadav Chand for safe custody vide memo Ex.PW-2/B. The recovered charas along with sample parcels was taken into possession vide recovery memo Ex.PW-1/B. NCB Forms Ex.PW-10/C was prepared in triplicate. The samples of seal 'S' Ex.PW-1/A, Ex.PW-11/B, and Ex.PW-11/C were drawn on a piece of cloth. The sample parcels were marked as A-1 and A-2 whereas parcels containing recovered charas A-3.

5. Rukka Ex.PW-1/C was prepared by PW-11 and the same along with case property NCB Forms, sample of seal 'S' was forwarded to Police Station, Solan through constable Surinder Singh PW-1. On the basis of Rukka FIR Ex.PW-5/A was registered. During the course of further investigation on the spot, the I.O. has prepared the site plan Ex.PW-11/E. The accused was arrested and arrest memo Ex.PW-11/D was prepared. Information regarding his arrest was given to his relatives over telephone. In the Police Station, the case property along with sample parcel, NCB Forms and seizure memo was handed over to PW-10, Jagdish Chand, SHO, who resealed the same with seal 'R'. The resealing certificate is Ex.PW-10/D. The rapat entered in the daily diary in this regard is Ex.PW-10/J. PW-10 handed over the case property along with NCB forms to Kehar Singh, PW-5 MHC Police Station, Solan. PW-5 has entered the case property and the documents i.e. NCB forms, seizure memo and sample of seals in the Malkhana register, extract whereof is Ex.PW-11/G.

6. The I.O. PW-11, on completion of the investigation on the spot, returned to police station and entered rapat Ex.PW-11/F, in daily diary in this regard. Special report Ex.PW-4/A was also prepared by PW-10 and forwarded the same to Superintendent of Police, Solan. One of the sample parcels was forwarded to Forensic Science Laboratory, Junga on 18.3.2009 through Constable Rakesh Kumar, PW-8. Subsequently, another sample parcel and parcel containing the recovered charas duly sealed with seals 'S' and 'R' were also forwarded to Forensic Science Laboratory, Junga on 22.8.2009, through HHC Krishan Dutt PW-7. The reports of chemical examiner Ex.PW-10/E and Ex.PW-10/F were received. It is thereafter; PW-10 has prepared the report under Section 173 of the Code of Criminal Procedure and filed the same in the trial Court.

7. Learned trial Judge on appreciation of the report filed by the police and documents annexed therewith has found a prima facie case under Section 20 of the Act made out against the accused and charge was framed accordingly. He, however, pleaded not guilty to the charge and claimed trial.

8. The prosecution in support of its case has examined 11 witnesses in all. As pointed out at the very outset that the material prosecution witnesses are PW-1 Constable Surinder Singh, PW-2 HC Yadav Chand and PW-11 ASI Santosh Thakur, the I.O.

9. The remaining prosecution witnesses are formal as PW-3 had taken the special report to the office of Superintendent of Police, Solan, whereas PW-4 ASI Yashwant Singh, who was reader to Superintendent of Police, Solan, has received the special report Ex.PW-4/A and placed before the Superintendent of Police for perusal. PW-5 is HC Kehar Singh, who was posted as MHC, Police Station, Solan at the relevant time. It is he, who registered the FIR Ex.PW-5/A and retained the case property in Malkhana, when handed over to him by PW-10 Jagdish Chand.

One of the sample parcels was also forwarded by him to Forensic Science Laboratory, Junga for analysis, through constable Rakesh Kumar PW-8. HC Sunil Kumar, PW-6 was working as MHC Malkhana on 22.8.2009. He has forwarded the parcels containing the recovered charas and sample parcel to Forensic Science Laboratory, Junga for analysis through HHC Krishan Dutt, PW-7. PW-9 SI Rupinder Kumar has partly investigated the case whereas PW-10 Jagdish Chand was posted as SHO Police Station, Sadar, Solan from March 2009 to October 2009 and it is he, who had received the case property as well as resealed the same and thereafter deposited with PW-5, the then MHC Police Station, Solan for safe custody.

10. Now if coming to the defence version, the accused in his statement recorded under Section 313 Cr.P.C. has denied the entire prosecution case being incorrect and stated that two groups of college students had quarreled at Kotla Nalah. He was detained by the police there. The police officials were suspecting him to be one of the boys involved in the quarrel, however, on his protest and as one of the police personnel had received injuries on his person, he was apprehended and this false case planted against him. He, however, opted for not producing evidence in his defence.

11. In the light of the facts and circumstances discussed hereinabove, we have heard Mr. D.S. Nainta, learned Additional Advocate General on behalf of the appellant-State and Shri Ajay Kochhar, Advocate, who is representing the accused in this case.

12. On analyzing the rival submissions, the questions such as compliance of Section 50 of the Act was not required in this case, nor was there any occasion to learned trial judge to have arrived at a conclusion that the contraband recovered from the accused has not been proved to be charas and that official witnesses were reliable and dependable because despite efforts made, independent witnesses could not be associated, hence their testimony should have been relied upon being not inconsistent and rather worthy of credence, arise for our consideration. The non-production of seal used by the I.O. for sealing the parcels containing the recovered contraband and the sample parcels whether has caused prejudice to the case of the accused or not, has also engaged our attention.

13. In our considered opinion, the acquittal of the accused on the ground that the contraband recovered from the accused has not been proved to be charas is not legally sustainable for the reason that while arriving at such conclusion learned trial Judge has placed reliance on judgment of a Division Bench of this Court in ***Sunil*** Versus ***State of H.P.*** and its connected matters, ***Latest HLJ 2010 (HP) 207.*** As a matter of fact, a larger Bench of this Court in ***State ofHimachal Pradesh*** versus ***Mehboob Khan, 2014, Cr. L.J. 705, (FB)***, while holding that the law laid down in ***Sunil's*** case supra is not the correct law, has overruled the same and answered the reference made to it as follows:-

> a. After taking into consideration Section 293 of the Code of Criminal Procedure, Sections 45 and 46 of the Indian Evidence Act and the Law laid down by the apex Court as well as various High Courts discussed in detail hereinabove, we conclude that on account of non-consideration of the same by the Division Bench, which has rendered the judgment in ***Sunil's*** case, correct law on the expert opinion and the reports assigned by the scientific expert after analyzing the exhibit has not been laid down.
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> b. We further conclude that on account of non-consideration of various reports of the United Nations Office on Drugs and Crime including Single Convention on Narcotic Drugs, 1961 and to the contrary placing reliance on the text books, which basically are on medical jurisprudence, the Division Bench in ***Sunil's*** case failed to assign correct meaning to 'charas' and 'cannabis resin', the necessary constituents of an offence punishable under Section 20of the NDPS Act.
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> c. In view of the detailed discussion hereinabove, the Division Bench while deciding ***Sunil's*** case supra has definitely erred in taking note of the percentage

of tetrahydrocannabinol in three forms of cannabis i.e. Bhang, Ganja and Charas and hence, concluded erroneously that without there being no reference of the resin contents in the reports assigned by the Chemical Examiners in those cases, the contraband recovered is not proved to be Charas, as in our opinion, the Charas is a resinous mass and the presence of resin in the stuff analyzed without there being any evidence qua the nature of the neutral substance, the entire mass has to be taken as Charas.

d. There is no legal requirement of the presence of particular percentage of resin to be there in the sample and the presence of the resin in purified or crude form is sufficient to hold that the sample is that of Charas. The law laid down by the Division Bench in Sunil's case that 'for want of percentage of tetrahydrocannabinol or resin contents in the samples analyzed, the possibility of the stuff recovered from the accused persons being only Bhang i.e. the dried leaves of cannabis plant, possession of which is not an offence, cannot be ruled out', is not a good law nor any such interpretation is legally possible. The percentage of resin contents in the stuff analyzed is not a determinative factor of small quantity, above smaller quantity and lesser than commercial quantity and the commercial quantity. Rather if in the entire stuff recovered from the accused, resin of cannabis is found present on analysis, whole of the stuff is to be taken to determine the quantity i.e. smaller, above smaller but lesser than commercial and commercial, in terms of the notification below Section 2 (vii-a) and (xxiii-a) of the Act.

e. We have discussed the Single Convention on Narcotic Drugs, 1961 in detail hereinabove and noted that resin becomes cannabis resin only when it is separated from the plant. The separated resin is cannabis resin not only when it is in 'purified' form, but also when in 'crude' form or still mixed with other parts of the plant. Therefore, the resin mixed with other parts of the plant i.e. in 'crude' form is also charas within the meaning of the Convention and the Legislature in its wisdom has never intended to exclude the weight of the mixture i.e. other parts of the plant in the resin unless or until such mixture proves to be some other neutral substance and not that of other parts of the cannabis plant.Once the expert expressed the opinion that after conducting the required tests, he found the resin present in the stuff and as charas is a resinous mass and after conducting tests if in the opinion of the expert, the entire mass is a sample of charas, no fault can be found with the opinion so expressed by the expert nor would it be appropriate to embark upon the admissibility of the report on any ground, including non-mentioning of the percentage of tetrahydrocannabinol or resin contents in the sample.

f. We are also not in agreement with the findings recorded by the Division Bench in ***Sunil's*** case that "mere presence of tetrahydrocannabinol and cystolithic hair without there being any mention of the percentage of tetrahydrocannabinol in a sample of charas is not an indicator of the entire stuff analyzed to be charas" for the reason that the statute does not insist for the presence of percentage in the stuff of charas and mere presence of tetrahydrocannabinol along with cystolithic hair in a sample stuff is an indicator of the same being the resin of cannabis plant because the cystolithic hair are present only in the cannabis plant. When after observing the presence of tetrahydrocannabinol and cystolithic hair, the expert arrives at a conclusion that the sample contains the resin contents, it is more than sufficient to hold that the sample is of charas and the view so expressed by the expert normally should be honoured and not called into question. Of course, neutral material which is not obtained from cannabis plant cannot be treated as resin of the cannabis plants. The resin rather must have been obtained from the cannabis plants may be in

'crude' form or 'purified' form. In common parlance charas is a hand made drug made from extract of cannabis plant. Therefore, any mixture with or without any neutral material of any of the forms of cannabis is to be considered as a contraband article. No concentration and percentage of resin is prescribed for 'charas' under the Act.

g. xxx xxx xxx

h. xxx xxx xxx."

14. Therefore, in a nut-shell as per the law laid down by the Larger Bench of this Court in ***Mehboob Khan's*** case supra, in a case of recovery of charas, presence of tetrahydrocannabinol and cystolithic hair in a sample of charas reveals that the same contains resin contents and as such, sufficient to hold that the sample is of charas. The resin obtained from the cannabis plants may be in 'crude' or 'purified' form and charas is hand made drug, made from the extract of cannabis plant. Therefore, any mixture with or without any neutral material of any of the form of cannabis is to be considered as a contraband article. Therefore, the acquittal of the accused on the ground that the contraband recovered from him is not proved to be charas, is not legally sustainable for the reason that the reports of chemical examiner Ex.PW-10/E and Ex.PW-10/F make it crystal clear that tetrahydrocannabinol and cystolithic hair were very much present in the sample as well as in the entire bulk analyzed in the laboratory.

15. The compliance of Section 50 of the Act is not required in the case in hand for the reason that the documentary evidence i.e. seizure memo Ex.PW-1/B and the Rukka Ex.PW-1/C, leave no manner of doubt that it is the search of the bag Ex.P-1, the accused was holding on his right shoulder conduced and besides his clothes, in one of the portion of the bag, charas, which was kept in a polythene bag, was recovered from another portion of the bag. The present, as such, is not a case of recovery of the charas during the course of personal search of the accused.

16. It is well settled at this stage that in the case of recovery of the contraband during the search of vehicle or container or bag or some premises, the compliance of Section 50 of the Act is not required to be made. We are drawing support in this regard from the judgment of Hon'ble apex Court in ***Kulwinder Singh and another*** vs. ***State of Punjab, (2015) 6, Supreme Court Cases, 674***. The relevant portion of this judgment reads as follows:-

"20. The next contention that has been raised by the learned counsel for the appellants relates to non-compliance of Section 50 of the NDPS Act. It is undisputed that the bags containing poppy husk were seized from the truck. Thus, it is not a case of personal search of a person. In Megh Singh v. State of Punjab, it has been held that Section 50 only applies in case of personal search of a person, but it is not extended to a search of a vehicle or a container or a bag or premises.

21. In *State of H.P. v. Pawan Kumar*, it has been held that:-

"10. We are not concerned here with the wide definition of the word "person", which in the legal world includes corporations, associations or body of individuals as factually in these type of cases search of their premises can be done and not of their person. Having regard to the scheme of the Act and the context in which it has been used in the section it naturally means a human being or a living individual unit and not an artificial person. The word has to be understood in a broad common-sense manner and, therefore, not a naked or nude body of a human being but the manner in which a normal human being will move about in a civilised society. Therefore, the most appropriate meaning of the word "person" appears to be — "the body of a human being as presented to public view usually with its appropriate coverings and clothing". In a civilized society appropriate coverings and clothings are considered absolutely essential and

> no sane human being comes in the gaze of others without appropriate coverings and clothings. The appropriate coverings will include footwear also as normally it is considered an essential article to be worn while moving outside one's home. Such appropriate coverings or clothings or footwear, after being worn, move along with the human body without any appreciable or extra effort. Once worn, they would not normally get detached from the body of the human being unless some specific effort in that direction is made. For interpreting the provision, rare cases of some religious monks and sages, who, according to the tenets of their religious belief do not cover their body with clothings, are not to be taken notice of. Therefore, the word "person" would mean a human being with appropriate coverings and clothings and also footwear.
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> 11. A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a holdall, a carton, etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word "person" occurring in Section 50 of the Act."
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> Similar view has been expressed in *Jarnail Singh v. State of Punjab* and *Ram Swaroop v. State* (*Government of NCT of Delhi*)
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> 22. In view of the aforesaid, the submission that non-compliance of Section 50 vitiates the conviction, leaves us unimpressed."

17. Similar is the view of the matter taken by the Hon'ble apex Court in ***State of Rajasthan*** versus ***Parmanand and another (2014) 5 SCC 345*** and in ***Yashihey Yobin and another*** versus ***Department of Customs, Shillong (2014) 13 Supreme Court Cases 344***. The relevant extract of this judgment reads as follows:

> "9. ..... The language employed "any person" under Section 50 of the Act would naturally mean a human being or a living individual unit and not an artificial person. It would not bring within its ambit any non-living creature viz.; bags, containers, briefcase or any such other article. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be a part of the body of a human being. The scope and ambit of Section 50 was examined in considerable detail in the case of State of Haryana v. Suresh, AIR 2007 SC 2245 and in a three judges bench decision in State of Himachal Pradesh v. Pawan Kumar, 2005 4 SCC 350, wherein it is observed that when a person is not searched, only the bag, container or the suitcase is searched, the provisions of Section 50, cannot be pressed into service. The items like bag, briefcase, or any such article or container, etc. are not a part of a human being as it would not normally move along with the body of the human being unless some extra or special effort is made. Either they have to be carried in hand or hung on the shoulder or back or placed on the head. In common parlance it could be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. but it is not possible to include

these articles within the ambit of the word "person" defined in Section 50 of the Act.

10. This position in law is settled by the Constitution Bench in the case of State of Punjab v Baldev singh, AIR 1999 SC 2378 and in Megh Singh v State of Punjab, 2003 8 SCC 666, where application of Section 50 is only in case of search of a person as contrasted to search of premises, vehicles or articles. But in cases where the line of separation is thin and fine between search of a person and an artificial object, the test of inextricable connection is to be applied and then conclusion is to be reached as to whether the search was that of a person or not. The above test has been noticed in the case of Namdi Francis Nwazor v. Union of India and Anr.,(1998) 8 SCC 534, wherein it is held that if the search is of a bag which is inextricably connected with the person, Section 50 of the Act will apply, and if it is not so connected, the provisions will not apply. It is when an article is lying elsewhere and is not on the person of the accused and is brought to a place where the accused is found, and on search, incriminating articles are found therefrom it cannot attract the requirements of Section 50 of the Act for the simple reason that the bag was not found on the accused person."

18. This Court has also taken similar view of the matter while placing reliance on the judgments supra, in ***Cr. Appeal No.181 of 2015***, titled ***Arun Kumar*** versus ***State of Himachal Pradesh***, decided on 21.10.2016.

19. If the evidence qua this aspect of the matter is seen, the I.O. PW-11 and official witnesses PW-1 and PW-2 are categoric while making statement in the witness-box that the charas was recovered during the search of the bag Ex.P-1, the accused was carrying on his right shoulder. Their testimonies find corroboration from documentary evidence i.e. seizure memo Ex.PW-1/B and the Rukka Ex.PW-1/C. True it is that in the consent memo Ex.PW-2/A, the I.O. PW-11 had suspected and apprised the accused about his suspicion that he may be in possession of some contraband, therefore, his search along with bag was required to be conducted. The charas was recovered during the search of the bag Ex.P-1. The personal search of the accused, no doubt, was conducted vide memo Ex.PW-2/C, however, after the recovery of the charas from his bag, which, as a mater of fact, is required to be conducted before the arrest of an offender in order to ensure that he may not take anything in his possession including some dangerous article when after arrest lodged in police lock up or Judicial custody.

20. It is apparent from the seizure memo Ex.PW-1/B and the Rukka Ex.PW-1/C that the search of the bag was conducted first and charas recovered therefrom. Otherwise also, the consent memo Ex.PW-2/A is suggestive of that the accused in so many words was apprised about his legal right of being searched before a Magistrate or a gazetted officer. Being so, the findings that the I.O., has failed to comply with the mandatory provisions enshrined under Section 50 of the Act otherwise are also legally unsustainable and as such acquittal of the accused of the charge on this score is based upon hypotheses and conjectures.

21. True it is that the independent witnesses have not been associated by the I.O. in this case. There is, however, explanation therefor because PW-1 while expressing his ignorance that there situated houses and shops nearer to the temple of Kalimata at a distance of 40 meters and Jogindra Central Co-operative Bank is also situated there has voluntarily stated that the accused was apprehended at a lonely place. As per the version of I.O. PW-11 in his cross-examination, efforts were made to associate the witnesses on the spot, but no one was willing to do so. Pradeep Kumar resident of Shamti, however, had handed over only weights and scale to them for weighing the contraband.

22. True it is that the search was conducted at Shamti near the temple of Kalimata. It was suggested to PW-1, PW-2 and PW-11 that Pujari resides in the temple with his family, however, they expressed their ignorance. The I.O. PW-11 admits the existence of building of Jogindra Central Bank adjoining to temple and shops also. PW-2 also admits the existence of

houses and shops and the building of Bank nearby. They both, however, expressed their ignorance qua distance thereof from the spot. PW-1 has expressed his ignorance qua existence of the houses and shops nearby the spot. They all had expressed their ignorance qua existence of house of one Bhagwan Singh, hotel of Sadi Ram and house of Ram Rattan, Advocate are situated nearby the temple. Even if the shops and houses were in existence nearby the spot, being odd hour, as the accused was apprehended at 10.30 p.m., no one would have come to assist the police in conducting the investigation on the spot because experience shows that as per the latest trend, no one like to come forward to assist the police in conducting the investigation even during day time, how one can expect that the local residents having houses and shops nearby to have come forward and associate the police to conduct the investigation that too during odd hours. Pradeep Kumar, no doubt, was there because as per prosecution case, the weights and scale were brought from him. Though the police could have asked him to associate as an independent witness, however, its failure to do so will be fatal to the prosecution case, in case it is ultimately concluded by us that the official witnesses on account of so called inconsistencies or contradictions are not dependable.

23. True it is that the I.O. was required to have maintained record in this regard and in the event of efforts made to associate someone from the locality in the investigation of the case and his/her refusal to do so, to have taken action under Section 100(8) of the Code of Criminal Procedure, however, as noticed supra, it is due to odd hours any such exercise seems to be not conducted.

24. Otherwise also, the present is not a case where no one is associated to witness the search and seizure because the official witnesses PW-1 and PW-2 were present there and in the absence of the independent witnesses, the I.O. PW-11, had associated them as witnesses and conducted the search and seizure in their presence. As such the approach of the I.O. in the matter cannot be termed as illegal for the reason that the apex Court in ***Makhan Singh*** versus ***State of Haryana, (2015) 12 SCC 247***, has held that it is not always possible to join independent persons to witness the search and seizure at all places and at every time. At occasions, the independent persons even show their reluctance also for being associated as witness. Also that official witnesses, if associated, in such an eventuality, if make trust worthy and consistent statement while in the witness-box, have to be termed as much good as any other independent person. The relevant extract of this judgment reads as follows:

> "……In peculiar circumstances of the case, it may not be possible to find out independent witnesses at all places and at all times. Independent witnesses who live in the same village or nearby villages of the accused are at times afraid of to come and depose in favour of the prosecution. Though it is well settled that a conviction can be based solely on the testimony of official witnesses, condition precedent is that the evidence of such official witnesses must inspire confidence. In the present case, it is not as if independent witnesses were not available….."

25. Therefore, merely that the I.O. has failed to join the independent person to witness the search and seizure due to the circumstances beyond his control, the findings of acquittal should have not been recorded particularly when PW-1 and PW-2 were associated as witnesses to witness the search and seizure.

26. The pivotal question, however, would be that the statements made by the official witnesses including the I.O. PW-11 are consistent and without any contradiction as well as inspire confidence. The close scrutiny of the statements made by PW-1 and PW-2 amply demonstrate that they are categoric while telling us that the police party had left the Police Station at 9.00 p.m. on that day in search of a proclaimed offender. Though as per the version of PW-1, the police party was patrolling in that area, however, PW-2 and the I.O. PW-11 have stated that they were in search of some proclaimed offender. PW-1 a constable may have not been in the knowledge of the purpose of patrolling by them. Otherwise also in the rapat Ex.PW-11/A there is specific mention that the police party left the Police Station in search of a proclaimed offender. PW-1 and PW-2 have also stated in one voice that the accused was noticed coming on

foot and while trying to flee away, was overpowered and apprehended, on suspicion. He was apprised about his search required to be conducted and that the charas was recovered during the search of his bag Ex.P-1, which was kept in a polythene bag Ex.P-8. They have also stated in one voice that the scale was brought by Constable Devender and the charas when weighed found 650 grams. They have also deposed about resorting to the sampling and sealing process and also taking into consideration the recovered charas vide seizure memo Ex.PW-1/B. They also tell us that Rukka Ex.PW-1/C was taken along with the case property, sample parcels and other record to the Police Station by PW-1 constable Surinder Singh. Their testimonies in examination-in-chief, therefore, corroborate the prosecution story qua recovery of charas weighing 650 grams from the exclusive and conscious possession of the accused. They both were subjected to lengthy cross-examination, however, nothing could be elicited therefrom suggesting that they were not present on the spot nor the accused apprehended there and the charas weighing 650 grams recovered from him.

27. In their cross-examination they are categoric about the time when they left the Police Station. They are also categoric about the time when the accused was spotted and apprehended. True it is that there are minor contradiction qua existence of houses, shops etc., nearby the temple of Kalimata because PW-1 has expressed complete ignorance qua this aspect of the matter whereas PW-2 while admitting the existence of the shops and houses nearby the place of recovery could not tell the exact distance thereof from that place. He has also expressed his ignorance qua distance of houses of Bhagwan Singh, Sadi Lal and Ram Rattan Advocate from the spot. However, these contradictions are not of such a nature, which could have been said to have gone to the roots of the prosecution case. Therefore, we are not in agreement with learned Additional Advocate General that the evidence, available on record has not been appreciated in its right perspective.

28. The I.O. of the case PW-11 has also supported the prosecution case and the manner in which he has conducted the investigation on the spot. There is nothing in his statement to show that the convict, who belongs to village Jorna, P.O. Pulbahal, Tehsil Chopal, District Shimla, a far away place from the spot, was implicated in this case falsely.

29. The evidence as has come on record by way of testimony of remaining prosecution witnesses, who remained associated with the investigation of the case in one way or the other, produce link to the prosecution story because PW-5 HC Kehar Singh, who was posted as MHC Police Station, Solan, had registered FIR Ex.PW-5/A, on receipt of the Rukka Ex.PW-1/C. The rukka was handed over by PW-1 to this witness whereas as per the testimony of PW-10, the then Inspector SHO Police Station, Sadar, the case property containing three parcels duly sealed with seal impression 'S' along with sample of seal, NCB forms and copy of seizure memo was produced by PW-1 before him, in the presence of PW-5 Kehar Singh. PW-10 also proves the prosecution case qua resealing of the parcels containing the recovered charas and sample parcels with seal 'R', the resealing certificate, which is in his hand and bears his signatures Ex.PW-10/D, and filling of the entries in relevant columns of NCB form Ex.PW-10/C. He handed over the case property along with sample seals, seizure memo and NCB forms to PW-5 Kehar Singh. PW-5 admits so while in the witness-box and further tells us that the case property was retained by him in safe custody in the Malkhana. The extract of Malkhana register Ex.PW-11/G also substantiates the prosecution case in this regard.

30. PW-5 further substantiates the prosecution case qua forwarding of one of sample parcels to Forensic Science Laboratory, Junga vide RC PW-5/D, through PW-8 constable Rakesh Kumar. PW-8 Rakesh Kumar tells us that the sample parcels was deposited by him in laboratory in safe custody and produced the receipt on RC before Kehar Singh PW-5. Sunil Kumar is PW-6 MHC Malkhana. He had forwarded the parcel containing the recovered charas and another sample parcel to Forensic Science Laboratory, Junga vide RC No.136/09 through PW-7 HHC Krishan Dutt on 22.8.2009. In this regard, he has proved the extract of Malkhana register Ex.PW-5/B also, in which the entries encircled red was made by him in his own hand. He had also proved the prosecution case that three parcels containing the case property and samples was

again taken out from the Malkhana by ASI Santosh Thakur on 17.3.2009 for exhibiting the same in the Court, it was re-deposited on the same day at 7.00 p.m. in the Malkhana in safe condition. PW-7 HHC Krishan Dutt has corroborated the statement of PW-6 HC Sunil Kumar while stating that two parcels handed over to him were deposited by him, in the laboratory in safe custody. Therefore, the link evidence as has come on record by way of testimony of the aforesaid witnesses also connects the accused with the commission of the offence.

31. Now if coming to the last point urged by learned defence counsel that non-production of seal 'S' in the Court is fatal to the prosecution case. We are not impressed thereby because what prejudice has been caused to the accused by non-production of the receipt, nothing tangible has brought to our notice. The doubt of learned defence counsel that the case property was tampered with is absolutely baseless for the reason that the parcels containing the case property were firstly taken to Forensic Science Laboratory where the same were found to be duly resealed with seal 'S' and 'R'. We can make a reference in this regard to the reports of chemical examiner Ex.PW-10/E and Ex.PW-10/F. The chemical examiner, who received these parcels in the Laboratory had recorded his satisfaction qua the sealing thereof and it is thereafter the same were received. Had the parcels been tampered with, the chemical examiner would have not received the same. These parcels were produced in the Court also during the course of trial and opened in the presence of learned Public Prosecutor and learned defence counsel at that time. Had there been any tampering therewith, the same could have been pointed out at that stage also. Therefore, non production of the seal in the Court is not to be treated a circumstance to render the prosecution case doubtful and to arrive at a conclusion that the case property was tampered with. In our opinion, unless and until prejudice caused to the accused by non-production of the seal is shown, the accused cannot seek any benefit on this score. Therefore, the findings recorded by learned trial Judge that the non-production of seal in the Court has rendered the prosecution story doubtful, are also not legally sustainable.

32. Now if coming to the defence of the accused, the same is neither probable nor reasonable. It cannot be believed by any stretch of imagination that he was present at Kotla Nalah, where two groups of college students quarreled and as he was believed to be a student, hence apprehended in this case falsely. Interestingly enough, he belongs to village Jorna, P.O. Pulbahal, Tehsil Chopal, District Shimla, a far away place from Shamati in District Solan, what he was doing there that too during odd hours, he failed to explain.

33. True it is that the onus to prove its case against the accused is on the prosecution, however, in the given situation where the accused has admitted his presence at the place of occurrence, however, as per his version believing that he is one of the college students, allegedly quarreled at Kotla Nalah, hence implicated falsely, he was under a legal obligation to have explained his presence during odd hours at that place. He, however, has failed to do so. Therefore, the only inescapable conclusion would be that he was dealing in the business of charas and was present there in connection with his business.

34. In view of what has been said hereinabove, we find the present a case, where the prosecution has successfully pleaded and proved that on 16.3.2009 at 10.30 p.m., during search of the bag, the accused was carrying on his shoulder, charas weighing 650 grams was recovered from his conscious and physical possession. The prosecution as such has proved its case against the accused beyond all reasonable doubt. The impugned judgment, therefore, is the result of misappreciation of the evidence available on record and also the law applicable in a case of this nature, hence not legally sustainable. We, therefore, allow the present appeal and convict accused Surender Kumar for the commission of the offence punishable under Section 20 of the Act. The impugned judgment as such is quashed and set aside. Let him to surrender to his bail bonds and produced in this Court on 13.6.2017, for being heard on the quantum of sentence. Production warrant be issued accordingly.

Judgment to continue.

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

Ashok Kumar ...Petitioner.

Versus

State of H.P. and Ors. ...Respondents.

CWP No. 8619 of 2014
Reserved on: 04.05.2017
Decided on: 23.5.2017

Constitution of India, 1950- Article 226- Petitioner was engaged as Secretary with respondent No.4- a Criminal Case was registered against the petitioner and he was put under suspension- another FIR was registered against the petitioner and services of the petitioner were terminated – the petitioner filed an appeal before Registrar Co-operative Societies, which was allowed and the petitioner was ordered to be re-engaged – the Society did not comply with the order and a notice was issued as to why the management of the Society should not be superseded – a reply was filed which was not found satisfactory and the supersession of the Committee was ordered- an appeal was filed, which was dismissed – however, the petitioner was not permitted to join- the petitioner filed a writ petition, which was disposed of with a direction to the petitioner to resort to the remedies available under the provisions of H.P. Co-operative Societies Act – the petitioner approached respondent No.2, who directed the respondent No.3 to issue notice to the Managing Committee to comply with the order – a notice was issued but respondent No.4 refused to comply with the order- a show cause notice was issued but the order was not complied – the petitioner filed a writ petition- held that the scheme of the Constitution is based upon the rule of law and nobody is above law – the Society has been persistently flouting and disobeying the orders of the statutory authority – the Society should have assailed the orders, if it felt aggrieved by them – writ petition allowed- all the members of the Management Committee of respondent No.4 from the year 2008 till date are debarred not only from being the members of the governing body of respondent No. 4 Society but are also debarred from becoming members of the society and from forming any new Co-operative Society or other Society for a period of five years – direction issued to respondent No.2 to dissolve the Managing Committee and appoint an administrator to implement the order with all consequential benefits – State Government also directed to create Co-operative Appellate Tribunal.(Para-11 to 21)

For the petitioner: Mr. Ajay Sharma, Advocate.
For the respondents: Ms. Meenakshi Sharma, Addl. A.G. for respondents No. 1 to 3.
Mr. Sanjeev Kuthiala, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge

The instant case depicts sordid, despotic and nepotic functioning of respondent No. 4 i.e. Andora Agriculture Cooperative Society, who in a most brazen, blatant and defiant manner has flouted and defied not only the mandate of the law but the various directions given under the adjudicatory authorities constituted under the H.P. Cooperative Societies Act, 1968 (for short the **Act**).

2. The facts, as are necessary, for the adjudication of the present petition are that the petitioner was engaged as a Secretary with respondent No. 4 and joined his duties as such on 2.9.1986. In the year, 2004, when the society was being manned by the Administrator, a criminal case came to be instituted against the petitioner vide FIR No. 148 of 2004. The Administrator vide order dated 1.7.2004 ordered the petitioner to remain under suspension till the decision of the case emerging out of the said FIR. On 28.3.2005, another FIR came to be registered against the

petitioner vide FIR No. 13 of 2005. On the basis of the inquiry conducted in the aforesaid FIRs and submissions of inquiry report the services of the petitioner were ordered to be terminated vide the order passed by respondent No. 4 on 9.1.2008.

3. This order was assailed by the petitioner before respondent No. 2-Registrar, Cooperative Societies, being the appellate authority and the same was set aside vide order dated 7.4.2008. When respondent No. 4 failed to re-engage the petitioner, it was asked by respondent No. 2 vide notice dated 4.1.2012, as to why the management of the society be not superseded. Not being satisfied with the reply by the society, respondent No. 2 vide order dated 14.6.2012 ordered the supersession of the committee.

4. This order was again assailed by respondent No. 4 before respondent No. 2 in appeal being case No. 26/2012, however, the same ordered to be dismissed vide order dated 14.9.2012.

5. Consequent upon the aforesaid order dated 14.9.2012, directions were given to respondent No. 4 to give joining to the petitioner within three days. However, despite these orders, the petitioner was not permitted to join and the same constrained him to approach this Court by medium of CWP No. 483/2013. However, the said petition was dismissed with the directions to the petitioner to resort to the remedy as available under the provisions of the Act. Accordingly, the petitioner approached respondent No. 2, who vide his order dated 26.10.2013 came to a categorical conclusion that respondent No. 4 had failed to comply with the lawful order issued by Registrar, Cooperative Societies on 7.4.2008 (supra) despite having been given sufficient time and respondent No. 3 i.e. the Assistant Registrar, Cooperative Societies, Una, was directed to issue notice of 15 days to the managing committee of respondent No. 4 to comply with the aforesaid order being a final opportunity and further directed to submit his report within a week on the steps taken by it to implement the aforesaid directions.

6. On 21.11.2013, respondent No. 3 sent a letter to respondent No. 4 with a direction to implement the order dated 7.4.2008 and submit its report. However, respondent No. 4 blatantly refused to comply with the said order constraining respondent No. 3 to send another letter dated 27.1.2014 to respondent No. 2 stating therein that respondent No. 4 was not implementing the lawful command and sought its guidance. This was followed by yet another communication dated 13.2.2014. However, when respondent No. 4 still failed to comply with the order dated 7.4.2008 and the subsequent order dated 26.10.2013 and was therefore issued a show cause notice on 25.6.2014 calling upon it as to why it be not superseded under Section 37 of the Act. This was followed by another letter dated 9.7.2014 whereby the time to file reply to the show cause notice was extended by 15 days. This was followed by yet another communication dated 21.7.2014 whereby time was again extended by fortnight. On 7.8.2014, respondent No. 3 sent yet another communication to respondent No. 2 thereby bringing to his notice that society is not adhering to lawful command. The petitioner at his own end also made certain representations but to no avail.

7. The long and short of the matter is that the petitioner despite repeated orders passed by respondents No. 2 and 3 as far back in the year, 2008 never came to be engaged, constraining him to file the instant petition for the grant of following substantive reliefs:-

a) That impugned acts of the respondents above stated, which amount to executive inaction, may very kindly be quashed and set aside with specific and categorical directions to respondents No. 2 and 3 implement the orders dated 7.4.2008, 27.9.2012 and 26.10.2013 in its letter & spirit and file compliance report with respect to said aspect of the matter in this Hon'ble Court;

b) That respondents No. 2 and 3 may very kindly be directed to allow the petitioner join his duties as Secretary of respondent No. 4 society, with all consequential benefits of seniority, pay etc. etc., and to deem the petitioner to

be in service from the date he was put under suspension and his services were terminated;

c) That the respondents may further be directed to calculate and pay the arrears of salary of the petitioner from the date he was put under suspension and thereafter his services were terminated alongwith interest @ 9% per annum;

d) That respondents No. 2 and 3 may very kindly be directed to see that rule of law is enforced in respondent No. 4 society or to take action against the society as per provisions of the Act and Rules either for supersession and in extreme case, liquidation/winding up of the society;

8. Respondent No. 1 State has filed reply, wherein, it has been specifically averred that it is not in any manner involved in the matter as no action or inaction on his part has been challenged in the petition.

9. As regards respondents No. 2 and 3, they have filed a joint reply, wherein, they have expressed their complete helplessness in getting their own orders implemented. It has been averred that even after resorting to coercive action of superseding the managing committee and appointing an Administrator on 14.6.2012, they were not in a position to have lawful directions of the statutory authorities implemented as the previous managing committee was again re-elected and did not permit the petitioner to join.

10. Respondent No. 4 has filed its separate reply, wherein. it has only tried to beat about the bush by leveling personal allegations against the petitioner that he is the owner of one jeep, private car, motor cycle and verka milk agency as also a pepsi cold drink agency in the name of his brother and is also possessed of sufficient property comprising hotel, residential building, agricultural land and other commercial building and shops and would content that since the petitioner was found guilty of embezzlement of the funds of the members and the society, therefore, the petitioner is not entitled to any relief whatsoever.

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

11. A Division Bench of this Court in a judgment authored by me in CWP No. 2080 of 2016, titled ***Nangal Jarialan, Cooperative Agriculture Service Society Ltd. & Anr. Vs. State of H.P. & Ors.,*** decided on 6.12.2016, while dealing with the philosophy and concept of cooperative movement observed as under:-

> 15. At the outset, it may be observed that the very philosophy and the concept of the cooperative movement is impregnable with public interest. A cooperative society is a substitute for self-interest of an individual or a group of individuals for the benefit of the whole community. Therefore, even the general body of the members cannot take any steps which may be derogatory to the promotion of the interests of any one of its member(s) or its employee(s) and the same is necessarily be in accordance with the cooperative principles. Conversely, the general body of the members cannot act in a manner so as to confer undue benefit or advantage in favour of anyone of its member(s) or employee(s). Above all, the society unlike a private individual cannot act as it pleases and the decision taken by the general body has to be in accordance with the H.P. Cooperative Societies Act, 1968 (for short '**Act**'), H.P. Cooperative Societies Rules, 1971 (for short '**Rules**') and the bye-laws of the society.
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> 16. A cooperative society is registered on cooperative principles of democracy, equity, equality and solidarity. Democratic accountability, mutual trust, fairness, impartiality, unity and agreement amongst its members are some of the cardinal dimensions of the cooperative principles. Therefore, the decision taken by the executive body of the society should enjoy the confidence and must have the backing of majority of its members.

17. Moreover, the cooperative societies are corporations within the meaning of Article 31-A(1)(c) as held by the Hon'ble Supreme Court in **Daman Singh and Ors. vs. State of Punjab and Ors. 1985 (2) SCC 670**. The very philosophy and concept of the cooperative movement is impregnable with public interest. Once a person becomes the member of the cooperative society, he loses his individuality qua the society and he has no independent right except those given to him by the statute and bye-laws. What is a corporation has been considered in the Daman Singh's case in the following manners:-

> "5. What is a corporation? In Halsbury's Laws of England, fourth Edition, Volume 9, Paragraph 1201, it is said,
>
> A corporation may be defined as a body of persons (in the case of a corporation aggregate) or an office (in the case of a corporation sole) which is recognized by the law as having a personality which is distinct from the separate personalities of the members of the body or the personality of the individual holder for the time being of the office in question."

18. A corporation is a substitute for self-interest of an individual or a group of individuals for the benefit of the whole community, therefore, the cooperative movement cannot be permitted to be polluted by certain vested interest at the helm of affairs.

19. In this context, it shall be advantageous to refer to the judgment rendered by the Bombay High Court in **Hindurao Balwant Patil & Anr., Vs. Krishnarao Parshuram Patil and Ors., AIR 1982 Bombay 216**, wherein it was observed:-

> "Co-operative movement cannot be permitted to be polluted or choked by internal or individual strike nor it can be permitted to be polluted by party politics. Co-operative capitalism despotism is not co-operation. On the other hand co-operation is a substitute for self interest of an individual or a group of individuals for the benefit of whole community. Therefore, if the society itself while framing and adopting its own code of conduct in the form of bye-laws, which are to be duly approved by the Registrar, has not made any provision for removal of the Chairman and vice Chairman by passing a vote of no confidence, it cannot be said that the step taken by the Society or Registrar in that behalf is not a regulatory one nor is in the interest of the society or the general public. The so-called mandate theory cannot be pushed to ridiculous extremes to convert co-operative movement into an arena or akhada of power politics. Whenever the legislature thought that a person is not fit to continue as a member of the board, specific provisions are made for his removal. A person is elected as Chairman or Vice Chairman for a particular term. His office is controlled by the provisions of the Act……."

20. At this stage, we may also refer to the decision made by the Punjab & Haryana High Court in **The Bapauli Co-operative Agricultural Service Society vs. The State of Haryana and Ors., AIR 1976 P&H 283**, wherein it was observed as under:-

> "The final authority in a co-operative society does of course vest in the general body of its members or its managing body elected in accordance with its bye-laws as laid down in Section 23 of the Act, but this authority is not absolute and free from restraints. Even the general body of the members cannot take any steps which may be derogatory to the promotion of the economic interests of the members of a society in accordance with co-operative principles; nor can the general body take

> any decision which may be contrary to the Act or the Rules framed thereunder. When considered in this light, Section 23 of the Act has to be interpreted in such a manner so that its operation does not set at naught some of the other provisions of the Act. It is settled law that two provisions of a statute have to be read in such a manner that one of them does not necessarily repeal the other. The question of repeal of one provision of a statute by another arises only when two of them are wholly incompatible with one another or if they are read together they would lead to wholly absurd consequences. If on a fair and proper interpretation these two provisions can be reconciled with each other, the Courts of law are under a duty to adopt such an interpretation and to give full effect to the two provisions of the Act instead of holding that one of them is repealed by the other....."

12. It is more than settled that "rule of law is the basic rule of governance of any civilized policy". The scheme of the Constitution of India is based on the concept of rule of law. Every one whether individually or collectively is unquestionably under the supremacy of law. This is not withstanding that whoever the person, however, high, powerful or rich he or she may be is above the law.

13. As observed in ***Nangal Jarialan, Cooperative Agriculture Service Society Ltd. Case (supra),*** the society unlike a private individual cannot act as it pleases and the decision taken by the general body has to be in accordance with the Act, Rules and bye-laws of the society. Therefore, it had no jurisdiction whatsoever to sit over the lawful decisions and directions issued by the respondents from time to time much less defy the same with impunity.

14. The conclusion that the society has been persistently flouting and disobeying the orders of the statutory authority is writ large, therefore, it is high time that there is a crack down on such blatant defiance and the sordid, despotic and nepotic functioning of respondent No. 4 is brought within the framework of law. The action or rather the inaction of the managing committee in not implementing and showing scant regard and respect to the solemn orders of the adjudicatory authorities only reflects upon their unseemingly conduct and attitude that are goarded by a personal ego. Such irresponsible and illegal conduct on their part cannot but earn frown from this Court, which could only be ignored at the cost of jettisoning the dignity, authority and majesty of the adjudicatory authorities.

15. If at all respondent No. 4 felt aggrieved by any of the orders that were passed against it by the various adjudicatory authorities, then the only course open for it was to have assailed the same in accordance with law. It had no business or authority to have sat upon the lawful orders and in a blatant and brazen manner defied the same. This only reflects the scant regard the members of the managing committee of respondent No. 4 have for the law. As already observed, whoever the person or authority, however, high, powerful or rich, he/she may be, is above the law. This Court will be failing in its duty if it does not voice its protest against these brazen acts of lawlessness.

16. It is unfortunate that despite the Act having been enacted in the year, 1968, authorities conferred with the adjudicatory powers under it virtually have no real and concrete powers to have their orders enforced and continue to remain paper tigers without any teeth or claws. It is probably for this reason that the orders are so ethereal, that they can be nullified or eschewed by a simple resolution or strong defiance.

17. It is, therefore, high time the State Government constitute a robust Cooperative Appellate Tribunal as per Section 108 of the Act read with Rule 132 of the H.P. Cooperative Societies Rules, 1971, capable of effectively and expeditiously deciding disputes so as to ensure that the adjudicatory authorities under the Act are not reduced to mere paper tigers but armed

with proper teeth and claws and the efforts put by these authorities are not wasted and the orders are not shelved by defiant Cooperative Societies like respondent No. 4.

18. Accordingly, while allowing this writ petition, this Court directs that, henceforth, all the members of the managing committee of respondent No. 4 from the year 2008 till date are debarred not only from being the members of the governing body of respondent No. 4 society but also debarred from becoming members of the society and are further debarred from forming any new cooperative society or other society for a period of five years.

19. Since, petitioner has been dragged into otherwise avoidable litigation, each member of the managing committee shall pay from their own pocket a sum of Rs.20,000/- each to the petitioner towards costs as also damages. Further, in case any of the member of the managing committee has died then this order shall be enforced against his legal representatives. In the event of failure of any of the aforesaid members to deposit this amount, the same shall be recovered as arrears of land revenue.

20. In addition thereto, respondent No. 2 is directed to forthwith dissolve the managing committee and appoint an administrator, who shall implement orders dated 7.4.2008, 27.9.2012 and 26.10.2013 in its letter and spirit and file compliance report within week of the receipt of this order by granting all consequential benefits to the petitioner including seniority, pay etc., as the petitioner was not permitted to join and has since already attained the age of superannuation.

21. The State Government has further directed to consider the creation of a Co-operative Appellate Tribunal in accordance with Section 108 of the Act read with Rule 132 of the H.P. Cooperative Societies Rules, 1971.

22. The petition is disposed of in the aforesaid manner. Let, a copy of this order be sent to the Chief Secretary to the Government of Himachal Pradesh, for compliance.

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

Jai Bahadur alias Raju .....Petitioner.
Versus
State of H.P. .....Respondent.

Cr.MP (M) No. 592 of 2017
Date of Decision: 23.05.2017

Code of Criminal Procedure, 1973- Section 439- a FIR has been registered against the petitioner for the commission of offences punishable under Section 21 of N.D.P.S. Act, 1985 for carrying 12 bottles of Corex without a valid permit- the petitioner prayed for bail on the ground that challan has been filed against him and that the quantity of substance present in the bottle has to be taken into consideration for determining the liability of the petitioner – held that SFSL had found that quantity of codeine phosphate was 2.006 mg per/ml in 100ml bottle of Corex, which if taken into consideration in 12 bottles comes to be less than 10 grams specified as small quantity by the Central Government-the petitioner is in custody for more than five months-challan has been filed in the Court and he is not required for the purpose of investigation – hence, bail application allowed and the petitioner ordered to be released on bail in the sum of Rs.50,000/- with one surety in the like amount.(Para- 10 to 21)

Cases referred:

State of Himachal Pradesh versus Mehboob Khan 2013(3) Him.L.R.(FB) 1834
Prasanta Kumar Sarkar versus Ashis Chatterjee and another,(2010)14 SCC 496

For the Petitioner: Mr. Deepak Kaushal, Advocate.
For the Respondent: Mr. P.M. Negi & Mr. M.L. Chauhan, Additional Advocate Generals.

The following judgment of the Court was delivered:

Sandeep Sharma, J (oral)

By way of present petition filed under Section 439 of the Code of Criminal Procedure, petitioner has prayed for grant of regular bail in case FIR No.159 of 2016, dated 24.12.2016, registered at Police Station, Sadar Nahan, District Sirmaur, H.P., under Sections 21-61-85 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (***hereinafter referred to as the Act)*** .

2. Sequel to order dated 19.5.2017, HC Pankaj Chandel No. 68, SIU Nahan, District Sirmaur, H.P., has come present in Court alongwith the record. Record perused and returned.

3. Perusal of status report/reply made available on record by the police suggest that on 24.12.2016 bail petitioner was caught/nabbed while carrying 12 bottles of Corex without there being any permit. Accordingly, FIR as mentioned above came to be registered against him under Section 21-61-85 of the Act. It also emerge from the record that since 24th December, 2016, bail petitioner is in judicial custody. Pursuant to aforesaid recovery of psychotropic substance from the petitioner, bottles so recovered from the petitioner were sent to State Forensic Science Laboratory, Himachal Pradesh Shimla, Junga for chemical analysis. The State Forensic Science Laboratory in its report has concluded that "***Codeine Phosphate is present in the exhibit as Corex"***. It also emerge from the record that challan stands presented in the competent Court of law on 21st March, 2017,

4. Mr. P.M.Negi, learned Additional Advocate General, while inviting attention of this Court to the status report/reply, as referred hereinabove, opposed the prayer having been made by the learned counsel representing the petitioner for grant of bail. Learned Additional Advocate General, contended that contraband/psychotropic substance recovered from the petitioner falls within the commercial quantity and as such, no leniency can be shown while considering the petitioner's prayer for grant of bail.

5. Mr. Deepak Kaushal, learned counsel representing the petitioner while making prayer for grant of bail in favour of the petitioner invited attention of this Court to the judgment passed by the Co-ordinate Bench of this Court in Cr.MP (M) No.432 of 2017, titled as ***Ankush Chauhan versus State of H.P.,*** decided on 25th April, 2017 as well as in Cr.MP(M) No.817 of 2016, titled as ***Prashant Chauhan versus state of H.P,*** decided on 15th July, 2016 and contended that only psychotropic substance contained in the bottle(s) is required to be taken into consideration while determining the quantity of prohibited drug i.e. "Codeine Phosphate" and not the whole mixture contained in the recovered bottles of Corex. While specifically referring to the report submitted by SFLS, learned counsel representing the petitioner contended that as per report only 2.006mg "Codeine Phosphate" has been found in one bottle of 100 ml of Corex and as such, quantity if taken into consideration qua all the recovered 12 bottles is definitely less then small quantity and as such, petitioner is entitled to be released on bail.

6. Lastly, learned counsel representing the petitioner, contended that the bail petitioner is in custody since 24th December, 2016 and more than five months have passed and even if for the sake of argument it is presumed that petitioner has violated provision as contained in Section 21 of the Act, maximum sentence of one year is provided under the Act, if contraband is of small quantity.

7. Mr. P.M.Negi, learned Additional Advocate General, while refuting the aforesaid submission having been made by the learned counsel for the petitioner, contended that as per settled law entire material contained in the recovered bottles is required to be taken into consideration while determining the quantity of psychotropic substance. Mr. Negi, further

contended that if the report of SFSL is read in its entirety, it has been clearly concluded that ***"Codeine Phosphate is present in the exhibit stated as Corex***", and as such, by no stretch of imagination, it can be argued that the contraband/ psychotropic substance recovered from the petitioner-accused is of small quantity. With a view to substantiate his aforesaid argument, Mr. Negi, invited attention of this Court to the judgment rendered by Hon'ble Full Bench of this Court in ***State of Himachal Pradesh versus Mehboob Khan*** 2013(3) Him.L.R. (FB) 1834.

8. Apart from above, Mr. Negi, also placed reliance upon the judgments passed by the Co-ordinate Bench of this Court in Cr.M.P.(M) No.450 of 2016, titled as ***Praduman Justa versus State of Himachal Pradesh,*** decided on 8th July, 2016, as well as in Cr.M.P(M) No.502 of 2014 titled ***Om Pal versus State of Himachal Pradesh***, decided on 6.5.2014 to suggest that entire contraband/ psychotropic substance allegedly recovered from the petitioner-accused is required to be taken into consideration while determining the quantity of prohibited drug.

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

10. Before adverting to the merits of the contentions/ submissions having been made by the learned counsel for the parties as well as law cited hereinabove, this Court deems it fit to take note of the relevant portion of the judgment passed by the Hon'ble Full Bench of this Court in ***State of Himachal Pradesh versus Mehboob Khan*** 2013(3) Him.L.R.(FB) 1834, wherein it has been held as under:-

> ***e) ……. The separated resin is cannabis resin not only when it is in 'purified' form, but also when in 'crude' form or still mixed with other parts of the plant. Therefore, the resin mixed with other parts of the plant i.e. in 'crude' form is also charas within the meaning of the Convention and the Legislature in its wisdom has never intended to exclude the weight of the mixture i.e. other parts of the plant in the resin unless or until such mixture proves to be some other neutral substance and not that of other parts of the cannabis plant. Once the expert expressed the opinion that after conducting the required tests, he found the resin present in the stuff and as charas is a resinous mass and after conducting tests if in the opinion of the expert, the entire mass is a sample of charas, no fault can be found with the opinion so expressed by the expert nor would it be appropriate to embark upon the admissibility of the report on any ground, including non-mentioning of the percentage of tetrahydrocannabinol or resin contents in the sample.***
>
> ***f)…….. When after observing the presence of tetrahydrocannabinol and cystolithic hair, the expert arrives at a conclusion that the sample contains the resin contents, it is more than sufficient to hold that the sample is of charas and the view so expressed by the expert normally should be honoured and not called into question. Of course, neutral material which is not obtained from cannabis plant cannot be treated as resin of the cannabis plants. The resin rather must have been obtained from the cannabis plants may be in 'crude' form or 'purified' form. In common parlance charas is a handmade drug made from extract of cannabis plant. Therefore, any mixture with or without any neutral material of any of the forms of cannabis is to be considered as a contraband article. No concentration and percentage of resin is prescribed for 'charas' under the Act."***

11. After having carefully perused the aforesaid judgment rendered by the Hon'ble Full Bench of this Court, there cannot be any dispute that while determining the quantity of contraband/psychotropic substance, entire contraband allegedly recovered from the accused is required to be taken into consideration for determining the quantity of psychotropic substance. But, if aforesaid judgment rendered by the Hon'ble Full Bench is read in its entirety, Hon'ble Full

Bench has specifically concluded/observed that legislature in its wisdom has never intended to exclude the weight of the mixture i.e. other parts of the plant in the resin unless or until such mixture proves to be some other neutral substance and not that of other parts of the cannabis plant. In the case referred hereinabove, dispute was whether whole bulk charas allegedly recovered from the accused is/was required to be taken into consideration while determining the quantity of the same or resin, if any, is/was to be excluded.The Hon'ble Full Bench in the aforesaid judgment has specifically concluded that even separated resin is cannabis resin and as such, whether it is in 'purified' form or in 'crude' form is required to be taken into consideration while determining the quantity. As far as the judgment passed by Full Bench of this Court in **Mehboob Khan** casesupra is concerned, it has been specifically held that entire plant of cannabis or the material, if any, extracted from any part of cannabis plant is required to be included while determining the quantity of charas/contraband. The Hon'ble Full Bench has further held that once expert expressed the opinion that after conducting the required test, he/she found the resin present in the stuff and as charas is a resinous mass and after conducting tests if in the opinion of the expert, the entire mass is a sample of charas, no fault can be found in the opinion.

12. At the cost of repetition, this Court after having perused the judgment passed by the Hon'ble Full Bench of this Court in ***Mahboob Khan*** case supra, wish to observe that Hon'ble Full Bench while holding that the entire plant of cannabis and the material, if any, extracted from any part of cannabis plant is required to be included while determining the quantity of charas/contraband, has definitely carved out a distinction that mixture, if any, in the recovered contraband proves to be of some other neutral substance and not that of other parts of the cannabis plant, same is required to be excluded while determining the quantity of contraband.

13. At this stage, it would be profitable to reproduce State Forensic Science Laboratory report herein:-

> ***"Various scientific tests such as physical identification, chemical tests, chromatographic as well as quantitative analysis were carried out in the laboratory with the exhibit stated as Cores under reference with representatives & homogeneous sample. The above tests performed indicated the presence of codeine phosphate in the sample of Corex. On its quantitative analysis, codeine phosphate was found to be 2.006 mg per/ml in 100 ml bottle of Corex. The result thus obtained is given below:-***
>
> ***Codeine Phosphate is present in the exhibit stated as Corex."***

14. As per aforesaid report of SFSL, "codeine phosphate i.e. prohibited drug, was found to be 2.006 mg per/ml in 100 ml bottle of Corex, meaning thereby, in one recovered bottle of Corex, quantity of prohibited drugs is 2.006 mg, which if taken into consideration of all 12 recovered bottles comes out to be less then small quantity. It may be noticed that SFSL, while concluding that 2.006 mg Codeine Phosphate is found in per/ml in 100 ml bottle of Corex, has nowhere rendered any opinion qua the remaining contents/mixture contained in the one bottle of Corex. Hence, in the absence of the same only inference can be drawn that small quantity of Codeine Phosphate i. e. 2.006 mg is present in 100 ml bottle of Corex.

15. This Court after having carefully perused the judgments passed by the Coordinate Bench of this Court in **Ankush Chauhan & Prashant Chauhan**case supra finds that similar view as of this Court has been taken while granting bail on similar facts and circumstances, wherein admittedly bottles of Corex were recovered.

16. Undisputedly, the aforesaid aspect of the matter is required to be considered/examined in detail by the trial Court during the course of the trial. But perusal of notification issued by the Central Government in exercise of the powers vested in it under clause (VII-A) and (XXII-A) of section 2 of the Act, suggest that it has prescribed small quantity as 10 grams qua the drugs namely "Codeine", whereas commercial quantity has been prescribed as one kilogram and above. In the instant case, where admittedly quantity of prohibited drug i.e."

Codeine Phosphate" is less then small quantity as clearly emerge from the report of the SFSL and as such , rigors of Section 37 of the Act, are not attracted in the case at hand.

17. Apart from above, Mr. Negi, learned Additional Advocate General, under instructions, fairly stated that investigation in the case is complete and matter is pending before trial Court for framing of charge and as such, this Court is of the view that custodial interrogation of the petitioner is not required. Moreover, petitioner is in custody for the last five months and as such, he deserves to be released on bail. Otherwise also, normal rule is bail and not jail. Court while granting bail, has to keep in mind the nature of accusations, nature of evidence in support thereof, severity of the punishment which conviction will entail, character of the accused, circumstances which are peculiar to the accused indulged in that crime. In the instant case, petitioner accused has fully cooperated with the investigating agency during the investigation and there is no likelihood of his fleeing from the trial. Apart from above, he is local resident of the area and his presence can be secured during the trial at any time.

18. The Hon'ble Apex Court in ***Prasanta Kumar Sarkar versus Ashis Chatterjee and another***,(2010)14 SCC 496, has laid down the following principles to be kept in mind, which deciding petition for bail:-

(i) Whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) Nature and gravity of the accusation;

(iii) Severity of the punishment in the event of conviction;

(iv) Danger of the accused absconding or fleeing, if released on bail;

(v) Character, behavior, 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.

19. Consequently, in view of the detailed discussion made hereinabove, the present petition is allowed and the petitioner is ordered to be released on bail on his furnishing personal bond in the sum of Rs. 50,000/- (rupees fifty thousand) with one surety in the like amount to the satisfaction of the Court concerned. He shall further abide by the following conditions:-

(i) That he shall join the interrogation as and when called upon to do so and regularly attend the trial court on each and every date of hearing. If prevented by any reason to do so, shall seek exemption from appearance by filling appropriate application;

(ii) That he shall not tamper with the prosecution evidence nor hamper the investigation of the case, in any manner, whatsoever;

(iii) That he shall not make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Investigating Officer;

(iv) That he shall not leave the territory of India without the prior permission of the Court.

20. It is clarified that if the petitioner misuses his liberty or violates any of the conditions imposed upon him, the Investigating Agency shall be free to move this Court for cancellation of the bail.

21. The observations made hereinabove shall remain confined to the disposal of this petition and shall have no bearing on the merits of the case. The application stands disposed of.

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

Ms.Shruti .....Appellant.
Versus
Baldev Singh and others ....Respondents.

R.S.A. No.53 of 2017.
Judgment reserved on: 19.05.2017.
Date of decision: 23rd May, 2017.

Specific Relief Act, 1963- Section 20- Predecessor-in-interest of defendants No.1 and 2 had agreed to sell complete first floor of the double storeyed building to the plaintiff for Rs.9,50,000/- - Rs.3,50,000/- was paid as earnest money – however, the sale deed was not executed and defendants No.1 and 2 executed the sale deed in favour of defendant No.3 – the plaintiff filed a civil suit seeking specific performance of the agreement and in the alternative for the recovery of the money- the suit was decreed for the refund of the money along with interest – an appeal was filed which was dismissed- it was contended in the second appeal that the suit for specific performance was barred by limitation and time was essence of contract – held that no specific date for execution of the sale deed or for the payment of balance consideration was mentioned in the agreement and time cannot be said to be the essence of the contract – the time is generally not of essence of contractin the agreements related to the sale of immovable property – the defendant has not denied the receipt of consideration, hence, the refund of the consideration is the logical conclusion otherwise it would amount to unjust enrichment of the defendants at the expense of plaintiff – appeal dismissed.(Para-9 to 22)

Cases referred:
Chand Rani (Smt.) (dead) by LRs vs. Kamal Rani (Smt.) (dead) by LRs (1993) 1 SCC 519
Gomathinayagam Pillai and others vs. Palaniswami Nadar AIR 1967 (SC) 868
Govind Prasad Chaturvedi vs.Hari Dutt Shastri and another (1977) 2 SCC 539
M/s Hind Construction Contractors vs. State of Maharashtra (1979) 2 SCC 70
D.S.Thimmappa vs. Siddaramakka (1996) 8 SCC 365
Swarnam Ramachandran vs. Aravacode Chakungal Jayapalan (2004) 8 SCC 689
Balasaheb Dayandeo Naik (Dead) through LRs and others vs. Appasaheb Dattatraya Pawar (2008) 4 SCC 464
Renusagar Power Co. Ltd. Vs. General Electric Co. 1994 Supp (1) SCC 644
Indian Council for Enviro-Legal Action Vs. Union of India and others (2011) 8 SCC 161

For the Appellant : Mr.Saurav Rattan, Advocate.
For the Respondents : Mr.Dalip K.Sharma, Advocate vice Mr.Vijay Sharma, Advocate, for respondent No.1.
Ms.Chetna Thakur, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

This Regular Second Appeal under Section 100 of the Code of Civil Procedure has been preferred by the defendant/appellant against the judgments and decrees concurrently passed by the learned Courts below, whereby the suit of the plaintiff/respondent No.1 has been partly decreed to the extent to refund a sum of Rs. 3,50,000/- received by her as earnest money.

The parties shall be referred to as the plaintiff and defendants.

2. Brief facts of the case are that Shri Swaran Pal Singh, the predecessor-in-interest, of defendants No.1 and 2 had agreed to sell complete first floor of the double storied building comprised in Khata/Khatauni No.91/212 min, Khasra No.2993/652, measuring 402 square metres, situated in Mauja Thodo, Solan, Tehsil and District Solan, (H.P.) (hereinafter shall be referred to as the suit property). It was averred by the plaintiff that the price of the property was settled to be Rs. 9,50,000/- and Rs. 3,50,000/- were paid towards earnest money at the time of the agreement dated 04.11.2004. It was further averred that later on, the defendants No.1 and 2 on succeeding their father executed a sale deed of the property on 08.06.2007 in favour of defendant No.3 after hatching a conspiracy with him in order to deprive the plaintiff of the property. The plaintiff averred that he was ready and willing to perform his part of agreement, but the defendants lingered on the matter on one pretext or the other and lastly refused to execute the sale deed. It was also averred that legal notice was served upon the defendants on 09.11.2012, but to no avail. As per the plaintiff, the cause of action accrued in his favour when agreement to sell was executed and lateron when the sale deed was not registered after demarcation and when defendants No.1 and 2 sold the property to defendant No.3. On these averments, the plaintiff prayed for specific performance of the agreement to sell dated 04.11.2004 and at the same time sought declaration to the effect that sale deed executed in favour of defendant No.3 be declared null and void. In the alternative, he prayed for recovery of Rs. 5,33,750/- alongwith interest against the defendants.

3. The suit was contested by defendants No.1 and 2 on the plea that earnest money stood forfeited on the failure of the plaintiff to perform his part of agreement. On merits, the agreement to sell was admitted with the clarification that time was the essence of contract and sale deed was to be executed within six months on the payment of remaining sale consideration by the plaintiff. It was averred that further stipulation was to the effect that in case sale deed was not executed within six months, then the earnest money was to be forfeited in case the plaintiff was at fault. It was also averred that the plaintiff did not come forward as per agreement and thus the agreement came to an end and, therefore, defendants No.1 and 2 in the year 2007 executed a sale deed in favour of defendant No.3 for consideration. It was lastly averred that plaintiff was never ready and willing to perform his part of agreement and, therefore, the earnest money stood forfeited. Hence, the plaintiff is neither entitled to decree for specific performance of contract nor for recovery of earnest money.

4. Defendant No.3 did not appear to contest the suit before the learned trial Court, therefore, was proceeded against ex part.

5. The learned trial Court on 04.08.2009 framed the following issues:-

"1. Whether the defendants No.1 and 2 entered into an agreement with the plaintiff on 4.11.2004 agreed to sell the suit property to the plaintiff for the sale consideration of Rs. 9,50,000/-? OPP.

2. Whether the plaintiff in accordance with agreement dated 4.11.2004 paid a sum of Rs. 3,50,000/- being earnest money to the defendants No.1 and 2 as alleged? OPP.

3. Whether the plaintiff is entitled for specific performance of agreement dated 4.11.2004, as alleged? OPP.

4. Whether registered sale deed dated 8.6.2007 executed by defendants No.1&2 in favour of defendant No.3 qua suit property is illegal, null and void, as alleged? OPP.

5. Whether the plaintiff in the alternative is entitled to recover a sum of Rs. 5,50,000/- alongwith interest at the rate of 18% per annum as prayed for? OPP.

6. Whether plaintiff has not come to the Court with clean hands and suppressed material facts with malafide intention? OPD 1&2.

7. Whether the plaintiff is estopped by his acts, conduct, deed and acquiescence? OPD 1&2.

8. Whether the plaintiff has no locus standi to file the present suit? OPD 1&2.

9. Relief."

6. The learned trial Court on the basis of equity held the plaintiff to be disentitled to a decree for specific performance of agreement, however, it ordered the defendants No.1 and 2 to refund the amount of Rs. 3,50,000/- received by them as earnest money alongwith interest @ 6% per annum.

7. Aggrieved by the judgment and decree passed by the learned trial Court, the defendant/appellant filed an appeal before the learned first appellate Court, however, the same was dismissed, constraining her to file the instant appeal before this Court on the ground that the learned Courts below have erred in concluding that time was not the essence of the contract and further erred in decreeing the suit for Rs. 3,50,000/- as refund of earnest money alongwith interest.

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

8. It is vehemently argued by the learned counsel for the appellant/defendant that the learned Courts below have erred in concluding that time was not the essence of the contract and, therefore, on this sole ground, the suit of the plaintiff/respondent deserved to be dismissed.

9. I have considered the said submission and find no force in the same. Admittedly, no specific date for execution of the sale deed or for payment of balance sale consideration was mentioned in the agreement Ex.PW1/B. Therefore, once this be the admitted position, obviously then the time cannot be said to be the essence of the contract.

10. Article 54 of the Limitation Act prescribes as under:

Description of suit	Period of limitation	Time from which period begins to run
54. For Specific performance of a contract	Three years	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.

Whether in a contract the time is the essence of the contract has been the subject matter of interpretation in number of cases, but the proposition can be said to have been settled by the decision of the Constitution Bench of the Hon'ble Supreme Court in case titled ***Chand Rani (Smt.) (dead) by LRs*** vs. ***Kamal Rani (Smt.) (dead) by LRs (1993) 1 SCC 519*** wherein the Hon'ble Supreme Court outlined the principle thus:

> ***"19. It is a well-accepted principle that in case of sale of immoveable property, time is never regarded as the essence of the contract. As, in fact, there is a presumption against time being the essence of the contract. This principle is not in any way different from that obtainable in England. Under the law of equity which governs the rights of the parties in the case of specific performance of contract to sell real estate, law looks not at the letter but at the substance of the agreement. It has to be ascertained whether under the terms of the contract the parties named a specific time within which completion was to take place, really and in substance it was intended that it should be completed within a reasonable time. An intention to make time the essence of the contract must be expressed in unequivocal language."***

11. It is well settled that in a contract of immovable property time is not essence of contract, subject to certain exceptions. The first is that it should be stipulated in the contract itself that time is the essence of the contract by mentioning a specific date on which the sale deed is to be executed.

12. In ***Gomathinayagam Pillai and others*** *vs.* ***Palaniswami Nadar AIR 1967 (SC) 868***, the Hon'ble Supreme Court has categorically held that "*in a contract relating to sale of immovable property, it will normally be presumed that time is not the essence of the contract".*

13. In ***Govind Prasad Chaturvedi*** *vs.****Hari Dutt Shastri and another (1977) 2 SCC 539***, the Hon'ble Supreme Court has said that "*the law is settled that fixation of period within which contract has to be performed does not make the stipulation as to time the essence of the contract. The language used in the agreement is not such as to indicate unmistakable terms that the time is of the essence of the contract. The intention to treat time as of the essence of contract may be evidenced by circumstances which are sufficiently strong to displace the normal presumption that in a contract of sale of land stipulation as to time is not the essence of contract".*

14. In ***M/s Hind Construction Contractors*** vs. ***State of Maharashtra (1979) 2 SCC 70***,the Hon'ble Supreme Court while discussing the question as to whether the time would be the essence of the contract, held as follows:

> ***"7....that question whether or not time was of the essence of the contract would essentially be a question of the intention of the parties to be gathered from the terms of the contract....(See Halsbury's Laws of England, 4th Edn., Vol.4, para 1179.)"***
>
> ***8.... even where the parties have expressly provided that time is of the essence of the contract such a stipulation will have to be read alongwith other provisions of the contract and such other provisions may, on construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental;...(See Lamprell v. Billericay Union (1849) 3 Exch 283, Exch at p. 308; Webb v. Hughes (1870) LR 10 Eq 281 ; Charles Rickards Ltd. v. Oppenheim (1950) 1 KB 616.)"***

15. In ***Smt. Indira Kaur and others*** *versus* ***Sheo Lal Kapoor (1988) 2 SCC 488***, the Hon'ble Supreme Court in para-6 held as under:-

> ***"6.....The law is well settled that in transactions of sale of immovable properties, time is not the essence of the contract...."***

16. In ***D.S.Thimmappa*** *vs.* ***Siddaramakka (1996) 8 SCC 365***, the Hon'ble Supreme Court held as under:-

> "**6.** It is settled law that unless the deed of agreement of sale stipulated a date for performance, time is not always of the essence of the contract...."

17. The Hon'ble Supreme Court in ***Swarnam Ramachandran*** *vs.* ***Aravacode Chakungal Jayapalan (2004) 8 SCC 689*** held as under:-

> ***"12. That time is presumed not to be of essence of the contract relating to immovable property, but it is of essence in contracts of reconveyance or renewal of lease. The onus to plead and prove that time was the essence of the contract is on the person alleging it.....; When the plaintiff pleads that time was not of essence and the defendant does not deny it by evidence, the Court is bound to accept the plea of the plaintiff. In cases where notice is given making time of the essence, it is duty of the Court to examine the real intention of the party giving such notice by looking at the facts and circumstances of each case. That a vendor has no right to make time of the essence, unless he is ready and willing to proceed to completion and secondly, when the vendor purports to make time of the essence, the purchaser must be guilty of such gross default as to entitle the vendor to rescind the contract."***

18. It is vehemently argued by learned counsel for the appellant/defendant that the agreement to sell clearly stipulates that the sale deed has to be executed within a period of six months and, therefore, it should be construed to mean that time was the essence of the contract.

19. I am afraid that even this submission of learned counsel for the appellant/defendant cannot be accepted in view of the authoritative pronouncements of the Hon'ble Supreme Court in ***Balasaheb Dayandeo Naik (Dead) through LRs and others*** *vs.* ***Appasaheb Dattatraya Pawar (2008) 4 SCC 464*** wherein while dealing with a similar clause of six months, the Hon'ble Supreme Court observed as under:-

> ***"15.....Even if we accept the recital in the agreement of sale (Ext.18) that the sale deed has to be executed within a period of six months, there is an express provision in the agreement itself that on failure to adhere to the time, the earnest money will be forfeited. In such circumstances and in view of recital pertaining to forfeiture of the earnest money makes it clear that time was never intended by the parties to be of essence....."***

20. Coming to the other contention raised by the learned counsel for the appellant/defendant that the learned Courts below could not have directed the refund of the earnest money alongwith interest, I really find this argument to be preposterous, particularly, when the defendant does not deny that the suit filed by the plaintiff is within limitation and the defendant has also not denied the receipt of consideration. What I find more intriguing is the next submission by the learned counsel for the appellant/defendant that ordering refund of earnest money has only resulted into undue enrichment of the plaintiff. In a suit filed for specific performance of contract that too filed within the prescribed period of limitation, the Court only has two options; firstly to decree the suit or in the alternative ordering the refund of earnest money depending upon the facts and circumstances and fulfillment of certain conditions. How the refund of earnest money to the plaintiff amounts to undue enrichment is beyond my comprehension? Rather, in case earnest money is not ordered to be refunded, it would be the defendant, who would be unduly enriched.

21. The principle of unjust enrichment proceeds on the basis that it would be unjust to allow one person to retain a benefit received at the expense of another person. This was so held by the Hon'ble Supreme Court in ***Renusagar Power Co. Ltd. Vs. General Electric Co. 1994 Supp (1) SCC 644***:-

> *"98. The principle of unjust enrichment proceeds on the basis that it would be unjust to allow one person to retain a benefit received at the expense of another person. It provides the theoretical foundation for the law governing restitution. The principle has, however, its critics as well as its supporters. In the words of Lord Diplok: "…there is no general doctrine of unjust enrichment in English law. What it does is to provide specific remedies in particular cases of what might be classed as unjust enrichment in a legal system that is based upon civil law." (See: Orakpo V. Manson Investments Ltd. 1978 AC, 104). In The Law of Restitution by Goff and Jones, it has, however, been stated "that the case-law is now sufficiently mature for the courts to recognize a generalized right of restitution" (3rd Edn., P. 15). In Chitty on Contracts, 26th Edn., Vol. I, p. 1313, para 2037, it has been stated that "the principle of unjust enrichment is not yet clearly established in English law". The learned editors have, however, expressed the view:*
>
> > *"Even if the law has not yet developed to that extent, it does not follow from the absence of a general doctrine of unjust enrichment that the specific remedies provided are not justifiable by reference to the principle of unjust enrichment even if they were originally found without primary reference to it." (pp. 1313-1314, para 2037)."*

22. The issue regarding undue enrichment thereafter came up before the Hon'ble Supreme Court in ***Indian Council for Enviro-Legal Action Vs. Union of India and others (2011) 8 SCC 161***and it was held as follows:-

> ***"UNJUST ENRICHMENT***
>
> ***151****. Unjust enrichment has been defined as:*
>
> > *"Unjust enrichment.---A benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense."*
>
> *See Black's Law Dictionary, 8th Edition (Bryan A. Garner) at page 1573. A claim for unjust enrichment arises where there has been an "unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience."*
>
> ***152****. "Unjust enrichment" has been defined by the court as the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. A person is enriched if he has received a benefit, and he is unjustly enriched if retention of the benefit would be unjust. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another.*
>
> ***153****. Unjust enrichment is "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience." A defendant may be liable "even when the defendant retaining the benefit is not a wrongdoer" and "even though he may have received [it] honestly in the first instance." (Schock v. Nash, 732 A.2d 217, 232-33 (Delaware. 1999). USA)*
>
> ***154****. Unjust enrichment occurs when the defendant wrongfully secures a benefit or passively receives a benefit which would be unconscionable to retain. In the leading case of Fibrosa v. Fairbairn, [1942] 2 All ER 122, Lord Wright stated the principle thus :*
>
> > *"... .Any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution."*
>
> ***155****. Lord Denning also stated in Nelson v. Larholt, [1947] 2 All ER 751 as under:-*
>
> > *"..... It is no longer appropriate, however, to draw a distinction between law and equity. Principles have now to be stated in the light of their combined effect. Nor is it necessary to canvass the niceties of the old forms of action. Remedies now depend on the substance of the right, not on whether they can be fitted into a particular frame-work. The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the court orders restitution if the justice of the case so requires."*
>
> ***156****. The above principle has been accepted in India. This Court in several cases has applied the doctrine of unjust enrichment.*
>
> ***Restitution and compound interest***
>
> ***157****. American Jurisprudence 2d. Volume 66 Am Jur 2d defined Restitution as follows:*

"The word `restitution' was used in the earlier common law to denote the return or restoration of a specific thing or condition. In modern legal usage, its meaning has frequently been extended to include not only the restoration or giving back of something to its rightful owner, but also compensation, reimbursement, indemnification, or reparation for benefits derived from, or for loss or injury caused to, another. As a general principle, the obligation to do justice rests upon all persons, natural and artificial; if one obtains the money or property of others without authority, the law, independently of express contract, will compel restitution or compensation."

***158**. While Section (') 3 (unjust enrichment) reads as under:*

"The phrase "unjust enrichment" is used in law to characterize the result or effect of a failure to make restitution of, or for, property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefor. It is a general principle, underlying various legal doctrines and remedies, that one person should not be permitted unjustly to enrich himself at the expense of another, but should be required to make restitution of or for property or benefits received, retained, or appropriated, where it is just and equitable that such restitution be made, and where such action involves no violation or frustration of law or opposition to public policy, either directly or indirectly."

***159**. Unjust enrichment is basic to the subject of restitution, and is indeed approached as a fundamental principle thereof. They are usually linked together, and restitution is frequently based upon the theory of unjust enrichment. However, although unjust enrichment is often referred to or regarded as a ground for restitution, it is perhaps more accurate to regard it as a prerequisite, for usually there can be no restitution without unjust enrichment. It is defined as the unjust retention of a benefit to the loss of another or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. A person is enriched if he has received a benefit, and he is unjustly enriched if retention of the benefit would be unjust. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another.*

***160**. While the term `restitution' was considered by the Supreme Court in South-Eastern Coalfields 2003 (8) SCC 648 and other cases excerpted later, the term `unjust enrichment' came to be considered in Sahakari Khand Udyog Mandal Ltd vs Commissioner of Central Excise & Customs ((2005) 3 SCC 738). This Court said:*

"31. …'unjust enrichment' means retention of a benefit by a person that is unjust or inequitable. `Unjust enrichment' occurs when a person retains money or benefits which in justice, equity and good conscience, belong to someone else."

***161**. The terms `unjust enrichment' and `restitution' are like the two shades of green - one leaning towards yellow and the other towards blue. With restitution, so long as the deprivation of the other has not been fully compensated for, injustice to that extent remains. Which label is appropriate under which circumstances would depend on the facts of the particular case before the court. The courts have wide powers to grant restitution, and more so where it relates to misuse or non-compliance with court orders.*

***162**. We may add that restitution and unjust enrichment, along with an overlap, have to be viewed with reference to the two stages, i.e., pre-suit and post-suit. In the former case, it becomes a substantive law (or common law) right that the court will consider; but in the latter case, when the parties are before the court and any*

act/omission, or simply passage of time, results in deprivation of one, or unjust enrichment of the other, the jurisdiction of the court to levelise and do justice is independent and must be readily wielded, otherwise it will be allowing the Court's own process, along with time delay, to do injustice.

***163**. For this second stage (post-suit), the need for restitution in relation to court proceedings, gives full jurisdiction to the court, to pass appropriate orders that levelise. Only the court has to levelise and not go further into the realm of penalty which will be a separate area for consideration altogether.*

***164**. This view of law as propounded by the author Graham Virgo in his celebrated book on "The Principle of Law of Restitution" has been accepted by a later decision of the House of Lords (now the UK Supreme Court) reported as 136 Sempra Metals Ltd (formerly Metallgesellschaft Limited) v Her Majesty's Commissioners of Inland Revenue and Another [2007] UKHL 34 = [2007] 3 WLR 354 = [2008] 1 AC 561 = [2007] All ER (D) 294.*

***165**. In similar strain, across the Altantic Ocean, a nine judge Bench of the Supreme Court of Canada in Bank of America Canada vs. Mutual Trust Co. [2002] 2 SCR 601 = 2002 SCC 43 (both Canadian Reports) took the view :*

> *"There seems in principle no reason why compound interest should not be awarded. Had prompt recompense been made at the date of the wrong the plaintiff should have had a capital sum to invest; the plaintiff would have received interest on it at regular intervals and would have invested those sums also. By the same token the defendant will have had the benefit of compound interest. Although not historically available, compound interest is well suited to compensate a plaintiff for the interval between when damages initially arise and when they are finally paid."*

This view seems to be correct and in consonance with the principles of equity and justice.

***166**. Another way of looking at it is suppose the judgment- debtor had borrowed the money from the nationalised bank as a clean loan and paid the money into this court. What would be the bank's demand.*

***167**. In other words, if payment of an amount equivalent of what the ledger account in the nationalised bank on a clean load would have shown as a debit balance today is not paid and something less than that is paid, that differential or shortfall is what there has been : (1) failure to restitute; (2) unfair gain by the non-complier; and (3) provided the incentive to obstruct or delay payment. Unless this differential is paid, justice has not been done to the creditor. It only encourages non-compliance and litigation. Even if no benefit had been retained or availed even then, to do justice, the debtor must pay the money. In other words, it is this is not only disgorging all the benefits but making the creditor whole i.e. ordering restitution in full and not dependent on what he might have made or benefited is what justice requires."*

23. No other point was urged.

24. In view of the aforesaid discussion, no question of law much less substantial question of law arises for consideration.

25. Accordingly, the appeal is dismissed *in limine*, leaving the parties to bear their own costs. All pending applications also stand disposed of.

CMP No.1347 of 2017.

26. Since the appellant is entitled to exemption from payment of court fee under Section 12 of the Legal Services Authorities Act, 1987, the application is allowed and the applicant is exempted from paying court fee of Rs. 11,310/-. The application stands disposed of.

CMP No.2653 of 2017.

27. By medium of this application, the applicant/appellant has sought permission to deposit 50% of the decretal amount i.e. 2,06,500/-, however, as the appeal itself stands dismissed, in the aforesaid terms, this application has been rendered infructuous and dismissed as such.

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

State of Himachal Pradesh .....Petitioner
Versus
Dharam Singh .....Respondent.

Cr. Appeal No. 498 of 2007
Decided on : 23/05/2017

Indian Penal Code, 1860- Section 279, 337 and 338- Accused was driving the truck and hit a Maruti van by taking it to the wrong side – occupants of the van sustained injuries – the accused was tried and acquitted by the Trial Court- held in appeal that the defence version that the accused was signaled to overtake the bus which was moving ahead of the truck was made probable by the prosecution witnesses – the negligence of the accused was not proved in these circumstances- accused was rightly acquitted- appeal dismissed. (Para-10 to 12)

For the petitioner: Mr. R.S.Thakur, Addl. A.G.
For the Respondent: Mr. B.S.Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal stands directed against the impugned judgement of acquittal recorded by the learned Judicial Magistrate 1st Class, Court No.3, Shimla whereby he pronounced an order of acquittal upon the accused qua the offences allegedly committed by him.

2. The brief facts of the case are that on 4.6.2004 complainant Anil Kumar was driving taxi bearing No. HP-02-4098 and was on its way from Longwood to Kanlog. It is alleged that Saran Singh was sitting inside the vehicle and his daughter was also boarding the same taxi. It is alleged that at about 9.10 a.m when he reached at Naltu where one truck bearing No.HR-69-2333 was coming from front side in a wrong direction and collided with his Maruti Van. It is alleged that Saran Singh sustained injuries on his arm. The injured were brought to the hospital for medical treatment. During investigation I.O. prepared the spot map and after completing all codal formalities and on conclusion of the investigation into the offences, allegedly committed by the accused, challan was prepared and filed in the Court.

3. A notice of accusation stood put to the accused, by the learned trial Court for his committing offences punishable under Sections 279, 337 and 338 of the IPC to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 11 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure, was recorded in which he pleaded innocence and claimed false implication. He did not choose to lead any defence evidence.

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

6. The learned Additional Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of acquittal warranting reversal by this Court in the exercise of its appellate jurisdiction and theirs standing replaced by findings of conviction.

7. The learned counsel appearing for the respondent has with considerable force and vigour contended qua the findings of acquittal recorded by the Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

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

9. The learned Additional Advocate General has submitted before this Court, that with the site plan borne on Ext.PW-9/C proving the fact of the offending vehicle driven by the accused being positioned on the inappropriate side of the road whereas the vehicle occupied by the victim PW-3 occupying the appropriate side of the road, hence on its anvil, the prosecution perse proving the charge. He also continues to submit that with the report of the mechanical expert borne on Ext.PW-4/A, proven by PW-4, revealing that the offending vehicle driven by the accused was not entailed with any blatant/patent defect, thereupon with Ext.PW-1/A pronouncing upon the roadworthiness of the offending vehicle, hence also the prosecution proving that the collision which occurred inter se the Maruti Van bearing No. HP-02-4098 vis-à-vis the offending vehicle driven by the accused, evidently arising from a sheer negligence on the part of the respondent/accused while driving the relevant offending vehicle. Furthermore he submits that with PW-6 who held the medical examination of the injured, proving the apposite MLC comprised in Ext.PW-6/B also his testifying that the injuries reflected therein being causeable on the person of the victim, in sequel to a road side accident, hence the prosecution assuredly succeeding in proving the charge.

10. The effect of the aforesaid submissions are in their entirety effaced, by the defence proving its espousal qua the accused/respondent, while driving the offending vehicle, his not transgressing the canons of due care and caution, given his, on an apposite signal purveyed to him by the driver of a bus moving ahead of the truck, hence preceding to overtake the bus which was moving ahead of the offending vehicle, hence his coming to strike the offending vehicle with the Maruti Van occupied by PW-3. The aforesaid espousal of the defence, is borne out by PW-2, an ocular witness to the occurrence purveying an apposite affirmative response, to a suggestion put to her during the course of hers being subjected to cross-examination by the learned defence counsel whereon a trite echoing is held that the driver of the bus which was moving ahead of the offending vehicle, purveying an apposite signal to the respondent accused, to proceed ahead, hence sequelling his endeavouring to over-take the **bus** aforesaid. An alike suggestion was put to the driver of the Maruti Car who testified as PW-7, during the course of his being subjected to cross-examination by the learned defence counsel. However, PW-4 omitted to categorically deny the apposite suggestion put to him by the learned defence counsel while holding him to cross-examination, with echoings therein that the ensual of the relevant collision which occurred inter se the offending vehicle vis-à-vis Maruti Car arising from the driver of the bus which was being plied ahead of the offending vehicle hence signalling the accused respondent, to over take it. The omission of PW-7 to purvey a categorical denial to the aforesaid suggestion rather his feigning ignorance with respect to the aforesaid espousal of the learned defence counsel, does also constrain this Court to conclude that hence his tacitly conceding to the espousal of the defence also hence his corroborating the version qua the occurrence, meted by PW-2 in her cross-examination, wherein she acquiesces to the suggestion put to her by the learned defence counsel that the accused respondent, on a signal purveyed to him by the driver of a bus being plied ahead of the offending vehicle, his endeavouring to over take it. With the accused succeeding in proving its defence also with the prosecution not establishing, that despite

the accused respondent receiving a signal from the driver of the bus, plying ahead of the offending vehicle, his yet sighting the occurrence of the Maruti Car on the appropriate side of the road whereupon he may have been precluded to overtake it, begets an inevitable corollary that the collision which occurred inter se the relevant vehicles, was not aroused by sheer negligence of the accused/respondent in driving the offending vehicle rather it was aroused by his adhering to the signal purveyed to him by the driver of the bus, bus whereof was evidently, as testified by the Investigating Officer, plying ahead of the offending vehicle. The effect of the aforesaid is that there cannot be any conclusion that the accused respondent omitted to adhere to the standards of the due care and caution nor hence it can be concluded that any penally inculpable negligence is attributable to the accused.

11. For the reasons which stand recorded hereinabove, this Court holds that the learned trial Court has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of material on record by the learned trial Court does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record whereupon its judgement warrants no interference.

12. In view of the above, I find no merit in this appeal, which is accordingly dismissed. In sequel, the impugned judgement is affirmed and maintained. Record of the learned trial Court be sent back forthwith.

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

Arun Kapoor .....Appellant/Petitioner.

Versus

Anita Kumari .....Respondent.

FAO No. 348 of 2009.
Reserved on : 16.05.2017.
Decided on :24th May, 2017.

Hindu Marriage Act, 1955- Section 11 and 12- A petition for annulment of marriage was filed with the allegations that husband had performed marriage on the assurance of the wife that she had taken divorce, which was not true- the marriage was void ab initio and it be declared as such – the petition was dismissed by District Judge – held that the evidence led by the husband that a telephonic call was received by his father from the previous husband of the wife was false- the evidence of the wife was more probable – appeal dismissed. (Para-6 to8)

For the Appellant: Mr. Ashwani Pathak, Sr. Advocate with Mr. Sandeep Sharma, Advocate.

For the Respondent : Mr. Vishal Panwar, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal stands directed against the judgment rendered by the learned District Judge, Mandi, H.P., on 22.04.2009 in Hindu Marriage Petition No. 47 of 2005, whereby, the petition aforesaid constituted before him by the petitioner/appellant herein, stood dismissed.

2. The brief facts of the case are that the appellant herein/petitioner has instituted a petition under Section 11 and 12 of the Hindu Marriage Act before the trial Court seeking

therein a decree for annulment of his marital ties with the respondent on the allegations that the petitioner got married in the year 1988. Out of the wedlock one child born. On account of death of first wife, the petitioner performed second marriage with the respondent at Shitla Mata Temple at Mandi on 11.12.1998. The respondent prior to the marriage was also married to Sh. Kamlesh resident of Dhundan and the parents of the respondent had affirmed about dissolution of marriage with the respondent by a decree of divorce. Sh. Kamlesh contacted the petitioner after his marriage with the respondent and told that no such divorce had taken place and the respondent was living adultery. On quarry the respondent turned violent and abused the petitioner, his family members and minor children. The respondent has given birth to a male child and started demanding property. The respondent managed assault on the petitioner with Gunda elements and lodged case under Section 498-A of the IPC against the petitioner, his parents and sister. The custom of divorce was not prevalent in the cast or area of the respondent. The marriage of the parties was void ab-initio. So, the petitioner filed this petition for grant of a decree for annulment his marital ties with the respondent.

3. The petition for divorce instituted by the petitioner/appellant herein before the learned District Judge, Mandi stood contested by the respondent herein, by hers instituting a reply thereto, wherein, she controverted all the allegations constituted against her in the apposite petition. She averred that the respondent after engagement remained with Sh. Kamlesh Kumar for some time per customs of the area without any marriage and then they decided not to marry and divorce deed was prepared. The petitioner was apprised about agreement and divorce deed before marriage. The respondent was tortured, humiliated and turned out of the house by the petitioner. The petitioner had also lodged a false case against the son of the sister of the respondent. The petitioner admitted the validity of the marriage during the proceeding under Section 127 of the Cr.P.C. filed before the Judicial Magistrate, Ani.

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

1. Whether the respondent at the time of marriage with the petitioner was already married to one Kamlesh Kumar as alleged?OPP

2. Whether the respondent has obtained divorce from her previous husband, namely, Kamlesh Kumar on the basis of the divorce deed/Talaknama on 2.12.1996 as alleged? OPR

3. Whether the petition is entitled to annulment of marriage as alleged?OPP

4. Relief.

5. On an appraisal of evidence adduced before the learned Additional District Judge, Mandi, the latter dismissed the apposite petition.

6. This Court would be constrained, to scuttle the findings recorded by the learned District Judge upon issue(s) No.1 and 2, in case, the evidence which exists on record makes a display, that at the time of the appellant contracting marriage with the respondent, the latter being previously married to one Kamlesh Kumar also in case, evidence displays that the fact aforesaid was unknown to the appellant herein besides the factum of Ex.PA, at the relevant time of his contracting marriage with the respondent, being also unknown to the former. Moreover, evidence on record, was enjoined to make a vivid display, that Ex.PA, whereunder severance of marital ties of the respondent herein with her previous husband Kamlesh Kumar was brought about, through a customary mode, was not legally tenacious, given the lack of proof of an apposite custom holding prevalence in the relevant area or amongst the executants of Ex. PA, for begetting a valid annulment of marital ties of the respondent herein with one Kamlesh Kumar. “Apart from” the tenable reasons assigned by the learned District Judge for his hence dismissing the apposite petition preferred before him by the appellant herein, “the evident existence” on record of the hereinafter referred evidentiary material, gives reinforced vigour to the impugned verdict recorded by the learned District Judge (a) the disclosures occurring in the examination-in-

chief, PW-1 qua his after 2-3 months of his contracting marriage with the respondent, his father receiving a telephonic call from one Kamlesh Kumar, the previous husband of the respondent, over telephonic call whereof, the latter disclosed that the respondent herein was his legally wedded wife, standing stained with a vice of falsity, arising from an apt articulation existing in the deposition of RW-2, the father of the previous husband of the respondent, with respect to the latter after severing his marital ties with the respondent herein, his solemnizing marriage and his also rearing two children therefrom. (b) The petitioner/appellant, throughout in his pleadings, as well as, in his deposition echoes that until his preferring the apposite petition, his holding no knowledge qua the making of Ex. PA inter se the respondent with Kamlesh Kumar, yet the aforesaid fact is also belied by his evidently prior to instituting the instant petition, his instituting a petition, for seeking dissolution of his marital ties with the respondent herein, in reply whereof furnished by the respondent herein, she appended Ex. PA. Consequently, with the appellant herein holding knowledge with respect to Ex. PA, at the time of his earlier instituting a petition for severance of his marital ties with the respondent, yet his "not" immediately subsequent to 2002, whereat, he instituted a petition under Section 13 of the Hindu Marriage Act for seeking dissolution of his marital ties with the respondent herein, " instituting" a petition under Section 11 and 12 of the Hindu Marriage Act, for seeking annulment of his marriage with the respondent, rather his with more than 10 months elapsing since his previous petition aforesaid standing dismissed as withdrawn, preferring the apposite petition, inevitably constrains this Court, to erect a formidable conclusion that the averments constituted in the apposite petition being wholly contrived besides being manipulated. As a corollary an inference also ensuing therefrom that he is estopped to rear the apposite ground for his seeking annulment of his marital ties with the respondent. (c) The father of the previous husband of the respondent herein making disclosure(s) in his examination-in-chief qua the prevalence of a custom in the area where his son and the respondent herein resided as married partners also qua a custom prevailing in the caste whereto both belong, with respect to severance, through customary mode, of marital ties inter se them, deposition whereof remains unshred of its efficacy, by any cogent evidence being adduced by the appellant herein, constrains this Court to conclude that Ex.PA whereunder marital ties inter se the respondent herein and her previous husband Kamlesh Kumar stood severed, in consonance with the relevant custom prevailing in the are where both resided also in respect of the caste to which both belong, hence standing cogently proven.

7. Even though RPW-1 has disclosed, that in the relevant gazeteer, their occurring no display of prevalence of severance of marital ties, by customary mode, yet her deposition when is not anchored upon the relevant documentary material, hence, her oral testification is construable to be holding no worth. Also when in Chapter VI of the "book" pertaining to the Local Culture and Dialects of District Solan, there occur no custom with respect to severance of marital ties, by customary mode, yet thereupon alone, the testimony of the father of the previous husband of the respondent herein cannot loose its vigour, significantly when the respondent upon whom the burden, to discharge the relevant issue with respect to the validity of Ex.PA, was cast, for discharge of burden whereof, she relied upon the deposition of the father of her previous husband. However, with the deposition of RW-2, the father of the previous husband of the respondent, being concerted to be rebutted by the appellant herein, by his leading into the witness box one Madhu Kaushik, whereas, her testimony in support of the averment cast in the apposite petition is, for reasons aforestated, infirm, predominantly also when the appellant herein rather failed to adduce, in rebuttal to the testimony of the father of the previous husband of the respondent herein, the relevant best evidence, comprised in the Wajib-ul-urj pertaining to the relevant area, wherein both the respondent and her previous husband resided and its making or not making a display qua their occurring or not occurring any prohibition therein against the severance of marital ties through customary mode, for hence, firmly resting the findings on the relevant issue. In aftermath, the non adduction of the aforesaid best evidence, constrains this Court, to conclude that the evidence adduced by the appellant herein comprised in the testimony of RPW Madhu Kaushik, for hence rebutting the testimony of the father of the previous husband of the respondent herein, is extremely fragile, for dislodging in respect of the relevant factum

probandum, the testimony of RW-2, the father of the previous husband of the respondent. Consequently, this Court is constrained to accept the veracity of the testimony of RW2.

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

9. For the foregoing reasons, there is no merit in the instant appeal which is accordingly dismissed. The impugned judgment and decree 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 AJAY MOHAN GOEL, J.

CMPMO No. 60/2017 with
CMPMO No.67 of 2017
Date of decision: May 24, 2017

CMPMO No. 60/2017

Sh. Des Raj .....Petitioner

Versus

Satish Chand ....Respondent

CMPMO No. 67/2017

Sh. Des Raj .....Petitioner

Versus

Satish Chand ....Respondent

Code of Civil Procedure, 1908- Order 9 Rule 7- A suit and counter-claim were pending before Trial Court- the defendant did not appear on the date of hearing- the suit was decreed ex-parte and the counterclaim was dismissed in default- applications for the restoration of the counterclaim and setting aside the ex-parte decree were filed, which were dismissed- appeals were filed against the order of the dismissal, which were also dismissed-aggrieved from the order, the present petitions have been filed-held that the applications for restoration and setting aside ex-parte order were filed within limitation and within reasonable time –applications were decided after five years – Trial Court held that applicant wanted to delay the matter, which was falsified by the fact that applications were filed within a reasonable time and within limitation- the applications, affidavits, and the evidence established sufficient cause on part of the applicant and it was wrongly held that there was no sufficient cause- applications allowed- directions issued to the judicial officers to dispose of the miscellaneous applications within a period of six months.

(Para-9 to16)

For the petitioner :Mr. Ajay Sharma, Advocate in both the petitions
For the respondent :Ms. Megha Kapoor Gautam, Advocate in both the petitions

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. (Oral)

Both these petitions are being disposed of by a common judgment as common issue is involved in the same. Brief facts necessary for adjudication of these two petitions are that the respondent herein filed a civil suit for declaration i.e. C.S. No.50/2002 titled as Satish Kumar Vs. Des Raj against the present petitioner in the Court of learned Civil Judge (Sr. Division), Nurpur, District Kangra (H.P.). Petitioner had filed cross objections in the said suit. He

was proceeded ex-parte by the learned Trial Court on 02.09.2009 and the counter claim was dismissed in default on the said date and thereafter the suit so filed by the present respondent was decreed ex-parte in his favour and against the petitioner on 11.09.2009.

2. Petitioner filed an application under Order 9 Rule 7 CPC before the learned Trial Court for setting-aside the order, vide which his counter claim was dismissed due to non appearance on 02.09.2009 i.e. counter claim No.67/2002 and he also filed separate application under order 9 Rule 13 CPC for setting-aside ex-parte judgment and decree dated 11.9.2009 passed in C.S. No.50/2002 by the learned Trial Court.

3. Both these applications so filed by the present petitioner were dismissed by the learned Trial Court vide separate orders dated 08.08.2014 by holding that the petitioner had failed to show sufficient cause for his non appearance in the Court on 02.09.2009 and for setting aside ex-pate judgment and decree dated 11.09.2009.

4. Feeling aggrieved, the orders so passed by the learned Trial Court were assailed by way of two appeals by the petitioner before the learned Appellate Court, which were dismissed by the learned Appellate Court i.e. Court of learned Addl. District Judge (I), Kangra at Dharamshala, Circuit Court at Nurpur, vide separate orders dated 08.12.2016. While dismissing the appeals so filed by the present petitioner, against the orders passed by the learned Trial Court dated 08.08.2014, it was held by the learned Appellate Court that the petitioner had miserably failed to satisfy as to what prevented him from appearing in the Court on 02.09.2009 and the explanation, which was given by the petitioner that he had gone to Rajasthan on the relevant date and that he was feeling sick and, as such, he could not inform his counsel about his illness, could not be proved on record by the present petitioner.

5. Feeling aggrieved by the orders, vide which the applications filed by the present petitioner under order 9 Rule 7 CPC and under order 9 Rule 13 CPC and were dismissed by the learned Trial Court as well as by the orders, vide which the appeals so filed by the present petitioner against the above mentioned orders, were dismissed by the learned Appellate Court, he filed these two petitions.

6. Vide CMPMO No.60/2017, the petitioner has assailed the order dated 08.08.2014 passed by the learned Trial Court in CMA No.231/2009 vide which his application filed under order 9 Rule 13 CPC was dismissed and the order dated 08.12.2016 passed by the learned Addl. District Judge (I), Kangra at Dharamshala, Circuit Court at Nurpur in CMA No.2-N/XIV/14, vide which his appeal filed against the said order was dismissed.

7. Vide CMPMO No.67/2017, the petitioner has assailed the order dated 08.08.2014 passed by the learned Trial Court in CMA No.224/2009 vide which his application filed under order 9 Rule 7 CPC was dismissed and the order dated 08.12.2016 passed by the learned Addl. District Judge (I), Kangra at Dharamshala, Circuit Court at Nurpur in CMA No.9-N/XIV/15, vide which his appeal filed against the said order was dismissed.

8. I have heard learned counsel for the parties.

9. It is a matter of record that the petitioner herein was proceeded against ex-parte by the learned Trial Court on 02.09.2009 and on the same date, the counter claim was also dismissed in default. It is also a matter of record that thereafter an ex-parte judgment and decree was passed by the learned Trial Court on 11.09.2009. It is also a matter of record that the present petitioner filed applications under order 9 Rule 7 CPC and under order 9 Rule 13 CPC before the learned Trial Court on 29.9.2009 and 7.10.2009 respectively. In other words, the applications, which were filed by the petitioner for recalling the orders, vide which his counter claim was dismissed in default and ex-parte judgment and decree was passed against him, were filed within reasonable time and within limitation.

10. Despite this, the learned Trial Court dismissed both the applications so filed by the petitioner by holding that the petitioner had not substantiated as to what was sufficient cause on account of which, he did not put in appearance in the Court on 02.09.2009. The orders so

passed by the learned Trial Court were upheld by the learned Appellate Court. In my considered view, while dismissing the applications and appeals so filed by the present petitioner, both the learned Courts erred in not appreciating that the procedure is hand maiden of justice and it would have been in the larger interest of justice, had the applications so filed by the present petitioner for setting aside the ex-parte judgment and decree and for setting aside the order of dismissal of his counter claim in default, been recalled and thereafter the suit had been heard on merit. Undoubtedly, it weighed with both the learned Courts below that the petitioner could not furnish sufficient cause for his not being present in the Court on 02.09.2009, but keeping in view the fact that the applications for recalling the dismissal of counter claim as well as for setting aside the ex-parte judgment and decree were filed by the petitioner within 30 days of passing of the said orders, learned Courts erred in not appreciating that the present respondent could have been compensated by the learned Courts below monetarily. But, both the learned Courts below treaded a hyper technical path and dismissed the applications so filed by the present petitioner as well as the subsequent appeals filed by him.

11. There is another aspect of the matter which needs to be highlighted and the same is that the applications which were filed before the learned Trial Court under order 9 Rule 7 CPC and under order 9 Rule 13 CPC in the months of September/October 2009 were decided after 5 years vide orders dated 08.08.2014. This Court is appalled by the time taken by the learned Trial Court in deciding these two applications. A perusal of the order so passed by the learned Trial Court demonstrates that it has approached the entire matter with a hyper technical manner, which in my considered view, has led to miscarriage of justice. A perusal of the order dated 08.08.2014 passed in application filed under order 9 Rule 7 CPC demonstrates that in para-9 of the said order, it has been held by the learned Trial Court that the date of decision being 11.09.2009, the said application having been filed on 29.09.2009, was not technically maintainable as the applicant had to set-aside the decree as the counter claim stood dismissed. On these basis, it was held by the learned Trial Court that the application was not maintainable on the said technical ground. It was further held by the learned Trial Court that no document had been produced by the petitioner to support his story and the conduct of the petitioner reflected that his intent was to frustrate the non-applicant by lingering the case. It was further held by the learned Trial Court that today when the connectivity is there in each and every corner of the world and electricity and water have been made available to the remotest corner and mobile phones have wide range of cover, the petitioner could have contacted his Advocate or at least his family members who could have apprised them of the said fact. Similar reasoning has been assigned by the learned Trial Court while rejecting the application filed by the petitioner under order 9 Rule 13 CPC.

12. As I have mentioned above also, a perusal of the orders so passed by the learned Trial Court in both these applications demonstrates that the issue was approached by the learned Trial Court in hyper technical manner. It is not understood as to on what basis this inference was drawn by the learned Trial Court that the intent of the petitioner was to delay the matter when admittedly the applications under order 9 Rule 7 CPC and under order 9 Rule 13 CPC were filed within 30 days of passing of the order and the judgment and decree. The learned Trial Court erred in not appreciating that the goal of the Court has to be to impart substantive justice between the parties rather than frustrating the cause of substantive justice by rejecting applications by taking a hyper technical view. This Court is not even remotely suggesting that each and every application which is filed under order 9 Rule 7 CPC and under order 9 Rule 13 CPC has to be allowed by a Court of law before which such application was filed in mechanical manner. However, while dealing with such like applications, the approach which has to be adopted by the Court concerned is that in case there is no any undue delay in filing such like applications, then such applications should ordinarily be allowed and the parties should be permitted to contest the case on merit. This important aspect of the matter has been lost sight of the learned Trial Court while dismissing the applications so filed by the petitioner. Similarly, even the learned Appellate Court fell in the same trap while dismissing the appeals filed by the petitioner against the orders passed by the learned Trial Court. Learned Appellate Court also

erred in not appreciating that as the applications under order 9 Rule 7 CPC and under order 9 Rule 13 CPC were filed within 30 days of passing of the ex-parte order and further within 30 days of passing of the ex-parte judgment and decree, it would have been in the interest of justice that the orders so passed by the learned Trial Court were set-aside by reviving the civil suit and by permitting the parties to contest the same on merit.

13. The order, vide which the counter claim of the petitioner was dismissed, is dated 02.09.2009 and the ex-parte judgment and decree was passed against him on 11.09.2009. Today, we are in the month of May 2017. 8 years have elapsed. Since then the present petitioner is agitating the orders, vide which his prayer for setting-aside the ex-parte judgment and decree and the dismissal of his counter claim in default, were rejected. Had the learned Trial Court allowed the applications so filed by the present petitioner by imposing costs upon him, in all probabilities, the suit itself after its revival and the counter claim after its revival could have been decided on merit.

14. Appalled by the time, which was consumed by the learned Trial Court in disposing of the applications filed under order 9 Rule 7 CPC and under order 9 Rule 13 CPC, this Court is issuing the following directions:

(a) Miscellaneous applications, which are filed before the learned Courts, be it, under Section 5 of the Limitation Act or under different Rules of Order 6, Order 7, Order 18, Order 22 etc. for example, should be decided by the learned Courts as expeditiously as possible and all endeavour should be made to dispose of all miscellaneous applications in a period not more than 6 months from the date of filing of the same. Provisions mentioned above are only illustrative in nature and not exhaustive.

(b) It shall not be incumbent upon the Courts to frame issues and then examine witnesses while deciding such like applications. Learned Courts shall dispose of these applications in a summary manner by adjudicating on the basis of material placed on record by the parties alongwith the pleadings.

(c) All endeavour should be made by the Courts to adjudicate the lis before it on merit and the learned Courts should also ensure that minor technicalities do not come in the way of imparting substantial justice between the parties.

15. Therefore, in view of the above discussions, these two petitions are allowed. The orders passed by the Court of learned Civil Judge (Sr. Dvn.), Nurpur, Distt. Kangra in CMA No.224/2009 dated 08.08.2014 as well as in CMA No.231/2009 dated 08.08.2014, are quashed and set-aside. Similarly, the orders passed by the learned Appellate Court in CMA No.9-N/XIV/15 dated 08.12.2016 as well as in CMA No.2-N/XIV/14 dated 08.12.2016 are also quashed and set-aside. Accordingly, the application filed under order 9 Rule 7 CPC by the present petitioner for setting-aside the order dated 02.09.2009, vide which his counter claim i.e. counter claim No.67/2002 was dismissed in default, is allowed and his counter claim is ordered to be restored to its original number before the learned Trial Court. Similarly, the application filed under order 9 Rule 13 CPC by the present petitioner for recalling ex-parte judgment and decree passed against him dated 11.09.2009, is also allowed and the judgment and decree dated 11.09.2009 is set-aside and C.S. No.50/2002, is ordered to be restored to its original number before the learned Trial Court. These orders are passed subject to the petitioner paying costs of Rs.10,000/- (Ten thousand) to the defendant on or before the next date. Parties are directed to appear before the learned Trial Court on **30.06.2017**.

16. Keeping in view the fact that the civil suit pertains to the year 2002, this Court hope and expects that the learned Trial Court shall dispose of the civil suit expeditiously as possible. It is made clear that in case the costs in terms of this order are not paid by the present petitioner to the respondent on or before the next date so fixed for appearance of parties before the learned Trial Court, then the order so passed by this Court shall automatically become inoperative and the orders passed by the learned Court below shall also automatically stand revived.

17. Both the petitions are allowed in the above terms. No order as to costs. Pending applications, if any, also stand disposed of.

18. Learned Registrar (Judicial) is hereby directed to make available a copy of the judgment to all the learned District Judges, who shall further bring the directions so passed by this Court in the knowledge of all Judicial Officers.

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

Dharam Chand and others .....Appellants/Defendants.

Versus

Achhru Ram (since deceased) through his legal heir Sheela .....Respondent/plaintiff.

RSA No. 235 of 2008.
Reserved on : 16.05.2017.
Decided on :24th May, 2017.

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit for injunction pleading that suit land was owned by plaintiff and his brother as non-occupancy tenants- they became the owners on the commencement of H.P. Tenancy and Land Reforms Act- the defendants threatened to interfere with the suit land without any right to do so- hence, the suit was filed for seeking the relief of injunction- the defendants pleaded that plaintiff had entered into an agreement to sell his share in favour of P and had delivered the possession after receiving Rs.10,000/- - the Trial Court decreed the suit – an appeal was filed, which was dismissed- held in second appeal thatthe agreement to sell and the receipt were not properly proved by the defendant – the Courts had properly appreciated the evidence- appeal dismissed. (Para-8 to 12)

For the Appellants: Mr. Ajay Sharma, Advocate.
For the Respondent: Mr. Divya Raj Singh, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal is directed against the concurrently recorded renditions of both the learned Courts below, whereby, his suit for permanent prohibitory injunction against the defendants, with respect to the suit land stood decreed. In sequel thereto, the defendants/appellants herein are driven to institute the instant appeal herebefore.

2. Briefly stated the facts of the case are that the land comprised in khewat No. 39, Khatauni No. 47, Khasra Nos. 272, 273, 274, 279, 281, 291, 293, 294, 322, 325, 333 and 334, measuring 62 kanal 13 marla, situated in Jandoor village in Tapaa Machhali, Tehsil Bangana, District Una, H.P., has been averred to be jointly owned and possessed by plaintiff Achhroo (since deceased) and his brother Beloo Ram as owners. It has been averred that formerly he and his brother Beloo Ram held the suit land as non-occupancy tenants, and that they became owners thereof on coming into operation of the H.P. Tenancy and Land Reforms Act. According to the plaintiff, the defendants have no right, title or interest over the suit land. However, about a week anterior to the institution of the suit, the defendants held out threats to interfere with the suit land and take possession thereof forcibly. It has been averred that the defendants have threatened to raise construction on the suit land as also threatened to cut and remove the trees standing on the suit land. The plaintiff, therefore, sought a decree of permanent prohibitory injunction restraining the defendants from interfering with his possession over the suit land and taking forcible possession thereof.

3. The defendants contested the suit and filed written statement, wherein, they have denied the claim of the plaintiff qua his being in possession of the suit land. They have admitted the plaintiff to be a co-owner of the suit land to the extent of half share and averred that on February 13, 1980, he entered into an agreement to sell his share in the suit land in favour of Prabhu (predecessor-in-interest of defendants No.1-A, 1-B and 1-C) and delivered possession of the land under sale to the prospective vendee after receiving from him Rs.10,000/-. With the prospective vendee having thus stepped into the shoes of the plaintiff, the latter according to the defendants, was left with no right, title or interest in the suit land. The plaintiff is averred to have no locus standi to bring action against the defendants nor does he has any enforceable cause of action against them.

4. The plaintiff/respondent herein filed replication to the written statement of the defendants/appellants, wherein, he denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the plaintiff is entitled for the relief of permanent injunction, as prayed for?OPP
2. Whether this suit is bad for mis-joinder of parties, as alleged?OPD
3. Whether the suit in the present form is not maintainable?OPD
4. Whether the plaintiff has transferred ½ share in the suit land with possession to defendant No.1, as alleged, if so, its effect?OPD.

4A. Whether the sale agreement dated 13.2.1980 was never executed by Sh. Achhru in faovur of the defendants as alleged?OPP

4B If issue No.4 A is not proved, whether the alleged sale agreement is a result of fraud, mis-representation, coercion and thus is suspicious document, as alleged?OPP

4C Whether the plaintiffs have no enforceable cause of action and locus standi to file the suit?OPD

5. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiff/respondent herein. In an appeal, preferred therefrom by the defendants/appellants before the learned First Appellate Court, the latter Court dismissed the appeal and affirmed the findings recorded by the learned trial Court.

7. Now the defendants/appellants herein, have instituted the instant Regular Second Appeal before this Court, wherein they assail the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission, on 17.11.2008, this Court, admitted the appeal instituted by the defendants/appellants against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether the impugned judgment and decrees stand vitiated being contrary to the provisions of order 20 Rule 5 CPC?

b) Whether document Ext. D-1 and D-2 having been proved in accordance with law, but just owing to misreading and mis appreciation of evidence the learned Courts below non suited the defendants?

c) Whether in view of provision of Section 53-A of the Transfer of Property Act, defendants are entitled for protection as envisaged in the said provision in view of agreement to sell Ex. D-1 dated 13.2.1980, but courts below mis-appreciated the said aspect thereby vitiating the impugned judgments and decrees?

Substantial questions of Law No.2 and 3:

8. Ex. D-1 embodies the purported agreement to sell, purportedly executed qua the suit land inter se the plaintiff Achhroo (since deceased) with the predecessor-in-interest of defendants No.1A to 1C, namely, one Prabhoo. Ex. D-2, is the receipt, wherein, a purported display is made with respect to a sum of Rs.10,000/- standing received by the plaintiff, as part of the total sale price of Rs.12,000/-, with respect to the suit land, as reflected in Ex.D-1. For resisting the suit of the plaintiff, the defendants had relied upon the provisions of Section 53-A, of the Transfer of Property Act (hereinafter referred to as the Act). Provisions whereof stand extracted hereinafter:-

> "**53A Part performance**.- Where any person contract to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:
>
> Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

9. For availing strength therefrom, the learned counsel appearing for the defendants/appellants, canvasses before this Court, that since in pursuance to Ex. D-1, they had obtained possession of the suit land from the plaintiff, factum whereof occurs in Ex. D-1, thereupon with within the ambit of Section 53-A of the Act, theirs provenly performing their part of the contract embodied in the relevant agreement, rendered its provisions being attracted qua them, hence, the relief of permanent prohibitory injunction, claimed with respect to the suit land by the plaintiff, warranted dismissal. For determining the fact whether both Ex. D-1 and Ex. D-2, stand aptly, pronounced by the learned Courts below, to be holding no vigour, for enhancing the plea of the defendants, qua theirs holding possession of the suit property, the factum of (a) jamabandi with respect to the suit land borne on Ex. P-1 and Khasra girdawaries with respect thereto, both displaying the suit land to be jointly possessed by the plaintiff and Bailu Ram in equal shares, displays whereof hold a rebuttable presumption of truth, whereas, with no cogent evidence existing on record for displacing the presumption of truth enjoyed by the relevant displays occurring in Ex. P-1 and in the apposite khasra girdawari, both exhibits whereof appertain to the suit land, rather does constrain this Court to impute conclusivity to the aforesaid displays occurring therein also this Court is constrained to repel the contention of the defendants, that they in pursuance to Ex. D-1, had obtained possession of the suit land from the plaintiff, hence, they are entitled to avail the benefit of the provisions embodied in Section 53-A of the Act, nor hence they hold any leverage for resisting the suit of the plaintiff wherein he claimed a decree for permanent prohibitory injunction. (b) The further reason for outweighing the vigour of Ex.D-1, emanates from Ex. PW3/A, exhibits whereof comprises, a copy of the plaint instituted by one Bailu Ram against Prabhu, the predecessor-in-interest of the defendants, wherein he had pleaded that with Achhru leaving the village also with his never personally cultivating the suit land and that hence aforesaid Prabhu taking forcible possession of the suit land. In the suit aforesaid instituted by one Bailu Ram, against the predecessor-in-interest of defendants No.1(a) to 1(c), namely, one Prabhu, the latter instituted an apposite written statement, wherein, he espoused that one Bailu Ram and his brother Achhru Ram are in joint possession of the suit land, in the capacity of non occupancy tenants, on payment of rent to owners thereof. During the

pendnecy of the suit, one Achhru had been joined as a party thereto and he averred qua his holding joint possession with respect to the suit land along with Bailu Ram, as a non occupancy tenant, hence, the learned trial Court had dismissed the suit of the plaintiff, wherein he claimed that he was holding exclusive possession of the suit land. Consequently, evidently a perusal of the written statement furnished by the predecessor-in-interest of the aforesaid defendants, in the suit previously instituted with respect to the suit land against him by Bailu Ram, written statement whereof is borne on Ex.PW4/A, reveals that it contains an espousal qua his working as a labourer under Achhru and his getting wages from him. His testification borne on Ex.PW4/B underscores, that he had been helping Achhru in cultivating the suit land, given the arm of Achhru being amputated. The statement borne on Ex.PW4/B stood recorded on 05.12.1987. Now, with the previous suit with respect to the suit property standing instituted in the month May, 1980, hence, in close proximity to the execution of the relevant agreement to sell comprised in Ex. D-1, besides Ex. D-1 being evidently executed with respect to property holdig apparent analogity with the suit khasra numbers herein, “whereas”, the predecessor-in-interest of the defendant concerned, not producing Ex. D-1 and Ex. D-2 before the trial Court concerned, rather his contrarily making disclosures, in his written statement, comprised in Ex.PW4/A, furnished before it also in his testification borne on Ex.PW4/B, that he was helping Achhru in cultivting the suit land, given the arm of Achhru standing amputated, does rear an inference that the pleadings borne on Ex.PW4/A and his testification borne on Ex.PW4/B, comprising his admission with respect to the manner, of hence Achhru holding possession of the suit property jointly along with one Bailu Ram. Consequently, he is estopped, to contend that since the execution Ex. D-1, execution whereof occurred prior to the institution of the previous suit also when is with respect to analogous suit property herein, as also, when it occurred prior to his furnishing a written statement to the earlier suit comprised in Ex. PW3/A, that he in pursuance to Ex. D-1 holds possession of the suit property. In aftermath, he is also estopped from contending that he in part performance of Ex. D-1 has received possession of the suit property from the plaintiff and that he is entitled to avail the statutory benefit of the doctrine of part performance, embodied in Section 53-A of the Act. Furthermore, the fact of the predecessor-in-interest of the defendants concerned, not producing, before the learned trial Court, either Ex. D-1 and Ex. D-2, during the pendency of the previous suit instituted by one Bailu Ram with respect to analogous suit property herein also brings home, a conclusion that his contriving their respective preparation. In addition apart from the aforesaid espousal standing concluded to be working against the predecessor-in-interest of the defendants concerned, its further effect is that it also constrains an inevitable conclusion, that the reflections occurring in the jamabandi borne on Ex. P-1 and in the khasra girdawaries, depicting the fact of the defendants not holding possession of the suit property, hence, enjoying conclusivity, corollary whereof,is that the doctrine of part performance being reinforcingly, not available for its leveraging by them.

10. Be that as it may, after termination of the previous lis inter se Bailu Ram and Achhru and Prabhu, the latter filed an application for correction of revenue entries with respect to the possessory column, borne in the apposite jamabandi qua the suit land. Application whereof, as stood preferred before the Assistant Collector stood dismissed also the appeal carried therefrom, comprised in Ex. P-4, before the learned Divisional Commissioner, also stood dismissed. Consequently, the efficacy of the relevant reflections occurring in the possessory column of the Jamabandi prepared with respect to the suit land, wherein, the defendants are not recorded to be in possession of the suit property, hold renewed conclusive vigour, hence, also the espousal of the defendants that their predecessor-in-interest, in pursuance to agreement to sell, borne on Ex. D-1 was holding possession of the suit property, hence, they are entitled to repulse the relief of permanent prohibitory injunction agitated by the plaintiff with respect to the suit property, warrants its standing rejected.

11. Be that as it may, as aptly concluded by both the learned Courts below, Ex. D-1, “apart from” the reasons ascribed hereinabove, not holding its vigour, the fact of, its at the apt concluding portion occurring at page '2' thereof 'not' holding the signatures or thumb impression of either of the purported executants thereto, renders it to be not completely executed. The

purported agreement to sell borne on Ex. D-1, recorded inter se Achhru and the predecessor-in-interest of the defendants concerned, is not, hence, amenable for any reliance, rather reliance thereupon is both feeble as well as frail. Receipt Ex. D-2, whereon the thumb impression of Achhru occur, though stand proven by its scribe and a witness thereto, yet what casts a grave suspicion qua its genuineness, is aroused by the fact of only one witness thereto, who is real brother of the defendants, proving its recitals, whereas, the other witness Gain Singh not being examined by the defendants in proof thereto, hence, constraining this Court, to derive a firm conclusion that hence the interested testimony of Taru, the witness to Ex.D-2 not overcoming the suspicion qua the authenticity of Ex. D-1, suspicious whereof ingraining it, arises for all the reasons aforestated.

12. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court as also by the learned trial Court are based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court have not excluded germane and apposite material from consideration. Accordingly, the substantial questions of law are answered in favour of the defendants/respondents and against the plaintiff/appellant.

13. In view of above discussion, the present Regular Second Appeal is dismissed. In sequel, the judgements and decrees rendered by both the learned Courts below are maintained and affirmed. All pending applications also stand disposed of. No order as to costs.

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

RSA No. 527 of 2004 along
with RSA No. 528 of 2004.
Reserved on : 12th May, 2017.
Decided on : 24th May, 2017.

1.RSA No. 527 of 2004.

Mohi Ram .....Appellant/defendant.
Versus
Ram Saran .....Respondent/plaintiff.

2.RSA No. 528 of 2004.

Mohi Ram .....Appellant/plaintiff.
Versus
Ram Saran .....Respondent/defendant.

Specific Relief Act, 1963- Section 34 and 38- Plaintiff M filed a civil suit pleading that he had become owner by way of adverse possession- the revenue entriesare incorrect and the defendant R is interfering with the suit land taking advantage of the wrong revenue entries – the defendant R filed a separate suit pleading that he had mortgaged the suit land with the plaintiff M- the defendant R is ready to pay the mortgaged amount but the plaintiff M refused to accept the same-hence, the suit was filed for seeking the redemption of the mortgage – the suit filed by M was dismissed while the suit filed R was decreed –M filed separate appeals, which were dismissed– aggrieved from the judgments, the present appeal has been filed – held that an application was filed before the Appellate Court pleading that R was not heard for more than 7 years- this application was not decided by the Appellate Court- the suit was filed by R through his power of attorney – the Appeal allowed and case remanded to the Appellate Court with a direction to decide the application in accordance with law. (Para-14 to 16)

For the Appellant(s): Mr. Ramakant Sharma, Senior Advocate with Mr. Dinesh, Advocate.
For the Respondent(s): Mr. Suneet Goel, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Since, both these appeals arise out of a common verdict pronounced by the learned Additional District Judge, Solan, H.P., in Civil Appeal No. 1-S/13 of 2004 and in Civil Appeal No. 2-S/13 of 2004, hence, both are liable to disposed off by common verdict.

2. Mohi Ram instituted Civil Suit No.21/1 of 1999/94 claiming a decree for declaration and consequential relief of injunction with respect to the suit land. The aforesaid suit of Mohi Ram stood dismissed by the learned trial Court. However, Civil Suit No. 460/1 of 99/97 instituted by Ram Saran, claiming therein a decree for possession of the suit land by way of redemption, stood decreed by the learned trial Court.

3. Mohi Ram, plaintiff in Civil Suit No. 21/1 of 1999/94 as also defendant in Civil Suit No. 461/1 of 1999/97, on standing aggrieved by his suit being dismissed, whereas, the suit of Ram Saran being decreed under a common verdict by the learned Civil Judge (Junior Dvision), Kasauli at Solan, hence, proceeded to assail both the verdicts by assail both the verdicts by instituting appeal before the learned Additional District Judge, Solan. The apposite Civil Appeals arising therefrom bearing No. Civil Appeal No.1-S/13 of 2004 and Civil Appeal No.2-S/13 of 2004 were decided under a common verdict pronounced by the learned Additional District Judge, Solan, whereby, he dismissed both the appeals.

4. Mohi Ram, being aggrieved by common verdict pronounced by the learned Additional District Judge, Solan in Civil Appeal No. 1-S/13 of 2004 and Civil Appeal No. 2-S/13 of 2004, has concerned to assail it by preferring the instant appeal therefrom before this Court.

BRIEF FACTS IN RSA No.528 of 2004.

5. Mohi Ram (plaintiff in Civil Suit No. 21/1 of 1999/94), instituted the said suit against Ram Saran, that he has become owner-in-possession of the the land comprised in khata khatauni No. 15/23, khasra Nos. 4, 36 and 102, measuring 19 bighas, 12 biswas and 18 biswansi, situated in majua Jatrog, Tehsil Kasauli,District Solan by way of adverse possession. The possession of the plaintiff over this land is averred to be hostile, open in assertion of his right as owner since January, 1979 to the knowledge of the defendant and the general public. It averred that Ram Saran, defendant under the garb of wrong revenue record is causing interference in the peaceful possession of the plaintiff qua the suit land and the defendant is threatening the plaintiff to dispossess him from the suit land forcibly.

6. The defendant contested the suit and filed written statement, wherein, he has taken preliminary objections inter alias; locus standi, estoppel and cause of action. On merits, the defendant has taken the stand that the plaintiff is coming in possession of the suit land as mortgagee since, 31.3.1979 when the defendant has mortgaged the suit land with the plaintiff Mohi Ram for Rs.8000/- and as such the possession of the plaintiff is that of mortgagee and he has not become the owner of the suit land by way of adverse possession.

7. The plaintiff/appellant herein filed replication to the written statement of the defendant/respondent, wherein, he denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the plaintiff has become owner by way of adverse possession? OPP
2. Whether the defendant is causing interference in the possession of the plaintiff?OPP
3. Whether the plaintiff has no locus standi and cause of action?OPD
4. Whether the plaintiff is estopped from filing the suit?OPD.

4A. Whether the possession of the plaintiff over the suit land is that of mortgagee, as alleged?OPD

5. Relief.

BRIEF FACTS IN RSA NO.527 OF 2004.

9. Ram Saran, plaintiff in Civil Suit No. 460/1 of 99/97, averred therein that he is the absolute owner of the land comprised in khata khatauni No.27/27 min, khasra No.4, 45 and 144, kitas 3, measuring 19 bighas, 12 biswas and 18 biswansies situated in Village Jatrog, Pargana Changi, Teh. Kasauli,District Solan, H.P. It has averred that the plaintiff had mortgaged the suit land with possession with Sh. Mohi Ram, defendant for a sum of Rs.8000/- vide agreement of 31.3.1979. Prior to the creation of mortgage, the land was in the physical possession of the plaintiff and since the date of mortgage, the defendant has been coming into the possession of the suit land as mortgagee. The plaintiff is ready to pay the mortgage amount i.e. Rs.8000/- to the defendant and he offered him several times the mortgage money but the defendant refused to receive the mortgage money and return the possession of the mortgaged land. Hence the suit.

10. The defendant contested the suit and filed written statement, wherein, Mohi Ram, defendant has pleaded that he has become owner of the suit land by way of adverse possession. The possession of the defendant over the suit land is hostile, continuous, without interference of anybody including the plaintiff since January, 1979 to the knowledge of the plaintiff and general public. The alleged mortgage deed is inadmissible in evidence as the same is incomplete, for want of registration.

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

1. Whether the plaintiff had mortgaged the suit land to the defendant for the sum of Rs.8000/- vide agreement dated 31.3.1979, as alleged? OPP.

2. Whether the plaintiff is entitled for the relief of possession by way of redemption, as prayed? OPP

3. Whether the alleged mortgage deed is inadmissible for the evidence, as alleged?OPD.

4. Whether no cause of action accrued to the plaintiff, as alleged? OPD

5. Whether the plaintiff is estopped from filing he present suit, as alleged?OPD

6. Relief.

12. On an appraisal of evidence, adduced before the learned trial Court, the latter under its common verdict proceeded to dismiss Civil Suit No. 21/1 of 1999/94 instituted by Mohi Ram, whereas, it proceeded to decree the suit instituted by Ram Saran. In appeals, preferred therefrom by aggrieved Mohi Ram, before the learned First Appellate Court, the latter Court dismissed both the appeals, whereas, it affirmed the findings recorded by the learned trial Court.

13. Now Mohi Ram/appellant herein, has instituted the instant Regular Second Appeals before this Court, wherein he assails the findings recorded in its impugned common judgment and decree by the learned first Appellate Court. When the appeals came up for admission, on 02.12.2004, this Court, admitted both the appeals instituted by Mohi Ram appellant against the common judgment(s) and decree(s), rendered by the learned first Appellate Court, on the hereinafter extracted common substantial questions of law:-

a) Whether the Courts below have dealt with the case by mis-appreciation and mis-interpretation of provisions of Section 17 of the Indian Registration Act, Section 59 of Transfer of Property Act and Article 65 of the Limitation Act?

b) Whether the Courts below have mis-interpreted the document Ext. D-2 and mis-appreciated the documents Exts.D-4 to D-8 and the statements of PW-1 to PW-3 and DW-1 to DW-3?

c) Whether the lower appellate Court by not disposing of the application of the appellant averring that the respondent was not heard of for the last 7 or 8 years has committed such illegalities which vitiates the impugned judgment and decree?

Substantial question of Law No.3:

14. A studied and careful perusal of the records unveils that the learned First Appellate Court, has not made any adjudication upon an application preferred before it, under the provisions of Section 151 of the Code of Civil Procedure by the appellant, wherein, he had espoused that since Ram Saran was not heard of, for the last 7-9 years, hence, the presumption embodied in Section 108 of The Indian Evidence Act qua his no longer being alive hence warranting its apt erection. The provisions of Section 108 of the Indian Evidence Act read as under:

> **"108. Burden of proving that person is alive who has not been heard of for seven years**.- [provided that when] the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is (shifted to) the person who affirms it."

15. Now with Ram Saran instituting Civil Suit No. 460/1 of 99/97 through his special power of attorney before the learned trial Court, suit whereof stood decreed, as also, with his special power of attorney stepping into the witnesses box for testifying in support of the averments made in the plaint, hence, constrained the learned trial Court to decree it. However, the learned First Appellate Court, especially when it stood seized with an appeal preferred before it, by the aggrieved concerned also with the latter preferring the aforestated application before it, was hence enjoined to, after striking issues on the pleadings of the respective parties in the aforesaid application also its consequently permitting the parties to adduce their respective evidence thereon, hence, pronounce its decision thereon. Moreover, when the evidence adduced by appellant Mohi Ram may have unveiled that Ram Saran was not surviving at the time of the learned First Appellate Court being seized with Civil Appeal Nos. 1-S/13 of 2004 and Civil Appeal No. 2-S/13 of 2004, whereupon, it may have been constrained, to while recording an affirmative rendition thereon also insist upon the litigants concerned to move an appropriate application therebefore, for seeking his substitution by his legal heirs. However, since the learned first Appellate Court omitted to make any pronouncement upon the aforesaid application, it has precluded, emanation of truth with respect to the fact of Ram Saran, surviving at the stage of its being seized with the appeals aforesaid also with respect to his surviving at the stage of its pronouncing a decision upon the aforesaid appeals. Further sequel whereof , is that it fosters an inference that a pervasive stain of vitiation percolating into the impugned rendition, vitiation whereof arises from the fact of, hence, its standing pronounced with Ram Saran may be not surviving at the stage when the learned First Appellate Court pronounced, its verdict upon the civil appeals aforesaid. In sequel thereto, it appears that the common verdict pronounced by the learned first Appellate Court in Civil Appeal No. 1-S/13 of 2004 and in Civil Appeal No. 2-S/13 of 2004 stands stained with a vice of its may be standing pronounced against a dead person. For erasing the aforesaid inference, hence, an apposite pronouncement thereon was imperative. Contrarily, non rendition of a verdict thereon enhances the aforesaid stain. In sequel, substantial question of law No.3 is answered in favour of the appellant and against the respondent.

16. Consequently, the instant appeals hence stand disposed off as allowed, with a direction of their remand to the learned First Appellate Court for enabling it to decide application being CMA No. 228-6 of 2004 instituted therebefore, by Mohi Ram under Section 151 of the CPC, "prior whereto" it shall strike issues upon the pleadings constituted by the respective contestants and shall also permit them to adduce their respective evidence on the relevant issues.

Reiteratedly, it shall thereafter make a pronouncement upon the aforesaid application bearing CMA No. 228-S/6 of 2004. In case on the strength of evidence existing before it, it concludes that the aforesaid application warrants its standing allowed, it shall thereafter proceed to, in accordance with law, permit the litigant concerned, to thereupon make an apposite application before it, for seeking substitution of the deceased concerned by his legal heirs and shall decide it in accordance with law, whereafter, it shall proceed to record in accordance with law, a fresh decision upon Civil Appeal No. 1-S/13 of 2004 and Civil Appeal No. 2-S/13 of 2004. In case, the learned First Appellate Court comes to the conclusion qua CMA No. 228-S/6 of 2004 warranting dismissal, it shall record its detailed reasons for drawing such a conclusion. Thereafter, it shall return the file to this Court, on receipt whereof, the instant appeals shall be restored to their respective original numbers and thereafter they shall be heard on merits. Substantial questions of law No.1 and 2 hence become redundant and do not warrant any meteing of any answer thereon. The parties are directed to appear before the learned First Appellate Court on 29.06.2017. The learned First Appellate Court is directed to dispose of the "matter(s)" within six months from today. All pending applications also stand disposed of. Records be sent back forthwith.

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

N.Balakrishnan ...Petitioner.

Versus

State of H.P. and another ...Respondents.

Cr.MMO No. 132 of 2014.
Date of decision: 24.05.2017

Code of Criminal Procedure, 1973- Section 482- A complaint was filed for the commission of offence punishable under Section 138 of N.I. Act- the accused did not appear – a proclamation was issued and a direction was also issued to register the FIR for the commission of offence punishable under Section 174-A of I.P.C. against the absentee accused – subsequently the accused appeared and the matter was compromised- he filed a petition for quashing the FIR – held that it has to be proved that the accused had not appeared before the court despite knowledge– no such allegation was made in the complaint – there is no evidence that newspaper was read by the accused in absence of which the necessary ingredients for the commission of offences are not made out- petition allowed and FIR ordered to be quashed.(Para-4 to 5)

For the petitioner: Mr. Sanjeev Bhushan, Sr. Advocate with Ms. Abhilasha Kaundal, Advocate.

For the respondents: Mr. Vivek Singh Attri, Dy. A.G. for respondent No.1.
Mr. Subhash Sharma, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

In the instant petition, the petitioner/accused prays for quashing of F.I.R bearing No. 75 of 2013 lodged under Section 174-A of the IPC with Police Station Barotiwala. A complaint under Section 138 of the Negotiable Instrument Act was lodged by respondent No.2 against M/s Online Knit Fashion and against the petitioner herein, who was at the relevant time holding in the aforesaid corporate entity, the position of its partner besides other corporate entities were arrayed in the apposite complaint as co-accused alongwith the petitioner. On the complaint being instituted before the Magistrate concerned, he issued summons for procuring the presence

of the accused before him. However, the accused did not come to be served through ordinary process. Subsequently the learned Magistrate concerned proceeded to order for issuance of bailable warrants upon the accused for theirs recording their appearance before him, on 26.11.2010. However, the bailable warrants aforesaid issued upon the accused did not come to be returned, by the executing agency concerned, to the learned Magistrate. In sequel, the learned Magistrate on 27.5.2011 ordered for issuance of non-bailable warrants upon the accused, returnable for 27.7.2011. Even the non-bailable warrants remained unexecuted by the executing agency concerned. On 27.10.2011 the learned Magistrate concerned had proceeded to order for issuance of fresh non-bailable warrants upon the accused returnable for 23.12.2011. However, the aforesaid NBWs issued upon the accused returnable for the relevant dates also remained unexecuted. In aftermath, the learned Magistrate concerned was constrained to conclude, that the accused are deliberately evading execution upon them of NBWs, hence, he ordered qua theirs being served through proclamation. He also ordered that the proclamation notice be printed in the newspaper holding circulation in the area whereat the accused resides. Even the printing of the proclamation notice in the relevant newspaper, did not elicit the presence of the accused/respondent before the learned Magistrate concerned. Hence, an application under Section 156(3) of the Cr.P.C was preferred by the complainant before the learned Magistrate, seeking a direction upon the SHO, Kasauli, for registration of a case under Section 174-A against the absenting accused, who stood declared as a proclaimed offender. The application was allowed. Consequently, an F.I.R against the absenting accused was ordered to be registered at the Police Station concerned. The petitioner/accused is aggrieved by the lodging of the apposite F.I.R hence he seeks a direction that it be ordered to be quashed and set-aside.

2. Consequent to printing of a proclamation notice, in the Newspaper concerned, the accused petitioner recorded his presence before the learned Magistrate, on 18.03.2014. On the date aforesaid he was ordered to be taken into custody. The petitioner filed an application under Section 437 Cr.P.C. for his being ordered to be released on bail, application whereof was allowed by the learned Magistrate concerned.

3. Apparently the offence arising out of dishonour of negotiable instrument stands compounded. However, the mere factum of the Magistrate concerned proceeding to, on an apposite joint motion made before him by the complainant and by the accused concerned, hence record an order for compounding the offence arising out of dishonour of Negotiable Instrument, would not per se exonerate the guilt of the accused especially when he despite the printing of a proclamation notice in the newspaper concerned holding circulation in the area whereat he was residing, omitted, to, on the date mentioned therein hence record his appearance before the learned Magistrate concerned, whereupon he attracted the mandate of Section 174-A, provisions whereof stand extracted hereinafter:-

> 1[174A. Non-appearance in response to a proclamation under section 82 of Act 2 of 1974.—Whoever fails to appear at the specified place and the specified time as required by a proclamation published under sub-section
>
> (1) of section 82 of the Code of Criminal Procedure, 1973 shall be punished with imprisonment for a term which may extend to three years or with fine or with both, and where a declaration has been made under sub-section (4) of that section pronouncing him as a proclaimed offender, he shall be punished with imprisonment for a term which may extend to seven years and shall also be liable to fine.]

4. Moreover, as submitted by the learned Deputy Advocate General that with the offence constituted under the provisions of 174-A IPC being incidental to besides unrelated to the offence constituted by the dishonour of negotiable instrument concerned, hence the mere recording of an order of composition by the Magistrate concerned, on the application preferred before him by the accused, would not erode the offence committed, within the ambit of Section 174-A, by the accused. In making the aforesaid submission the learned Deputy Advocate General has relied upon judgements rendered by the Delhi High Court in Pradeep Kumar Sehdev vs. The

State (Govt. of Nct of Delhi) in CRL.M.C.3683 of 2016 and in M/s Sundri Apparels (India) Pvt. Ltd. & others vs. State (NCT Delhi) & another reported in 2016 SCC OnLine Del 2512. However, the aforesaid submission addressed before this Court by the learned Deputy Advocate General also the mandate of verdicts recorded by the Delhi High Court upon petitions preferred before it, by the accused concerned seeking quashing of F.IR encapsulating an offence constituted under Section 174-A of the IPC, would not per se be binding upon this Court, as the Delhi High Court, appears, to, not hold an appropriate interpretation besides appreciation of the mandate of Section 174-A of the IPC, rather it appears, to, in a stricto sensu manner attract its penal clout upon the accused, merely, upon the fact of the mere printing of a proclamation notice, in the newspaper concerned per se inviting attraction of its provision upon the accused, predominantly when in consonance thereof, the accused failed to record his appearance before the learned Magistrate concerned "whereas" the subtle underlying nuance of all the penal provisions embodied in the Indian Penal Code, for hence attracting their clout "rests' upon the accused concerned holding the apt mens rea. Also without any attribution of or want of ascription of any mens rea, to the accused concerned, the criminal Court concerned, would be disabled to work the mandate of Section 174-A viz-a-viz the accused. Moreover, want whereof would be antithetical to the trite tenet of criminal jurisprudence qua unless the mens rea appropriate, to attracting the mandate of the relevant penal provisions upon the accused, is spelt out or established, thereupon the clout of the relevant penal provisions being both unattractable besides unworkable upon the accused concerned. Being so, the stricto sensu interpretation purveyed by the Delhi High Court upon the mandate of Section 174-A appears to be grossly astray from the subtle underlying nuance, of the aforesaid trite tenet of criminal jurisprudence rather this Court is constrained to read into the mandate of Section 174-A, an imperative ingredient qua the apposite mens rea embodied therein for attracting its clout being constituted in the accused concerned intentionally despite holding knowledge of the printing of the publication notice hence failing to appear before the Court concerned, imputation whereof qua him warranting an averment being recorded in the complaint, that the absenting accused "had" despite his reading the proclamation notice evidently printed in the newspaper or despite his reading it on the relevant website, of even upon the social media, if provenly loaded thereon, his yet omitting to on the dates specified therein record his appearance before the learned Magistrate concerned. However, the aforesaid ingredient constituting the imperative mens rea apposite to the penal provisions held in Section 174-A of the IPC, is amiss in the apposite complaint. In sequel, its not finding its occurrence therein renders the apposite F.I.R to warrant its being quashed. Moreover, the continuation of further proceedings launched against the accused, in pursuance thereto, would also be both inappropriate and unjust.

5. Furthermore, a perusal of the relevant publication material, which stood purportedly printed in the newspaper holding circulation in the area whereat the accused concerned was residing "discloses" that the newspaper wherein the relevant proclamation notice was printed also carrying a news item therein with respect to the holding of elections in Punjab. Nowat, with Punjab being located in a part of India remotely distant from the place where the accused concerned was residing nor also it being echoed in the complaint, that the relevant newspaper evidently hence holding circulation within the territory of Punjab also holding circulation in the territory where the accused was residing nor any communication occurring in the apposite complaint, that the accused had read the printed proclamation notice on web-site or internet despite given its being loaded thereon, hence sequels an inference, that the accused concerned 'never' had the opportunity to read the proclamation notice published in a newspaper holding circulation only in the territory of Punjab, corollary whereof is that "no" imputation of knowledge thereof by him nor any imputation qua his non appearance before the Court concerned, on the date spelt thereto, holding the apposite mens rea of intentional omission 'can hence be made upon him'. In aftermath, the ingredients for constituting an offence under Section 174-A IPC is not made out against the petitioner. Consequently, I find merit in the petition and is allowed accordingly. In sequel F.I.R bearing No. 75 of 2013 lodged under Section 174-A of the IPC with Police Station Barotiwala, is quashed and set-aside.

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

Om Prakash alias Parkash & others .....Appellants/Defendants.
Versus
Devinder .....Respondent/Plaintiff.

RSA No. 269 of 2003.
Reserved on : 19.05.2017.
Decided on :24th May, 2017.

Code of Civil Procedure, 1908- Section 100- Plaintiff filed a civil suit for damages pleading that the defendants No.1 and 2had given lathi and spade blows to the father of the plaintiff, who succumbed to the injuries- the defendants denied the case of the plaintiff and stated that plaintiff and his father were aggressors who had attacked and inflicted injuries on defendant No.3- the suit was decreed by the Trial Court – an appeal was filed, which was dismissed- held in second appeal that the Courts had assessed Rs.85,400/- as pecuniary damages based upon the medical bills – the plaintiff had suffered loss of estate due to death of his father – the Courts had properly appreciated the evidence- appeal dismissed.(Para-8 to 14)

For the Appellant: Mr. Divya Raj Singh Thakur, Avocate.
For the Respondents: Ms. Megha Kapur Gautam, Advocate vice to Mr. J.R. Poswal, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal is directed against the concurrently recorded renditions of both the learned Courts below, whereby, his suit for damages against the defendants stood decreed. In sequel thereto, the defendants/appellants herein are driven to institute the instant appeal herebefore.

2. Briefly stated the facts of the case are that on 17.09.1994 at about 6.30 a.m., when plaintiff and his father were standing in the courtyard after doing agricultural work, the defendants came in the courtyard and asked the father of the plaintiff to divide the landed property. The father of the plaintiff told that since crop has been sown now and after harvesting of the crop the land would be divided. Upon this defendants became angry and defendant No.1 assaulted the father of the plaintiff with a Lathi, whereas, defendant No.2 attacked with a spade. The plaintiff also tried to rescue his father as a result of which both plaintiff and his father fell down on the ground. The defendants gave several lathi and spade blows, as a result of which, father of the plaintiff became unconscious on the spot. The wife of the plaintiff was also caught hold by defendant No.3, who did not allow her to save the plaintiff and his father. Lateron, the matter was also reported to the Pradhan by the wife of the plaintiff. Thereafter plaintiff along with his father was taken to CHC, Gagret, who referred them to District Hospital, Una. Lateron, the father of the plaintiff succumbed to the head injury and postmortem was also performed by the doctor wherein the doctor has opined that father of the plaintiff died due to head injury etc. The plaintiff was also admitted in District Hospital, Una and x-ray was also done. There was fracture in the left arm of the plaintiff. It has been averred that plaintiff was driver and earning Rs.2500/- per month and now the plaintiff is unable to do any work with his left arm. The plaintiff also suffered great pain, agony, mental injuries etc. The father of the plaintiff has retired and was drawing Rs.1600/- per month as pension. The father of the plaintiff was having good health and was doing agricultural work. Now the plaintiff had to spend Rs.5000/- every year on labourers for agricultural work as plaintiff is unable to do the same. The plaintiff has restricted his claim to Rs.1,00,000/- only. Hence the suit.

3. The defendants contested the suit and filed written statement. It has been averred by the defendants that the plaintiff and his father, namely, Harjal Singh were aggressors and they attacked the defendant and inflicted injuries on defendant No.3. A case was also registered against the plaintiff. The criminal case registered against defendants is false as defendants No.1 and 3 acted in self defence. Defendant No.2 was away from home and has been wrongly impleaded as party. The defendants have denied other averments made in the plaint. It has also been alleged that defendant No.3 was medically examined at PHC, Gagret. It has been admitted that Harjal Singh, father of the plaintiff, died at Una, but defendants were not responsible for the injuries of the plaintiff and Harjal Singh.

4. The plaintiff/respondent herein filed replication to the written statement of the defendants/appellants, 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 recover Rs. 1 lac. as damages, as prayed?OPP.
2. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiff/respondent herein. In an appeal, preferred therefrom by the defendants/appellants before the learned First Appellate Court, the latter Court dismissed the appeal and affirmed the findings recorded by the learned trial Court.

7. Now the defendants/appellants herein, have instituted the instant Regular Second Appeal before this Court, wherein they assail the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission, on 24.10.2003, this Court, admitted the appeal instituted by the defendants/appellants against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial question of law:-

a) Whether the award made by the trial Court as affirmed by the first appellate Court is excessive being against the weight of evidence and settled position of law and also mis-interpretation and misreading of the evidence on record?

Substantial question of Law No.1:

8. Since, this Court is enjoined to purvey an answer only upon the aforesaid substantial question of law, hence, this Court would not proceed to determine the legality of the pronouncement concurrently made by both the learned Court below, with respect to the maintainability of the suit also with respect to the entitlement of the plaintiff, to the quantum of pecuniary damages assessed vis-a-vis him and against the defendants. However, this Court is enjoined to determine whether the quantum of pecuniary damages concurrently assessed upon the plaintiff and against the defendants, is excessive, inference of excessive assessment whereof, would arise from theirs respectively evidently discarding the apt evidence, also both evidently misreading the relevant evidence besides mis-appraising the relevant laws applicable thereon.

9. In meteing an adjudication upon the aforesaid apposite facet, the fact that both the learned Court below had concurrently assessed a minimal sum of Rs.85,400/-, as pecuniary damages vis-a-vis the plaintiff and against the defendants, besides when the aforesaid quantum of compensation, concurrently assessed by both the Court below, is grooved upon medical bills, comprised in Ex.PW2/A and Ex.PW2/B, wherein reflections occur qua the sums of money borne therein, standing expended for the treatment of the injured concerned also is grooved upon Ex.PW3/A, exhibit whereof likewise stands proven, apparently, hence, the sums of money comprised therein, warranted imputation of credence thereto also when the sums of money reflected therein stood, hence, evidently expended towards the treatment of the injured concerned, necessarily, hence, the sums of money borne therein being computable towards

assessing compensation upon the plaintiff against the defendants. In sequel, any reliance upon them by both the learned Courts below for theirs making the relevant assessment(s), does not suffer from any absurdity and perversity.

10. The suit of the plaintiff was not only with respect to the loss accruing to his estate, on account of the demise of his father also it was for monetary damages being assessed upon him for the injuries which he received in the relevant assault perpetrated upon him and also upon the deceased. The suit was constituted under Section 1A of the Fatal Accidents Act, 1855, provisions whereof stand extracted hereinafter:-

> "1(A) suit for compensation to the family of a person for loss occasioned to it by his death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action or suit for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony or other crime.
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> b. Every such action or suit shall be for the benefit of the wife, husband, parent and child, if any, of the person whose death shall have been so caused, and shall be brought by and in the name of the executor, administrator or representative of the person deceased; and in every such action the court may give such damages as it may think proportioned to the loss resulting from sch death to the parties respectively, for whom and for whose benefit such action shall be brought, and the amount so recovered, after deducting all costs and expense, including the costs not recovered from the defendant, shall be divided amongst the beforementioned parties, or any of them, in such shares as the Court by its judgment or decree shall direct."

11. Consequently, the suit instituted by the plaintiff for computation of pecuniary damages with respect to the loss to the estate of his deceased father arising from his demise occurring in sequel to his standing assaulted by the defendants, was within the ambit of the aforesaid provisions, hence was apparently maintainable. Moreover, the suit for computation of pecuniary damages vis-a-vis him arising from the factum of his, too, in the ill-fated assault "even" upon his person, suffering injuries in sequel thereto his standing entailed with great pain, agony and mental sufferings, was also apart from a claim for computation therein of damages qua loss to his estate arising from the demise of his father, hence, maintainable. The factum of his, in sequel to the demise of his father, in sequel to his evidently standing assaulted by the defendants, being entailed with extreme pain, agony and suffering, stood proven by the plaintiff. Since, with proof emanating with respect to the aforesaid pleaded fact also with his, hence evidently on the ill-fated demise of his father, being hence encumbered with evident pain, agony and mental injury, renders also the aforesaid sufferings entailed upon him, to be tenably reckonable for computation of compensation in respect thereof vis-a-vis the plaintiff. Consequently, it appears that the assessment of compensation made upon the plaintiff and against the defendants by both the learned Courts below does not suffer from any perversity or absurdity.

12. However, during the course of arguments, the learned counsel appearing for the appellants/defendants has contended with vigour, that both the learned Courts below have committed a gross error, in levying upon the principal decretal amount of Rs.85,400/-, interest at the rate of 6% per annum from the date of institution of the suit till the realization of the decretal amount. He contends that the aforesaid levying of interest on the compensation amount, is beyond the scope of sub-section (1) of Section 34 of the Code of Civil Procedure. For appreciating the worth of the aforesaid contention, of the learned counsel appearing for the appellants, it is apt to extract the provisions of sub-section (1) of Section 34 of the Code of Civil Procedure (hereinafter referred to as the CPC):-

> "34. Interest.- (1) Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable

to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, [with further interest at such rate not exceeding six per cent. per annum as the Court deems reasonable on such principal sum}, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit;"

13. Moreover, with the provisions of Section 1-A of the Fatal Accidents Act, not holding any contemplation for levying of interest by a Civil Court on the principal decretal amount, hence, attraction of besides the applicability hereat, of the provisions of Section 34 of the CPC by the Civil Court, when their play remains not ousted by any specific statutory clause, cast in the Fatal Accidents Act, is obviously apt. The word "may" occurring in sub-section (1) of Section 34 of the CPC, is the nerve center, for determining, whether the levying of interest by both the learned Court below upon the principal decretal amount, levy whereof was ordered by both the learned Courts below, to commence from the date of institution of the suit and was to end on realization of the decretal amount, is within the precincts of sub-section (1) of Section 34 of the CPC. The Civil Court concerned, is vested with a discretion, given the apparent directoriness of the parlance borne by the aforesaid coinage "may", occurring therein, to levy upon the decretal amount interest at the rate of 6% per annum, levying whereon is to occur "from the date of the of suit to the date of the decree", yet the aforesaid phrase occurring therein, is separated by the coinage "in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit". Also hence naturally, it also holds its apt relevance, rather a conclusion is enhanced that the discretion vested in the Civil Court, to levy interest on the principal decretal amount "from the date of suit to the date of the decree", being a discretion, exercisable by it, only when it also exercises the additional discretion in coalescence therewith, comprised in its also levying on the principal decretal amount, interest for a period "prior to the institution of the suit". However, both the learned Courts below had apparently proceeded to not put into operation, any a part of the aforesaid mandate occurring in the opening portion of sub-section (1) of Section 34, of the CPC. Nonetheless, the learned trial Court below "within" the ambit of the apt, portion of sub-section (1) of Section 34 of the CPC occurring subsequent to the aforesaid part thereof "wherein" a mandate is held that the Civil Court concerned may in consonance therewith, levy the relevant rate of interest on the principal decretal amount, levy whereof would occur from the date of decree upto the date of payment or to such earlier date as the Court deems it fit, besides the signification borne by the coinage occurring therein "from the date of the decree to the date of payment" being none other than that its apparent literal meaning conveys, that its vesting/clothing in the Court concerned, a discretion, to on the principal decretal amount, levy interest commencing from the date of decree or commencing "from such earlier date as the Court thinks fit", period/date whereof is to be concluded to be envisaged therein to be one from the date of the institution of the suit till the apposite realization occurs also is to be concluded to fall within the four corners of the aforesaid relevant provisions, "hence", has made an apt adjudication with respect to levy of interest upon the principal decretal amount. In aftermath, the aforesaid rate of interest levied in the aforesaid manner by both the learned Courts below on the principal decretal amount, does not suffer from any infirmity.

14. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court as also by the learned trial Court are based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court have not excluded germane and apposite material from consideration. Accordingly, the substantial question of law is answered in favour of the plaintiff/respondent and against the defendants/appellants.

15. In view of above discussion, the present Regular Second Appeal is dismissed. In sequel, the judgements and decrees rendered by both the learned Courts below are maintained and affirmed. All pending applications also stand disposed of. No order as to costs.

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

Shri Rajinder Kumar .....Petitioner.

Vs.

Smt. Kusum Goel and others .....Respondents.

Civil Revision No.: 164 of 2011
Reserved on: 04.05.2017
Date of Decision: 25.05.2017

Himachal Pradesh Urban Rent Control Act, 1987- Section 14- An eviction petition was filed for eviction of the premises on the ground that the premises were handed over to the subtenant without the written consent of the landlords, tenants are in arrears of rent and the premises are required bonafide for the purpose of rebuilding and reconstruction, which cannot be carried out without vacating the premises- the petition was allowed by the Rent Controller on the ground of arrears of rent, subletting, rebuilding and reconstruction – an appeal was filed, which was allowed and the case was remanded to the Rent Controller after framing the issues– this order of remand was set aside in revision by the High Court- Appellate Authority dismissed the appeal and affirmed the order passed by the Rent Controller – held in revision that once the order of remand was set aside, it had the effect of setting aside the order of framing of issues as well- there was no requirement to record findings on the additional issues- the evidence established the subletting on the part of the tenant after the commencement of H.P. Urban Rent Control Act- it was also established that the reconstruction cannot be carried out without vacating the building- the Courts had correctly appreciated the evidence- appeal dismissed.(Para- 20 to 46)

Cases referred:

Dharam Pal Vs. Durga Dass, Indian Law Reports (H.P. Series) Vol. X 1981 P. 521
Sham Sunder Mehra Vs. Mastan Singh and others 1994 (1) Sim. L.C. 171
Hindustan Petroleum Corporation Limited Vs. Dilbahar Singh (2014) 9 Supreme Court Cases 78
Dr. Gyan Parkash Vs. Som Nath and others 1996(1) RCR 342
Lekh Raj Vs. Muni Lal, 2001(1) RCR 168
Vallampati Kalavathi Vs. Haji Ismai, 2001(1) RCR 375
Dr. Pushap Lata Sharma Vs. Ramesh Kumari 2001(1) RCR 268

For the petitioner: Mr. Bhupender Gupta, Senior Advocate, with Mr. Ajeet Jaswal, Advocate.

For the respondents: Mr. Vinay Kuthiala, Senior Advocate, with Ms. Vandana Kuthiala, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge :

By way of this revision petition filed under Section 24(5) of the Himachal Pradesh Urban Rent Control Act, 1987, the petitioner herein has challenged the judgment passed by the learned Appellate Authority (II), Shimla in Rent Appeal No. 8-S/13(b) of 2007, dated 09.08.2011, vide which, learned Appellate Authority has dismissed an appeal filed by the present petitioner against order passed by learned Rent Controller (2), Shimla in Rent Petition No. 17/2 of 97/96, dated 26.03.2007, whereby learned Rent Controller while allowing an application for eviction filed under Section 14 of the Himachal Pradesh Urban Rent Control Act, 1987 by the present respondents, ordered the eviction of the present petitioners from the premises in dispute on the ground of arrears of rent, sub-letting and re-building and re-construction.

2. Brief facts necessary for the adjudication of the present case are that present respondents (hereinafter referred to as "the landlords") filed an application for eviction of the present petitioner and respondent No. 4 under Section 14 of the Himachal Pradesh Urban Rent Control Act, 1987 (hereinafter referred to as "the 1987 Act") in the Court of learned Rent Controller-(II), Shimla on the pleadings that the landlords were owners of shop No. 49, First Floor, Lower Bazaar, Shimla and that the premises were in exclusive possession and control of respondent No. 2 therein, i.e., present petitioner as sub-tenant. The suit property comprised of two rooms including kitchen and latrine and as per the landlords, the annual rent of the same was Rs. 1200/- per annum besides taxes. It was further mentioned in the petition that respondent No. 1 therein was tenant in respect of the demised premises prior to the purchase of the property by the landlords from their predecessors-in-interest and they were not aware as to whether any agreement was executed in this regard as no copy of the same had been supplied to them by the previous landlords except a list of tenants. In para 18 of the eviction petition, which pertains to grounds on which the eviction was sought, the grounds mentioned therein were:

> "(i) That the respondent No.1 has miserably failed to make the payment of arrears of rent in respect of the premises in question @1200/- per annum besides 8% taxes w.e.f. 18.4.94 today despite petitioners' repeated requests and demands and as willful default has been committed by the respondent No. 1 in the payment of arrears of rent, hence the respondent No. 1 is also liable to pay statutory interest @ 9% per annum besides the cost of the petition.
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> (ii) That the premises under the occupation of the respondent No. 1 alongwith the premises under the occupation of another tenant Sh. Mani Ram are bonafide required by the petitioners for carrying out re-construction work in the building including the premises in question on old lines and which re-construction work cannot be carried out without getting the building/premises vacated by respondent No. 1. The building of which the premises in question are part and parcel is situated in the Main Bazaar and has its commercial value and the petitioners want to carry on re-construction work in the said building on old lines by way of replacing existing structure by providing RCC columns, beams and slabs etc. including brick work etc. and which work cannot be carried out without getting the vacant possession of the premises in question. It may be stated here that the building is stated to be more than 90 years old and material used for the construction of the building has also outlived its life and utility and keeping in view the fact that the reconstruction work is to be carried out in the said building including the premises in question, the said work will definitely increase the value and utility of the building and can be put to better use and keeping in view its location and commercial value and also for argument its income.
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> It may be submitted that except two tenants against whom the petitions have been filed the entire possession of the building is with the petitioners. If the petitioners are able to get the eviction of the respondents and as well as another tenant against whom the petitions stood already filed, the petitioners will be able to re-construct the building expeditiously. The petitioners have already intimated the process for taking permission from the competent authorities and they are hopeful to get the same in due course of time. The petitioners have enough resources at their disposal to re-construct the building including the premises in question on old lines. After getting the re-construction work done, the petitioners will be able to put their building to maximum utility keeping in view the commercial value of the same and also location of the building.
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> (iii) That the respondent No. 1 has after commencement of H.P. Urban Rent Control Act, 1987 transferred his rights under the lease in favour of respondent No. 2 for valuable consideration and at present the respondent No. 2 is in

exclusive possession and control of the premises in question. The said act of sub-letting has been done by the respondent No. 1 without the written consent of the petitioners or their predecessors-in-interest."

3. Records demonstrate that no reply was filed to the eviction petition by respondent No. 1, though the eviction petition was resisted and contested by respondent No. 2 therein, i.e., the present petitioner.

4. Records demonstrate that after service, appearance was put in on behalf of respondent No. 1 in the eviction petition also through their counsel, who had filed Power of Attorney on behalf of both the respondents, but reply was filed to the eviction petition by respondent No. 2 only. In the reply, the stand taken by the present petitioner therein was that respondent No. 1 therein had no concern whatsoever with the premises in question and it was he (present petitioner) who was tenant in the premises in issue in his own capacity. A preliminary objection was also taken that eviction petition lacked material particulars in para 18(a)(ii). On merits, it was stated in the reply that respondent No. 2 in the eviction petition was tenant in the premises in his own right. Respondent No. 1 had no concern whatsoever with the premises and rent stood paid by him up to August, 1994 to Shri Sunil Kuthiala, the previous owner of the premises and subsequently, rent was also sent to the new landlords, who refused to receive the same. Arrears of rent were denied, it was also denied that the premises were bonafidely required by the landlords for additions or alterations in the building or that the building was 80 years old. In reply to para 18(a)(iii) of the eviction petition, it was stated by respondent No. 2 therein that respondent No. 1 in the eviction petition had no concern with the premises in question and it was the answering respondent who was tenant in his own right, however, in the alternative, in case the learned Court comes to the conclusion that status of respondent No. 2 therein was to that of a sub-tenant, then in that event, the alleged subletting took place before the commencement of 1987 Act and as such, the petition was not maintainable. Another ground taken in alternative in reply to said para of the eviction petition was that as respondent No. 2 was occupying the premises openly to the knowledge of the predecessor-in-interest of the new landlords, who had also received rent from respondent No. 2, as such, respondent No. 2 had acquired status of a tenant by way of adverse possession. It was also mentioned in the reply that respondent No. 2 had been paying rent to the predecessor-in-interest of the landlords and was occupying the premises to the knowledge and implied consent of previous landlord, namely, Shri Sunil Kuthiala.

5. By way of rejoinder, the stand so taken by respondent No. 2 in the eviction petition was denied by the landlords, who reiterated the contentions raised in the eviction petition.

6. On the basis of pleadings of the parties, learned Rent Controller framed the following issues on 27.05.1997 and 25.11.2002:

"1. Whether the respondent is in arrears of rent, as alleged? OPP

2. Whether premises in question is required by the petitioner for bonafidely for additions and alternations, as alleged? OPP

3. Whether the premises in question has been sublet by the respondent No. 1 to the respondent No. 2, as alleged? OPP

3-A Whether the premises in question are required bonafidely by the petitioners for the purpose of re-building and reconstruction, as alleged? OPP

4. Whether the petition is bad for mis-joinder of necessary party, as alleged? OPR 2

5. Whether the petition is not maintainable in the present form? OPR 2

6. Relief."

7. On the basis of evidence produced on record by the respective parties, the following findings were returned to the issues so framed by the learned Rent Controller:

"Issue No. 1:	Yes.
Issue No. 2:	No.
Issue No. 3:	Yes.
Issue No. 4:	No.
Issue No. 5:	No.
Issue No. 6(Relief):	Petition of the petitioner is allowed with costs vide my operative part of the order.

8. Learned Rent Controller allowed the eviction petition on the grounds of arrears of rent, sub-letting and re-building and re-construction issues, however, it declined the eviction petition on the ground of additions and alterations. Learned Rent Controller ordered the eviction of respondents on the ground of arrears of rent as respondent No. 1 therein had failed to pay the arrears of rent to the petitioner therein @ 1200/- per annum since 18.04.1994. It also ordered the eviction of respondent No. 1 therein on the ground that said respondent had sublet the premises to respondent No. 2 (present petitioner) without the written consent of the landlord for a valuable consideration. Learned Rent Controller also ordered the eviction of respondents therein on the ground of re-building and re-construction by holding that the premises were bonafidely required by the petitioners for the purpose of re-building and re-construction, for which the plan had already been sanctioned by the Municipal Corporation.

9. Order so passed by the learned Rent Controller was assailed by way of an appeal by present petitioner before the learned Rent Controller. Respondent No. 1 before the learned Rent Controller did not challenge the order of eviction so passed by the learned Rent Controller.

10. On 28.12.2010, learned Appellate Authority allowed the appeal and remanded the case back to the learned Rent Controller with a direction to frame additional issues as were mentioned in judgment dated 28.12.2010 and further directed the learned Rent Controller to give opportunity to respondent No. 2 therein to lead evidence on additional issues framed and then give opportunity to petitioners/landlords to rebut the same and thereafter decide the case.

11. Judgment dated 28.12.2010 was challenged before this Court by way of Civil Revision No. 02 of 2011. Vide order dated 10th March, 2011, this Court with the consent of the parties, set aside the judgment so passed in appeal dated 28.12.2010 and appellate authority was directed to decide the matter afresh in accordance with law.

12. Learned Appellate Authority (II), Shimla vide judgment dated 09.08.2011 while affirming the order passed by the learned Rent Controller, dated 26.03.2007, dismissed the appeal filed against it by the present petitioner.

13. It was held by the learned appellate Court that as respondent No. 2 in the eviction petition did not mention as to when he was inducted in possession of the premises as a tenant and by whom and further as it was evident that respondent No. 2 was not in possession of the premises in his capacity as a tenant and it was respondent No. 1 who in fact was tenant in the premises, the same demonstrated that respondent No.2 was inducted into possession of the premises by respondent No. 1 as a tenant after commencement of the 1987 Act and not by the previous landlord. Learned appellate Court also held that as respondent No. 2 was a stranger and was in exclusive possession of the premises, onus thus shifted upon respondent No. 1 to prove terms and conditions on which the respondent No. 2 was kept in possession. It was further held by the learned appellate Court that respondent No. 1 had not produced any evidence to substantiate the terms and conditions on which respondent No. 2 was put in possession and in these circumstances, inference which thus had to be drawn was that either subletting or parting with possession took place in favour of respondent No. 2 or respondent No. 1 had created sub-tenancy and transferred his rights in favour of respondent No. 2 for consideration. It was thus held by the learned appellate Court that as landlords had proved that respondent No. 1 was tenant in the premises and he had sublet or parted with the possession of the premises in favour of respondent No. 2, therefore, findings of the learned Rent Controller to this effect were

sustainable. It was further held by the learned appellate Court that the statement of the landlord that rent was not paid w.e.f. 18.04.1994 by the respondents remained un-controverted and un-rebutted, which demonstrated that respondent No. 1 was in arrears of rent from 18.04.1994 onwards. It was also held by the learned appellate Court that petitioners/landlords came to acquire the property on 10th May, 1994 and 13th May, 1994 to the extent of their respective shares and records demonstrated that respondent No. 1 had not paid any rent to the petitioners after they acquired the property. It was also held by the learned appellate Court that receipt produced by respondent No. 2 was not a genuine document and the same did not prove his status as that of a tenant. On these bases, it was held by the learned appellate Court that petitioners/landlords were entitled to recover arrears of rent due alongwith interest from the respondent and findings to this effect returned by the learned Rent Controller were sustainable. It was further held by the learned appellate Court that totality of circumstances substantiated that age and condition of the building was such that the landlords intended to reconstruct the building and they had also got the plan sanctioned in this regard. Learned appellate Court also held that the petitioners had capacity to mobilize finances for reconstruction of the building and building would result in modernization and would make additional space available and would augment the earning of the landlords. On these bases, it was held by the learned appellate Court that requirement of the petitioners/landlords of the building for the purpose of re-building the same which also included the premises in dispute was bonafide. On these bases, learned appellate Court while affirming the findings returned by the learned Rent Controller, dismissed the appeal so filed before it by the present petitioner/respondent No. 2 before the learned Rent Controller.

14. One more fact which is pertinent to mention at this stage is that during the pendency of the appeal before the learned appellate Court, on the basis of directions issued in this regard by this Court in CMPMO No. 222 of 2010, decided on 28th July, 2010, Identity Card of the present petitioner was permitted to be exhibited and the said document is Ex. AW2/A and Sh. Sunil Kuthiala was examined as AW-1.

15. Feeling aggrieved by the order so passed by the learned Rent Controller as well as the judgment in appeal so passed by the learned Appellate Authority, the petitioner/respondent No. 2 has filed the present revision petition.

16. Mr. Bhupender Gupta, learned senior counsel appearing for the petitioner/respondent No. 2 has assailed the order and judgment so passed by both the learned Courts below on the following grounds:

(A) Mr. Gupta has argued that the judgment passed by the learned appellate Court is not sustainable in the eyes of law as the additional issues which were previously framed by the said Court vide judgment dated 28.12.2010 were not decided by the learned appellate Court and which according to Mr. Gupta was perversity on the face of it as far as the impugned judgment was concerned.

(B) According to Mr. Gupta, both the learned Courts below erred in not appreciating that the landlords had failed to prove that the present petitioner was not inducted as a tenant of the demised premises in his own capacity and further that the landlords had failed to prove that the present petitioner was not in possession of the demised premises before the 1987 Act came into force.

(C) The judgment passed by the learned Courts below were otherwise also not sustainable in the eyes of law as both the learned Courts below erred in not appreciating that the pleadings contained in the rent petition qua subletting were vague, cryptic and not proved on record and this very important aspect of the matter had been ignored by both the learned Courts below.

(D) Both the learned Courts below had erred in not appreciating that the best evidence was concealed by the petitioners/landlords.

17. In support of his contentions, Mr. Gupta has relied upon the following judgments:

"1.Dharam Pal Vs. Durga Dass, Indian Law Reports (H.P. Series) Vol. X 1981 521.

2.Sham Sunder Mehra Vs. Mastan Singh and others, 1994 (1) Sim. L.C. 171"

No other point was urged.

18. On the other hand, Mr. Vinay Kuthiala, learned senior counsel appearing for the respondents has argued that there was neither any illegality nor any perversity either with the order passed by the learned Rent Controller or with the judgment passed by the learned Appellate Authority. Mr. Kuthiala argued that it stood proved on record that the premises in dispute were let out by the previous landlords to respondent No. 1 in the rent petition, who had sublet the property in issue to respondent No. 2 therein after coming into force of the 1987 Act without the consent of the landlord. Mr. Kuthiala further argued that neither the pleadings were cryptic or vague as alleged nor learned Courts below had erred in coming to the conclusion that respondent No. 2 (before the learned Rent Controller) was inducted into the premises in issue as a sub-tenant by respondent No. 1 without the consent of the landlord. It was further argued by Mr. Vinay Kuthiala that the factum of respondent No. 1 not filing any reply to the eviction petition meant that they had conceded and admitted the averments made in the eviction petition. It was further argued by Mr. Kuthiala that there was no merit in the contention of Mr. Gupta that there was perversity in the judgment passed by the learned appellate Court on the ground that the issues previously framed by the learned appellate Court vide judgment dated 28.12.2010 were not decided by the Appellate Authority, because once the judgment vide which the said issues were framed, was set aside by this Court in Civil Revision No. 02 of 2011, the issues which were so framed vide the said judgment set aside, also stood set aside. Mr. Kuthiala further argued that even otherwise learned counsel for the petitioner wanted this Court to re-appreciate the entire evidence again, which was not permissible in exercise of its revisional jurisdiction by this Court, because at this stage, this Court was not to re-appreciate the entire evidence, but it was only to satisfy its judicial conscience as to whether the order and judgment passed by the learned Rent Controller and learned Appellate Authority, respectively were passed on the basis of material on record and the same were not perverse. In support of his contention, Mr. Vinay Kuthiala has relied upon the following judgments:

"1. Hindustan Petroleum Corporation Limited Vs. Dilbahar Singh (2014) 9 Supreme Court Cases 78.

2. Dr. Pushap Lata Sharma Vs. Ramesh Kumari, 2001(1) RCR 269

3. Vallampati Kalavathi Vs. Haji Ismail, 2001(1) RCR 375.

4. Dr. Gyan Parkash Vs. Som Nath and others, 1996(1) RCR 342.

19. I have heard the learned counsel for the parties and have also gone through the records as well as the judgments passed by the learned Rent Controller and learned Appellate Authority.

20. Firstly, I will deal with the contention of Mr. Gupta that there is perversity with the judgment rendered in appeal by the learned appellate Court as the appellate Court did not adjudicate upon the issues which were framed by the said Court as was evident from judgment dated 28.12.2010. The contention of Mr. Gupta is that after the learned Appellate Authority had framed additional issues, it ordered the remand back of the case to the learned Rent Controller for adjudication of the said issues and said judgment of remand was set aside by this Court to this effect only that the matter was not to be re-heard by the learned Rent Controller, but there was no order passed by this Court to the effect that the issues so framed vide judgment dated 28.12.2010 were also not to be heard and decided by the learned Appellate Authority.

21. I am afraid the said contention of the learned counsel for the petitioner does not has any merit. Judgment dated 28.12.2010 demonstrates that the learned appellate Court in its

wisdom vide said judgment framed additional issues and thereafter went on to allow the appeal so filed against the order passed by the learned Rent Controller and remanded the case back to the Court of learned Rent Controller with a direction to the learned Rent Controller to frame additional issues as stated in the said judgment by first giving an opportunity to respondent No. 2 therein to lead evidence on additional issues so framed and thereafter providing opportunity to the petitioners/landlords to rebut the same. It is a matter of record that the judgment so passed by the learned appellate Court dated 28.12.2010 was set aside by this Court vide judgment dated 10th March, 2011 passed in Civil Revision No. 02 of 2011, which reads as under:

> "With the consent of parties, the impugned order dated 28.12.2010, rendered in Rent Controller's Case No. 17-2 of 1997/96, Rent Appeal No. 8-S/13(B) of 2007, is set aside. The Appellate Authority (II), Shimla, H.P. is directed to decide the matter afresh in accordance with law, within a period of four months from today. While taking the decision, the Appellate Authority (II), Shimla, H.P. shall also take into consideration the law laid down by this Court in Smt. Surinder Kaur Vs. Mohinder Pal Singh, Indian Law Reports (Himachal Series) (1976), 620, H.P. The parties are directed to appear before the learned Appellate Authority (II), Shimla, H.P. on 28th March, 2011. The petition stands disposed of."

22. In my considered view, when the judgment vide which learned appellate Court had directed the learned trial Court to frame additional issues and thereafter decide the same was set aside by the Court in Civil Revision No. 02 of 2011, though by a consent order, the judgment so passed by the learned appellate Court was rendered ineffective in toto, which means that the additional issues which were so framed vide the said judgment were also set at naught with the said judgment being set aside by this Court. Now, in this background, it cannot be said that setting aside of the judgment passed by the learned appellate Court dated 28.12.2010 would not mean that additional issues which were so framed by the learned appellate Court on the said date still subsisted. At the cost of repetition, in my considered view, once the judgment passed by the learned appellate Court was set aside, everything contained in the said judgment went away, including the additional issues, which were so framed by the learned appellate Court. Even otherwise, it is not the case of the present petitioner that the additional issues were independently thereafter also framed by the learned appellate Court, but after framing of the same it did not went on to adjudicate upon the additional issues so framed. The judgment which was passed by this Court in Civil Revision vide which it set aside the judgment passed by the learned appellate Court dated 10th March, 2011 is clear and unambiguous. Vide said order, the entire judgment passed by the learned appellate Court was set aside and it is not as if the judgment so passed by the learned appellate Court was only partly set aside and the part of the judgment wherein it had framed the additional issues was not set aside by this Court.

23. Therefore, in view of the above discussion, the submission of the learned counsel for the petitioner that there is perversity in the judgment passed by the learned appellate Court that it had failed to decide the additional issues previously framed by it vide judgment dated 28.12.2010 is without any merit and the said contention is thus rejected.

24. Now, I will touch the second contention raised by the learned counsel for the petitioner, which is to the effect that there was perversity with the findings returned by both the learned Courts below as both the learned Courts below erred in not appreciating that respondent No. 1 was the tenant of the demised premises in own capacity, that too for the last more than 30 years and there was no subletting of the demises premises to him by respondent No. 1 without the consent of the original landlord, as alleged.

25. It is a matter of record that respondent No. 1, who as per the landlords was the original tenant inducted as such in the demised premises by the predecessor-in-interest of the rent petitioners chose not to file any reply to the rent petition. It is also a matter of record that in his reply so filed to the rent petition, respondent No. 2 therein, i.e., the present petitioner took a specific stand that he stood inducted as a tenant in the demised premises by the previous

landlord, i.e., Sh. Sunil Kuthiala and therefore, he was not in possession of the demised premises as sub-tenant, but he was in possession of the same in his capacity as a tenant. It is also a matter of record that the present landlords/rent petitioners purchased the building in which the demised premises is situated from its previous landlords vide sale deeds dated 10.05.1994 and 13.05.1994, respectively. There is also on record Ex. PX, a list of the tenants which was handed over to the rent petitioners by Sh. Sunil Kuthiala, one of its previous owners at the time when agreement to sell the said property was entered into between the previous owners and the present landlords. A perusal of the said list demonstrates that name of respondent No. 1 in the rent petition, i.e., Ram Dass Salig Ram is mentioned in the said exhibit, however, the name of present petitioner is not mentioned in the same as a tenant of the building in issue. This list of tenants stands duly proved on record and furnishing of the said list by Sunil Kuthiala, who himself in fact has appeared as a witness during the pendency of the appeal on behalf of the present petitioner has not been denied by him. The explanation which has been given by him as to why the said list was issued to the present landlords was that it was due to pressure. Now, in my considered view, the justification which has been given by Sh. Sunil Kuthiala as to why this particular list was given to the present landlords is not satisfactory. It is not understood as to what compulsion or pressure was there to have had issued the said list, as has been alleged by Sh. Sunil Kuthiala at the time when agreement to sell the building in issue was being entered into between the previous owners and the present owners.

26. Another important aspect of the matter is that the factum of the present petitioner having been inducted as tenant in the demised premises in his own capacity has been tried to be established by the present petitioner primarily as per the testimony of one of its previous owners, i.e., Sunil Kuthiala, who was permitted to depose during the pendency of the appeal by this Court vide judgment dated 28th July, 2010 passed in CMPMO No. 222 of 2010.

27. Now, at this stage, if we peruse the testimony of the present petitioner, who entered into the witness box before the learned Rent Controller as RW-1, a perusal of the same demonstrates that he has deposed on oath that he was inducted as tenant in the demised premises by Sh. Sunil Kuthiala about 20 years ago. The statement of this witness was recorded in the Court on 17.11.2006. Now, if we simultaneously peruse the statement of Sh. Sunil Kumar Kuthiala, who deposed in the Court as AW-1, i.e., in the appellate Court on 25.08.2010, a perusal of his deposition demonstrates that he has stated that he had never seen Ram Dass Salig Ram firm as tenants of the demised premises in the building since he gained senses and he has always seen the present petitioner as tenant of the demised premises. In my considered view, the fallacy becomes apparent herein. According to petitioner, it was Sunil Kuthiala, who inducted him as a tenant somewhere in the year 1986, but Sunil Kuthiala has not stated that the present petitioner was inducted by him as tenant over the demised premises and the stand of Sunil Kuthiala is that he has always seen the present petitioner only as a tenant in the demised premises. The remaining ocular evidence which has been produced by the present petitioner to prove that he was in possession of the demised premises as a tenant in his own capacity and his possession was prior to coming into force 1987 Act lacks any credibility.

28. Now, another important aspect of the matter which requires to be highlighted at this stage is that though the petitioner claims himself to be a tenant qua the demised premises in his own capacity, however, he has not produced on record any rent receipt etc. qua the demised premises except Ex. R-1, which pertains to the year 1993-94 and demonstrates that Sunil Kuthiala had received rent from Sh. Rajinder Kumar from 20.12.1993 to 28.02.1994. There is nothing produced on record except this Ex. R-1 from which it can be inferred that the present petitioner had paid rent qua the premises in issue to its previous owners in his capacity as a tenant. The factum of his being a tenant of the demised premises in his capacity as tenant was also tried to be established by the petitioner on the strength of document Mark-A, which is a communication issued by Telecom District Engineer, Shimla and a copy of voter list Mark-B, but incidentally these documents also pertain to the year 1992-1993only. Another document which was permitted to be placed on record by this Court during the pendency of the appeal on behalf of the present petitioner was Ex. DW2/A, which is an Identity Card issued in favour of the

petitioner. On the strength of the said Identity Card, which contains the date of discharge of the present petitioner as 27.12.1969, the petitioner has emphasized to demonstrate that this document proved that he was in possession of the demised premises since the year 1969. In my considered view, the said contention of the petitioner is also totally misconceived. The date as to when this Identity Card was issued is not on record. Who issued the said Identity Card and from where the same was issued is also not on record. It simply contains the date of discharge of the petitioner alongwith address given on it. However, this alone is not sufficient to lead to the conclusion that the petitioner in fact was in possession of the demised premises since the year 1969. Incidentally, as I have also mentioned above, the petitioner in his deposition in the Court in the year 2006 stated that he was inducted as a tenant about 20 years back. Now, if that is to be believed, then even as per the petitioner, he was inducted as a tenant of the demised premises only in the year 1986. However, the Identity Card reflects his date of discharge as 27.12.1969. Therefore, there is a great mismatch in the deposition of the petitioner in the Court as compared to the inference he wants this Court to draw from Ex. AW2/A

29. It was argued on behalf of the petitioner that the order and the judgment passed by both the learned Courts below were not sustainable in the eyes of law as both the learned Courts below have erred in not appreciating that the pleadings which were made by the landlords in the rent petition qua the alleged sub-tenancy of the present petitioner over the demised premises were vague and cryptic. It was further the contention of the petitioner that it was not mentioned in the said petition as to when the present petitioner was inducted as a sub-tenant over the demised premises. Further, according to the petitioner, the best evidence from which it could have been demonstrated by the landlords that it was not the present petitioner, but someone else who was the original tenant in the said property was respondent No. 1 before the learned Rent Controller and the said best evidence was concealed by the landlords from the Court, for which adverse inference had to be drawn against them.

30. In my considered view, there is no force in the said submission of the petitioner. A perusal of the rent petition (i.e. the amended petition) demonstrates that in para-16 of the same, it has been mentioned that the premises in question are in exclusive possession and control of respondent No. 2 therein in his capacity as a sub-tenant. Besides this, in para-18 of the rent petition, it has been mentioned that respondent No. 1 therein has after commencement of Himachal Pradesh Urban Rent Control Act, 1987, transferred his rights under lease in favour of respondent No. 2 for valuable consideration and at present, the respondent No. 2 was in exclusive possession and control of the premises in question. It was further mentioned that the act of subletting was done by respondent No. 1 without the written consent of the rent petitioners or their predecessors-in-interest. It is also pertinent to mention that in Columns No. 14 and 15 of the Rent Petition, it has been mentioned that respondent No. 1 therein was tenant in respect of the premises prior to the purchase of the same by the rent petitioners from their predecessors-in-interest and they were not aware as to whether any agreement was executed as no copy of the same had been supplied to the petitioners by the previous owners except list of tenants.

31. In my considered view, it cannot be said that the averments made in the rent petition with regard to the person being in possession of the demised premises by virtue of subletting are either cryptic or vague. A perusal of the rent petition demonstrates that it is apparent from reading of the same that the landlords therein intended to say that the demised premises were in fact let out by their predecessor-in-interest to respondent No. 1, who after coming into force 1987 Act without the written consent of the previous landlord had sublet the same to respondent No. 2. Therefore, in this view of the matter, in my considered view, there is no merit in the contention of the present petitioner that averments made with regard to subletting of the demised premises in the eviction petition were vague.

32. Now, as far as the factum of the landlords concealing the best evidence from the Court is concerned, in my considered view, there is no force in the said submission of the present petitioner also. As per the rent petitioners, the premises in issue were let out to Ram Dass Salig Ram. Ram Dass Salig Ram were duly impleaded by them as party respondent in the rent petition alongwith the present petitioner, who was impleaded as respondent No. 2 in the rent petition. It is

a matter of record and was not disputed during the course of arguments that both the respondents were served before the learned Rent Controller and they had put in appearance through a common counsel and Vakalatnama of the common counsel is also on record. It is also a matter of record that no reply to the eviction petition was filed by respondent No. 1. Now, in the absence of respondent No. 1 having not contested the claim as was put forth in the eviction petition after being served, the only inference which could be drawn from the same is this that the contentions which were made by the rent petitioners stood accepted by respondent No. 1. Therefore, when respondent No. 1 did not contest the claim of the landlords, there was no necessity for the landlords to have had further examined the said respondent to prove its case. Even otherwise, when the landlord had impleaded respondent No. 1 as a party respondent and the said respondent having impliedly admitted the claim of the landlords by not filing any reply to the claim petition after service, it is not understood as to what was the necessity for the landlords to have had taken the risk of calling upon the said respondent to depose in his favour in the witness box. Further, during the course of arguments, learned counsel for the petitioner could not satisfy as to what prevented the present petitioner to examine respondent No. 1 before the learned Rent Controller as his witness.

33. In my considered view, in the peculiar circumstances of the case, when the contention of the landlords stood impliedly conceded to by respondent No. 1, who as per the landlords was original landlord, then the entire onus shifted upon respondent No. 2 in the rent petition, i.e., present petitioner, to have had demonstrated that he was not inducted in the demised premises as a sub-tenant by respondent No. 1, but he stood inducted in the demised premises as a tenant in his own capacity by the original landlords. Present petitioner has miserably failed to discharge the said onus.

34. Besides this, the evidence which has been produced on record by the landlords both ocular as well as documentary, which has also been taken into consideration by both the learned Courts below, in my considered view, duly establishes the fact that before the said premises were purchased by the rent petitioners, the same were let out by their predecessors-in-interest to Ram Dass Salig Ram, who thereafter had sublet the same after coming into force 1987 Act to respondent No. 2. On the other hand, respondent No. 2 has not been able to discharge the onus that he was not inducted into the premises after coming into force the 1987 Act by respondent No. 1 by subletting and rather he was inducted as a tenant over the demised premises in his own capacity. I have already mentioned above that the statement of Sunil Kuthiala does not furthers the cause of the present petitioner, as his statement is neither credible nor reliable nor it inspires the confidence of the Court. Further, ocular evidence which the present petitioner has produced on record also in no way substantially proves that either the present petitioner was inducted as a tenant over the demised premises in his capacity by the previous owners or he was in possession thereof either as a tenant or a sub-tenant before coming into force of the 1987 Act. Not even a single document has been placed on record by the present petitioner from which it can be inferred that he was in possession of the demised premises before coming into force of the 1987 Act. The documents which he has placed on record to prove his tenancy pertains to 1992-93 or one or two years prior to the above mentioned years. In these circumstances, in my considered view, there is neither any perversity nor any illegality with the order and judgment passed against the present petitioner by both the learned Courts below.

35. Now, I will also refer to the judgments which have been relied upon by the learned counsel for the parties in support of their respective contentions.

36. In **Dharam Pa**l Vs. **Durga Dass,** Indian Law Reports (H.P. Series) Vol. X 1981 P. 521, the issue involved was as to whether eviction petition for sub-letting could have been preferred under the provisions of Section 14 of the Himachal Pradesh Rent Control Act, 1971, wherein sub-letting had taken place prior to the Act of 1971 coming into force or not. It was held by this Court that eviction petition for sub-letting under the 1971 Act was maintainable only if it was proved that sub-tenancy came into existence after commencement of 1971 Act.

37. In my considered view, this judgment has no applicability in the facts of this case, because the petitioner herein has failed to prove that he was in possession of the demised premises in any capacity before coming into force of the 1987 Act.

38. In **Sham Sunder Mehra** Vs. **Mastan Singh and others** 1994 (1) Sim. L.C. 171, it was inter alia held by this Court that for subletting, a landlord is required to allege and then prove that tenant has after the commencement of the Act, without the written consent of the landlord, transferred his rights under the lease or sublet the entire building or rented land or any portion thereof and in case there was no pleading and subletting took place after commencement of the Act, then there may be lack of cause of action.

39. In my considered view, this judgment is also of no assistance to the petitioner. There is no lack of pleading qua the factum of subletting as it has been clearly mentioned in the petition filed under Section 14 of the Himachal Pradesh Urban Rent Control Act, 1987 before the learned Rent Controller that sub-tenancy was created by respondent No. 1 therein in favour of the present petitioner without the consent of the landlord after the commencement of the 1987 Act.

40. A five Judge Bench of the Hon'ble Supreme Court in **Hindustan Petroleum Corporation Limited** Vs. **Dilbahar Si**ngh (2014) 9 Supreme Court Cases 78 has held:

> "43.....The consideration or examination of the evidence by the High Court in revisional jurisdiction under these Acts is confined to find out that finding of facts recorded by the Court/Authority below is according to law and does not suffer from any error of law. A finding of fact recorded by Court/Authority below, if perverse or has been arrived at without consideration of the material evidence or such finding is based on no evidence or misreading of the evidence or is grossly erroneous that, if allowed to stand, it would result in gross miscarriage of justice, is open to correction because it is not treated as a finding according to law. In that 30 Page 31 event, the High Court in exercise of its revisional jurisdiction under the above Rent Control Acts shall be entitled to set aside the impugned order as being not legal or proper. The High Court is entitled to satisfy itself the correctness or legality or propriety of any decision or order impugned before it as indicated above. However, to satisfy itself to the regularity, correctness, legality or propriety of the impugned decision or the order, the High Court shall not exercise its power as an appellate power to reappreciate or re-assess the evidence for coming to a different finding on facts. Revisional power is not and cannot be equated with the power of reconsideration of all questions of fact as a court of first appeal. Where the High Court is required to be satisfied that the decision is according to law, it may examine whether the order impugned before it suffers from procedural illegality or irregularity."

41. The tests laid down by the Hon'ble Supreme Court are squarely applicable in the facts and circumstances of this case, as this Court has not undertaken the exercise of re-appreciating the evidence, but it has gone through the evidence to satisfy its judicial conscience as to whether there was any procedural illegality or irregularity and further whether the conclusions arrived at by the learned Courts below were borne out from the records or perverse. As both the learned Courts below have returned the finding that the present petitioner being a sub-tenant was inducted in the premises by the original tenant after coming into force the 1987 Act without the consent of the landlord, these findings of fact recorded by both the learned Courts below even otherwise do not call for any interference by this Court as the said findings of fact are duly brone out from the records of the case. It cannot be said that the findings recorded by the learned Courts below have been arrived at without considering the material evidence or by misreading the same.

42. In **Dr. Gyan Parkash** Vs. **Som Nath and others** 1996(1) RCR 342, the Hon'ble Supreme Court has held:

"9. The learned counsel appearing for the respondent Nos. 2 and 3 has, however, submitted that the landlord is admittedly an absentee landlord in this case and the uncle of the landlord was an agent of the landlord who had been receiving rent from respondent No. 3 by cheques issued by the said respondent. No cogent explanation has been given as to why the said agent had allowed the respondent No. 3 to make payment by the cheques in respect of the said shop. Such payment of rent by the respondent No. 3 for the shop room coupled with exclusive possession of the said shop room by her and acceptance of such rent from her over the years only indicate that the landlord through his agent was fully aware that the said respondent No. 3 had been exercising her right as a tenant and in that capacity had been making payment of the rent for the said shop room. Even then, the landlords accepted such payment of rent from respondent No. 3. The landlord, therefore, cannot be permitted to contend that there had been any sub-tenancy without the knowledge and consent of the landlord in favour of the respondent No. 3 by the original tenant Som Nath or by respondent No. 2 Ashwani Kumar. The learned counsel has submitted that at least from 1973 onwards, the exercise of such right by the respondent No. 3 qua tenant has been established beyond any shadow of doubt and the implication of such payment and acceptance of rent not having been properly considered by the Courts below, the High Court was justified, in exercise of its revisional power under Section 21(5) of the Rent Act to interfere with erroneous finding of fact arrived by non-consideration of relevant material. He has submitted that in any event, in view of long possession of respondent No. 3 qua tenant with full knowledge of the landlord by accepting payment of rent from her by cheques having been established convincingly, no interference need be made by this Court in its discretionary jurisdiction under Article 136 of the Constitution because exercise of such jurisdiction will be against the equity in this case. This appeal, therefore, should be dismissed.

10. After giving our anxious consideration of the facts and circumstances of the case and contentions made by the learned counsel for the parties, it appears to us that in the facts of the case, the High Court had quite improperly exercised its jurisdiction for revision under Section 24(5) of the Rent Act. It appears to us that the trial Court had considered the case of payment of rent by the respondent No. 3 by cheques but such payment has not been accepted by the trial Court as constituting creation of new tenancy in favour of respondent No. 3. The Court of appeal has not made any specific discussion of such payment. As the judgment of the appellate authority is a judgment of affirmance, we do not think that any elaborate discussion on the said aspect was required. It appears to us that the High Court being oblivious of the limited scope and ambit of Section 24(5) of the Rent Act, has exercise the power of a Court of appeal and having reappreciated the entire evidence come to a contrary finding. Such exercise as a court of appeal should not have been done by the High Court in the facts of the case."

43. In **Lekh Raj** Vs. **Muni Lal**, 2001(1) RCR 168, the Hon'ble Supreme Court has held:

"10. The pith and substance of these authorities, to which appellant relies is that Court under its revisional jurisdiction cannot disturb finding of facts nor could it reappraise evidence on record, it can only interfere if there is impropriety and illegality in the impugned order. One of the submissions for the appellant is that the High Court in its revisional jurisdiction should not have permitted the inspection of the disputed shop by the local Commissioner while exercising its revisional jurisdiction. The submission is, the revisional court could only take into consideration the fact existing on the date of filing of the eviction petition

supported by evidence on record, thus by bringing on record the aforesaid report of the local Commissioner which was called after 18 years of the pendency of the revision in the High Court cannot be said to be within the jurisdiction of the Revisional courts."

44. In **Vallampati Kalavathi** Vs. **Haji Ismai**, 2001(1) RCR 375, the Hon'ble Supreme Court has held:

> "13. As the language of the section suggests, the revisional power vested in the High Court is to be used for the purpose of satisfying itselfas to the legality, regularity or propriety of such order or proceeding, and if satisfied that the order/orders suffer any such vice the High Court may pass such order in reference to the proceeding as it thinks fit. The expression legality, regularity or propriety are undoubtedly wider than mere correction of jurisdictional error. But even such revisional power cannot be exercised to upset the concurrent findings of fact recorded by the Forums below merely on the ground that the High Court is inclined to take a different view on the materials on record in the case. We should not be understood to be saying that the concurrent findings of fact can in no case be interfered with in revision. For such interference it has to be shown that the findings recorded by the Forums below suffer from any inherent defect or are based on inadmissible or irrelevant materials or are so perverse that no reasonable person will come to such conclusion on the materials."

45. In **Dr. Pushap Lata Sharma** Vs. **Ramesh Kumari** 2001(1) RCR 268, this Court has held that the finding returned by the Courts on the issue of subletting is a question of fact. Relevant paras of the judgment are quoted herein below:

> "26. The question which has been raised before me is: Whether the authorities below have committed an error of law and/or jurisdiction in recording a finding that Smt. Savitri Devi has parted with exclusive possession in favour of Yash Pal. Now, it is not in dispute that Smt. Savitri Devi was not the original tenant. The suit premises were let to Kishan Chand, husband of Smt. Savitri Devi, who was medical practitioner. It is in evidence that petition No. 2 Yash Pal was working with Kishan Chand. It is also not in dispute that Kishan Chand died in 1989. It is undisputed that Smt. Savitri Devi was an old lady of about 65 years of age. It was the allegation of the respondent that Smt. Savitri Devi had sublet the premises to petitioner No. 2 Yash Pal in 1990, as against the version of Smt. Savitri Devi that possession of the suit premises was with her and petitioner No. 2 was merely in her employment. According to Smt. Savitri Devi, during the life time of her husband, petitioner No. 2 used to work with Kishan Chand, and after his death, she continued to allow petitioner No. 2 as her employee and was paying salary to him. She had also stated that the relevant record was produced by her from which the fact relating to employment of petitioner No. 2 by Smt. Savitri Devi could be established. Reliance in this connection was placed by the petitioners on documentary evidence in form of returns, certificates and payment of salary. The authorities below, however, appreciating the facts and circumstances including the fact that some of them were prepared at a time with the same ink, did not believe them to be genuine and observed that they were prepared at a belated stage as an after-thought only with a view to create an impression that petitioner No. 2 was not sub-tenant but was an employee of petitioner No. 1. It was, therefore, not believed by the authorities.
>
> 27. In my opinion, such a finding can be said to be "a pure finding of fact", which cannot be disturbed in exercise of revisional jurisdiction of this Court.
>
> .....
>
> 47. From the above decisions, in my considered opinion, the legal position appears to be fairly well-settled. It is this: Whenever a landlord approaches a

competent Court or a Rent Controller praying for eviction of tenant on the ground that he has, without the permission of the landlord sublet demised premises to a stranger, he must prove to the satisfaction of the Court or the Rent Controller, as the case may be, that he has parted with exclusive possession of the demised premises in favour of the stranger and that he had not retained possessory right or control over the demised premises. But once the landlord is able to establish that fact, it is open to a Court or Rent Controller to draw an inference that such parting of possession by the tenant in favour of a stranger is with valuable consideration. It is then for the tenant to rebut the said presumption by leading evidence and by showing to the Court or the Rent Controller that there is no subletting and the case does not fall within the mischief of the relevant provisions of law. If he is unable to rebut initial presumption, it is permissible to the Court or the Rent Controller to draw or make an order of eviction against him on the ground of sub-letting.

48. In the instant case, as observed by me hereinabove, both the authorities, on the basis of evidence adduced by the parties, held that Yash Pal, petitioner No. 2 was in exclusive possession of the suit property and that Smt. Savitri Devi, petitioner No. 1 (since deceased) had parted with possession in favour of said Yash Pal. In view of that finding, initial onus which was required to be discharged by the landlady had been discharged by her. In the light of the laid down by the Supreme Court in Rajbir Kaur and other cases, it was, therefore, open to the Rent Controller to raise a rebuttable presumption in favour of the landlady that parting of such exclusive possession by petitioner No. 1 in favour of petitioner No. 2 was with valuable consideration in the absence of rebuttal evidence by the tenant. Since there was no rebuttal evidence, the Courts below were fully justified in drawing an inference of sub-letting and in passing an order of eviction against the tenant, which cannot be said to be illegal or contrary to law and deserves no interference."

46. Besides this, a perusal of the judgment and order under challenge by way of this revision petition also demonstrate that the findings which have been returned by the learned Courts below with regard to arrears of rent as well as re-construction of the building are also duly borne out from the records of the case and the same are not perverse. Landlords have duly substantiated that the condition of the building is such that it requires re-construction, which cannot be carried out without the same being vacated by its occupants and further arrears of rent from tenant/respondent No. 1 before the learned Rent Controller also stands duly proved on record. Therefore, findings returned to this effect also do not warrant any interference in the present revision petition.

47. In view of the discussion held above, as there is no merit in the present revision petition, the same is dismissed, so also miscellaneous applications, if any. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh. .....Appellant.

Versus

Sanjeev Kumar. .....Respondent.

Cr. Appeal No. 184 of 2012
Reserved on: 12.05.2017
Decided on: 25.05.2017

Indian Penal Code, 1860- Section 323, 341, 376 and 511- Prosecutrix and her friend, D were returning through forest area, when the accused tried to sexually assault the prosecutrix by pulling her clothes- the accused snatched dupatta of the prosecutrix and tried to strangulate her with it – accused threw the prosecutrix in a drain – D narrated the incident to the mother of the prosecutrix – search was made for prosecutrix and she was found in an injured and unconscious condition – the accused was tried and acquitted by the Trial Court- held that Medical Officer had not found any evidence of sexual intercourse – injuries were in the nature of scratches – the identity of the accused was not established- name of different person was given in the FIR – the prosecutrix was acquainted with the accused- D was declared hostile – there are contradictions regarding the recovery of dupatta- the Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-8 to 26)

Cases referred:

K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258

T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401

For the appellant:	Mr. Puneet Rajta, Deputy Advocate General, with Mr. J.S. Guleria, Assistant Advocate General.
For the respondent:	Mr. R.L. Chaudhary, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal has been preferred by the appellant/State (hereinafter referred to as "the appellant") laying challenge to the judgment, dated 31.12.2011, passed by the learned Additional Sessions Judge(II), Kangra, at Dharamshala, H.P., in Sessions Trial No. 36/2011, whereby the accused/respondent (hereinafter referred to as "the accused") was acquitted for the offence punishable under Sections 341, 323, 376 and 511 of Indian Penal Code, 1860 (hereinafter referred to as "IPC").

2. Tersely, the facts giving rise to the present appeal, as per the prosecution, are that on 21.11.2005 the prosecutrix (name withheld), alongwith her friend Daya Devi, went to Mali Ration Depot from her village Gharchindi. Around 11 a.m., when both of them were coming back, through forest area, accused, Sanjeev Kumar, tried to sexually assault the prosecutrix by pulling her clothes. The accused also snatched the *'dupatta'* of the prosecutrix and tried to strangulate her with it. Thereafter, accused threw the prosecutrix in a drain after putting some papers in her mouth. It has further come in the prosecution story that Daya Devi came from the spot and the prosecutrix could not come. Daya Devi, on being inquired by mother of the prosecutrix, narrated the incidence to her. Resultantly, parents of the prosecutrix alongwith others searched and found her at Kunal Khola, in an unconscious condition. The prosecutrix had sustained injuries, so she was immediately taken to hospital and police was accordingly informed. Police recorded the statement of the prosecutrix, whereupon an FIR was registered. The prosecutrix was got medically examined. Police prepared the spot map, seized *salwar, chappal* and *dupatta* of the prosecutrix and also seized bark of the tree with which accused allegedly tied the *dupatta.* The sealed parcels were sent for chemical examination and reports of chemical analysis were also obtained. Police thoroughly investigated the matter and after conclusion of investigation *challan* was presented in the Court.

3. In order to prove its case, the prosecution examined as many as seventeen witnesses. The statement of the accused, under Section 313 Cr.P.C., was recorded. No defence witness was led by the accused.

4. The learned Court below, vide its judgment dated 31.12.2011, acquitted the accused for the offence punishable under Sections 341, 376, 511 and 323 IPC, hence the present appeal.

5. We have heard the learned Deputy Advocate General for the appellant/State and learned counsel for the respondent/accused.

6. The learned Deputy Advocate General has argued that the findings arrived at by the learned Trial Court are wrong and illegal, as the learned Court below rendered its findings on surmises and conjectures, ignoring the weight of available evidence against the accused. He has further argued that the learned Trial Court did not appreciate the evidence to its right perspective. He prayed that the judgment of acquittal may be set aside and the accused may be convicted. In contrast to the arguments addressed by the learned Deputy Advocate General, the learned counsel for the accused has argued that the story of the prosecution is full of lacunae and there are material contradictions in the statements of the witnesses, which render the prosecution story doubtful and full of suspicions, thus no interference in the judgment of acquittal is called for.

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

8. PW-1, Dr. Anju Viz, deposed that on 22.11.2005 she medically examined the prosecutrix. She observed as under:

> ***"Labia minora & majora blood stained of menstruation. No injury marks seen. No semen stains seen on external genitalia and pubic hair. Hymen not intact, no bleeding and no inflammation seen at hymen site. Introitus admits two fingers easily. Vagina healthy. No injury or lacerations see. Cervix nulliparous and healthy. Patient menstruating. Uterus nulliparous. Swabs taken from cervix and vagina or posterior fornix. Pubic hair also sent."***

This witness has further deposed that on 25.04.2006, she, on receipt of FSL report, gave her final opinion wherein she found no evidence qua sexual intercourse. She has deposed that the prosecutrix was referred to her from Palampur for gyne opinion.

9. PW-2, Dr. Jaidesh Rana, deposed that on 22.11.2005, around 1:30 a.m., he examined the prosecutrix and observed as under:

> ***"(i) abrasion 1x1cm on right side of the forehead.***
>
> ***(ii) abrasion 1x1 cm on left side of the forehead.***
>
> ***(iii) abrasion on the bride of the nose 1x1 cm.***
>
> ***(iv) bruise on the left eye 3x3 cm with swelling left temporal region.***
>
> ***(v) abrasion on chin dark browny in colour 3x1 cm.***
>
> ***(vi) abrasion on right supra clavicular region dark brown 3x1 cm.***
>
> (vii) ***abrasion 2 cm wide and 11 cm long present on the neck extending from the right side of the neck and anteriourly to left side of the neck latterly."***

This witness referred the prosecutrix for gynecologist opinion at RPGMC, Dharamshala. He has admitted in his cross-examination that the injuries sustained by the prosecutrix were in the nature of scratches. As per this witness, the prosecutrix inquired from him about the cause of injuries. He has deposed that owing to injuries No. iv and vii, a person may become unconscious. He has further deposed that injury No. vii could happen if a person wears a chain of bigger size.

10. The testimony of PW-3 (prosecutrix) is vital in the case in hand. She has deposed that on 21.11.2005, around 10:00 a.m., she alongwith her friend Daya, went to Ration Depot,

Malli. When they were returning from the depot, and were crossing the forest, they saw the accused lying down in a *nallah*. The accused, after seeing them, got up and started pulling her clothes. As per the prosecutrix, she started crying and accused pulled her *dupatta* and tried to strangulate her. He took the prosecutrix to a *nallah* and the prosecutrix tried to escape. She sustained injuries on her neck as her *dupatta* got entangled around her neck. She also sustained injuries on her head and face. Thereafter, the accused committed rape on her and when she regained consciousness, she felt pain on her body and private parts. The accused had also filled her mouth with papers. She has further deposed that her mother, alongwith some boys of her village, took her to her house. The prosecutrix has further deposed that when she lodged the report, she was under the impression that name of the accused is Surinder, however, later on his actual name was known as Sanjeev Kumar. The prosecutrix knew the accused, as he had once come to her house with her brother. The prosecutrix had also seen the accused twice/thrice in the market. She was shifted to hospital by her father and police visited the hospital, recorded her statement, Ex. PW-3/A, which was signed by the prosecutrix. She was medically examined in SDH, Palampur and at Dharamshala. As per the prosecutrix, on subsequent morning, i.e. 22.11.2005, she gave her statement to the police. On 24th November police, at her instance, took into possession her *kameez* (shirt) and *salwar,* vide seizure memo, Ex. PW-3/B, which bears her signatures. Roop Lal and Bhagat Singh were also present there at the time of recovery. The prosecutrix has further deposed that when their scuffle started, Daya ran way from there and the scuffle lasted for ten minutes. The prosecutrix, in her cross-examination, has deposed that villagers use the same passage, through which they were returning. The accused was lying amidst the passage and the time was around 12:00/12:30 p.m. She was carrying 12 kgs wheat and approximately 5 kgs sugar. She has further deposed, in her cross-examination, that when the accused started pulling her clothes, wheat and sugar fell down. She did not remember when she was taken to her house. The prosecutrix tried to ran away, however, accused overpowered her. He pulled her *dupatta* and tied the same around her neck. She was taken to her home and then to the hospital. Her brother gave the mobile number of the accused to the police. She has further deposed that firstly the accused tried to rape her and when she became unconscious, he raped her in unconscious state. She regained consciousness in her house. The prosecutrix, in her cross-examination has deposed that when the accused came to their house, he disclosed to her family members that he is a Captain in the Army.

11. PW-4, Dr. R.K. Ahluwalia, deposed that on 29.01.2006 he medically examined the accused and found him capable of performing sexual intercourse. He preserved the underwear of the accused and sent the same for chemical examination. PW-5, Rani Devi, who is mother of the prosecutrix, deposed that on 21.11.2005 her daughter, around 12:00 noon, went to Malli for bringing ration from the depot. She got baffled when her daughter did not return till 4:00 p.m. and went to the house of Daya. On inquiry, Daya told her that accused met the prosecutrix and started quarreling with her. He also asked the prosecutrix to marry her, but she refused. PW-5 has further deposed that she went to the spot alone and found the prosecutrix unconscious in the *nallah.* There was a piece of paper in her mouth and *dupatta* was also tied around her neck. She found ration scattered on the spot and there were injury marks on the face and neck of the prosecutrix. She, with the help of Sanjay Kumar and Satpal, shifted the prosecutrix to her house. The prosecutrix regained consciousness after two hours and divulged to her that accused started scuffling with her and asked her to marry him. However, when she refused to marry him, he threatened to rape her. As per this witness, the prosecutrix was taken to hospital by her husband and police came on the spot on subsequent morning. Police seized *dupatta* and *chappal,* vide seizure memos Ex. PW-5/A and Ex. PW-5/B,respectively, which were handed over to her. This witness, in her cross-examination, has deposed that she divulged to police what had been told to her by Daya (PW-17). She reached the spot around 4:15 p.m. and it takes approximately half an hour to reach Kunal Khola from her village. She reached there in 3/4 minutes and found one end of *dupatta* wastied around the neck of her daughter and the other end was tied with a tree. She has categorically deposed that she brought the *dupatta* to her house and she told to the police that *dupatta* had been brought by her. The accused was not called by them and her son (brother of the prosecutrix) did not know the accused. She disclosed

to the police the number wherefrom the accused used to call her. She has further deposed that she did not remember when she reached Kunal Khola. As per this witness, *dupatta* was not seized by the police on the spot. When the prosecutrix vomited, papers came out of her mouth and the vomit was kept in a bottle.

12. PW-6, Shri Roop Lal, deposed that on 22.11.2005, he was associated by the police. PW-5, Rani Devi, handed over a pair of *chappal,* vide seizure memo Ex. PW-5/B, which was witnessed by him and Bhagat Ram. The bark of the tree, on which the *dupatta* was allegedly tied, was also taken into possession vide memo Ex. PW-6/A. As per this witness, on 24.11.2005 the prosecutrix produced shirt and *salwar*, which are Ex. P-1 and Ex. P-2, and the same were taken into possession vide memo Ex.Pw-3/B. This witness, in his cross-examination has deposed that PW-5, Rani Devi, is his relative. When he went to the spot, *dupatta* was tied with the tree at approximately 5-6 or 4/4½ feets' height. PW-7, Kali Dass (father of the prosecutrix), deposed that on 21.11.2005 he had gone to Panchrukhi for work and returned around 7 p.m. His wife, Rani Devi (PW-5) narrated the entire incidence to him. This witness is a hearsay witness and he has deposed the story disclosed to him by his wife (PW-5). This witness in his cross-examination has deposed that the prosecutrix did not say anything in the hospital.

13. PW-8, Constable Lal Chand, deposed that on 02.05.2006 MHC Kehar Singh, vide RC No. 18/21, handed over him a sealed parcel, which he deposited in FSL, Junga, on the same day. He had handed over the receipt thereof to MHC and the said parcel was not tampered till the time it remained in his custody. PW-9, ASI Kehar Singh, deposed that on 24.11.2005 ASI Onkar deposited with him four parcels, which contained six seals of seal impression 'T', a parcel containing three seals of seal 'ZH' and a parcel containing four seals of seal 'CHP'. This witness made an entry qua the parcels in the *malkhana* register. He has further deposed that on 05.02.2006, vide RC No. 18/21, he sent two parcels, containing seal 'T', a parcel containing seal 'ZH' and a parcel containing seal 'CHP', through constable Lal Chand to FSL, Junga, and receipt was handed over to him. As per this witness, the aforesaid case property remained entact under his custody and was not tampered with. PW-10, Deputy Superintendent of Police, Sanjeev Chauhan, deposed that he prepared the *challan* and on receipt of reports, Ex. PX and PY, from Forensic Science Laboratory, he prepared supplementary *challan.* PW-11 has signed the FIR.

14. PW-12, SI Onkar Singh, deposed that on 22.11.2006 MHC, Police Station Palampur, received information that a girl has been admitted, in an injured condition, in Palampur Hospital. He, alongwith other police personnel, went to the hospital. He moved application, Ex. PW-12/A, before Medical Officer, Palampur, for recording the statement of the prosecutrix and for her medico legal certificate. The doctor gave his consent for recording the statement of the prosecutrix, vide endorsement, Ex. PW-12/B, and he recorded her statement, Ex. PW-3/A. He sent the *rukka,* through Constable Gopal, for registration of FIR. He prepared the spot map, Ex. PW-12/D. This witness has categorically stated that mother of the prosecutrix, Rani Devi (PW-5), in presence of Roop Lal and Bhagat Ram, produced a *dupatta* and a *chappal,* which was taken into possession vide seizure memos, Ex. PW-5/B and PW-5/A, respectively, and the memos bear the signatures of PW-5 and the aforesaid witnesses. He also took into possession bark of the tree, Ex. P5, vide recovery memo, Ex. PW-6/A. Aforesaid *dupatta, chappal* and bark were sealed in three parcels with six seals of seal having impression 'T' and the sample seal was handed over to witness Bhagat Ram. Facsimile seal was also taken on separate piece of cloth, which is Ex. PW-12/E. He also recorded the statements of the witnesses. As per this witness, on 24.11.2005, in presence of Roop Lal and Bhagat Ram, the prosecutrix produced a shirt, Ex. P-1, and a *salwar,* Ex. P2, which was taken into possession vide recovery memo, Ex. PW-3/B. He sealed the aforesaid clothes in a parcel and sealed the same with seal impression 'T' and facsimile seal was handed over to Bhagat Ram. As per his version, he recorded the statements of Sanjay, Daya and Rani Devi, which are Ex. PW-12/F, Ex. PW-12/G and Ex. PW-12/H, respectively. This witness, in his cross-examination, stated that he did not take into possession record of the ration depot, however, he recorded the statement of salesman of the ration depot (PW-14, Ram Saran). He has admitted that he did not take into possession sugar and flour, which was scattered on the spot.

15. PW-13, Naresh Kumar (brother of the prosecutrix), deposed that on 21.11.2005 his sister went to Mali depot and when she did not return, he alongwith Sanjay and Deepak searched her. They found the prosecutrix in an unconscious state in Kunal Khola *nallaha.* The prosecutrix had sustained injuries on her back, eyes and neck. They brought her to their house and thereafter she was shifted to hospital. The prosecutrix told him that accused tried to rape and kill her. This witness, in his cross-examination, deposed that on that day he had returned from the school around 5 p.m. He has further deposed that they reached the *nallaha* around 6 p.m. As per this witness, the accused was not acquainted with him. The prosecutrix earlier disclosed the named of the accused as Surinder. PW-14, Ram Saran, salesman of Government Ration Depot, Malli, deposed that on 21.11.2005, around 11:00 a.m. the prosecutrix and Daya Devi came to the depot and they returned after purchasing ration. On the subsequent day, he came to know that the accused attempted to rape the prosecutrix. PW-15, Sanjay Kumar, who was doing labour work in Village Ghar Chindi, deposed that on 21.11.2005 PW-5, Rani Devi, came and divulged the incident to him. He accompanied her and found the prosecutrix in an injured condition at Kunal Khola. She was shifted to her house and than to the hospital. She could not reveal that how she sustained injuries. This witness, in his cross-examination, denied that he gave statement to the police that accused Sanjeev used to meet the prosecutrix and he committed the offence. He has also denied that accused Sanjeev is known to him.

16. PW-16, Satpal, deposed that on 21.11.2005 PW-5, Rani Devi, came to him and narrated the occurrence. Thereafter, they found the prosecutrix in an unconscious and injured condition in Kunal Khola. She was firstly brought to her house and subsequently shifted to hospital. Later on, he came to know that accused Sanjeev thrashed and molested the prosecutrix.

17. PW-17, Daya Devi, is a key witness in this case, as she was with the prosecutrix when the accused met them. As per her version, on 21.11.2005 she alongwith the prosecutrix went to Malli for bringing ration. They reached the depot at 11:30 a.m. and returned therefrom at 12:30 p.m. A boy met them and the prosecutrix started talking with him. This witness, while deposing in the Court, did not identify that boy. She has categorically stated that mother of the prosecutrix (PW-5, Rani Devi) asked her to tell that the prosecutrix stayed with a boy. Subsequently, she came to know that the prosecutrix sustained injuries and was found at Kunal Khola. As per her version, when they were coming back from the depot, Manoj and Surinder met them. This witness, in her cross-examination, deposed that afterwards she came to know that Sanjeev (accused) thrashed the prosecutrix. She has further deposed that at 10:30 a.m. they started towards the depot and approximately it took an hour to reach there. They used the public path and while they were returning, Manoj and Surinder met them.

18. In the instant case, the identity of the accused Sanjeev has not been conclusively established. The prosecutrix, in her statement recorded under Section 154 Cr.P.C., divulged that when they were coming back from the ration depot and at Kunal Khola, she found Surinder Kumar, son of Jagdish Chand, caste *Rajput,* lying on the path. Surinder Kumar, blocked their path and he caught hold of her and commited the crime. Thus, the prosecutrix clearly and unambiguously divulged the name of Surinder Kumar and also immaculately gave his other details. Thus, in the light of speckless details given by the prosecutrix, in her statement under Section 154 Cr.P.C. qua the identity of the accused, no allegations have been imputed against accused Sanjeev Kumar. The prosecutrix, while deposing in the Court, deposed that while lodging the report, she was under the impression that the name of the accused is Surinder and subsequently she came to know that real name of the accused is Sanjeev Kumar. The prosecutrix, in her testimony, has further deposed that she was already acquainted with the accused, as he had come to their house with her brother and she has also noticed him in the market twice or thrice. Thus, it can be safely held that the prosecutrix already knew the accused. Mistake qua wrongly mentioning the name of the accused by the prosecutrix is justifiable, but the prosecutrix also divulged the name of the father of the accused and his caste with precision and certainty. She has divulged that father's name of accused is Jagdish and he belongs to *Rajput* caste, resident of Panchrukhi, however, father's name of accused Sanjeev Kumar is Hans Raj,

resident of Gharchindi and he is from different caste. This Court is of the view that the prosecutrix gave conflicting statements qua the identity of the accused, thus it cannot be held clearly that accused Sanjeev Kumar committed the crime in question. When the identity of accused Sanjeev Kumar has not been established clearly, the case of the prosecution becomes weak, as sufficient doubt is created in the mind of the Court qua the identity of the accused. Thus, it is difficult to hold that the accused is the same person, who, on 21.11.2005, blocked the path of the prosecutrix, when she alongwith Daya (PW-17) was coming back from Ration Depot, Malli. When the identity of the accused has not been established and proved beyond the scope of reasonable doubt, he cannot be convicted. So, there is no illegality committed by the learned Court below.

19. At the same point of time, the statement of PW-17, Daya Devi, is very vital, as she was with the prosecutrix when the accused met them. This witness, while appearing in the witness-box, has deposed that on 21.11.2005 when she alongwith the prosecutrix was coming from Malli ration depot, a boy met them. She did not know the name of that boy and she could not identify him. She has categorically stated that the prosecutrix started talking with him and she asked her to go. This witness was declared hostile and in her cross-examination she deposed that later on she came to know that Sanjeev Kumar thrashed the prosecutrix. This witness nowhere states that accused Sanjeev had met them, when they were coming from the depot. Thus, statement of this witness is not enough, especially when she specifically stated that she came to know about the accused subsequently. As per her version, the prosecutrix herself asked her to go and she (prosecutrix) started talking with the accused, in that event there is no question qua blocking of path by the accused.

20. PW-5, Rani Devi (mother of the prosecutrix) deposed that Daya Devi (PW-17) told her that accused had met the prosecutrix, asked her to marry him, but she refused and the accused started quarreling with the prosecutrix, whereas PW-17 did not utter these facts in her statement. Subsequently, PW-5 rushed to the spot and found the prosecutrix. There was a paper in her mouth and her *dupatta* was tied around her neck. The prosecutrix divulged to PW-5 that accused quarreled with her (prosecutrix) and also threatened to rape her, but the statement of the prosecutrix is in contrast to the statement of PW-5. The prosecutrix has specifically deposed that accused had raped her. As per the testimony of PW-7, Kali Dass (father of the prosecutrix) Daya Devi (PW-17) told him that accused Sanjeev injured his daughter, whereas the testimony of PW-17, Daya Devi, does not reflect that she divulged any facts to PW-7, Kali Dass (father of the prosecutrix).

21. As per the prosecution story, during the course of investigation, police took into possession *chappal,* Ex. P-3, and *dupatta,* Ex.P-4, through recovery memos, Ex. PW-5/A and Ex. PW-5/B, respectively, and this fact has been stated by PW-5, Rani Devi (mother of the prosecutrix). However, PW-5, Rani Devi, stated that *dupatta* was not taken into possession. Surprisingly, another witness of recovery, i.e., Roop Lal (PW-6) deposed that *dupatta* had been taken into possession by the police from the spot and the same was tied with a tree. As per this witness, *dupatta* was also measured in his presence. Thus, there are contradictions qua the recovery of *dupatta.* PW-12, Investigating Officer, S.I. Onkar Singh, has categorically deposed that mother of the prosecutrix produced a *dupatta* and the same was taken into possession by the police, vide seizure memo, Ex. PW-5/B, in presence of witnesses Roop Lal and Bhagat Ram. Thus, there is lot of variance qua the recovery of *dupatta,* which also renders the prosecution doubtful.

22. As per the prosecution story, when the alleged scuffle took place between the accused and the prosecutrix, ration carried by the prosecutrix scattered on the spot. However, the police had not recovered any ration from the spot and it is not the story of the prosecution that the prosecutrix handed over the ration to PW-17, Daya Devi, who was accompanying her. Now the story that the accused blocked the path of the prosecutrix at Kunal Khola, when she was coming from the ration depot becomes difficult to believe. PW-2, Dr. Jaidesh Rana, has deposed that when the prosecutrix was brought to him, she was conscious.

23. In view of what has been discussed hereinabove, it is clear that the prosecution has failed to prove its case beyond the shadow of reasonable doubt and thus the accused cannot be held liable for the commission of the offence, as alleged by the prosecution.

24. It has been held in ***K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258,*** that when two views are possible, appellate Court should not reverse the judgment of acquittal merely because the other view was possible. When judgment of trial Court was neither perverse, nor suffered from any legal infirmity or non-consideration/mis-appreciation of evidence on record, reversal thereof by High Court was not justified.

25. 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.

26. In view of the above discussion, the inescapable conclusion is that the prosecution has failed to prove the guilt of the accused beyond the shadow of reasonable doubt. Thus, we are of the considered view that there is no occasion to interfere with the well reasoned judgment of the learned Trial Court, as such the appeal, which sans merits, deserves dismissal and is accordingly dismissed. Pending application(s), if any, stand(s) disposed of accordingly.

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

Ajay Kumar .....Appellant.
Versus
State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 44 of 2017.
Decided on : 26/05/2017

Indian Penal Code, 1860- Section 395- Complainant and his friend were returning from Pathankot to Paprola in a train - when they reached Panchrukhi, the accused boarded the coach – one person stood in front of the complainant and rest of them went to switch off the light – one of the accused asked the complainant to stand up and started threatening him by Darat – other accused tried to beat the friend of the complainant and snatched the bags– the bags contained clothes, documents, and Rs.1400/- - the mobile phones were also taken away – the accused were tried and convicted by the Trial Court- held in appeal that the presence of the accused was not disputed in the cross-examination; therefore the holding of test identification parade was not necessary- the Court had correctly appreciated the evidence, however, the sentence imposed upon the accused reduced to the period already undergone.(Para-8 to 11)

For the Appellant: Mr. Rajesh Mandhotra, Advocate.
For the Respondent: Mr. Vivek Singh Attri, Addl. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The instant appeal stands directed against the impugned judgement of conviction pronounced upon the appellant herein besides is directed against the sentence pronounced upon him for his committing offences punishable under Section 395 IPC.

2. The brief facts of the case are that on 6.7.2013 at about 5.10 p.m complainant Nishant Bhardwaj reported the matter at Police Station GRPS Kangra that on 4.7.2013 at about 10.30 p.m he alongwith his friend Tushar were coming from Pathankot to Paprola in train and

when they reached Panchrukhi then accused Ajay Kumar alongwith his other co-accused, namely, Vijay Kumar, Munish Kumar and Arvind Kumar boarded their coach, one of the person stood in front of the complainant and rest of them went to switch off the light and when all the lights were switched off in the coach then one of accused Bichu (Vijay) told the complainant to stand up and started threatening him by Darat and kept in on the neck of the complainant whereas the other accused tried to beat Tushar and snatched their bags from them. The aforesaid bags of the complainant and of his friend contained their clothes and some documents alongwith Rs.1400/- and accused Ajay Kumar took away the bags alongwith both mobile phone of the complainant and of his friend. The matter was reported to the police on an application under Ext.PW-1/A and after completing all codal formalities and on conclusion of the investigation into the offences, allegedly committed by the accused challan was prepared and filed in the Court.

3. A charge stood put to the convict/appellant herein, by the learned trial Court, for his committing offence punishable under Section 395 IPC to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 17 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure, was recorded in which he pleaded innocence and claimed false implication. However, he did not choose to lead any evidence in defence.

5. The accused stands aggrieved by the findings of conviction recorded upon him by the learned trial Court, for his committing offences punishable under Sections 395 read with Section 34 IPC, hence prefers therefrom, the instant appeal. The learned counsel appearing for the accused has concerted to vigorously contend qua the findings of conviction recorded by the learned Courts below standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of conviction warranting reversal by this Court, in the exercise of its appellate jurisdiction and theirs being replaced by findings of acquittal.

6. On the other hand, the learned Additional Advocate General appearing for the State has with considerable force and vigour, contended qua the findings of conviction recorded by the Courts below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating any interference rather meriting vindication.

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

8. The learned counsel appearing for the convict/appellant submits before this Court, that since in immediate sequel to the occurrence “no” Test Identification Parade was held by the Investigating Officer concerned, rather when the convict appellant was for the first time identified in Court, hence the aforesaid manner of identification of the convict not firmly establishing the fact of his committing the alleged offences. He further submits that even the fact of PW-2 making a disclosure in his examination in chief that the Mobile set, uncontrovertedly owned by the complainant being handed over to his wife by accused Ajay alias Rimpi also not firmly establishing the identity nor the participation of the convict in the alleged offence(s), significantly when effect thereof is effaced by his in his cross-examination admitting the existence of inimical relations inter se him and the convict/appellant hence obviously rendering unnatural any erection of any inference, that the accused appellant had handed over the looted mobile set of the complainant, to the wife of PW-2. The effect of the aforesaid inference is that the prosecution on anvil thereof not erasing the ill-effect of the Investigating Officer concerned in quick spontaneity to the ill-fated occurrence omitting to hold a Test Identification Parade, whereupon alone the identity besides the participation of the accused appellant, in the ill fated alleged offence, would have been firmly established.

9. Be that as it may, yet the effect of the aforesaid omission is obliterated by PW-1, during the course of his being subjected to cross-examination by the learned counsel for the convict/appellant, his being purveyed an affirmative suggestion with echoing(s) therein, that in

the ill-fated occurrence, he had seen Bichu alias Ajay and that the latter during the course of the ill-fated occurrence had spoken to him, suggestion whereof evinced a reply in the affirmative from PW-1. Consequently, with the counsel for the convict appellant obviously admitting the presence of convict Bichu @ Ajay at the site of occurrence, naturally renders insignificant, the illeffect of the Investigating Officer omitting to, in quick spontaneity to the occurrence taking place, hold a TIP for his thereupon firmly establishing the identity of the convict besides his participation in the ill fated occurrence, nor obviously, want thereof not casting any doubt with respect to either the participation or the presence of the convict appellant in the relevant occurrence.

10. For the reasons which have been recorded hereinabove, this Court holds that the learned Court below has appraised the entire evidence on record in a wholesome and harmonious manner, apart therefrom the analysis of the material on record by the learned Addl. Sessions Judge does not suffer from any perversity and absurdity of mis-appreciation and non appreciation of evidence on record. I find no merit in the appeal. Consequently, it is dismissed. However, the prayer made by the counsel that the sentence of imprisonment as pronounced by the learned trial Court upon the accused, be reduced to the term of imprisonment already undergone, is accepted. The reason for accepting, the aforesaid submission is anvilled upon a judgement of the Hon'ble Apex Court reported in Shivappa and others vs. State of Mysore, *1971 Cri.L.J 260, w*herein the Hon'ble Apex Court has held that the mandate occurring in the relevant provision(s) that the conviction of the accused for offences though prescribes imposition upon him sentence of imprisonment, which may extend to life, yet it also permitting Courts to reduce the apposite sentence to a term of imprisonment already undergone, in sequel, when the conviction as hereat stands imposed upon the appellant, is with respect to offences though warranting imposition of sentence of imprisonment upon him for a term which may extend upto life hence it too, in consonance herewith, is reducible to the term of imprisonment already suffered by him, moreso, when in consonance therewith, the appellant has already served sentence of imprisonment for a term of three years.

11. Since the accused is in jail, he be released forthwith, if not required in any other case. The Registry is directed to forthwith prepare the release warrants in conformity with the judgment and send the same to the Superintendent of the jail concerned,. Records be sent back forthwith.

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

Gian Chand .....Appellant.
Versus
State of Himachal Pradesh .....Respondent.

Cr. Revision No. 89 of 2011.
Decided on : 26/05/2017

Indian Penal Code, 1860- Section 451, 323 and 506- Accused trespassed in the courtyard of the complainant, caught her from her arm, pushed her on the grounds and gave beatings with fist and kicks blows – the accused was tried and convicted by the Trial Court- he filed an appeal, which was dismissed- held in revision that there was variation between FIR and ocular version – Medical Officer admitted that injuries can be caused by way of fall – the prosecution version was not proved beyond reasonable doubt and the Courts had wrongly convicted the accused- revision allowed- judgments passed by the Courts set aside.(Para-8 to 11)

For the Appellant: Ms. Rita Goswami, Advocate.
For the Respondent: Mr. Vivek Singh Attri, Addl. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The instant appeal stands directed against the impugned judgements of conviction concurrently pronounced by both the Courts below upon the appellant herein besides, is directed against the sentence(s) pronounced upon him for his committing offences punishable under Sections 451, 323 and 506 IPC

2. The brief facts of the case are that on 7.6.2007 Smt. Dropti Devi reported the occurrence to the police stated that she belongs to village Khera and she is a house wife. On 7.6.2007 at about 8.30 a.m when she was bathing her children then accused Gian S/o Sant Ram trespassed in her courtyard caught her from hairs and she was laid down. Thereafter, he sits on her breast and started beating her with fist blows and kicks. He has also threatened her that he will not leave her and after hearing the cries Jagat Ram came to rescue her and who rescued her from the clutches of the accused person. F.I.R Ext.PW-1/A was registered against the accused person. During the course of investigation I.O. prepared spot map and MLC of the injured was obtained and after completing all codal formalities and on conclusion of the investigation into the offences, allegedly committed by the accused challan was prepared and filed in the Court.

3. A charge stood put to the convict/appellant herein, by the learned trial Court, for his committing offences punishable under Sections 451, 323 and 506 IPC to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 6 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure, was recorded in which he pleaded innocence and claimed false implication. However, he did not choose to lead any evidence in defence.

5. The accused person stands aggrieved by the findings of conviction concurrently recorded upon him by both the courts below, for his committing offences punishable under Sections 451, 323 and 506 IPC hence he thereafter prefers the instant appeal. The learned counsel appearing for the accused has concerted to vigorously contend qua the findings of conviction recorded by the learned Courts below standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, she contends qua the findings of conviction warranting reversal by this Court, in the exercise of its appellate jurisdiction and theirs being replaced by findings of acquittal.

6. On the other hand, the learned Additional Advocate General appearing for the State has with considerable force and vigour, contended qua the findings of conviction recorded by the Courts below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating any interference rather meriting vindication.

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

8. The prosecution was under a solemn duty to beyond reasonable doubt also to the hilt prove the version qua the occurrence embodied in the F.I.R borne in Ext.PW-1/A, wherein the complainant/victim has made a firm disclosure that on 7.6.2007 at about 8.30 a.m, when she was bathing her children in the Angan of her house, then at the aforesaid place the accused making his appearance and his proceeding to clutch her hair. Also she has disclosed therein that he threw her on the floor of Varandah, whereafter he proceeded to position himself on her chest. She has also disclosed therein that he thereafter proceeded to belabour her with kicks and fist blows. The aforesaid penal misdemeanor of the accused, sequelled hers raising out bursts and outcries, whereupon the presence of one Joghal Ram at the site of occurrence was aroused. She has also echoed therein that in sequel to the aforesaid assault perpetrated on her person by the accused, she sustained injuries on her head, on her arm as well as certain internal injuries stood sustained on her body. The mere fact of the aforesaid communication(s) with respect to the

occurrence being embodied in the F.I.R would not per se constrain any conclusion, that hence the prosecution succeeding in proving to the hilt the charge to which the accused stood tried,contrarily, it was incumbent upon the prosecutrix to depose in, closest tandem therewith. In other words, each of the communications occurring in the apposite F.I.R were enjoined to be testified by the complainant. In case some of the material particulars occurring in the apposite F.I.R remained omitted to be testified by the complainant, thereupon the version qua the occurrence embodied in the apposite F.I.R. would constrain a conclusion (a) particulars occurring therein for want of any testification in respect thereto by the prosecutrix hence concomitantly remaining unproven. (b) The version qua the occurrence hence being construable to be concocted also invented, hence fostering an inference that the prosecutrix had proceeded to falsely implicate the accused, with respect to his purportedly exaggerated penal misdemeanor(s). Corollary whereof, would be, that the prosecution not proving to the hilt the charge in respect whereof the accused stood tried. In making the aforesaid discernment(s) "while" throughout bearing in mind the aforesaid disclosures occurring in the apposite F.I.R, an allusion to the testification of PW-1 makes a disclosure that the accused had, on ingressing onto her courtyard hence proceeded to clutch her hair whereafter he proceeded to belabour her with kick and fist blows besides proceeded to hurl abuses upon her. Subsequent thereto she has testified that the accused departed from the site of occurrence. She also testifies that one Joghal Ram had made his appearance at the site of occurrence yet he did not intercede in the scuffle. The aforesaid testification does not mete absolute corroboration qua the version qua the occurrence embodied in the apposite F.I.R., wherein she has made a disclosure that the accused had also positioned himself on her chest, whereupon the occurrence of the aforesaid fact in the F.I.R concerned, whereas its non occurrence in her testification, foments an inference that the prosecutrix had in the apposite F.I.R. hence unraveled an exaggerated version qua the occurrence, wherefrom the ensuable concomitant derivative is, that she therein had hence endeavoured concoction besides hence concerted to falsely implicate the accused. The further corollary thereof, is that the prosecution hence failing to prove to the hilt, the charge, especially when it stands anvilled upon the apposite F.I.R. Also with the prosecutrix in the apposite complaint making a communication that on hers raising shrieks and cries in sequel to her standing assaulted by the accused, one Joghal Ram making his appearance at the site of occurrence and on his rescueratory inter cession she being saved from the assault perpetrated upon her person by the accused yet while testifying she has not made any echoings in absolute tandem therewith rather she has therein disclosed that the aforesaid Joghal Ram had merely arrived at the site of occurrence and that he did not make any rescueratory intercession. The aforesaid rescueratory role ascribed in the F.I.R vis-à-vis one Joghal Ram and its non ascription qua him by her in her testification also constrains an inference that the prosecutrix is hence contriving to scuttle besides camouflage the truth qua the occurrence, hence her testimony qua the occurrence is rendered to be both uninspiring besides untrustworthy. Aggravated momentum to the aforesaid inference is lent by the fact of the aforesaid Joghal Ram "not" coming to be examined as a prosecution witness "whereas" on his stepping into the witness box he would have purveyed the entire truth qua the genesis of the prosecution case. In sequel, the suppression by the prosecution, of the truth qua the genesis of the occurrence, comprised in its omitting to lead into the witness box, the aforesaid Joghal Ram, begets an inference that the version qua the occurrence, for reasons aforesaid, testified by PW-1 being insufficient to record findings of conviction with respect to the charge to which the accused stood subjected to.

9. The learned Additional Advocate General has contended that with PW-3 making a disclosure in her testification that the apposite MLC Ext.PW-3/A revealing injuries in consonance with the testification of the prosecutrix also hers deposing that the injuries noticed by her to be occurring on her person being relatable to the time of occurrence, spelt in the apposite F.I.R hence, the prosecution succeeding in proving the charge. However, the aforesaid submission is not worthy of merit nor it countervails the ill-effect of the uninspiring testimony qua the occurrence purveyed by PW-1. Moreso, when PW-3 has accepted the suggestion put to her by the learned defence counsel that the injuries borne on Ext.PW-3/A being sustainable by fall on hard surface.

10. The learned Additional Advocate General has also proceeded to contend that with the learned defence counsel while holding PW-1 to cross-examination, his putting suggestions to her, couched in an affirmative phraseology also with an apt communication therein that she is on talking terms with the accused , suggestion whereof also stood replied in the affirmative by PW-1 besides with the learned defence counsel while holding PW-1 to cross-examination, his casting a suggestion in an affirmative phraseology, that the accused had held talks with the victim/lady, for 15 to 20 minutes, suggestion whereof also evinced an alike affirmative response from the prosecutrix, hence the prosecution proving the presence at the site of occurrence of the accused also its proving the charge to which he stood tried 'dehors' the uninspiring and untrustworthy testimony purveyed by the prosecutrix with respect to the recitals held in the apposite F.I.R. The aforesaid submission holds weight only with respect to the presence of the accused at the relevant site of occurrence. However, his presence at the site of occurrence, cannot be extended to connote that the prosecution has proven the entire chain of incidents borne in the apposite F.I.R., contrarily the effect of the aforesaid acquiescence of the prosecutrix or of the accused, is that theirs conveying that she was on the relevant day holding talks with the accused rather than as communicated by her in her examination in chief that the accused on ingressing into her Varandah, his immediately launching an assault on her person, hence the aforesaid acquiescence rather also erodes the effect of the genesis of the prosecution version borne in both the apposite F.I.R also as held in her apposite testification, whereupon the Court is constrained to conclude qua a false version qua the occurrence standing reported to the police by the victim hence rendering it to be unbelievable.

11. For the reasons which have been recorded hereinabove, this Court holds that the learned Courts below have not appraised the entire evidence on record in a wholesome and harmonious manner, apart therefrom the analysis of the material on record by the learned Addl. Sessions Judge suffers from a gross perversity and absurdity of mis-appreciation and non appreciation of evidence on record.

12. In view of above discussion, the appeal is allowed and the impugned judgment rendered by the learned Addl. Sessions Judge, is set aside. The appellant/accused is acquitted of the offences charged. The fine amount, if any, deposited by the accused is ordered to be refunded to him. Personal and surety bonds are cancelled and discharged.

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

State of Himachal Pradesh .....Appellant
Versus
Baljit Singh .....Respondent.

Cr. Appeal No. 143 of 2009
Decided on : 26/05/2017

Punjab Excise Act, 1914- Section 61(1)(a)- Accused were carrying 11 bags of country liquor No.1 containing 264 pouches and one gunny bag of country liquor Lalpari containing 50 pouches – they could not produce any permit on demand- the accused were tried and convicted by the Trial Court- an appeal was filed, which was allowed and the accused were acquitted by the Appellate Court-heldin appeal that the acquittal was recorded on the basis of contradictions in the testimonies of the prosecution witnesses- however, the contradictions were not significant – the identity of the case property was not disputed in the cross-examination – non-production of the seal in the Court will not adversely affect the prosecution version- independent witness turned hostile but admitted his signatures on the seizure memo – the samples were representative and it was not necessary to take sample from every pouch – the Appellate Court had wrongly recorded

the acquittal- appeal allowed- judgment of Appellate Court set aside and that of the Trial Court restored.(Para-10 to 16)

For the petitioner: Mr. Vivek Singh Attri, Addl. Advocate General.
For the Respondent: Mr. Divya Raj Singh, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal is directed against the judgment of the learned Additional Sessions Judge (Fast Track Court), Una, District Una, H.P. who while reversing the findings of conviction pronounced upon the accused by the learned Addl. Chief Judicial Magistrate, Court No.1, Una, proceeded to acquit the accused.

2. The brief facts of the case are that the on 15.08.2001 at about 3.00 a.m a police party headed by ASI Akshay Kumar was present in Naka duty and on routine checking near Shamshan Ghar, Una an Indica Car white in colour being driven by accused Baljeet Singh who was accompanied by his co-accused Firoj Singh came from the side of Jhalera. It was stopped for checking. On checking 11 bags of country liquor No.1 containing 264 pouches and one gunny bag of country liquor Lal Pari brand having 50 pouches were recovered from the vehicle. The accused persons could not produce any permit or licence to carry the same. Accordingly, a case was registered against the accused. After completing all codal formalities and on conclusion of the investigation into the offences, allegedly committed by the accused challan was prepared and filed in the Court.

3. A charge stood put to the accused by the learned trial Court for his committing offences punishable under Sections 61(1)(a) of the Punjab Excise Act, as applicable to the State of H.P. to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 6 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the C.P.C., was recorded in which he pleaded innocence and claimed false implication. However, he chose to lead evidence in defence.

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

6. The learned Additional Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned Additional Sessions Judge, Una, standing not based on a proper appreciation of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation by him of the material on record. Hence, he contends qua the findings of acquittal warranting reversal by this Court, in the exercise of its appellate jurisdiction and theirs standing replaced by findings of conviction.

7. The learned counsel appearing for the respondent has with considerable force and vigour contended qua the findings of acquittal recorded by the Addl. Sessions Judge standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

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

9. The accused respondent No.2 Firoz Singh died during the pendency of the appeal before the learned Additional Sessions Judge. Hence, the prosecution case against him stands already abated.

10. The learned Additional Sessions Judge, Una, while reversing the findings of conviction pronounced upon the accused by the learned trial Magistrate, had anvilled his

reasoning upon the factum of there occurring intra se contradictions inter se the testimonies of PW-1, PW-14 and PW-6 with respect to the number of pouches of liquor of brand "Lal Pari" and of brand "Una No.1", as held in the relevant bag(s) and in the relevant gunny bag(s). He hence proceeded to countervail the effect of the apposite recovery memo borne on Ext.PW-1/A, whereunder recovery(s) of the relevant pouches of liquor, stood effectuated from Car Indica (applied for), car whereof at the relevant time stood evidently occupied by both the accused. The aforesaid reason assigned by the learned Addl. Sessions Judge, for his hence countervailing the probative worth of Ext.PW-1/A, the relevant recovery memo, is per se flimsy especially when it is not borne out by any relevant or apposite suggestion(s) being purveyed by the defence counsel, respectively to each of the prosecution witnesses while holding them to cross-examinations suggestions whereof impinged upon the falsity of the apposite recital borne thereunder. It appears that the learned Addl. Sessions Judge suo moto has drawn an inference that the testifications of each of the prosecution witnesses aforesaid while not holding compatibility with the apposite recitals borne in Ext.PW-1/A hence per se theirs being falsified "despite" no observation in respect thereto standing recorded by the learned trial Magistrate, during the course of the recording of their depositions, whereat the relevant pouches as stood produced in Court were shown to them "nor" any suggestions being purveyed to the PWs by the learned defence counsel while holding them to cross-examination, suggestions whereof marking/highlightingthe fact of the relevant haul in respect whereof Ext.PW-1/A stood prepared, not appertaining thereto rather its preparation appertaining to a haul effectuated from the conscious and exclusive possession of person(s) other than the accused. In absence of the aforesaid observation(s) being recorded by the learned trial Court, predominantly also when the learned defence counsel while holding the prosecution witnesses to cross-examination 'not' putting any suggestions to any of them that the relevant case property, as stood shown to them in Court, being unrelated to the recovery memo borne in Ext.PW-1/A rather its preparation being with respect to recovery(s) made with respect to some other F.I.R., whereupon alone the recitals borne in Ext.PW-1/A would stand falsified, whereas with the aforesaid suggestion remaining unpurveyed to the PWs by the learned defence counsel while holding them to cross-examination, thereupon it was grossly untenable for the learned Addl. Sessions Judge, Una, to not relate the production in Court of the relevant case property, vis-à-vis Ext.PW-1/A nor it was tenable for him to falsify the recitals borne therein, merely on anvil of the aforesaid untenable reason, conspicuously when the discrepancy with regard to the count of apposite numbers of pouches may have arisen only on account of inadvertence with respect to the counting of pouches in Court by the PWs concerned.

11. The learned counsel for the appellant has contended with vigour that the non production in Court of the seal with which the case property was sealed at the relevant site of occurrence hence vitiating in its entirety the judgement of conviction pronounced by the learned trial Magistrate yet the aforesaid submission does not hold any vigour given there being no mandate of law that any non production in Court of the relevant seal by the official concerned or by the Investigating Officer, per se rendering vitiated the entire genesis of the prosecution witnesses. Contrarily, when the production of the apposite seal in the Court concerned, is merely a directory edict hence its non production in Court does not at all vitiate the genesis of the prosecution version. Preeminently, also with the case property standing produced in Court and thereat it being shown to the material prosecution witnesses also with the learned defence counsel despite holding the opportunity to closely sight the case property also to hold its closest scrutiny, for hence his deciphering therefrom whether all descriptions borne therein inclusive with respect to the apposite descriptions held in the "seal" affixed on the bags, being relatable to all the apt description(s) borne in the relevant memo, yet he has grossly omitted to avail the relevant opportunity, for making either the relevant decipherings or to hence entail the learned trial Court to record an observation qua lack of analogity emerging interse the description(s) of the seal carried on the bag(s) vis.a.vis its recorded description in the relevant memo. Consequently, it appears that he has failed to unrelate the case property which stood produced in Court and which stood thereat shown to the prosecution witnesses "with" the one which stood recovered under Ext.PW-1/A. In sequel the case property as stood produced in Court and was

thereat shown to PWs, is to be concluded to be coinciding with the one in respect whereof PW-1/A stood prepared.

12. Nowat, the effect of PW-1 an independent witness, to recovery memo Ext.PW-1/A reneging from his previous statement recorded in writing, is to stand construed alongwith the factum of his in his cross-examination to which he stood subjected to by the learned PP on his standing declared hostile, admitting the factum of his signatures occurring thereon. Consequently, when he admits the occurrence of his signatures on the relevant memo, thereupon the mandate of Section 91 and 92 of the Indian Evidence Act whereupon he on admitting the occurrence of his signatures thereon, hence stood statutorily estopped to renege from the recitals borne thereon, thereupon the effect of his orally deposing in variance or in detraction to the recitals which occur therein, gets statutorily belittled rather when he naturally emphatically hence statutorily proves the recitals comprised in the apposite memo, his orally reneging from the recitals borne thereon holds no evidentiary clout nor it is legally apt to outweigh the creditworthiness of the testimony of the official witnesses qua the recovery of liquor under recovery memo Ext.PW-1/A standing effectuated from the conscious and exclusive possession of the accused, contrarily the uncontroverted factum qua his signatures occurring in the relevant exhibits, concomitantly renders the apposite recitals borne thereon to hold grave probative worth. The ensuing sequel thereof is qua with the statutory estoppel constituted in Sections 91 and 92 of the Indian Evidence Act, barring PW-1 to orally resile from the contents of Ext.PW-1/A especially when he admits the signatures occurring thereon to belong to him renders unworthwhile besides insignificant the factum qua his orally deposing in variance of its recorded recitals, thereupon per se an inference stands enhanced qua dehors his reneging from his previous statement(s) recorded in writing, a deduction standing capitalized qua thereupon his proving the genesis of the prosecution case. Moreover, the reason assigned by the learned Addl. Sessions Judge for falsifying the recitals occurring in the Ext.PW-1/A gets countervailled

13. Even though, one of the witnesses to recovery memo has turned hostile, hence also when the other witness thereto remained un-examined, cannot, constrain the Court to unbefittingly conclude, as untenably done by the learned Addl. Sessions Judge, that it arousing an inference that the contents of Ext.PW-1/A hence remaining unproved. Significantly, when the entire effect of PW-1, a witness to Ext.PW-1/A deposing in contradiction to the apposite recitals borne in F.I.R., is for reasons aforestated unworthwhile.

14. The learned counsel for the accused has contended with vigour qua with the Investigating Officer concerned evidently not collecting samples from each of the liquor bottles carried in all the bags/gunny bags borne in the relevant vehicle nor his dispatching to the CTL concerned, the samples collected from each of the liquor pouches carried in all the bags borne on the relevant vehicle, for their respective examination by it, whereas with the CTL opining qua only samples of liquor extracted from some of the pouches amongst the entire cache of liquor, carried in bags or gunny bags, bags whereof were borne in the relevant vehicle, hence entailing a sequel of the prosecution succeeding in proving the opinion recorded by the CTL concerned with respect to the samples sent to it for analyzing, contrarily he contends qua the prosecution not succeeding in proving the factum of all “bags” carried in the relevant vehicle “all” therewithin holding liquor. However, the aforesaid submission warrants its standing discountenanced. A thorough circumspect reading of the evidence on record unravels qua the accused respondent, in his defence embodied in his statement recorded under Section 313 Cr.P.C. “not” unravelling therein the factum of “except” three samples extracted by the I.O. from the pouches held in the “bags” borne in the relevant vehicle, all other pouches held in the “bags” carried in the relevant vehicle “not” therewithin holding liquor nor also he while holding the prosecution witnesses to cross-examination, purveyed apposite suggestions qua the facet aforesaid. The effect of the aforesaid omission(s), is that the accused acquiescing to the factum of all the pouches held in all the “bags” borne in the relevant vehicle holding therein liquor dehors the factum of the Investigating Officer concerned not extracting samples from all the pouches held in all “bags” borne in the relevant vehicle.

15. The learned counsel for the accused has contended with vigour that with intra-se contradictions occurring inter se the testifications of the material prosecution witnesses, with respect to the number of the relevant pouches of liquor hence per se begetting an inference, of tampering with the relevant case property by the Investigating Officer, whereupon hence it is befitting to conclude that there was a concomitant enjoined necessity upon the Investigating Officer to send to the CTL concerned "samples" extracted from all the pouches carried in all the gunny bags and in the bags borne on the relevant vehicle whereupon alone, upon an affirmative opinion being pronounced by the CTL upon all the samples, would constrain a conclusion that the entire cache of liquor "pouches" carried in the vehicle holding liquor therewithin. However, the aforesaid submission is rejected, as (a) the learned defence counsel while holding each of the prosecution witnesses to cross examination has neither put suggestions apposite thereto, comprised in the fact that the pouches held in the bag(s) and in the gunny bag(s) not holding therein contents of liquor, contrarily theirs holding milk, juice or water besides the defence counsel omitted to adduce in defence the best documentary evidence comprised in bills appertaining to purchase by him of pouches of juice, milk or water whereupon alone a vivid display would occur that the relevant pouches held therein contents of water, juice or milk. In absence of the aforesaid suggestion(s) besides want of the aforesaid best evidence, begets an inference of the defence acquiescing that all the relevant bags/gunny bags were holding pouches wherein liquor was carried, thereupon there was no necessity for the Investigating Officer to either extract samples from all the pouches or to send them for analyses to the CTL concerned. It appears that the learned counsel for the accused has hence made an idle submission, that the case property was tampered, without their occurring any apposite suggestions in respect thereto.

16. For the reasons which have been recorded hereinabove, this Court holds that the learned Additional Sessions Judge has not appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned Addl. Sessions Judge suffers from a gross perversity or absurdity of mis-appreciation and non appreciation of evidence on record. In sequel thereto, I find merit in the appeal, which is accordingly allowed and the judgement of acquittal rendered by the learned Additional Sessions Judge, Una, is quashed and set-aside. Judgement of the learned trial Court is upheld Accordingly, the accused is held guilty for his committing offences punishable under Sections 16(i)(a) of the Punjab Excise Act as applicable to the State of Himachal Pradesh. The judgement of conviction and sentence pronounced by the learned Addl. Chief Judicial Magistrate, Una, is affirmed and upheld. In aftermath, the pronouncement recorded by the learned Addl. Chief Judicial Magistrate in Case No. 98-III-2001 be forthwith put to execution.

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

Gurdarshan Singh alias Darshan Singh ....Petitioner.

Versus

State of Himachal Pradesh. ...Respondent.

Cr. MP (M) No. 505 of 2017
Decided on: 29th May, 2017

Code of Criminal Procedure, 1973- Section 439- a FIR has been registered for the commission of offence punishable under Section 15 of the N.D.P.S. Act- the petitioner pleaded that he is innocent and has been falsely implicated and he be released on bail- held that there are sufficient reasons to believe that petitioner was involved in the commission of offence and is likely to repeat the same in future in case of release on bail- there is likelihood that petitioner will flee from justice and tamper with prosecution evidence – the petitioner cannot be enlarged on bail – petition dismissed. (Para- 6)

For the petitioner : Mr. Rajiv Jiwan, Advocate.
For the respondent : Mr. Virender K. Verma, Addl. AG, with Mr. Pushpinder Jaswal, Dy. AG.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge*(oral).*

The present bail application has been maintained by the petitioner under Section 439 of the Code of Criminal Procedure seeking his release in case FIR No. 21 of 2017, dated 08.03.2017, under Section 15 of Narcotic Drugs & Psychotropic Substances Act, registered at Police Station Kot Kehloor, District Bilaspur, H.P.

2. As per the petitioner, he is innocent and has been falsely implicated in the present case. He is resident of the place and neither in a position to tamper with the prosecution evidence nor in a position to flee from justice, so he may be released on bail.

3. Police report stands filed. As per the prosecution, on 08.03.2017, around 02:15 p.m., when a police party was on patrol duty near the Office of Gram Panchayat, Majari, they received a secret information that the petitioner is involved in selling poppy husk and he is operating from his residence. Acting upon the tip off, the police raided the residence of the petitioner in his presence. During the search, a bag was recovered, which contained poppy husk. The recovered contraband was weighed in the *Kiryana* shop of the petitioner, which was found 12.5 kgs. The police completed all the codal formalities. The statements of the witnesses were recorded and the accused was arrested on 08.03.2017, at 07:15 p.m. Sample, separated from the recovered contraband, was sent for chemical analysis and as per the report received from SFSL, the recovered contraband contained poppy husk. As per the prosecution, the petitioner had been dealing with the contraband since long and earlier some cases of NDPS have also been registered against him. Lastly, the prosecution has prayed that the petitioner is habitual offender and he is likely to tamper with the prosecution evidence, therefore, the present bail application may be dismissed.

4. Heard. The learned counsel for the petitioner has argued that the petitioner stands acquitted in other cases and the quantity recovered from him, in the present case, is not a commercial quantity, so keeping in view the above submissions, he may be released on bail. Conversely, the learned Additional Advocate General, has argued that taking into consideration the conduct of the petitioner and his past history, he may not be released on bail. In rebuttal, the learned counsel for the petitioner has argued that the petitioner has already been acquitted in earlier cases, meaning thereby he was not involved in those cases. He has further argued that in order to meet the ends of justice, the petitioner may be released on bail.

5. I have gone through the rival contentions of the parties and the police report in detail.

6. In the present case, the police acting on a secret information that the petitioner is dealing in poppy husk, recovered 12.5 kgs of poppy husk from his possession. The petitioner was apprehended and the recoveries were effected. At this stage, this Court finds that there are reasonable grounds to believe that the petitioner was involved in the offence and he is likely to repeat the same in future, in case he is enlarged on bail. At the same point of time there is likelihood of petitioner's fleeing from justice and there are chances that he may tamper with the prosecution evidence. This Court, after taking into consideration the manner and the nature in which the offence has been committed, behaviour of the petitioner and the quantity of the recovered contraband, i.e., 12.5 kgs, and also the interest of the society at large, finds that the present is not a fit case where the judicial discretion to admit the petitioner on bail is required to be exercised in his favour.

7. In view of what has been discussed hereinabove, the petition, which sans merits, deserves dismissal and is accordingly dismissed.

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

Kuldip Singh .....Petitioner.
Vs.
State of Himachal Pradesh and others .....Respondents.

CWP No.: 722 of 2011
Date of Decision: 29.05.2017

Himachal Pradesh Holdings (Consolidation and Prevention of Fragmentation)Act, 1971- Section 54- The order passed by Divisional Commissioner, Mandi was challenged on the ground that the order was passed against the petitioner behind his back – the petitioner was not heard before passing the impugned order – no service was effected upon the petitioner – the petitioner remained admitted in CHC, Barsar from 16.11.2010 till 20.11.2010 and it was not possible to tender the summons to the petitioner on 18.11.2010 – the report regarding the refusal by the petitioner is incorrect- hence, it was prayed that the order passed by Divisional Commissioner be set aside- held that the plea of the petitioner is corroborated by the discharge slip - the report submitted by the Process Server regarding the service cannot be accepted in view of the discharge slip – the writ petition allowed- order passed by Divisional Commissioner set aside with a direction to the Divisional Commissioner to issue fresh notices to the petitioner and also to conduct an inquiry against the Process Server.(Para-8 to 10)

For the petitioner: Mr. R.P. Singh, Advocate.
For the respondents: Mr. Vikram Thakur, Deputy Advocate General, for respondents No. 1 and 2.
Respondents No. 3 to 6 *ex parte.*

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge*(Oral)**:*

CMP No. 2206 of 2017

By way of this application, the petitioner/applicant has prayed that the documents appended with this application may be taken on record. Learned Deputy Advocate General has no objection in case the same is allowed. Accordingly, the application is allowed and the documents appended therewith are ordered to be taken on record. Application stands disposed of.

CMP No. 7056 of 2011

2. Mr. R.P. Singh submits that he shall not press this application which has been filed for amendment of the writ petition. He further submits that his limited prayer is that alongwith the said application, he has placed on record a copy of the discharge slip issued in favour of the petitioner by Medical Officer, CHC Barsar, District Hamirpur Annexure P-1/L, which may be taken into consideration while hearing the main writ petition. To this limited prayer of the learned counsel for the petitioner, the State has no objection.

3. Accordingly, this application is dismissed as not pressed and learned counsel for the petitioner is permitted to refer to Annexure P-1/L appended with this application during the course of hearing of the case.

CWP No. 722 of 2011

4. By way of this writ petition, the petitioner has assailed the order passed by the Court of learned Divisional Commissioner, Mandi Division, exercising powers under Section 54 of the Himachal Pradesh Holdings (Consolidation and Prevention of Fragmentation) Act, 1971 in Case No. 86/2003 (Old) 544/2009 (New), decided on 08.12.2010 *inter alia* on the ground that

said order has been passed by the authority concerned against the present petitioner at his back. As per the petitioner, he was never served in the said revision petition, which was filed before the Divisional Commissioner, Mandi Division under Section 54 of the Himachal Pradesh Holdings (Consolidation and Prevention of Fragmentation) Act, 1971 and therefore, as the order impugned, which has been passed against the petitioner, has been passed without hearing him, the same was liable to be quashed and set aside on this count only as the petitioner had been condemned under heard.

5. Respondents No. 3 to 6 were proceeded against *ex parte* on 05.05.2017.

6. In order to substantiate his contention that the impugned order was passed at the back of the petitioner, Mr. R.P. Singh, learned counsel for the petitioner has drawn the attention of this Court to Annexure P-1/L, which was appended alongwith an application filed under Order VI Rule 17 of the Code of Civil Procedure praying for amendment of the petition, which is a copy of Discharge Slip signed by Medical Officer, CHC, Barsar, District Hamirpur. Perusal of same demonstrates that the petitioner stood admitted in the said CHC from 16.11.2010 to 20.11.2010.

7. Mr. Singh has referred to Annexure P-3 and Annexure P-4, which have been placed on record vide CMP No. 2206 of 2017. Annexure P-3 is copy of summons, which purportedly were served upon the petitioner by the Process Server and Annexure P-4 is report of the Process Server, which according to Mr. Singh does not even bears the signatures of the Process Server. As per the report of the Process Server, the summons were served upon the petitioner on 18.11.2010, however, he refused to receive the same.

8. In my considered view, if the present petitioner was admitted in CHC, Barsar from 16.11.2010 up to 20.11.2010, as is evident from the discharge slip, which is duly signed by Medical Officer, CHC Barsar, District Hamirpur, then it is not understood as to who was served by the Process Server on 18.11.2010, who refused to accept the summons, as has been reported by the Process Server. It has not been mentioned in this report that service of the summons was effected upon the present petitioner at CHC, Barsar. Therefore, the only conclusion which can be drawn is that the alleged refusal to receive the summons by the present petitioner was at his address which was mentioned in memo of parties of Revision Petition so filed under Section 54 of the Himachal Pradesh Holdings (Consolidation and Prevention of Fragmentation) Act, 1971 and impugned order demonstrates that the address of the present petitioner mentioned therein was '*Village Harsour, Tehsil Barsar, District Hamirpur, H.P.'*

9. The contention of the learned Deputy Advocate General that presumption of truth is attached with the report of the Process Server, in my considered view, cannot be accepted on its face value, because to counter the same, there is a Discharge Slip which has been duly issued by the Medical Officer of Community Health Centre, Barsar and there is no reason for this Court to disbelieve the said Discharge Slip, which has been so issued by a responsible Medical Officer. Not only this, a perusal of the Discharge Slip also demonstrates that besides serial number, even OPD number of the present petitioner is mentioned therein. Thus, the only inference and conclusion which can be drawn is that the present petitioner was never served in the revision proceedings and the report submitted by the Process Server about summons having been served upon the petitioner and his having refused to accept the same was incorrect.

10. Therefore, in view of the above discussion, in my considered view, the contention of the petitioner that the impugned order was passed by the Divisional Commissioner, Mandi Division in revision at his back has been duly demonstrated by the petitioner.

11. Accordingly, in view of my findings returned above, this writ petition is allowed. Impugned order dated 08.12.2010 (Annexure P-2), passed by the Court of Divisional Commissioner, Mandi Division in Case No. 86/2003 (Old) 544/2009 (New), is quashed and set aside. The matter is remanded back to the Divisional Commissioner, Mandi Division with a direction that the said authority shall issue fresh notices to the parties and thereafter adjudicate upon the Revision Petition on merit after giving an opportunity of being heard to all the concerned

parties. Divisional Commissioner, Mandi Division is also directed to hold an inquiry with regard to the report submitted by the Process Server qua alleged service of the present petitioner. Said inquiry shall positively be completed within a period of three months from today and a copy of the report shall be made available to this Court. Learned Deputy Advocate General undertakes to inform Divisional Commissioner, Mandi Division of the order passed by this Court. Petition is disposed of in above terms. Miscellaneous applications, if any, also stand disposed of. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Raju Thakur ...Petitioner.

Versus

State Election Commission and others ...Respondents.

CWP No. 975 of 2017
Reserved on: 26.5.2017.
Decided on: 29th May, 2017

Constitution of India, 1950- Article 226- The previous elections to M.C. Shimla were held on May, 2012- M.C. was constituted on 4.6.2012 with a term of five years, which will expire on 4.6.2017 on which date a new elected body is required to be constituted as per the mandate of law- the respondents stated that electoral rolls are not correct and there are various discrepancies in the same – hence, an order was issued for correction of electoral rolls- held that the purpose of inserting part IX-A in the Constitution is to ensure timely elections of the local bodies – the delay in holding the elections can be due to exceptional circumstances – the exercise of revision of electoral rolls cannot stop the elections process – the order passed to postpone the elections set aside- direction issued to frame a programme for general elections and take all consequential actions to ensure that elections are held not later than 18.6.2017 and new body is constituted by 19.6.2017. (Para-17 to 58)

Cases referred:

Kishansing Tomar vs. Municipal Corporation of the City of Ahmedabad and others (2006) 8 SCC 352
Quinn vs. Leathem, 1901 AC 495
London Graving Dock Co. Ltd. V. Horton (1951 AC 737 at P.761)
Home Office. V. Dorset Yatch Co. (1970 (2) All ER 294)
Herrington v. British Railways Board, (1972) 2 WLR 537
Ambica Quarry Works v. State of Gujarat and others (1987) 1 SCC 213
Quinn v. Leathem (1901) AC 495
Krishena Kumar v. Union of India and others (1990) 4 SCC 207
Caledonian Railway Co. v. Walker's Trustees (1882) 7 App Cas 259:46 LT 826 (HL)
Islamic Academy of Education v. State of Karnataka (2003) 6 SCC 697
Union of India v. Amrit Lal Manchanda and another (2004) 3 SCC 75
Orissa v. Mohd. Illiyas (2006) 1 SCC 275
Oriental Insurance Co. Ltd. Vs. Smt. Raj Kumari and Ors.; 2007 (13) SCALE 113
Som Mittal v. Government of Karnataka (2008) 3 SCC 574
Arasmeta Captive Power Company Private Limited and another v. Lafarge India Private Limited AIR 2014 SC 525
K.B.Nagur, M.D. (Ayurvedic) vs. Union of India (2012) 4 SCC 483

For the Petitioner: Mr. B.C. Negi, Senior Advocate, with Mr. Nitin Thakur, Advocate.

For the Respondents: Mr. Dilip Sharma, Senior Advocate, with Ms. Nishi Goel, Advocate, for respondents No. 1 and 2.

Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan, Mr. V.S. Chauhan, Additional Advocate Generals, Mr. Kush Sharma and Mr. Puneet Rajta, Deputy Advocate Generals, for respondent No.3.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge:

Aggrieved by the order passed by respondent No.1 on 9.5.2017 (Annexure P-2) whereby the elections to the Shimla Municipal Corporation have been postponed, the petitioner has filed the instant writ petition for the following substantive reliefs:

> *"i) Issue a writ of certiorari to quash Annexure P-2 i.e. officeorder dated 09.05.2017.*
>
> *ii) Issue a writ of mandamus directing the respondent authorities not to implement Annexure P-2 i.e. office order dated 09.05.2017.*
>
> *iii) Issue a writ of mandamus directing the respondent authorities to conduct election on time and to constitute a duly elected Shimla Municipal Corporation on or before 04.06.2017.*
>
> *iv) Issue a writ of mandamus directing the concerned authorities to initiate appropriate necessary disciplinary proceedings against erring officials and qua removal of the present incumbent heading respondent No.1."*

Certain undisputed facts may be noticed.

2. The previous elections to Municipal Corporation, Shimla were held in May, 2012 and the Municipal Corporation was constituted on 4.6.2012 with a term of five years which admittedly is due to expire on 4.6.2017, on which date a new elected body is required to be constituted as per the mandate of law.

3. This position is not even disputed by respondent No.1, who in its reply has admitted that the term of the Municipal Corporation is going to expire on 4.6.2017. However, it is submitted that the Deputy Commissioner, Shimla in the capacity of Electoral Registration Officer (respondent No.2) vide letter dated 30.3.2017 was asked by respondent No.1 to get the draft electoral rolls verified. The schedule for the preparation of electoral rolls was also issued and sent vide letter dated 11.4.2017. This exercise of verification of the electoral rolls was started by respondent No.2 and thereafter even the draft electoral rolls were published on 11.4.2017 for calling objections. However, a very large number of complaints were received regarding errors in such rolls not only from the various political parties like Bhartiya Janta Party (BJP), Communist Party of India (Marxist) (CPM) (Annexures R-1/3 and R-1/4), but even the Municipal Corporation had passed unanimous resolution (Annexure R-1/5) requesting that the date for filing objections and suggestions be extended. In the meanwhile, this Court also in its order dated 27.4.2017 in CWP No. 815 of 2017 directed the acceptance of complaints on Sunday the 30th April, 2017 and on Monday the 1st May, 2017. This direction was fully carried out and it was still expected that the polls would be held timely.

4. The respondent No.2 completed the process and even published the final electoral rolls on 5.5.2017. However, the political parties as also certain interested persons were still not satisfied with the final electoral rolls and again made numerous complaints annexed with the reply as Annexures R-1/7 to R-1/14. Discrepancies in the electoral rolls were even highlighted by the print media. Thus, it became absolutely clear that there were still errors in the electoral rolls and efforts to correct them in time had not succeeded.

5. It was with a view to check this situation that the Election Commission of India (office of the Chief Electoral Officer, H.P.) was requested vide letter dated 5.5.2017 to intimate the office of respondent No.1 the total number of voters enrolled in Legislative Assembly segments relatable to the area of Municipal Corporation, Shimla. The Chief Electoral Officer informed that total number of such electors as per their record as on 1.1.2017 was 85,546 and it appeared that this was much lower than the number of voters published in the electoral rolls for the Shimla Municipal Corporation on 5.5.2017 which was 88,167.

6. It was further averred that while some difference always remains, yet in the instant case the difference was substantial and moreover, 2200 applications were still pending decision. Therefore, taking into consideration the entirety of the facts and circumstances, respondent No.1 issued order dated 9.5.2017 (Annexure P-2) with a view to ensure that the elections are conducted in a free and fair manner as is expected of respondent No.1 and the same reads thus:

" MUNICIPAL CORPORATION
ELECTIONS

STATE ELECTION COMMISSION HIMACHAL PRADESH
No. SEC-13-96/2017-III-764 dated the 9th May, 2017.

ORDER

Whereas this Commission had directed the Electoral Registration Officer-cum-Deputy Commissioner, Shimla district, to undertake the process for preparation of electoral rolls of the Municipal Corporation Shimla vide Notification No. SEC-13-96/2017-III-568-79 dated 11th April, 2017.

And whereas the Electoral Registration Officer-cum-Deputy Commissioner, Shimla district had prepared and notified the electoral rolls of Municipal Corporation Shimla on 5.5.2017, which shows the number of the electors as 88167. As this appeared on the higher side, the Chief Electoral Officer, H.P. (which is an office of Election Commission of India) was requested to inform the number of electors in the Legislative Assembly Constituency areas relatable to the Municipal Corporation Shimla. The CEO, HP had on 05.05.2017 informed the total number of electors enrolled by them was 85546 for the Municipal Corporation area. Considering that both the electoral rolls were prepared with reference to the same qualifying date i.e. 01.01.2017, the difference was on the higher side. Though some difference always occurs, but this difference is substantial, keeping in mind that further around 2200 applications were still pending with the Revising Authorities. A report was accordingly sought from the ERO-cum-Deputy Commissioner Shimla district.

And whereas the ERO-cum-Deputy Commissioner Shimla vide letter No. SML-LFA-Election(300)/2017-2033 dated 08th May, 2017 has reported inter-alia that the some areas which falls under Gram Panchayat(s) had got included inadvertently.

And whereas this Commission has also received many complaints from political parties, the Mayor/Councilors of Municipal Corporation Shimla and the public regarding discrepancies in the electoral rolls such as that the electors are not appearing in the relevant wards, address of the electors is incomplete, names of many eligible electors have been left out and many persons have got included in the electoral rolls who are not so entitled.

Keeping in view the above, the Commission has reached the conclusion that in the interest of fair and smooth elections, it will be appropriate to correct the electoral rolls. Therefore, the State Election Commission, in exercise of the powers

vested in it under Article 243ZA of the Constitution of India, Section 9 of the Himachal Pradesh Municipal Corporation Act, 1994 read with Rule 24 of the Himachal Pradesh Municipal Corporation Election Rules, 2012 hereby directs special revision of the electoral rolls of Municipal Corporation Shimla as per following programme:-

Sr.No.	*Exercise to be undertaken*	*Period*
1.	*Verification of electors already enrolled in the final electoral rolls and receipt of claims and objections by the Revising Authorities.*	*15.05.2017 To 24.05.2017*
2,	*Preparation of list of voters whose names are proposed for addition/deletion/correction.*	*24.05.2017 To 29.05.2017*
3.	*Service of notices to such electors by the Revising Authorities.*	*30.05.2017 To 03.06.2017*
4.	*Disposal of cases by the Revising Authorities.*	*05.06.2017 To 12.06.2017*
5.	*Appeal by the aggrieved voters to the ERO-cum-Deputy Commissioner Shimla.*	*Within three days from the passing of order by Revising Authorities.*
6.	*Disposal of appeals.*	*Within three days from the filing of appeals.*
7.	*Preparation of supplementary lists-II and insertion of corrections in the finally published electoral rolls.*	*23.06.2017.*

By Order

State Election Commissioner

Himachal Pradesh."

7. It was after the incorporation of Part IXA in the Constitution of India vide 74th Amendment Act, which came into force from 1.6.1993 that the municipalities as institution of self governance were given the constitutional status.

8. For adjudication of this lis, it is Article 243U of the Constitution of India that is of utmost importance and reads thus:

"***243U. Duration of Municipalities, etc.*** *- (1) Every Municipality, unless sooner dissolved under any law for the time being in force, shall continue for five years from the date appointed for its first meeting and no longer: Provided that a Municipality shall be given a reasonable opportunity of being heard before its dissolution*

(2) No amendment of any law for the time being in force shall have the effect of causing dissolution of a Municipality at any level, which is functioning immediately before such amendment, till the expiration of its duration specified in clause (1).

(3) An election to constitute a Municipality shall be completed -

(a) before the expiry of its duration specified in clause (1);

(b) before the expiration of a period of six months from the date of its dissolution:

Provided that where the remainder of the period for which the dissolved Municipality would have continued is less than six months, it shall not be necessary to hold any election under this clause for constituting the Municipality for such period

(4) A Municipality constituted upon the dissolution of a Municipality before the expiration of its duration shall continue only for the remainder of the period for which the dissolved Municipality would leave continued under, clause (1) had it not been so dissolved."

9. Section 5 of the Himachal Pradesh Municipal Corporation Act, 1994 prescribes the duration of Municipal Corporation and reads thus:

*"**5. Duration of Corporation**.- (1) The Corporation, unless sooner dissolved under section 404 of this Act, shall continue for five years from the date appointed for its first meeting.*

(2) An election to constitute the Corporation shall be completed -

(a) before the expiry of its duration specified in sub-section (1);

(b) before the expiration of a period of six months from the date of its dissolution :

Provided that where the remainder of the period for which the dissolved Corporation would have continued is less than six months, it shall not be necessary to hold any election under this section for constituting the Corporation for such period.

(3) A Corporation constituted upon its dissolution before the expiration of its duration shall continue only for the remainder of the period for which the dissolved Corporation would have continued under sub-section (1) had it not been so dissolved."

10. Section 9 of the Himachal Pradesh Municipal Corporation Act, relates to the Election to the Corporation and reads thus:

*"**9. Election to the Corporation.**--(1) The superintendence, direction and control of the preparation of electoral rolls, delimitation of wards, reservation and allotment of seats by rotation for, and the conduct of all elections of the Corporation, shall be vested in the State Election Commission.*

(2) The Government as well as the Corporation shall, when so requested by the State Election Commission, make available to the Commission such staff [material and monetary resources] as may be necessary for the discharge of the functions conferred on the State Election Commission by sub-section (1).

(3) The Commission shall frame its own rules and lay down its own procedure."

11. The superintendence, direction and control of the preparation of electoral rolls, delimitation of wards, reservation and allotment of seats by rotation for, and the conduct of all elections to the Municipalities, are vested in the State Election Commission referred to in Article 243K, subject to the provisions of the Constitution, the Legislature of a State has been conferred with power to make provision with respect to all matters relating to, or in connection with, elections to the Municipalities as would be evident from Article 243ZA of the Constitution, which reads thus:

> *"**243ZA. Elections to the Municipalities**.- (1) The superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Municipalities shall be vested in the State Election Commission referred to in Article 243K.*
>
> *(2) Subject to the provisions of this Constitution, the Legislature of a State may, by law, make provision with respect to all matters relating to, or in connection with, elections to the Municipalities.*

12. The State Legislature in furtherance to Part IXA of the Constitution has incorporated the Municipal Corporation Act, 1994 and Municipal Corporation Election Rules, 2012. Chapter-II therein deals with Delimitation and Reservation of Wards, Chapter IV deals with Electoral Rolls, Chapter VI deals with conduct of elections and Chapter VIII deals with counting of votes and declaration of results.

13. For the adjudication of this petition, the provisions relevant are contained in Rules 22, 23, 24 and 33, which read thus:

> "***22. Disposal of claims and objections**: (1) On the date, time and place fixed under the provisions of **rule 20,** the Revising Authority shall hear and **decide within 10 days or such shorter period as may be specified by the Commission** the claims and objections under the provisions of these rules, and shall record his decision in the registers in **Forms 7, 8 and 9** as the case may be.*
>
> *(2) Copy of the order relating to the objection shall be given on payment of Rs.15/- to the claimant against receipt and objector immediately, if he is present. Otherwise he can get the copy of the same on payment of Rs.25/- in cash against receipt.*
>
> *(3) Any person aggrieved by an order passed under the provisions of **sub-rule (1),** may, within 3 days from the date of the order, file an appeal to **Electoral Registration Officer**, who shall as far as practicable, within a week, decide the same.*
>
> *(4) If it appears to the **Electoral Registration Officer** that due to inadvertence or error during the preparation of **draft** Electoral rolls, names of electors have been left out of the Electoral roll or the names of dead persons or persons who ceased to be or are not ordinarily resident in the ward or part thereof have been included in the Electoral roll **or certain voters have been shown in the wrong ward or polling station** and that remedial action is required to be taken under this sub-rule, shall **within seven days from the date of publication of draft Electoral roll** –*
>
> *(a) prepare a list of the name and other particulars of such electors;*
>
> *(b) exhibit on the notice board of his office a copy of the list together with a notice as to the date(s) and place(s) at which the matter of inclusion of the names in Electoral roll or deletion of the names from the Electoral roll shall be considered; and*
>
> *(c) after considering any verbal or written objection that may be preferred, decide whether all or any of the names may be included in or deleted from the Electoral roll.*
>
> ***(23) Final publication of Electoral roll**. – (1) The Revising Authority as soon as it has disposed of all the claims or objections presented to it, shall forward the same alongwith the register of such claims or objections and the orders passed by it thereon to the **Electoral Registration Officer**,*

who shall cause the Electoral roll to be corrected in accordance with such orders or the orders passed on appeal by him under sub-rule (3) of rule 22 ***and corrections consequential to sub-rule (4) of rule 22,*** *as the case may be, and shall publish the* ***final Electoral roll, on a date fixed by the Commission*** *by making a complete copy thereof available for inspection and display a notice thereof in Form-17 in his office and also in the offices of the Corporation and the Tehsil concerned.*

(2) On such publication, the Electoral roll with or without amendments shall be the electoral roll of the ward or part thereof and shall come into force from the date of its publication under this rule.

(24) Special Revision of Electoral rolls. *– Notwithstanding anything contained in rule 23, the Commission may at any time, for the reasons to be recorded, direct a special revision for any ward or part thereof in such a manner as it may think fit:*

Provided that, subject to, other provisions of these rules, the Electoral rolls for the wards or part thereof as in force at the time of the issue of any such directions shall continue to be in force until the completion of the special revision, so directed.

(33) Election Programme. – (*1) the State Election Commissioner shall frame a programme of general elections of the Corporation or a programme to fill up any casual vacancy in a Corporation or hold election to a Corporation which has been dissolved (hereinafter referred to as "election programme").*

(2) The election programme shall specify the date or dates on, by, or within which –

(i) the nomination papers shall be presented;

(ii) the nomination papers shall be scrutinized:

(iii) a candidate may withdraw his candidature:

(iv) the list of contesting candidates shall be affixed;

(v) the list of polling stations shall be pasted:

(vi) the poll, if necessary shall be held on……..from …….A.M. to …….P.M. (the hours of poll shall not be less than six hours).

(vii) the counting in the event of poll, shall be done ……. (here time and place fixed for the purpose shall also be specified); and

(viii) the result of the election shall be declared.

(3) The election programme shall be published seven days before the date of filing of nomination papers by pasting a copy at the office of the Deputy Commissioner, Tehsil and Corporation and at such other conspicuous places in the Corporation as may be determined by the Deputy Commissioner in this behalf.

(4) The period for filing of nomination papers shall be three working days and the date of scrutiny shall be the next working day from the last date of filing of nomination papers. The date of withdrawal shall be the third working day from the date of scrutiny. The date for affixing the list of contesting candidates shall be the same as fixed for withdrawal of candidature. The list of polling stations shall be published approximately one month before the date of poll or on a date as may be specified by the Commission. The gap between the date of withdrawal and the date of poll

shall atleast be ten days and the day of poll shall preferably be a Sunday or any gazetted holiday.

(5) The Commission may be an order amend, vary or modify the election programme.

Provided that unless the Commission otherwise directs, no such order shall be deemed to invalidate any proceedings taken before the date of the order."

14. It would be noticed that the provisions of the local statutes as have been reproduced above, in fact, only follow what has otherwise been provided for by Article 243, more particularly Article 243U. Therefore, it is the interpretation of Article 243U, upon which the entire adjudication of the instant lis hinges.

15. Having set-out the relevant provisions of law, we would now deal with the rival contentions of learned counsel for the parties.

16. Mr. B.C. Negi, Senior Advocate, assisted by Mr. Nitin Thakur, Advocate, learned counsel for the petitioner would vehemently argue that the order dated 9.5.2017 (Annexure P-2) cannot withstand judicial scrutiny as it has been issued in violation of the provisions of Article 243U of the Constitution as interpreted by the Constitutional Bench of the Hon'ble Supreme Court in ***Kishansing Tomar*** vs. ***Municipal Corporation of the City of Ahmedabad and others (2006) 8 SCC 352.*** While, on the other hand, Mr. Shrawan Dogra, learned Advocate General, assisted by Mr. V.S. Chauhan, learned Additional Advocate General would vehemently argue that it was on account of bonafide reasons as already set out hereinabove that the respondent No.1 was compelled to postpone the elections or else the same could not have been held in a free and fair manner as many of the electors would have been deprived of their right of franchise and vote to elect their representatives.

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

17. At the outset, we may notice that the petitioner has not raised or levelled directly or indirectly or even tactically any allegations of malafide and, therefore, we would presume that the impugned order was issued bonafidely.

18. However, nonetheless the question that still remains open for consideration is whether the action of the respondents conforms to the law laid down in ***Kishansing Tomar's*** case (supra).

19. In order to appreciate this point, it would be necessary to first refer to the decision itself.

20. Kishansing Tomar was the Chairman of the Standing Committee of the Ahmedabad Municipal Corporation, to which the elected body was constituted for the relevant period pursuant to an election held in October, 2000 and its term was due to expire on 15.10.2005. He apprehended that the authorities may delay the process of election to constitute the new municipal body and therefore filed a writ petition before the Gujarat High Court on 23.8.2005. The Ahmedabad Municipal Corporation filed an affidavit before the High Court stating that it was the responsibility of the State Election Commission to conduct the elections in time. The State Election Commission in a separate affidavit in reply submitted that under the provisions of the Bombay Provincial Municipal Corporation Act, 1949, the State Government had issued a notification on 8.6.2005 determining the wards for the city of Ahmedabad by which the total number of wards had been increased from 43 to 45 and therefore, in view of the increase in the number of wards, the Commission was required to proceed with the exercise of delimitation of the wards of the city of Ahmedabad in accordance with the provisions of the Bombay Provincial Municipal Corporation (Delimitation of Wards in the City and Allocation of Reserved Seats) Rules,

1994. It was alleged by the Commission that it was required to consult the political parties to carry out the delimitation of the wards and that it would take at least six months time for completing the process of election and the Commission could act only after the State Government issued the notification. The State Government produced a chart showing the detailed steps taken by the State Government at various stages culminating in the issue of notification dated 8.6.2005.

21. Kishansing Tomar contended before the learned Single Judge that in view of Article 243U of the Constitution, the authorities were bound to complete the process at the earliest and the elections should have been held before the expiry of the term of the existing Municipal Corporation. However, the learned Single Judge accepted the timeframe suggested by the State Election Commission and directed that it should be strictly followed and the process of elections must be completed by 31st December, 2005, and that no further extension for holding the elections would be permissible.

22. Aggrieved by the decision of the learned Single Judge, Sh. Kishansing Tomar filed LPA before the High Court and the learned Division Bench of the High Court upheld the order passed by learned Single Judge and further held that the timeframe given by the State Election Commission was perfectly justified and the Election Commission was directed to begin and complete process as per the dates given in its affidavit and accordingly the L.P.A. was dismissed.

23. It was in this background that Kishansing Tomar approached the Hon'ble Supreme Court wherein the main thrust of his argument was that in view of various provisions contained in Part IXA of the Constitution of India, it was incumbent on the part of the authorities to complete the process of election before the expiry of the period of five years from the date appointed for first meeting of the Municipality. Whereas, the case of the State Election Commission was that every effort was made by it to conduct the elections before the stipulated time, but due to unavoidable reasons, the elections could not be held and the preparation of the electoral rolls and the increase in the number of wards had caused delay in the process of election and under such circumstances the delay was justified in conducting the elections.

24. The Hon'ble Supreme Court after setting out in detail the relevant provisions of the Constitution of India contained in Articles 243U, 243ZA, 243S and 243T as also the provisions of the Bombay Provincial Municipal Corporations Act, 1949 held as under:

> *"12. It may be noted that Part IX-A was inserted in the Constitution by virtue of the Seventy Fourth Amendment Act, 1992. The object of introducing these provisions was that in many States the local bodies were not working properly and the timely elections were not being held and the nominated bodies were continuing for long periods. Elections had been irregular and many times unnecessarily delayed or postponed and the elected bodies had been superseded or suspended without adequate justification at the whims and fancies of the State authorities. These views were expressed by the then Minister of State for Urban Development while introducing the Constitution Amendment Bill before the Parliament and thus the new provisions were added in the Constitution with a view to restore the rightful place in political governance for local bodies. It was considered necessary to provide a Constitutional status to such bodies and to ensure regular and fair conduct of elections. In the statement of objects and reasons in the Constitution Amendment Bill relating to urban local bodies, it was stated :*
>
> > *"In many States, local bodies have become weak and ineffective on account of variety of reasons, including the failure to hold regular elections, prolonged supersessions and inadequate devolution of powers and functions. As a result, urban local bodies are not able to perform effectively as vibrant democratic units of self-Government.*

Having regard to these inadequacies, it is considered necessary that provisions relating to urban local bodies are incorporated in the Constitution, particularly for :

(i) putting on a firmer footing the relationship between the State Government and the Urban Local Bodies with respect to :

(a) the functions and taxation powers, and

(b) arrangements for revenue sharing.

(ii) ensuring regular conduct of elections.

(iii) ensuring timely elections in the case of supersession; and

(iv) providing adequate representation for the weaker sections like Scheduled Castes, Scheduled Tribes and women.

Accordingly, it has been proposed to add a new Part relating to the Urban Local Bodies in the Constitution to provide for ---

** ** ** **

(f) fixed tenure of 5 years for the Municipality and re- election within a period of six months of its dissolution."

13. The effect of Article 243-U of the Constitution is to be appreciated in the above background. Under this Article, the duration of the Municipality is fixed for a term of five years and it is stated that every Municipality shall continue for five years from the date appointed for its first meeting and no longer. Clause (3) of Article 243-U states that election to constitute a Municipality shall be completed - (a) before the expiry of its duration specified in clause (1), or (b) before the expiration of a period of six months from the date or its dissolution. Therefore, the constitutional mandate is that election to a Municipality shall be completed before the expiry of the five years' period stipulated in Clause (1) of Article 243-U and in case of dissolution, the new body shall be constituted before the expiration of a period of six months and elections have to be conducted in such a manner. A Proviso is added to Sub-clause (3) Article 243-U that in case of dissolution, the remainder of the period for which the dissolved Municipality would have continued is less than six months, it shall not be necessary to hold any election under this clause for constituting the Municipality for such period. It is also specified in Clause (4) of Article 243-U that a Municipality constituted upon the dissolution of a Municipality before the expiration of its duration shall continue only for the remainder of the period for which the dissolved Municipality would have continued under Clause (1) had it not been so dissolved.

14. So, in any case, the duration of the Municipality is fixed as five years from the date of its first meeting and no longer. It is incumbent upon the Election Commission and other authorities to carry out the mandate of the Constitution and to see that a new Municipality is constituted in time and elections to the Municipality are conducted before the expiry of its duration of five years as specified in Clause (1) of Article 243-U.

15. *The counsel for the respondents contended that due to multifarious reasons, the State Election Commission may not be in a position to conduct the elections in time and under such circumstances the provisions of Article 243-U could not be complied with stricto sensu.*

16. *A similar question came up before the Constitution Bench of this Court in Special Reference No. 1 of 2002 with reference to the Gujarat Assembly Elections matter. The Legislative Assembly of the State of Gujarat was dissolved before the expiration of its normal duration. Article 174(1) of the Constitution provides that six*

months shall not intervene between the last sitting of the Legislative Assembly in one session and the date appointed for its first sitting in the next session and the Election Commission had also noted that the mandate of Article 174 would require that the Assembly should meet every six months even after dissolution of the House and that the Election Commission had all along been consistent that normally a Legislative Assembly should meet at least every six months as contemplated by Article 174 even where it has been dissolved. As the last sitting of the Legislative Assembly of the State of Gujarat was held on 3.4.2002, the Election Commission, by its order dated 16.8.2002, had not recommended any date for holding general election for constituting a new Legislative Assembly for the State of Gujarat and observed that the Commission will consider framing a suitable schedule for the general election to the State Assembly in November-December, 2002 and therefore the mandate of Article 174(1) of the Constitution of India to constitute a new Legislative Assembly cannot be carried out. The Reference, thus, came up before this Court.

17. *Speaking for the Bench, Justice Khare, as he then was, in paragraph 79 of the Answer to the Reference, held : (SCC p.288)*

> *"79.However, we are of the view that the employment of the words "on an expiration" occurring in Sections 14 and 15 of the Representation of the People Act, 1951 respectively show that the Election Commission is required to take steps for holding election immediately on expiration of the term of the Assembly or its dissolution, although no period has been provided for. Yet, there is another indication in Sections 14 and 15 of the Representation of People Act that the election process can be set in motion by issuing of notification prior to expiry of six months of the normal term of the House of the People or Legislative Assembly. Clause (1) of Article 172 provides that while promulgation of emergency is in operation, Parliament by law can extend the duration of the Legislative Assembly not exceeding one year at a time and this period shall not, in any case, extend beyond a period of six months after promulgation has ceased to operate.....The aforesaid provisions do indicate that on the premature dissolution of the Legislative Assembly, the Election Commission is required to initiate immediate steps for holding election for constituting Legislative Assembly on the first occasion and in any case within six months from the date of premature dissolution of the Legislative Assembly."*

18. *Concurring with the foregoing opinion, Pasayat, J. in paragraph 151, stated as follows : (SCC p.322)*

> *"151. The impossibility of holding the election is not a factor against the Election Commission. The maxim of law impotentia excusat legem is intimately connected with another maxim of law lex no cogit ad impossibilia. Impotentia excusat legem is that when there is a necessary or invincible disability to perform the mandatory part of the law that impotentia excuses. The law does not compel one to do that which one cannot possibly perform. "Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him." Therefore, when it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like an act of God, the circumstances will be taken as a valid excuse. Where the act*

of God prevents the compliance with the words of a statute, the statutory provision is not denuded of its mandatory character because of supervening impossibility caused by the act of God. (See Broom's Legal Maxims, 10th Ed., at pp 1962-63 and Craies on Statue Law, 6th Edn., p.268.) These aspects were highlighted by this Court in Special Reference No. 1 of 1974. Situations may be created by interested persons to see that elections do not take place and the caretaker Government continues in office. This certainly would be against the scheme of the Constitution and the basic structure to that extent shall be corroded."

19. *From the opinion thus expressed by this Court, it is clear that the State Election Commission shall not put forward any excuse based on unreasonable grounds that the election could not be completed in time. The Election Commission shall try to complete the election before the expiration of the duration of five years' period as stipulated in Clause (5). Any revision of electoral rolls shall be carried out in time and if it cannot be carried out within a reasonable time, the election has to be conducted on the basis of the then existing electoral rolls. In other words, the Election Commission shall complete the election before the expiration of the duration of five years' period as stipulated in Clause (5) and not yield to situations that may be created by vested interests to postpone elections from being held within the stipulated time.*

20. *The majority opinion in Lakshmi Charan Sen & Ors. Vs. A.K.M. Hassan Uzzaman & Ors. (1985) 4 SCC 689 held that the fact that certain claims and objections are not finally disposed of while preparing the electoral rolls or even assuming that they are not filed in accordance with law cannot arrest the process of election to the Legislature. The election has to be held on the basis of the electoral rolls which are in force on the last date for making nomination. It is true that Election Commission shall take steps to prepare the electoral rolls by following due process of law, but that too, should be done timely and in no circumstances, it shall be delayed so as to cause gross violation of the mandatory provisions contained in Article 243-U of the Constitution.*

21. *It is true that there may be certain man-made calamities, such as rioting or breakdown of law and order, or natural calamities which could distract the authorities from holding elections to the Municipality, but they are exceptional circumstances and under no circumstance the Election Commission would be justified in delaying the process of election after consulting the State Govt. and other authorities. But that should be an exceptional circumstance and shall not be a regular feature to extend the duration of the Municipality. Going by the provisions contained in Article 243-U, it is clear that the period of five years fixed thereunder to constitute the Municipality is mandatory in nature and has to be followed in all respects. It is only when the Municipality is dissolved for any other reason and the remainder of the period for which the dissolved Municipality would have continued is less than six months, it shall not be necessary to hold any elections for constituting the Municipality for such period.*

22. *In our opinion, the entire provision in the Constitution was inserted to see that there should not be any delay in the constitution of the new Municipality every five years and in order to avoid the mischief of delaying the process of election and allowing the nominated bodies to continue, the provisions have been suitably added to the Constitution. In this direction, it is necessary for all the State governments to recognize the significance of the State Election Commission, which is a constitutional body and it shall abide by the directions of the Commission in the same manner in which it follows the directions of the Election Commission of India during the elections for the Parliament and State Legislatures. In fact, in the*

domain of elections to the Panchayats and the Municipal bodies under the Part IX and Part IX A for the conduct of the elections to these bodies they enjoy the same status as the Election Commission of India." (underlining supplied by us).

25. Incidentally, both the parties have relied upon the aforesaid decision and would interpret it in a manner as would best serve them. It is here that the theory of precedents and binding effect of decision assumes significance.

26. It is more than settled that it is the ratio of a case which is applicable and not what logically flows therefrom. A case is only an authority for what it actually decides and not logically flows from it. Observations of court are not to be read as Euclid's theorems nor as provisions of the statutes. These observations must be read in the context in which they appear and judgments of courts are not to be construed as statutes.

27. On the subject of precedents Lord Halsbury, L.C., said in **Quinn vs. Leathem, 1901 AC 495**:

> *"Now before discussing the case of Allen Vs. Flood (1898) AC1 and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but are governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical Code, whereas every lawyer must acknowledge that the law is not always logical at all."*

28. Lord Mac Dermot in **London Graving Dock Co. Ltd. V. Horton (1951 AC 737 at P.761**), observed:

> *"The matter cannot, of course, be settled merely by treating the ipsissima vertra of Willes, J. as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished Judge."*

29. Lord Reid in **Home Office. V. Dorset Yatch Co. (1970 (2) All ER 294)** said:

> *"Lord Atkin's speech..is not to be treated as if it was a statute definition. It will require qualification in new circumstances." Megarry, J. in (1971) 1 WLR 1062 observed: "One must not, of course, construe even a reserved judgment of even Russell L.J. as if it were an Act of Parliament."*

30. Lord Morris in **Herrington v. British Railways Board, (1972) 2 WLR 537** said:

> *"There is always peril in treating the words of a speech or judgment as though they are worlds in a legislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case."*

31. The following words of Lord Denning in the matter of applying precedents have become locus classicus.

> *"Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail*

may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."

xxx xxx xxx "Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it."

32. In **Ambica Quarry Works v. State of Gujarat and others (1987) 1 SCC 213**, the Hon'ble Supreme Court held that the ratio of any decision must be understood in the background of the facts of that case. Relying on **Quinn v. Leathem (1901) AC 495**, it has been held that the case is only an authority for what it actually decides, and not what logically flows from it.

33. In **Krishena Kumar v. Union of India and others (1990) 4 SCC 207**, the Constitution Bench of the Hon'ble Supreme Court while dealing with the concept of ratio decidendi, has referred to **Caledonian Railway Co. v. Walker's Trustees (1882) 7 App Cas 259:46 LT 826 (HL) and Quinn (supra)** and the observations made by Sir Frederick Pollock and thereafter proceeded to state as follows:-

"The ratio decidendi is the underlying principle, namely, the general reasons or the general grounds upon which the decision is based on the test or abstract from the specific peculiarities of the particular case which gives rise to the decision. The ratio decidendi has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premise consisting of a pre-existing rule of law, either statutory or judge-made, and a minor premise consisting of the material facts of the case under immediate consideration. If it is not clear, it is not the duty of the court to spell it out with difficulty in order to be bound by it. In the words of Halsbury (4th edn., Vol.26, para 573)."

"The concrete decision alone is binding between the parties to it but it is the abstract ratio decidendi, as ascertained on a consideration of the judgment in relation to the subject matter of the decision, which alone has the force of law and which when it is clear it is not part of a tribunal's duty to spell out with difficulty a ratio decidendi in order to bound by it, and it is always dangerous to take one or two observations out of a long judgment and treat them as if they gave the ratio decidendi of the case. If more reasons than one are given by a tribunal for its judgment, all are taken as forming the ratio decidendi." (Emphasis added)

34. In **Islamic Academy of Education v. State of Karnataka (2003) 6 SCC 697**, the Hon'ble Supreme Court has made the following observations:-

"2.....The ratio decidendi of a judgment has to be found out only on reading the entire judgment. Infact, the ratio of the judgment is what is set out in the judgment itself. The answer to the question would necessarily have to be read in the context of what is set out in the judgment and not in isolation. In case of any doubt as regards any observations, reasons and principles, the other part of the judgment has to be looked into. By reading a line here and there from the judgment, one cannot find out the entire ratio decidendi of the judgment."

35. In **Union of India v. Amrit Lal Manchanda and another (2004) 3 SCC 75**, it has been stated by the Hon'ble Supreme Court that observations of courts are neither to be read

as Euclid's theorems nor as provisions of the statute and that too taken out of their context. The observations must be read in the context in which they appear to have been stated. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes.

36. In State of **Orissa v. Mohd. Illiyas (2006) 1 SCC 275**, it has been stated by the Hon'ble Supreme Court thus:-

> *"12.....According to the well-settled theory of precedents, every decision contains three basic postulates: (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment."*

37. In **Oriental Insurance Co. Ltd. Vs. Smt. Raj Kumari and Ors.; 2007 (13) SCALE 113**, the well known proposition, namely, it is ratio of a case which is applicable and not what logically flows therefrom is enunciated in a lucid manner by the Hon'ble Supreme Court and it was observed thus:

> *"10.Relinace on the decision without looking to the factual background of the case before it is clearly impermissible. A decision is a precedent on its own facts. Each case presents its own features. It is not everything said by a Judge while giving a judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. According to the well-settled theory of precedents, every decision contains three basic postulates –(i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct," or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is an, authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment. The enunciation of the reason or principle on which a question before a Court has been decided is alone binding as a precedent. (See:State of Orissa v. Sudhansu Sekhar Misra and Ors. (1970) ILLJ 662 SC and Union of India and Ors. V. Dhanwanti Devi and Ors. (1966) 6 SCC 44. A case is a precedent and binding for what it explicitly decides and no more. The words used by Judges in their judgments are not to be read as if they are words in Act of Parliament. In Quinn v. Leathern (1901) AC 495 (H.L.), Earl of Halsbury LC observed that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which are found there are not intended to be exposition of the whole law but governed and qualified by the particular facts of the case in wich such expressions are found and a case is only an authority for what it actually decides."*

38. In **Som Mittal v. Government of Karnataka (2008) 3 SCC 574** the Hon'ble Supreme Court observed that judgments are not to be construed as statutes. Nor words or phrases in judgments to be interpreted like provisions of a statute. Some words used in a

judgment should be read and understood contextually and are not intended to be taken literally. Many a time a judge uses a phrase or expression with the intention of emphasizing a point or accentuating a principle or even by way of a flourish of writing style.

39. Ratio decidendi of a judgment is not to be discerned from a stray word or phrase read in isolation (**See**: **Arasmeta Captive Power Company Private Limited and another v. Lafarge India Private Limited AIR 2014 SC 525**.)

40. Now, adverting to the judgment in ***Kishansing Tomar's*** case (supra), it would be noticed that the Hon'ble Supreme Court has categorically observed therein that the very purpose of inserting Part IXA in the Constitution by introducing various provisions as per 74th Amendment Act, 1992 was that in many States the local bodies were not working properly and even the timely elections were not being held and the nominated bodies were continuing for long periods. Even the elections had been irregular and many times unnecessarily delayed or postponed and the elected bodies had been superseded or suspended without adequate justification at the whims and fancies of the State authorities.

41. The Hon'ble Supreme Court also took into consideration the Statement of Objects and Reasons in the Constitution Amendment Bill relating to urban local bodies wherein it was recognised that the local bodies in many States had become weak and ineffective on account of a variety of reasons including the failure to hold regular elections, prolonged supersessions and inadequate devolution of powers and functions. As a result, urban local bodies were not able to perform effectively as vibrant democratic units of self-Government. One of the object for introducing the aforesaid provision was to ensuring the regular conduct of elections.

42. In paragraph 14 of the aforesaid judgment, it has been specifically observed by the Hon'ble Supreme Court that duration of the Municipality is fixed as five years from the date of its first meeting and no longer and it is incumbent upon the Election Commission and other authorities to carry out the mandate of the Constitution and to see that a new Municipality is constituted in time and elections to the Municipality are conducted before the expiry of its duration of five years as specified in Clause (1) of Article 243U.

43. It would further be noticed that a contention had been putforth by the respondent therein before the Hon'ble Supreme Court that due to multifarious reasons, the State Election Commission may not be in a position to conduct the elections in time and there could be instances where the provisions of Article 243-U like the case before the Hon'ble Supreme Court cannot be complied with stricto sensu.

44. The Hon'ble Supreme Court after considering the contention in light of the earlier Constitution Bench judgment in Special Reference No.1 of 2002 in (2002) 8 SCC 237, held that State Election Commission, should not put forward any excuse based on unreasonable grounds that the election should not be completed in time rather the Election Commission should try to complete the election before the expiration of the duration of five years period as stipulated in Clause (5). Any revision of electoral rolls should be carried out in time and if it cannot be carried out within a reasonable time, the election has to be conducted on the basis of the then existing electoral rolls. It was further clarified that the Election Commission should complete the election process within the aforesaid time and not yield to situations that may be created by vested interests to postpone elections from being held within the stipulated time.

45. Learned Advocate General would vehemently argue that the Hon'ble Supreme Court in paragraph 19 of its report has categorically observed that the State Election Commission should not put forward any excuse based on unreasonable grounds that the elections are not being postponed by taking into consideration the certain vested interests. Whereas, this is not the fact situation obtaining in the instant case as the elections have been postponed for reasons that are genuine and bonafide and not even doubted by the petitioner.

46. No doubt, the submission of the learned Advocate General appears to be attractive, however, in light of the Constitution Bench judgment of the Hon'ble Supreme Court in ***Kishansing Tomar's*** case (supra), we are unable to accede to his submission. The Hon'ble Supreme Court has in ***Kishansing Tomar's*** case (supra) in no uncertain terms makes it clear that it is only in case of certain activities such as rioting or breakdown of law and order, or natural calamities which could distract the authorities from holding elections to the municipality, but they are exceptional circumstances and under no (*sic* other) circumstances would the Election Commission be justified in delaying the process of election after consulting the State Government and other authorities. It has further clarified that even this should be an exceptional circumstance and should not be a regular feature to extend the duration of the municipality. Not only this, it has thereafter unequivocally held that going by the provisions contained in Article 243-U, it is clear that the period of five years fixed thereunder to constitute the municipality is mandatory in nature and has to be followed in all respects.

47. Reference in this regard can conveniently be made to para 21 of the report which though already stands extracted above, but we still deem it proper to reproduce the same herein also and the same reads thus:

> *"21. It is true that there may be certain man-made calamities, such as rioting or breakdown of law and order, or natural calamities which could distract the authorities from holding elections to the Municipality, but they are exceptional circumstances and under no circumstance the Election Commission would be justified in delaying the process of election after consulting the State Govt. and other authorities. But that should be an exceptional circumstance and shall not be a regular feature to extend the duration of the Municipality. Going by the provisions contained in Article 243-U, it is clear that the period of five years fixed thereunder to constitute the Municipality is mandatory in nature and has to be followed in all respects. It is only when the Municipality is dissolved for any other reason and the remainder of the period for which the dissolved Municipality would have continued is less than six months, it shall not be necessary to hold any elections for constituting the Municipality for such period."*

48. Notably, the judgment rendered in ***Kishansing Tomar's*** case (supra) was subject matter of consideration before three Judges of the Hon'ble Supreme Court in ***K.B.Nagur, M.D. (Ayurvedic)*** vs**.** ***Union of India (2012) 4 SCC 483*** and the ratio laid down therein (***Kishansing Tomar's)*** case (supra) was culled out in the following manner:

> *" 33. In Kishansing Tomar (supra), this Court while dealing with the question of revision of electoral rolls by the State Election Commission, noticed that the Election Commission shall complete the election before the expiration of the duration of five years' period as stipulated in Clause (9) of Article 243-U of the Constitution and not yield to situations that may be created by vested interests to postpone elections beyond the stipulated time. The State Election Commission shall take steps to prepare the electoral rolls, by following due process of law, but that too, should be done in a timely manner and in no circumstances, shall the elections be delayed so as to cause gross violation of the mandatory provisions contained in Article 243U of the Constitution.*
>
> *34. Further, while drawing a distinction between severe man-made calamities such as rioting, breakdown of law and order or natural calamities, which could distract the authorities from holding elections to the Municipality and other reasons for delay, this Court noted that the former are exceptional circumstances and under no other circumstance would the Election Commission be justified in delaying the process of election after consulting the State Government and other authorities. This*

Court laid significant emphasis on the independence of the State Election Commission and expected all other authorities to fully cooperate, and in default, granted liberty to the State Election Commission to approach the High Court and/or the Supreme Court, as the case may be for relief/directions. However, no final or time-bound directions were issued, in the petition above-referred, because election to the Ahmedabad Municipal Corporation in that case had already been held in the meanwhile." (underlining supplied by us).

49. The aforesaid exposition of law culled out from the decision in ***Kishansing Tomar's*** case (supra) makes it evidently clear that while drawing a distinction between certain man-made calamities, such as rioting or breakdown of law and order, or natural calamities which could distract the authorities from holding elections to the Municipality and other reasons for delay, the Hon'ble Supreme Court had noted that former are exceptional circumstances and under no other circumstance would the Election Commission be justified in delaying the process of election.

50. Indubitably, the exercise of special revision of electoral rolls as is being undertaken by respondent No.1 does not fall within the former category so as to entitle it to postpone the elections. The provisions contained in Article 243U of the Constitution, makes it absolutely clear that the period of five years fixed thereunder to constitute the Municipality is mandatory in nature and has to be followed in all respects.

51. Once the ratio of the aforesaid judgment is absolutely clear, then judicial comity, discipline, concomitance, pragmatism, poignantly point, per force to observe constitutional propriety and adhere to the decision rendered by the Hon'ble Supreme Court in ***Kishansing Tomar's*** case (supra).

52. Judicial discipline requires decorum known to law which warrants that appellate directions should be followed in the hierarchical system of court which exists in this country. It is necessary for each lower tier to accept loyally the decisions of the higher tier. After all, the judicial system only works if someone is allowed to have the last word, and if that last word once spoken is loyally accepted. Therefore, we cannot deduce any other ratio of what was decided in ***Kishansing Tomar's*** case (supra) in view of the judgment subsequently rendered by the Hon'ble Supreme Court in ***K.B.Nagur's*** case (supra).

53. The exercise now being undertaken by respondent No.1 for revision of the electoral rolls cannot rest the process of election and should have been done timely. For it is incumbent upon respondent No.1 and other respondents to carry out the mandate of the Constitution and to see and ensure that a new Municipality is constituted in time and election to the Municipality are conducted before the expiry of its duration of five years as specified in Clause (1) of Article 243 (4). The revision of electoral rolls was required to be carried out in time by the respondents and if they have not been carried out within the time frame, then the election has to be conducted on the basis of the existing electoral rolls.

54. In view of the above discussion, the action of the respondents in postponing the election, even though presumed to be bonafide, cannot be countenanced or upheld as the same is contrary to the Constitutional mandate of Article 243U as interpreted by the Constitution Bench of the Hon'ble Supreme Court in ***Kishansing Tomar's*** case (supra) and thereafter re-affirmed in ***K.B.Nagur's*** case (supra). Accordingly, the order passed by respondent No.1 on 9.5.2017 (Annexure P-2) is quashed and set-aside.

55. However, even after coming to the aforesaid conclusion we cannot accede to the third prayer made by the petitioner for constituting a duly elected Municipal Corporation on or before 4.6.2017 in view of the provisions contained in the Municipal Corporation Election Rules, 2012, more particularly Rule 33 thereof which provides for the election programme.

56. It is more than settled that legal formulations cannot be enforced divorced from the realities of the fact situation of the case. Situations without precedent demand remedies without precedent. The extra-ordinary situation may call for extra-ordinary response and situational demands.

57. Therefore, in the peculiar facts and circumstances of the case we feel that the following directions shall subserve the ends of justice:

(i) The respondent No.1 shall forthwith and no later than 24 hours of the receipt of this judgment frame a programme for general elections of the Municipal Corporation and take all consequential action so as to ensure that the elections are held no later than 18.6.2017, even if this calls for some deviation of Rule 33 (supra).

(ii) The respondents shall ensure that the new body of duly elected representatives of the Corporation is constituted latest by 19.6.2017.

(iii) The election shall be conducted on the basis of the final electoral rolls published on 05.05.2017 subject to the proviso as contained in Rule 25 of the Himachal Pradesh Municipal Corporation Election Rules, 2012, which reads thus:

> ***"25. Correction of entries in Electoral rolls**.- If the **Electoral Registration Officer** on an application in **Form-6** or in **Form-18** made to him, or on his own motion, is, satisfied, after such inquiry as he thinks fit, that any entry in the Electoral roll –*
>
> *(a) is erroneous or defective in any particular;*
>
> *(b) should be deleted on the ground that the person concerned is dead or has ceased to be ordinarily resident or is otherwise not entitled to be registered in that Election roll, he shall amend or delete the entry:*
>
> *Provided that before taking any action on any ground under clause (a) or clause (b), the Electoral Registration Officer shall give the person concerned a reasonable opportunity of being heard in respect of the action proposed to be taken in relation to him:*
>
> *Provided further that an application under this rule at any time after the publication of the election programme under **rule 33** shall be made to the **Electoral Registration Officer** not later than 8 days before the last date fixed for the filing of nomination papers."*

(iv) The elected and nominated body of the existing Municipal Corporation shall not be permitted to be in office after 4.6.2017 and it shall further be the duty and responsibility of the State Government to put in place a proper mechanism so as to ensure that the working of the Corporation does not suffer on account of implementation of this judgment.

However, before parting, it is made clear that this judgment shall not be treated as a precedent.

58. The petition is disposed of in the aforesaid terms. The parties are left to bear their own costs. Pending application(s) if any, stands disposed of.

An authenticated copy of this judgment be supplied to respondent No.1 forthwith by the Court Master.

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